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# Analysis

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## Reforming Succession Law: Intestate Succession

It is traditional to characterise the law of succession as part of property law: the teaching of succession within property classes at Scottish universities, which is more or less ubiquitous, creates a mindset from which it is difficult to escape. The practice is understandable because, after all, succession law provides the rules for the transmission of property and it invariably requires deeds and conveyances to be drawn up and sometimes involves conditions, burdens and different forms of title. But at least in relation to intestate succession, it would be equally, or more, apt to characterise succession as a part of family law. For the rules that have always applied in Scotland are designed to identify the closest family relationships, and to strike an appropriate balance between family members with differing relationships to the deceased. Succession rights have always, literally, legitimated family relationships.

The Scottish Law Commission's recent discussion paper on *Succession*<sup>1</sup> is timely, not because of any fundamental changes to the law of property, but because of shifting understandings in the concept of "family". Social changes such as increased levels of divorce, second marriages and step relationships, and legal changes such as the introduction of civil partnership and the recognition of the legitimacy of claims of cohabitants, have rendered the carefully constructed complexities of the Succession (Scotland) Act 1964 more and more out of touch with how family life in Scotland operates today. The response of the Scottish Law Commission to the increased diversity and complexity of family life is to seek a simpler set of rules, for only thus, it believes, can anomalies and inconsistencies be avoided. The Commission does not seek to challenge the principle of family-based intestate succession – indeed it is difficult to envisage any practical alternative – but instead to recalibrate the balance of interests between potential claimants. In the part of the discussion paper concerned with intestate succession (part 2), the Commission limits its consideration to the situation of a deceased who is survived by a spouse or civil partner. The clear winner in its proposed recalibration is the spouse or civil partner; as we will see, it will usually be the issue of the deceased who are the losers. It may be noted in passing that this will be the second time in recent years that issue lose out in law reform, for the share that cohabitants might now claim under section 29 of the Family Law (Scotland) Act 2006 will come from the portion that would otherwise have gone to issue.

1 Scot Law Com DP No 136 (2007); available on [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk).

### A. OUTLINE OF THE PROPOSALS

Currently, when a person dies intestate survived by a spouse or civil partner, that spouse or civil partner has a variety of different entitlements: prior rights, which take precedence over all other claims and, subject to a financial limit, often exhaust the whole estate; legal rights, which are shared with any issue of the deceased; and rights under section 2 of the Succession (Scotland) Act 1964, though these last are postponed to preferred claimants including the deceased's issue, siblings (or their representatives, i.e. nephews and nieces) and parents. In its discussion paper, the Scottish Law Commission proposes a much simpler approach, based on two all-embracing propositions. First, where a person dies leaving a spouse or civil partner but no issue, that surviving spouse or civil partner should simply take the whole estate, whatever its nature and whatever its value.<sup>2</sup> Secondly, where a person dies leaving both spouse or civil partner and issue, the surviving spouse or civil partner should be entitled to a fixed sum, tentatively set at £300,000, with the remainder being shared with the issue. This would mean that the whole estate goes to the spouse or civil partner where its value is less than the stated sum; if the estate's value is more, the excess would be divided equally with half going to the spouse or civil partner and the other half being shared amongst the issue.<sup>3</sup> In most cases this approach is likely to give rather more than currently to the spouse or civil partner, though the discussion paper provides some examples to show that the shift away from issue will often be modest.<sup>4</sup>

### B. POSSIBLE EXCEPTIONS

Following the traditional Scottish approach to intestate succession, which eschews discretion and variation due to the actual circumstances of the family relationship involved, the Scottish Law Commission is not keen on qualifications to its proposed rules, arguing that individual family circumstances are likely to be so diverse that subsidiary rules might not produce any more satisfactory results. This is sensible. The fewer the subsidiary rules, the less scope for the disgruntled to seek a judicial examination of the nature of his or her parents' personal relationships. The presence of absolute rules, fixed by the legal recognition of relationships, has insulated Scotland from the bitterly fought family disputes for sometimes very modest successions that are common in countries that allow courts to sit in judgment on the nature of individual family relationships. This strongly inclines the Commission to propose that the rules stated above should not be affected by the fact that the spouses or civil partners had separated (either in fact or judicially): the actual state of the relationship should be subsumed in its very existence.<sup>5</sup>

The Commission is only slightly less convinced on the question of whether a child accepted by the deceased as a member of his or her family (typically a step-child) should be treated in the same way as a blood child. The simplifying

<sup>2</sup> Scot Law Com DP No 136 para 2.26.

<sup>3</sup> Para 2.57.

<sup>4</sup> Para 2.50.

<sup>5</sup> Para 2.64.

instinct of the Commission, which makes it incline to a negative answer, is sound.<sup>6</sup> The concept of the “accepted child”, though well-known in, for example, the law of aliment, is ill-fitted to the absolutist traditions of intestate succession where certainty and predictability are far more important than in needs-based alimentary claims. “Acceptance” is not determined by something as simple as a DNA test but by a minute examination of how the family organised itself and the interrelationship between its members. Perhaps an even more serious objection to giving step-children and accepted children rights on intestacy is that that class of children would then be entitled to two (or perhaps even more) inheritances: the more a family is reconstituted, the more disparate will be the claims of children depending upon their life-experiences. This would be bad social policy.

### C. A MORE DIFFICULT SCENARIO

A major imperative of the Scottish Law Commission is to ensure general public acceptance of how the rules on intestate succession operate. This is important not because of a need for the law to reflect what people want, but because expectations are the basis of what can reasonably be assumed to be intended by a person who dies without a will. I have little doubt that the proposals so far discussed will usually meet that imperative. But I am far less sure that the unqualified preference given to the spouse or civil partner will be welcomed in some fairly common situations.

Imagine that a man – let us call him Abraham – marries Sarah while they are young, and they have a child, Isaac. They live together for 30 or 40 years (acquiring wealth, perhaps including family property inherited by Sarah from her parents). On Sarah’s death most people would probably agree with the Commission that Abraham should succeed to most or all of her estate. Isaac is likely to be content to wait for his mother’s inheritance while his father still lives. But suppose further that, after some years of lonely widowhood, Abraham meets and then marries Hagar, when they are both in their declining years. On Abraham’s death it is Hagar and not Isaac who would then take most of Abraham’s estate (including that portion to which he succeeded on the death of Sarah). It is possible that Isaac might be persuaded to accept the justice of this result as the cost to be borne for the years of his father’s twilight happiness, and perhaps for the care and companionship Hagar relieved him from providing. But the real problem comes when Hagar dies, because at that point all her property, including that which was originally acquired by Sarah and Abraham, would, on the existing law – which on this point is not affected by the current proposals – pass to her (by now middle-aged) son (called, of course, Ishmael). Isaac gets nothing from his parents’ estates because, through marriage, it has all passed to Ishmael who had no blood connection to either Sarah or Abraham. The heirlooms from Sarah’s family move out of her family. It is not self-evident that this is a just outcome, or one acceptable to Scottish society generally, or one that is justified by any principle identified by the Law Commission – except the sterile tyranny of simplicity.

In reality this is not really a competition between surviving spouse or civil partner and issue but between a first family (represented by issue) and a second family

<sup>6</sup> Para 2.80.

(represented by the surviving spouse) and it may well be that the balance of interests in that situation needs to be struck differently from the balance in those intra-familial competitions which will, presumably, be the norm. The Commission's "inclination at present" is to make no distinction between different types of surviving spouse or civil partner, on the basis that "the range of possible situations is too great and it is not clear that any new rule would produce more satisfactory results than [the one being proposed]".<sup>7</sup> The Commission also points out that applying a different rule to non-parental spouses would have the practical effect of making a sharp distinction between spouses and civil partners, since the latter will seldom be shared (legal) parents.

Taking the latter objection first, I am not sure that it is as strong as it sounds. In the coming years, changes in the law (both adoption and human fertilisation) will make it much more common for same-sex couples to be joint parents, and step-relationships amongst opposite-sex couples already mean that substantial numbers of married couples are *not* joint parents of the children they are bringing up. The other objection is more substantial. In the example postulated above there is a clear separation between the first family and the second family, but this will not always be so and the variety of circumstances involving reconstituted families is almost infinitely great. Hagar might have been the woman who brought Isaac up; Ishmael might have been the son of Abraham and Hagar and half-brother of Isaac; Hagar might have other children, now grown, who never lived in a family with Abraham; Abraham might have other non-marital issue; Abraham's first marriage might have lasted one year, while his second lasted ten, or forty. Where, in other words, is the line to be drawn between the claims of a first and those of a second (or subsequent) family, and indeed where is the line between these families themselves? The Commission has been unable to identify a clear principle upon which a departure from its simple, spouse-takes-virtually-everything, rule might be based. And nor can I.

#### D. CONCLUSION

The lesson here is perhaps that, whatever rules are adopted for intestacy, they can deal satisfactorily only with the norm, and that protection from an unjust result in other cases can and must be sought through the simple expedient of making a will. For it is to be remembered that intestacy rules are default rules, applicable only when there has been a failure by the deceased to express his or her wishes in valid form. It is to be hoped that when the new law, whatever its eventual shape, comes into force, the Scottish government and the legal profession make serious efforts to advise, encourage and persuade far more people to make a will than do so currently. Might the celebrant of the marriage or civil partnership have a role in persuading any parent who marries of the need at least to consider whether or not to make a will?

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<sup>7</sup> Paras 2.65-2.70.

## Reforming Succession Law: Legal Rights

The origins of legal rights are shrouded by the mists of time,<sup>1</sup> but they have functioned in Scots law for at least seven centuries as a form of family provision whereby a surviving spouse (or, now, civil partner)<sup>2</sup> and children of a deceased person have an infeasible right to a one-half or one-third share of the moveable estate, whether testate or intestate.<sup>3</sup> They amount to a form of forced heirship under which certain family members are considered as creditors of the deceased's moveable estate.<sup>4</sup> In its recent discussion paper on *Succession*, the Scottish Law Commission takes the view that legal rights should be abolished,<sup>5</sup> thus maintaining and extending the position adopted in 1990 in its unimplemented report on *Succession*.<sup>6</sup> While the Commission accepts that protection from disinheritance should remain part of the law, it believes that, rather than treating surviving spouses, civil partners and children in the same way, and ignoring cohabitants, such protection should be re-focused so that the partnership aspect of adult relationships is given priority and the alimentary obligations of the deceased towards his or her children enforced.

The discussion paper identifies four defects in the existing system of legal rights: the value of the entitlement may be too great or too small; the distinction between heritage and moveables is arbitrary and complex; in taking no account of needs, resources or conduct, the current rules are too rigid and may lead to injustice; and, finally, delays in making an election between testamentary provision and legal rights may be prolonged by the operation of the long negative prescription. The character of legal rights is thus presented as arbitrary, unprincipled and archaic. The paper goes on to set out a package of provisional proposals which, taken together, constitute a comprehensive, if fractured, overhaul of the current system. However, not all of the defects identified by the Commission are resolved under its proposals for reform; conversely, some of the more controversial reforms proposed – in particular, the question of whether children of all ages ought to have a claim to a deceased parent's estate – do not relate to any of the defects at all.

1 On the likely origins of legal rights, see J C Gardner, *The Origin and Nature of the Legal Rights of Spouses and Children in the Scottish Law of Succession* (1928); W D H Sellar, "Succession law in Scotland – a historical perspective", in K G C Reid, M J de Waal and R Zimmermann (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative* (2007) 49 at 55, 59-60.

2 A right identical to the right of surviving spouses at common law has been conferred on surviving civil partners by the Civil Partnership Act 2004 s 131.

3 Where a person entitled to claim legal rights is also entitled to a legacy from the testate estate an election must be made: see H Hiram, *The Scots Law of Succession*, 2nd edn (2007) paras 3.13-3.18.

4 *Naismith v Boyes* (1899) 1 F 79; *Sanderson v Lockhart-Mure* 1946 SC 298; *Duncan v Duncan* 2000 GWD 26-1012.

5 Scot Law Com DP No 136 (2007); available on [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk). The proposals on legal rights are contained in part 3. For a discussion of the proposals on intestate succession, found in part 2, see 77 above.

6 Scot Law Com No 124 (1990).

### A. THE PROPOSALS

Abolition by section 1 of the Succession (Scotland) Act 1964 of the status of heir-at-law, and the corresponding system of primogeniture which had dominated the entire structure of the law of succession, rendered redundant any special treatment of the heritable estate. This development is not referred to in the Scottish Law Commission's paper, but it lends weight to the argument that restricting family provision to rights in the moveable estate is archaic. The Commission regards it as axiomatic that claims by spouses, civil partners and children in relation to any of the new rights proposed should be payable from the whole estate, heritable and moveable. Given the strong opposition to the same proposal in 1990, and the fact that similar objections are likely to be raised again, views are sought on whether agricultural and business property ought to be excluded from the general principle of assimilation.

As well as this structural change to the estate from which claims may be made, three main changes are proposed to the forms of entitlement. First, where the deceased dies testate,<sup>7</sup> the legal rights of spouses and civil partners would be replaced by a new entitlement, called legal share, amounting to 25% of what the claimant would have been entitled to on intestacy. As with *jus relictii* and *jus relictiae* under the current law, the right would be available equally to separated spouses and civil partners.<sup>8</sup>

Secondly, a cohabitant's claim on intestacy under section 29 of the Family Law (Scotland) Act would be extended to cases of testacy.

Thirdly, legitime would be abolished. In the Commission's view, the right of adult children to an automatic share of a parent's estate is unjustifiable.<sup>9</sup> But dependent children (i.e. children under the age of 18, or 25 if in education or training, and including those accepted as a child of the family) would have the right to claim aliment from any part of the estate except for estate passing to a person who is already under an obligation to aliment the child. The effect is to limit the power of a testator to make testamentary provision for anyone other than dependent children unless the beneficiary already has an obligation of aliment towards them. The form of the claim would be an amalgam of common law aliment *de jure representationis* and aliment under sections 1-7 of the Family Law (Scotland) Act 1985: liability would arise in similar cases to the former, while the method of assessment would be based on the latter, subject to the crucial difference that any award would be payable as a capital sum (by instalments, if appropriate) and variation or recall excluded. If this proposal

<sup>7</sup> In cases of intestacy, surviving spouses and civil partners are to be provided for differently and generously. See 77 above.

<sup>8</sup> Except where the deceased was cohabiting at the date of death; in this case, the surviving cohabitant's claim would also be protected: paras 3.70-3.71.

<sup>9</sup> Public opposition to this idea led to it being abandoned in the Scottish Law Commission's earlier Report on *Succession* (n 6), and it appears that there is still overwhelming public support for the right of all children to a share of a parent's (and step-parent's) estate, though attitudes differ as to whether as a fixed share or on application to the court: see *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (mruk Research, 2005; available on <http://www.scotland.gov.uk/Publications/2005/07/18151328/13297>) paras 2.14-2.24.

should fail to gain support, the Commission proposes in the alternative that all the deceased's children, regardless of age, should be entitled to a 25% legal share of what they would be entitled to between them if the deceased had died intestate. This means that where the deceased is survived by a spouse or civil partner as well as by children, the children would have the right to a legal share only where an estate was worth more than £300,000.

In addition, there are supplementary proposals. Part 4 of the paper suggests anti-avoidance measures, such as exist in other jurisdictions<sup>10</sup> and which apply in Scots law on divorce or dissolution of marriage and civil partnership.<sup>11</sup> In relation to testate succession, this could perhaps be achieved by imposing personal liability on the recipients of gifts made by the deceased *inter vivos*; in relation to intestate succession, the doctrine of collation *inter liberos* could be adapted. It is also proposed that the obscure rules relating to the prescription of claims be clarified<sup>12</sup> and that the prescriptive period for claims for legal share, a share of the intestate estate and legacies should be 5 years. Claims by a dependent child should be competent until the child ceases to be an alimentary creditor at 18 or 25; and the time limit for claims by cohabitants should continue to be six months.

## B. COMMENTARY

The Scottish Law Commission rejects the idea that the rights of spouses or civil partners should depend on factors such as the duration of the relationship, the wealth of the survivor, or whether this is a first or subsequent marriage. Rather, the public commitment of marriage or civil partnership is evidence enough of the merits of the claim. While this approach to entitlement is perfectly sound, it can be criticised as suffering from the same failure to adjust it to individual relationships which the Commission identified as a weakness of the current system of legal rights.

Coupled with the proposal to assimilate heritage and moveables, legal share has the potential to be far more generous than legal rights and would avoid the kind of situation illustrated recently in *Pirie v Clydesdale Bank*.<sup>13</sup> Here, the deceased left the family home to his daughter and his moveable estate to his wife and daughter between them. Given that she would have received less by way of *jus relictæ* than under the will (one-third of the moveable estate rather than one-half), the only recourse open to the widow was the somewhat artificial one of averring that her husband had been subject to the undue influence of his daughter.<sup>14</sup>

In its 1990 report the Commission had recommended abolition of the right to aliment from the executors or beneficiaries of a deceased parent's estate (aliment *de jure representationis*) on the ground that its continuing nature made it

10 For example, England and Wales, France, Ireland, New South Wales and certain states of the USA: see para 4.5.

11 Family Law (Scotland) Act 1985 s 18; see para 4.11.

12 It appears that claims for prior and legal rights prescribe after 20 years but this is not set out expressly in the Prescription and Limitation (Scotland) Act 1973.

13 [2005] CSOH 51, [2006] CSOH 82, 2007 SCLR 18.

14 Had her action been successful, the will would have been reduced and she would have been entitled to prior rights under the rules of intestacy in addition to *jus relictæ*.



impracticable and onerous.<sup>15</sup> The Commission now proposes its effective revival by statute, with the previous objections seemingly resolved by changing it to a capital payment, subject to the same factors as claims for aliment from a living person under the Family Law (Scotland) Act 1985. At least in theory, the whole estate remaining after satisfaction of a claim for legal share may be claimed to fulfil the obligation. The rationale is clear: while the deceased's children ought not to be enriched at the expense of their surviving parent, non-relatives ought not to be enriched to the detriment of the children. The proposal seeks neatly to address the situation where a testator leaves most or all of his or her estate to a partner who is not the parent of the testator's children, by transferring the testator's obligations towards the children to that partner.

While the proposals for legal share recognise that the purpose of *jus relictæ* and *jus relicti* is not maintenance but recognition of a kind of deferred community of property, the proposals to replace legitim by aliment fail to do the same. By applying a needs-based system, they deny to children legal recognition as family members. However, the fluid form in which this proposal is framed results, potentially, in the negation of freedom of testation. This does not appear to sit easily with the stated aim of preserving a reasonable degree of testamentary freedom.<sup>16</sup>

Under the current law, children are entitled to aliment *de jure representationis* in addition to, rather than instead of, the right to legitim, although in practice it is rarely, if ever, claimed. If, instead of aliment, the Commission's alternative proposal were to be enacted – whereby all children are entitled to a legal share of 25% of the estate remaining after a claim by a surviving spouse or civil partner for legal share – there is no reason why some means could not be devised to encourage alimentary claims under the existing law, in addition to legal share, in appropriate cases. The practical problem with the Commission's preference for a new type of aliment is that it is difficult to see how the value of a capital payment, which cannot be varied for future needs or circumstances and which in any event takes account of a number of variables, can be assessed with any more accuracy or refinement than the apparently blunter instrument of legal share.

The proposals relating to cohabitants are constrained by the Family Law (Scotland) Act 2006 in as much as the Commission clearly does not consider it feasible to propose root-and-branch reform in this area. It does propose, however, that claims from the estate of a deceased cohabitant should be competent in testate as well as intestate succession, on the basis not only of public opinion but also because “a cohabitant is a member of the deceased's immediate family to whom he or she is bound by ties of love and affection”.<sup>17</sup> The Commission further proposes that policy aims be included within section 29 of the 2006 Act in order to assist the court in making an appropriate award. These, the Commission suggests, should be similar to the aims already set out in section 28(3), namely the recognition of financial and non-financial contributions which benefited the deceased economically, and the economic burden

<sup>15</sup> Report on *Succession* (n 6) recommendation 55.

<sup>16</sup> See e.g. Discussion Paper on *Succession* (n 5) para 3.41.

<sup>17</sup> Para 3.63.

of childcare that the survivor will bear. The purpose of this proposal is to provide a clear aim towards which the court may direct its discretion; its effect is to align provision for cohabitants on death with the kind of award that may be made where the relationship terminates during life.<sup>18</sup> This approach is quite different to that taken in respect of spouses and civil partners, where the value of legal shares may bear no relation to the kind of award that might be made on divorce or dissolution – it may be greater, but is more likely to be smaller. Divergence between the two regimes is one of the consequences of maintaining the principle of fixed rights for spouses and civil partners.

### C. RULE-BASED AND COURT-BASED SCHEMES

In contrast to the uniform provision of the current law, the reformed scheme combines different forms, types and values of provision, depending on the class of claimant: a rule-based system is applied to surviving spouses and civil partners, a discretionary, court-based system to cohabitants and dependent children. Given the conflicts inherent in this area of the law, in terms of both human dynamics and moral argumentation, the question of protection from disinheritance is one where there cannot be right answers – or, possibly, wrong ones either. The divergence in provision as between the Civil and the Common Law worlds is as likely to be reflective of pragmatic compromises as to represent any superiority in one over the other.

The point of a system of fixed rights is that the sorts of questions that must be asked in a discretionary system – questions about individual desert, individual need, and the effect of an award on the collectivity of interested persons – can thereby be avoided. While, however, the Scottish Law Commission identifies as one of the defects of legal rights the fact that, depending on the value of the moveable estate, either too much or too little protection may be offered to a surviving spouse, civil partner or children, “regardless of the merits” of their claims,<sup>19</sup> addressing questions of merit is precisely what it wishes to avoid. Although fixed systems are said to be “rigid” and “may lead to injustice” since they take no account of “needs, resources, or conduct”, to replace legal rights with a discretionary system would, the Commission states, entail uncertainty and inconvenience and the potential for litigants to make “distasteful averments of past conduct” while adjusting to bereavement.<sup>20</sup> However, while a discretionary system would undoubtedly place a strain on the financial and emotional resources of a surviving spouse or civil partner, this is no less likely in the case of the cohabitants and children who, under the Commission’s proposals, would be required to litigate to establish their claims.

18 Such an alignment resembles the position of spouses and civil partners under the Inheritance (Provision for Family and Dependents) Act 1975 s 3(2), where the level of likely provision available on divorce or dissolution must be considered in making an award on death.

19 Para 3.11.

20 Para 3.34. In England, the Inheritance (Provision for Family and Dependents) Act 1975 takes precisely these factors into account. For example, the duration of a marriage, referred to specifically in para 3.11 of the discussion paper, is one factor to be taken into account under s 3(2) of the 1975 Act: see for example *Cunliffe v Fielden* [2006] Ch 361.

The question of whether justice is best served by fixed or discretionary provision or whether, in the end, there is much to choose between them, has been considered several times before in relation to legal rights, not only by the Scottish Law Commission but by legal academics. Michael Meston concluded that, despite the undoubted merits of a discretionary system, decisions made under it would, if applied consistently, “ossify into fixed rules”. Moreover, “a legislature which enacts a discretionary system should perhaps recognise that it is merely avoiding the responsibility of working out a comprehensive and sophisticated system of fixed shares”.<sup>21</sup> This may indeed be true, but the Commission’s proposed legal share can be no more typified as “sophisticated” than can legal rights.

Neil MacCormick likewise has pointed out that decisions made under the English discretionary rules may lead as indubitably to a particular distribution as the terms of the Scots fixed rule; on the other hand, the advantages of clarity and predictability may appear to be offset by their apparent unfairness in particular cases. Clarity and predictability are not necessarily morally compelling. Rather, while Scots law may lead to morally unexceptionable conclusions based on certain assumptions about family structure and relationships, and about the propensity of testators to act reasonably,<sup>22</sup>

surely it is also the case that the English system will more probably get the morally right and fair answer in more cases than the others, just because the court is given discretion to take account of all the morally relevant factors with special weightings for some of them?

However the question of rights versus discretion is to be decided, the Scottish Law Commission’s approach is to find merit in both: fixed shares are appropriate for surviving spouses and civil partners, and discretionary awards for children and cohabitants. It may be that there are persuasive reasons for applying different regimes to different classes of claimant, but no overarching rationale is given. Rather, the sorts of provision that ought to be available to each class of claimant are treated independently of the other classes, and no specific justifications are given for preferring certainty and convenience in one case and individual desert in another.

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## Compensation for Commercial Agents: an end to plucking figures from the air?

In the thirteen years since the Commercial Agents Directive was implemented in the United Kingdom, courts have struggled with the concept of “compensation”

<sup>21</sup> M Meston, “Succession – rights or discretion?” 1987 JR 1 at 11.

<sup>22</sup> N MacCormick, “Discretion and rights” (1989) 8 *Law and Philosophy* 23 at 33-34.

contained in the Directive.<sup>1</sup> Compensation is one of two bases upon which a commercial agent may receive an award from his principal on termination of the commercial agency agreement (the other being indemnity). Until recently, *King v T Tunnock Ltd*,<sup>2</sup> a decision of an Extra Division of the Inner House, was the only appellate-level decision in the UK on the calculation of compensation. As a result, *King* became that rare species, a Scottish case frequently discussed in English judicial proceedings. English courts have, in general, been critical of the approach adopted by the Inner House, and in particular of the generosity of Mr King's award. In 2007 the House of Lords decided an English appeal on compensation, *Lonsdale v Howard & Hallam Ltd*.<sup>3</sup> In *Lonsdale*, as earlier in *King*, the principal's business had gone into serious decline prior to termination of the agency, and the decision provides important guidance, not only on compensation in general, but also on the impact that the declining nature of the principal's business has on the process of calculation.

### A. THE LEGAL LANDSCAPE

Two provisions in particular help to identify the aims of the Directive: the preamble, and its source within the Treaty of Rome, art 117. The preamble refers to the detrimental effect of different national laws on the protection available to commercial agents vis-à-vis their principals. As such the Directive aims to create a level playing field for commercial agents throughout Europe. Article 117 refers to the "need to promote improved working conditions and an improved standard of living for workers". Implementation in the UK called for a marked shift in thinking. Hitherto, the overriding tendency in agency law had been the protection of the principal: in contrast to the agent's extensive fiduciary duties, the principal's duties towards the agent were few in number.<sup>4</sup> The Directive, by contrast, is intensely protective of commercial agents.

The Directive involves partial rather than full harmonisation, giving member states a choice between two types of payment on termination: "compensation" or "indemnity".<sup>5</sup> The Commercial Agents (Council Directive) Regulations,<sup>6</sup> which transpose the Directive for Great Britain, pass that choice on to the contracting parties. Whilst indemnity can be opted into in the commercial agency agreement, compensation applies if the agreement is silent.<sup>7</sup> Given that the Regulations apply to all agreements in force on 1 January 1994, compensation is thus the rule for most agreements.

1 Council Directive 86/653 OJ 1986 L382/17 on the co-ordination of the laws of Member States relating to self-employed commercial agents.

2 2000 SC 424.

3 [2007] UKHL 32, [2007] 1 WLR 2055.

4 See L Macgregor, "Agency and Mandate", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2002) paras 102-124.

5 Art 17.

6 SI 1993/3053. For Northern Ireland, see the Commercial Agents (Council Directive) Regulations (Northern Ireland) 1993, SR 1993/483.

7 Reg 17(2).

Compensation and indemnity are quite distinct. The former is drawn from French law<sup>8</sup> and the latter from German law.<sup>9</sup> In the case of indemnity, the commercial agent is entitled to a payment:<sup>10</sup>

if and to the extent that he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers.

As such, it seeks to anticipate the gains which might be made by the principal in the future by virtue of the commercial agent's efforts, and to claw back a proportion of those gains for the commercial agent. The definition of compensation in the Regulations<sup>11</sup> (and Directive) is short and uninformative, but includes two sets of circumstances in which relevant damage is deemed to occur. In the earlier stages of *King* it was stated that these situations were exhaustive of the possibilities, but the Inner House later confirmed that they were no more than examples.<sup>12</sup> Only in the case of indemnity must payment be "equitable having regard to all the circumstances", and only indemnity is subject to a maximum of one year's commission.<sup>13</sup>

### B. *KING v TUNNOCK*

The facts of this case are memorable, involving the decline in the fortunes of Scotland's most famous confectionery manufacturers and the closure of their Uddingston bakery. As a result, Tunnocks terminated their relationship of more than 30 years with Mr King. This was no doubt keenly felt by him, especially as his father had worked as a Tunnock's agent before him. Because the agency contract was silent on the issue of payment on termination, compensation automatically applied under the 1993 Regulations.<sup>14</sup>

At first instance, the sheriff refused compensation, and this finding was confirmed by the sheriff principal on appeal.<sup>15</sup> Lord Caplan, delivering the opinion of the Inner House,<sup>16</sup> began by considering reg 17(6) of the 1993 Regulations: "the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal." He concluded from the use of the present tense for "suffers" that damage is calculated at the moment of termination. In effect, the agent has lost an asset with commercial value.<sup>17</sup> Later in his opinion when he came to value the loss, it was clearly significant to Lord Caplan that the agent's business was likely to have "enjoyed considerable goodwill."<sup>18</sup>

8 Originally based on decree n.58-1345 of 23 Dec 1958.

9 *Handelsgesetzbuch* § 89(b).

10 Reg 17(3)(a).

11 Reg 17(6), (7).

12 2000 SC 424 at para 42.

13 Reg 17(3)(b), (4).

14 Reg 17(2).

15 1996 SCLR 742.

16 2000 SC 424.

17 Para 38.

18 Para 50.

Lord Caplan was at pains to emphasise that compensation does not seek to value the agent's loss of future commissions suffered due to severance of the agreement. "Damage" under the regulations, he suggested, should not be confused with "damages" payable at common law for breach of contract.<sup>19</sup> After all, compensation is not confined to cases of the principal's breach. It is payable where the agent himself has terminated because he can no longer work due to ill-health or age,<sup>20</sup> and also where his agency agreement was a fixed-term one which has now expired.<sup>21</sup> It is also payable to his estate on his death.<sup>22</sup> Significantly, in view of the turn of events in the House of Lords in *Lonsdale*, Lord Caplan warned against confusing compensation with indemnity. The calculation of indemnity involves looking into the future, at the financial gains the principal could expect to make which are attributable to the agent's efforts.<sup>23</sup> Compensation has no similar forward-looking thrust.

When calculating compensation, Lord Caplan drew extensively on practice in French law, where courts tend to award two years' gross commission. Whilst acknowledging that French law provided only a guide or benchmark, he concluded that the court was not precluded from considering what would happen in France:<sup>24</sup>

[T]he rulings of a judicial system applying the same legislation (intended indeed to operate in the same way between the relevant systems) must be entitled to some respect.

Compensation remained payable despite the failing nature of the principal's business. In a passage quoted in many of the later English decisions, Lord Caplan stated that "so far as entitlement to compensation is concerned, the Directive is not troubled with what happens after the date of termination".<sup>25</sup> Noting that the pursuer would have "expected and required a relatively high level of compensation to surrender his successful and long-established agency,"<sup>26</sup> the court awarded the sum of £27,144. This was, in effect, two years' gross commission.

As was later to be noted in *Lonsdale*, not without implied criticism,<sup>27</sup> this result was reached without the benefit of expert evidence valuing the agent's business at the moment of termination. Its absence can be easily explained. Mr King's legal team, misunderstanding the impact of the relatively new Regulations, had originally sought to claim the commission which would have been due had the agency not been terminated (on analogy with breach of contract). As the case changed its emphasis only on appeal, no valuation evidence was ever led.

19 Para 38.

20 Reg 18(b)(ii).

21 *Frape v Emerco International Ltd* 2002 SLT 371; *Light v Ty Europe Ltd* [2003] EWCA Civ 1238, [2004] 1 Lloyd's Rep 693 at para 32 per Tuckey LJ; *Tigana v Decoro Ltd* [2003] EWHC 23 (QB), [2003] Eu L R 189; *Whitehead v Jenks and Cattell Engineering Ltd* [1999] Eu L R 827.

22 Reg 17(8).

23 Para 43.

24 Para 49.

25 Para 43.

26 Para 51.

27 [2007] 1 WLR 2055 at para 26 per Lord Hoffmann.

### C. *LONSDALE v HOWARD & HALLAM LTD*

As already mentioned, the facts of *Lonsdale* are similar to those of *King*, although the principal's business in *Lonsdale* seems to have been in more serious decline. Lord Hoffmann delivered the only speech in what was a unanimous decision. As in *King*, Lord Hoffmann focused on reg 17(6), and discussed how the equivalent provisions are applied in France.<sup>28</sup> He explained that the agent's entitlement to compensation arises because, at the moment of termination, the agent in effect "hands back" the goodwill in the principal's business which that agent has helped to create.<sup>29</sup> Strictly speaking, therefore, a proportion of the goodwill ought to be attributed to the agent; but because of the difficulties involved in such attribution, the French courts have, rather, sought to place a value on the "right to be an agent".<sup>30</sup>

At this point, the similarities between the cases end. Lord Hoffmann equated the agent's loss with the open-market sale value of the agency, the value of which "lies in the prospect of earning commission, the agent's expectation that 'proper performance of the agency contract' will provide him with a future income stream."<sup>31</sup> He supported his view by reference to the leading text, S Saintier and J Scholes, *Commercial Agents and the Law*.<sup>32</sup> Oddly, however, those writers make no such statement on the pages cited by Lord Hoffmann, and it could even be said that his interpretation is contrary to the whole tenor of the relevant chapter in the book. Indeed, in a more recent article, Saintier criticised the Court of Appeal in *Lonsdale* for taking exactly this approach, arguing that it risked confusion of compensation with indemnity.<sup>33</sup>

Counsel for *Lonsdale* had sought to persuade the judges to apply the French approach of awarding two years' gross commission. He further submitted that, if their Lordships did not agree on this point, a reference should be made to the Court of Justice for a preliminary ruling. Lord Hoffmann dismissed this submission on several grounds. He referred to *Honeyvem Informazioni Commerciali Srl v Mariella De Zotti*,<sup>34</sup> where the European Court of Justice held that the national court enjoys a margin of discretion in relation to calculation of indemnity. A further reason was the difference in market conditions between France and England. In France there is a market for trade in commercial agencies and the premium usually paid is two years' gross commission. This provides a clear rationale for the use of this amount as a guideline in France. In England, according to Lord Hoffmann, there is "no such market". Whether this statement is accurate is difficult to say.<sup>35</sup> No supporting evidence on this point was cited to Lord Hoffmann, or volunteered by him.

28 The particular piece of French legislation is art 12, *Loi no 91-593 du 25 juin 1991 relative aux rapports entre les agents commerciaux et leurs mandants*.

29 Para 9.

30 Para 10.

31 Para 11.

32 (2005) 187-188, referred to by Lord Hoffmann at para 10.

33 S Saintier, "The principles behind the assessment of the compensation option under the Agency Regulations: clarity at last" [2007] JBL 90 at 94.

34 [2006] ECR I-02879 at paras 34-36.

35 Although see S Saintier and J Scholes, *Commercial Agents and the Law* (2005) 187 where a similar statement is made, unsupported by evidence.

Towards the end of his speech Lord Hoffmann criticised the conclusion reached by the Inner House in *King*, commenting:<sup>36</sup>

I respectfully think that the sheriff was right. In view of the closure of the business, the agency was worth nothing. No one would have given anything for the right to earn future commission on the sales of cakes and biscuits because there would be none to be sold. Nor had the principal retained any goodwill which the agent had helped to build up. The goodwill disappeared when the business closed.

Lord Hoffmann's emphasis on the declining nature of the principal's business had a catastrophic effect on the quantum of compensation. At first instance Mr Lonsdale had been awarded a mere £5,000. Like the Court of Appeal before it,<sup>37</sup> the House of Lords upheld this award, although hinting that the first instance judge could not have been faulted had he simply dismissed the claim.<sup>38</sup>

#### D. ANALYSIS

One could argue that the decision in *Lonsdale* is a simple application of the European Court of Justice decision in *Honeyvem*.<sup>39</sup> In terms of the principle of national autonomy, a member state is entitled to determine the conditions under which a right granted by European Community law is to be enforced.<sup>40</sup> There are, of course, limits to that margin of discretion. National enforcement procedures must not threaten the effectiveness of EC law.<sup>41</sup> The balance between the autonomy of the member state and the need to ensure the effectiveness of EC law is a complex issue which cannot be fully analysed here. Nevertheless, it is suggested that the decision in *Lonsdale* comes close to upsetting this delicate balance. It means that an agent working in Great Britain will be denied the compensation to which he would have been entitled had he worked in another member state of the European Union where compensation applies. This provides obvious cause for concern. Admittedly, the Directive only intended to achieve partial harmonisation. But while diversity in the size of award is one thing, the outright denial of an award is quite another. Presently, agents whose entitlements arise when they choose to terminate their agreements for reasons of illness or age do not have their awards valued by reference to prospective commission. Is the failure of the principal's business not an equally random event, lying similarly beyond the power of the agent?

As narrated above, the traditional approach in the UK has not been to identify commercial agents as in need of protection. Yet, the facts of cases such as *King* and

<sup>36</sup> Para 23.

<sup>37</sup> [2006] EWCA Civ 63, [2006] 1 WLR 1281.

<sup>38</sup> Para 34.

<sup>39</sup> *Honeyvem Informazioni Commerciali Srl v Mariella De Zotti* [2006] ECR I-02879 at paras 34-36.

<sup>40</sup> For the development of this principle see, for example, Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989; Case C-312/93 *Peterbroeck, Van Campenhout & Cie v Belgian State* [1995] ECR I-4599; Cases C-430-431/93 *Van Schijndel & Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705; P Craig and G de Búrca, *EU Law Text Cases and Materials*, 4th edn (2008) 305 ff.

<sup>41</sup> Craig & de Búrca, *EU Law Text Cases and Materials* (n 40) 313 ff.



*Lonsdale* suggest that there is a class of agents working in this country whose earnings are low. Speaking of Mr Lonsdale, Lord Hoffmann questioned why the court should compensate for the loss of a business “which earned him less than he would have been paid as a bus conductor.”<sup>42</sup> But it may indeed be such agents who are most in need of protection, and whom the Directive is designed to protect.

There are, of course, conceptual difficulties in the valuation of an agent’s business without reference to a catastrophic event such as the principal’s insolvency. But when one considers the intensely protective background to the Directive, it seems logical to disregard the declining business in the valuation exercise. That was the approach taken in *King* and in some English cases. Judge Morland in *Ingmar GB Ltd v Eaton Leonard*<sup>43</sup> decided not to use the level of commission earned in the last year of the agency to calculate compensation and was commended by Saintier for doing so.<sup>44</sup> The final year’s figures would not, he concluded, have been representative of the true value of the volume of sales. After *Lonsdale*, however, this case is no longer good law.

The method used by Lord Hoffmann is, in any event, a curious one. He used French law to reach what is, it is argued here, an erroneous conclusion, by equating compensation with a right to future commissions.<sup>45</sup> But later in his speech he distanced himself from the French practice of using the figure of two years’ commission as a guideline. Speaking of the earlier stages of the case, he criticised the fact that the judge was invited “to pluck a figure out of the air from across the Channel.”<sup>46</sup> One might argue that to use certain elements of the French legal approach but reject others is an equally random approach.

Nor is Lord Hoffmann’s approach consistent with the leading English agency text, *Bowstead & Reynolds*. Reynolds, describing assessment of the agent’s loss as part of the exercise of calculating compensation, states:<sup>47</sup>

This on the whole, but not exclusively, involves looking backward rather than forward (but without referring to how long the agency has continued nor to benefits conferred on the principal.)

It seems clear that, with their decision in *Lonsdale*, the House of Lords has set the law on a new and uncharted path.

At a practical level, the decision is likely to prove equally unwelcome. Legal advisers on both sides may struggle to understand why aspects of indemnity now apply to compensation. Although the ability to refer to French law has been placed beyond doubt, no one acting for the agent is likely to do so because of Lord

42 Para 23.

43 [2002] ECC 5.

44 See S Saintier, *Commercial Agency Law: A Comparative Analysis* (2002) 255.

45 Para 10.

46 Para 35.

47 F M B Reynolds, *Bowstead & Reynolds on Agency Law*, 18th edn (2006) para 11-049. The reference to “not exclusively” seems to refer to the fact that loss is not always limited to valuation of goodwill but may also include expenses which the agent has incurred in setting up the agency on the advice of the principal which he has been unable to amortize because of the termination of the agency relationship. See para 11-050, and also para 11-050 where Reynolds notes that “cases which pay too close attention to deprivation of future net commission may be regarded as doubtful.”

Hoffmann's comments contrasting the market for commercial agencies in England and in France. There are also cost implications as it will now be necessary to call expert valuation evidence. Indeed the cost of such evidence may exceed the expected award, remembering that many of these cases involve low-earning agents.

To conclude, a few words are offered on the status of *Lonsdale* as a precedent for Scots law. As a decision of the House of Lords in an English appeal on legislation applying equally to Scotland, it is at least highly persuasive, if not binding.<sup>48</sup> Only the very brave (or foolish) would seek to argue against it, particularly given that Lord Rodger voiced his approval of Lord Hoffmann's speech. Nevertheless, it is not beyond the bounds of possibility that a Scottish judge might conclude, as has been argued here, that the decision in *Lonsdale* undermines the purpose of the Directive. Certainly it is to be hoped that *Lonsdale* does not mark the end of discussion of *King* in the Scottish courts.

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## The Unfair Prejudice Remedy

*Wilson v Jaymarke Estates Ltd*,<sup>1</sup> the first Scottish appeal concerning section 459 of the Companies Act 1985 to reach the House of Lords, gave the House a second opportunity to consider the provision, eight years after *O'Neill v Phillips*.<sup>2</sup> *Wilson* is likely to be remembered, however, not for its discussion of section 459 but for remarks concerning the process of appeal from Scotland. A couple of months earlier, the Judicial Committee of the Privy Council also heard an appeal concerning the protection provided to shareholders against unfairly prejudicial conduct. This appeal came from Jersey and concerned a statutory provision identical in substance to section 459. The Committee's opinion in *Gamlestaden Fastigheter AV v Baltic Partners Ltd*.<sup>3</sup> will be of interest in Scotland (and England) because explicit reference was made to section 459. This note analyses and explains the significance of *Wilson* and *Gamlestaden*.

<sup>48</sup> See *Dalglish v Glasgow Corporation* 1976 SC 32; G Maher and T B Smith, "Sources of Law (Formal)", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 22 (1987) para 280.

<sup>1</sup> [2007] UKHL 29, 2007 SLT 958.

<sup>2</sup> [1999] 1 WLR 1092.

<sup>3</sup> [2007] UKPC 26, [2007] 4 All ER 164.

### A. THE STATUTORY REMEDY

Section 994 of the Companies Act 2006 provides minority shareholders with their principal form of statutory protection.<sup>4</sup> Effective from 1 October 2007 but identical to its predecessor (section 459 of the Companies Act 1985), section 994 enables a shareholder to petition the court for relief where the affairs of the company are being (or have been) conducted in a manner unfairly prejudicial to his interests or to the interests of shareholders generally. The prejudice must be suffered *qua* shareholder and not some other capacity.<sup>5</sup>

Both unfairness and prejudice must be established but neither is defined. In this regard, the most important decision on section 459 is *O'Neill*, in which Lord Hoffmann articulated a twofold test of unfairness that has been accepted as authoritative in Scotland, although its application is not without its difficulties.<sup>6</sup> In Lord Hoffmann's view, unfairness arises where there is a breach of the terms on which it was agreed that the company's affairs would be conducted, or where a majority exercises a legal power in a manner regarded by equity as contrary to good faith. Lord Hoffmann also recognised that unfairness could arise where an event occurs which "puts an end to the basis upon which the parties entered into association with each other, making it unfair that one shareholder should insist upon the continuance of the association".<sup>7</sup> Moreover, in Scotland it has been recognised that under section 459 the court can give effect to "recognised restraints on the exercise of rights or powers – such as ... for example, on personal bar or acquiescence or waiver".<sup>8</sup>

Lord Hoffmann's opinion in *O'Neill* represented the refined articulation of an approach he had developed earlier in the Court of Appeal<sup>9</sup> and High Court.<sup>10</sup> These earlier decisions are significant for another reason: they established the remedy's success through purposive interpretation, particularly concerning the broad interpretation of the *qua* member requirement and the recognition that the nature of a shareholder's participation in a company can be broader than his strict legal rights.<sup>11</sup>

Section 996 of the 2006 Act enables the court to make "such order as it thinks fit for giving relief". The most popular is the purchase of the petitioning shareholder's shares by the company or majority shareholders. Other orders include regulating the future affairs of the company or restraining the company from altering its articles

4 The remedy's pivotal role is unlikely to diminish following the introduction of statutory derivative proceedings in Scotland (described as a derivative claim in England and Wales). See Companies Act 2006 ss 265-269 (Scotland), ss 260-264 (England Wales).

5 See *Brown v Scottish Border Springs Ltd* 2002 SLT 1213, following an earlier English decision, *J E Cade & Son Ltd* [1991] BCC 360.

6 See, e.g., *Hall v Gamut Technologies Ltd* 1999 SLT 1276; *Anderson v Hogg* 2002 SC 190. For further discussion see R Goddard, "Shareholder remedies in Scotland" (2003) 7 EdinLR 93.

7 [1999] 1 WLR 1092 at 1101.

8 *Anderson v Hogg* 2002 SC 190 at para 5 per Lord Hamilton.

9 See, e.g., *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14.

10 See, e.g., *Re a Company* [1986] BCLC 376.

11 In this respect *Ebrahimi v Westbourne Galleries* [1973] AC 360 has been influential.

of association without court approval. In *Gamlestaden*, the order sought was one requiring the company's directors to pay damages to the company. In *Wilson*, as we shall now see, the order sought was the purchase of the minority's shares.

### B. WILSON

Wilson was a minority shareholder (30%) in a company formed with another shareholder (Shaw) who held the remaining shares. Wilson petitioned for relief under section 459, making several allegations of unfairly prejudicial conduct. These included Shaw's unilateral payment of company funds to another company in which his son was interested; the levying on the company of management charges (in excess of £200,000) payable to other companies in which Shaw was interested, where the company derived no benefit; and the failure to hold annual general meetings. At first instance the sheriff found that the affairs of the company had been conducted in an unfairly prejudicial manner and ordered that Shaw purchase Wilson's shares.<sup>12</sup> This decision was upheld by the First Division on appeal.<sup>13</sup> Several days were allotted for the further appeal to the House of Lords,<sup>14</sup> but in the event only a few hours were needed. The main point argument for the appellant was that the management charges were not unfairly prejudicial because Wilson had previously consented to similar payments. In rejecting the appeal, Lords Hoffmann and Hope (delivering the only reasoned opinions, with which Lords Rodger, Walker and Carswell agreed) expressed surprise that the case had reached the House. Lord Hope emphasised that the limits on the right of appeal to the House of Lords must be "carefully and jealously respected",<sup>15</sup> particularly the restriction to questions of law and the requirement to give a proper estimate of the time needed. Lord Hope was not satisfied that counsel had given proper attention to these matters.

Although *Wilson* did not raise any novel question of law, it demonstrates the significance of the relationship between shareholders for the purposes of determining unfairness. Conduct that is fair whilst mutual trust exists between the parties may be unfair where that trust is destroyed. A shareholder's agreement that payments should be made, or that the company should be run informally, will not be absolute. Lord President Cullen's opinion in *Wilson* was undisturbed by the House of Lords and remains a leading Scottish authority. Although it is not suggested that the Lord President reached the wrong decision, two points about his opinion seem worth making.

The Lord President cited *O'Neill* and stated that "[a] member of a company will be entitled to complain of unfairness where there has been some breach of the terms on which he agreed that the affairs of the company should be conducted, or where the rules have been used in a manner that equity would regard as contrary to good faith".<sup>16</sup> He added, with reference to *Re Legal Costs Negotiators Ltd*

<sup>12</sup> 2002 GWD 28-962.

<sup>13</sup> [2005] CSIH 84, 2006 SCLR 510.

<sup>14</sup> [2007] UKHL 29, 2007 SLT 958.

<sup>15</sup> Para 20.

<sup>16</sup> 2006 SCLR 510 at para 10.

(an English decision handed down prior to *O'Neill*),<sup>17</sup> that in quasi-partnership companies “legitimate expectations can exist and can render the use of powers unfairly prejudicial to the interests of members”.<sup>18</sup> The relationship between these propositions requires consideration. *O'Neill* makes clear that legitimate expectations arise only where equitable principles make it unfair to exercise strict legal rights. As Lord Hoffmann explained, the legitimate expectation “is a consequence, not a cause, of the equitable constraint”.<sup>19</sup> To be consistent with *O'Neill*, the Lord President’s statement concerning legitimate expectations must be seen as an illustration of the manner in which equitable principles restrain the exercise of strict legal powers; it cannot be regarded as a free-standing proposition. Indeed, as Lord Hoffmann recognised in *O'Neill*, it is probably best to avoid the term “legitimate expectation” altogether.<sup>20</sup>

The second point concerns the Lord President’s statement, with reference to another English case (*Re Phoenix Office Supplies Ltd*),<sup>21</sup> that:<sup>22</sup>

Section 459 is designed for the protection of the members of companies. It is in that capacity that they seek its protection, not as directors or employees.

This is the *qua* member requirement but its boundaries are not as precise as the Lord President’s statement suggests. Conduct affecting a shareholder in another capacity can, in certain cases, be unfairly prejudicial to his interests *qua* shareholder. The classic example is a shareholder’s removal from the office of director by an ordinary resolution under section 168 of the 2006 Act. This will be unfairly prejudicial where there was an understanding between the shareholders that he would participate in decision-making and continue to be involved with the management of the company. The expectation of participation is therefore an essential part of the shareholder’s interests in the company. Such understandings are common in so-called quasi-partnership-type companies and their existence enables the court to subject the exercise of legal powers to equitable considerations. How far this should go is less clear. Whether the interests capable of protection under section 459 should include the shareholder’s interests as a creditor of the company was the question considered in *Gamlestaden*.

### C. GAMLESTADEN

The key issues in *Gamlestaden* concerned Jersey’s unfair prejudice remedy (arts 141 and 143 of the Companies (Jersey) Law 1991) which is identical in substance to sections 994 and 996 of the 2006 Act.<sup>23</sup> *Gamlestaden* was a minority shareholder in Baltic Partners Ltd, a company incorporated in Jersey and formed for the purpose

<sup>17</sup> [1999] 2 BCLC 171.

<sup>18</sup> 2006 SCLR 510 at para 10.

<sup>19</sup> [1999] 1 WLR 1092 at 1102.

<sup>20</sup> Lord Hoffmann used the term in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14.

<sup>21</sup> [2002] EWCA Civ 1740, [2003] 1 BCLC 76.

<sup>22</sup> 2006 SCLR 510 at para 11.

<sup>23</sup> The only differences concern grammar and the choice of some words.

of a joint venture. Gamlestaden loaned Baltic money. When Baltic became insolvent, Gamlestaden brought an action under art 141, alleging breaches of directors' duties and seeking an order that the directors pay damages to Baltic. The Jersey Court of Appeal<sup>24</sup> upheld the Bailiff's decision to strike out the action because no relief could be granted which would benefit Gamlestaden *qua* shareholder; only the creditors (including Gamlestaden) would benefit. The Privy Council rejected the Jersey Court of Appeal's interpretation and stated that art 141 "properly construed [does] not *ipso facto* rule out the grant of relief simply on the ground that the relief sought will not benefit the applicant in his capacity as member".<sup>25</sup>

The order sought by Gamlestaden was the payment of damages to Baltic in respect of harm suffered by the company. With reference to *Re Chime Corp Ltd*,<sup>26</sup> the Privy Council accepted that such an order could be made. This is consistent with the position in Scotland and England,<sup>27</sup> although the issue remains controversial given the long-standing principle that the company is the proper pursuer where it has suffered harm.<sup>28</sup> That breaches of directors' duties can form the basis of a successful claim under section 994 is also consistent with the twofold test of unfairness outlined by Lord Hoffmann in *O'Neill v Phillips*<sup>29</sup> and accepted as relevant in Jersey.<sup>30</sup>

In *Gamlestaden* it was argued that shareholders only have standing to bring an action under art 141 where the relief would benefit them *qua* shareholder. The Privy Council rejected this argument and, with reference to the English decision *R&H Electric Ltd v Haden Bill Electrical Ltd*,<sup>31</sup> stated that it was:<sup>32</sup>

somehow artificial to insist that the qualifying loss for Article 141 (or section 459) purposes, must be loss which has reduced the value of the investor's equity capital and that it is not sufficient to show that it has reduced the recoverability of the investor's loan capital.

The Privy Council added that:<sup>33</sup>

in a case where an investor in a joint venture company has, in pursuance of the joint venture agreement, invested not only in subscribing for shares but also in advancing loan capital, the investor ought not, in their Lordships' opinion, [to] be precluded from the grant of relief under Article 143(1) (or section 461(1)) on the ground that the relief would benefit the investor only as loan creditor and not as member.

The Privy Council rightly rejected the arguments that relief could only be granted where it would benefit the shareholder *qua* shareholder and that the prejudice must

24 [2005] JLR 57.

25 [2007] UKPC 26, [2007] 4 All ER 164 at para 36. The judgment was delivered by Lord Scott of Foscote.

26 (2004) 7 *Hong Kong Court of Final Appeal Reports* 546.

27 See e.g., *Anderson v Hogg* 2002 S C 190; *Re Bhullar Bros* [2003] EWCA Civ 424, [2003] 2 BCLC 241; *Clark v Cutland* [2003] EWCA Civ 810, [2004] 1 WLR 783.

28 For further discussion see J Payne, "Sections 459-461 Companies Act 1985 in flux: the future of shareholder protection" (2005) 64 CLJ 647.

29 [1999] 1 WLR 1092.

30 See, e.g., *Robertson v Slous* [2002] JLR 361.

31 [1995] 2 BCLC 280.

32 [2007] UKPC 26 at para 30.

33 Para 37.

have reduced the value of the shareholder's equity. But it does not follow, as the Privy Council's opinion implies, that if the relief does not benefit the shareholder *qua* shareholder it must do so in some other capacity such as a creditor. Article 141 and section 994 do not require this. For example, where a director is ordered to disgorge a gain made in breach of fiduciary duty, the shareholders do not directly benefit; yet there is no reason why relief should be precluded on this basis. Moreover, shareholders' interests can be prejudiced in ways that do not reduce the value of their equity investment. The authorities confirm this point: in *Re Elgindata Ltd*,<sup>34</sup> a case concerning alleged mismanagement, Warner J held that a reduction in the value of equity was not the only way of establishing that conduct was prejudicial to a shareholder's interests. Actions placing the value of the shareholders' equity in jeopardy can also be prejudicial.<sup>35</sup> These points were not fully explored by the Privy Council. They are important because they suggest that whether a shareholder benefits directly from the art 143 relief should not be determinative of the shareholder's standing to bring an action.

The Privy Council did not expound a general rule that shareholders who are also creditors can use article 141 (or section 994) to protect their interests *qua* creditor. It would be difficult to support such a rule because the purpose of the remedy is to protect the interests of shareholders in that capacity. Creditors (including employees) have contractual remedies available to them that shareholders do not, and in Scotland and England the courts have confirmed that section 994 should not be used by shareholders to pursue interests unconnected with their capacity as a shareholder of the company.<sup>36</sup>

The Privy Council nevertheless recognised that in some companies the nature of a shareholder's participation will not be fully reflected in the legal rights conferred *qua* shareholder. This is consistent with *O'Neill*, in which Lord Hoffmann observed that "the requirement that prejudice must be suffered as a member should not be narrowly or technically construed".<sup>37</sup> This broad interpretation explains the success of section 994 in small, so-called quasi-partnership companies. However, the fact that the company is small, or has few shareholders, is not sufficient in itself for the recognition of interests and expectations beyond the shareholder's legal rights. Something more is required, as illustrated by the facts of *R&H Electric Ltd v Haden Bill Electrical Ltd*.<sup>38</sup> At the time that Haden Bill was formed it was agreed that a minority shareholder would participate in management for as long as a company under his control (R&H) remained a creditor. When, later, the shareholder was removed as director, the fact that Haden Bill was formed on the basis of mutual trust and confidence enabled the court to provide relief under section 459. The trial judge held that the fact the shareholder and R&H were separate did not preclude

34 [1991] BCLC 959.

35 *Re R A Noble (Clothing) Ltd* [1983] BCLC 273.

36 See, e.g., *Brown v Scottish Border Springs Ltd* 2002 SLT 1213, *Wright v J & A Mitchell & Co Ltd* 1996 GWD 32-1303, [1997] BCC 198; *Re John Reid & Sons (Strucsteel) Ltd* [2003] 2 BCLC 319.

37 [1999] 1 WLR 1092 at 1105.

38 [1995] 2 BCLC 280.

relief and that the court should take a broad view of a shareholder's interests *qua* member.

The facts of *Gamlestaden* were very different from those in *R&H Electric Ltd*, not least because there was no evidence that Baltic was formed on the basis of mutual trust and confidence. It is therefore not clear on what basis the Privy Council held that Gamlestaden's interests *qua* shareholder were capable of including its interests *qua* creditor. The decisions cited by their Lordships were not fully analysed, and general statements from the (English) cases to which the Privy Council referred – such as Arden J's view that the section 459 jurisdiction has an “elastic quality”<sup>39</sup> – do not by themselves justify an expansive view of shareholders' interests. Their Lordships nevertheless suggest that in a joint venture a shareholder's interests capable of protection under section 459 (now section 994 of the 2006 Act) can include his interests *qua* creditor without the need for establishing that the relationship was formed on the basis of mutual trust and confidence.

The extent to which such a broad interpretation was necessary can be questioned. Where a company has suffered harm there is nothing in art 141 or section 994 which says that the shareholder must directly benefit from the relief sought. Moreover, several important questions remain unanswered. First, what financing arrangements will constitute a joint venture? The fact that a shareholder has provided a loan should not imply that there is a joint venture; but what weight should be attached to the proportion of the shareholder's investment that is advanced in this way? Secondly, directors may take a decision in the interests of the company (to which their legal duties are owed) which conflicts with the interests of a loan creditor. Should the unfair prejudice remedy be used as a means of resolving conflicts between shareholders *qua* loan creditors and the company as a separate legal entity?

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## Causation and Apportionment of Damages in Cases of Divisible Injury

Scots law has been responsible for some of the seminal cases on the proper test for causation of loss. In *Wardlaw v Bonnington Castings*<sup>1</sup> the House of Lords settled the point that, for a defender to be shown to have caused a pursuer's injury, it is not necessary that the defender was the sole cause of the injury, but merely that, but for the defender's conduct, the injury would not have occurred to the same extent. To put it another way, it need only be shown that the defender made a “material

<sup>39</sup> *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354.

<sup>1</sup> 1956 SC (HL) 26.



contribution” to the totality of the pursuer’s losses. Subsequently, in *McGhee v National Coal Board*,<sup>2</sup> the House of Lords developed a further test for causation, the material increase in risk test, by which a defender could be shown to have caused an injury by virtue of the fact that it materially increased the risk of the injury’s occurrence. Although dressed up as a mere variation of the material contribution test, this development was in fact a radical one, for it established that risk creation alone, rather than any “but for” connection to actual harm, could be used to prove a causal link.<sup>3</sup>

While both *Wardlaw* and *McGhee* were groundbreaking decisions, they did not address a further fundamental issue: what should be the liability in damages of a defender who has materially contributed to an injury? This is an issue of apportionment not causation.

#### A. THE WARDLAW LACUNA

In *Wardlaw* liability was imposed for the whole of the pursuer’s losses even though the defender’s culpable behaviour had not been the only cause of the pursuer’s injuries. The fairness of such a result is questionable. In *McGhee*, a justification for such a finding of liability could be argued to lie in the fact that the disease (dermatitis) was a so-called “indivisible injury”, in that the totality of the harm caused could not be divided into portions attributable to either of its two possible causes. Each causal contribution could therefore be said to be a cause of the whole indivisible loss. In *Wardlaw*, however, the pursuer had contracted pneumoconiosis, a divisible, dose-related disease, the severity of which was affected by the length and severity of exposure to the harmful agent. The disease had been caused by the pursuer’s exposure to noxious dust created by a number of different machines in the defender’s factory. It was held that the defender had been negligent only in respect of the dust produced by two types of machine, but not the third which had also thrown material quantities of dust into the air. The House of Lords concluded that, as the machines for which the defender was liable had themselves produced a substantial amount of dust, which must (their Lordships inferred) have contributed to the pursuer’s illness, the defender’s negligence had therefore been a cause of that illness. Surprisingly, however, the defender was then held liable for the totality of the pursuer’s losses, no reduction in damages being made to reflect the fact that it was likely that a proportion of the overall severity of the disease had been produced by a cause (the third machine) to which no liability attached.

The failure to make some apportionment of damages in *Wardlaw* has always been troubling. If, for instance, three defenders are each responsible for contributing quantifiable proportions of a divisible harm, it seems just that each of the three should bear responsibility only for the proportion of the overall harm caused by it. Things are

<sup>2</sup> 1973 SC (HL) 37.

<sup>3</sup> The *McGhee* test was recently reformulated by the House of Lords, in *Barker v Corus plc* [2006] UKHL 20, [2006] 2 AC 572, as liability for loss of a chance: see further M Hogg, “Re-establishing orthodoxy in the realm of causation” (2007) 11 EdinLR 8 at 15-17.

otherwise where the injury is indivisible, such as with death, when a court will rightly hold each defender to have caused the whole loss, with the result that each is liable *in solidum*, subject to a right to ask the court to order co-defenders to contribute in such proportion as the court “deems just”. The assessment of so-called “conjunct relief” on a just basis has been possible since the passage of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. *Wardlaw* was an example of the first type of case, that is, a case of a sole defender having made a divisible contribution to the overall totality of a pursuer’s losses. Why therefore was there no apportionment of damages? The answer is probably that it was not asked for by the defender, although it will be argued in the conclusion that such a request should not be necessary. Why it was not asked for is a matter of speculation, but it may be that the state of scientific and medical knowledge at the time precluded any sensible method of calculating the proportionate contribution made by the machines for which the defender was responsible.<sup>4</sup>

As has often been said, courts should do the best they can to make appropriate apportionment in cases of divisible injury.<sup>5</sup> But while the interests of justice may so suggest, recent comments in the Outer House of the Court of Session tend to support a different view.

#### **B. *WRIGHT v STODDART INTERNATIONAL***

In *Wright v Stoddart International plc*<sup>6</sup> a widow sued the defender for having materially contributed to asbestosis allegedly contracted by her deceased husband. The deceased had been exposed to asbestos while working at premises owned by the defender’s predecessors, a company called Templetons. In addition, over the course of his working life the deceased had also been exposed to asbestos while working for five other employers. Some of these exposures were much greater in severity than the Templetons’s exposure. The deceased also suffered from pleural plaques, although no claim in respect of these was made by the pursuer and such a claim would now, in any event, be unsuccessful given the recent decision of the House of Lords in *Johnston v NEI International*.<sup>7</sup> The Lord Ordinary, Lord Uist, held that the deceased had not in fact contracted asbestosis but rather cryptogenic fibrosing alveolitis, a disease with similar symptoms but of “unknown aetiology”. In view of the uncertain cause of the disease, the defender was, quite properly, assoilzied. The decision, however, contains a discussion of the position in the event that the deceased had, after all, contracted asbestosis. These *obiter* remarks address not only the question of causation but, more importantly for present purposes, the apportionment of damages in respect of what was plainly a divisible injury.

<sup>4</sup> See J Stapleton, “Lords a’leaping evidentiary gaps” (2002) 10 Torts LJ 276 at 283.

<sup>5</sup> *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All ER 421 at 429A-B per Smith LJ; *Allen v British Rail Engineering* [2001] ICR 942 at 952D-E per Schiemann LJ; *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405 at 443G-444A per Mustill J.

<sup>6</sup> [2007] CSOH 138.

<sup>7</sup> *Johnston v NEI International Combustion Ltd* [2007] UKHL 39. Following this decision, Lord Uist issued a supplementary opinion, [2007] CSOH 173, confirming that, even had damages for such been sought by the pursuer in *Wright*, such a claim could not have succeeded, given the decision in *Johnston*.

On that point Lord Uist's conclusion, contrary to the position argued for above, was that:<sup>8</sup>

where a pursuer proves that a single defender made a material contribution to his injury or illness, that defender is liable in full to the pursuer for causing the injury, and not just the extent of his material contribution.

This conclusion runs counter to a number of recent English decisions, in particular the decision of the Court of Appeal in *Holtby v Brigham & Cowan (Hull) Ltd*,<sup>9</sup> in which a claimant who had suffered asbestosis as a result of separate exposures caused by a number of parties, but had raised an action against only one, was permitted to recover from the sole defendant only to the extent of that defendant's contribution to the condition (assessed at 75%).

In view of the contrary authority, Lord Uist gave detailed consideration to the issues, seeking support for his position by reference to five principal justifications:

1. A finding that a defender who has made only a partial contribution to a divisible injury is nonetheless liable for the whole of the damages was supported by the decisions of the House of Lords in *Wardlaw* and *McGhee*.<sup>10</sup>
2. In assessing damages, there is no reason to differentiate between a defender who has materially contributed to a divisible disease (such as asbestosis) and one who has materially contributed to an indivisible disease (such as a mesothelioma of the pleura).<sup>11</sup>
3. The fact that a cause has materially contributed to a harmful outcome logically entails that a defender responsible for such a cause must bear the losses of the whole of that outcome.<sup>12</sup>
4. The decision in *Holtby* must be incorrect, as it suggests that there was no reason for the introduction of the statutory provision, referred to above, regarding relief against co-defenders in cases of joint and several liability.<sup>13</sup>
5. The defender's request to assess damages by reference to the extent of its material contribution was tantamount to a request to apportion liability upon parties who had not been called as defenders.<sup>14</sup>

Despite the careful discussion of the issues, however, it is suggested that each of these justifications is questionable.

8 [2007] CSOH 138 at para 141.

9 [2003] 3 All ER 421.

10 As well as *Nicholson v Atlas Steel Foundry and Engineering Co* 1957 SC (HL) 44. See [2007] CSOH 138 at para 140.

11 Para 142.

12 Para 141.

13 Para 143. The relevant statutory provision in Scotland, referred to above, is s 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. The parallel provision in England is s 2 of the Civil Liability (Contribution) Act 1978 (which re-enacts an earlier provision of the Law Reform (Married Women and Tortfeasors) Act 1935).

14 Para 147.

### C. CRITICAL REVIEW OF *WRIGHT*

First, the difficulty in relying upon *Wardlaw* is, as indicated earlier, that no consideration was given to apportionment of damages. As Lord Uist points out, this cannot have been because counsel (later Lords Avonside and McDonald) were “remiss in their duty”.<sup>15</sup> The fact remains, however, that we neither know why the matter was not put to the court, nor whether any representations would have produced a different outcome if so put. The decision is thus of little assistance as an authority on apportionment.<sup>16</sup> As for *McGhee*, again not only was the apportionment question not put to the court, but *McGhee* was an entirely different kind of case from *Wright*. *McGhee* was not about “but for” causation of a divisible injury, but was concerned with indeterminate causation of an indivisible disease of uncertain aetiology, and resulted in the court fashioning an equitable remedy based upon the idea that creating or increasing a risk of injury might itself found liability. Such an approach has little, if anything, to do with cases of asbestosis, where causation can be shown on a “but for” basis using an entirely traditional approach.

Secondly, there is good reason to distinguish between divisible and indivisible injuries. In the case of the latter, it is precisely because the individual effects of a number of causes cannot be separated out that courts have had to utilise exceptional methodology for determining liability. Otherwise a defender would be able to exculpate itself from responsibility by saying “it cannot be shown what precisely I have caused by way of damage, so the pursuer’s case must fail”. No such problem exists in cases of divisible injury: as the effect of each cause can be demonstrated – if not precisely, then at least by using some equitable method of calculation such as length and severity of exposure in asbestosis cases – there is no need to adopt the solution applied in *McGhee* and *Fairchild*, and later modified in *Barker v Corus plc*.<sup>17</sup>

Thirdly, despite Lord Uist’s suggestion that Lord Reid said as much in *Wardlaw*, it does not follow, as a matter of logic, that if it can be shown that a defender materially contributed to an outcome, he must bear all the damages for that outcome.<sup>18</sup> Establishing causation of loss, and the subsequent decision as to what damages a defender should bear, are quite separate matters; to conflate them disrupts well-established principles of assessment and apportionment of damages.<sup>19</sup>

Fourthly, the decision in *Holtby* does not disturb the rationale for section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. That section relates to circumstances where two or more defenders are found jointly and severally liable

<sup>15</sup> Para 141.

<sup>16</sup> *Wardlaw*, it is worth adding, was a case where only one party had exposed the pursuer to the noxious agent responsible for the injuries; in *Wright*, by contrast, six parties had exposed the deceased to asbestos. The circumstances of the cases are not therefore entirely on all fours.

<sup>17</sup> [2006] UKHL 20, [2006] 2 AC 572.

<sup>18</sup> A close reading of the relevant passage in *Wardlaw* (1956 SC (HL) at 33) indicates only that Lord Reid was asserting that a material contribution to an injury is sufficient to “establish liability”: it says nothing on apportionment of damages.

<sup>19</sup> In the *Wright* case itself, on Lord Uist’s approach, had asbestosis been proven, the pursuer would have been entitled to full damages even although she had already received an out-of-court settlement from another of the parties responsible for exposing the deceased to asbestos.

in damages, and creates an entitlement to request the court to grant conjunct relief against fellow defenders in such proportions as the court “deems just”. The section modifies the common law right of conjunct relief, which allowed only for *pro rata* apportionment. However, the circumstances of *Holtby* were not within the ambit of the English equivalent of this statutory provision: as *Holtby* was not a case of a joint tort, so no question of joint and several liability or of conjunct relief arose. *Holtby* is authority for the position that the assessment of damages of a defendant which has, through the commission of a discrete tort, materially contributed to an injury should be made according to the magnitude of its contribution to the harm. Thus *Holtby* should not be seen as undermining the rationale for section 3 of the 1940 Act or its English equivalent.

Fifthly, Lord Uist mischaracterised the defender’s request. All the defender was seeking was that the quantum of damages awarded should be assessed by reference to the contribution which its actions had made to the deceased’s illness. There was no question of a request that liability somehow be imposed by the back door on parties who were not called to the action. A similar attempt to so characterise the defendant’s argument was rejected by Stuart-Smith LJ in *Holtby*.<sup>20</sup>

#### D. CONCLUSION

*Wright* considers the issue tantalisingly left unconsidered in *Wardlaw*, namely whether a defender who has materially contributed to a divisible injury should be liable only to the extent of his contribution to the overall totality of the pursuer’s loss, or whether, as Lord Uist suggests, such circumstances should give rise to liability for the whole of the losses, such as occurs in cases of joint and several liability (of which *Wright* is not an example). It has been suggested here that the former approach is the correct one, and that an apportionment of damages according to the causal contribution made by each defender should be made. Admittedly, in many cases this will have to be a “best guess” approach, but to refuse to attempt such an apportionment<sup>21</sup> is to saddle a sole defender with damages for losses which he did not cause.

By way of a further conclusion, it is suggested that a defender in a case of divisible injury should not be required to ask for an apportionment of damages. After all, such a request merely asks a court to undertake a task which it is in any event supposed to do, namely to assess the contribution made to an injury by a defender’s behaviour and then properly to quantify the damages which should accrue to that defender. If a defender has caused only 25% of a pursuer’s overall losses, the defender should not be required to ask that only 25% of the damages be attributed to it: the court should do that in any event.<sup>22</sup> Doubtless a wise defender will suggest the apportionment which

20 [2000] 3 All ER 421 at para 23 per Stuart-Smith LJ.

21 Lord Uist states, at para 150, that he would have declined to make an apportionment if he had concluded that the defender had indeed causally contributed to asbestosis contracted by the deceased.

22 In *Holtby*, Stuart-Smith LJ had mused, at 429, that “strictly speaking the defendant does not need to plead that others were responsible in part. But at the same time I certainly think that it is desirable and preferable that this should be done. Certainly the matter must be raised and dealt with in evidence, otherwise the defendant is at risk that he will be held liable for everything.”

it thinks properly falls to it, but a failure to do so should not prevent the court from being required to consider the matter itself.

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## Interference with Natural Watercourses: Nuisance, Negligence and Strict Liability

In *Viewpoint Housing Association Ltd v The City of Edinburgh Council*,<sup>1</sup> a culvert had been created by the defender's predecessor to allow the Braid Burn to pass beneath Redford Road. Unfortunately, the provision made for water flow was inadequate and since 1984 there had been a history of flooding caused by the build-up of debris at the culvert's mouth. The defender was aware of this state of affairs, having received a series of reports between 1993 and 1996, but although remedial measures were discussed, they were not implemented until after the flood in April 2000 which damaged the pursuer's sheltered housing complex. The pursuer argued that this flood would have been avoided or at least materially reduced in extent and duration had the applicable standards been met. Accordingly, the pursuer sought damages, grounding its action on both nuisance and negligence, but also arguing that the defender might be strictly liable. The defender attacked the pursuer's pleadings on relevancy.

As strict liability had not been relevantly pled, it was not the subject of debate or a finding. Regarding the case in negligence, counsel for the defender contended that no common law duty of care was owed by a roads authority to any party other than a road user. However, authorities such as *Hanley v Magistrates of Edinburgh*<sup>2</sup> tended to counter this contention, and in any event the defender was sued not merely as roads authority but as the party which, by its own admission, was in ownership, occupation and control of the culvert. Since the court could not be satisfied that either ground of action was bound to fail, the case was allowed to go to proof before answer.

### A. NEGLIGENCE AND NUISANCE

Counsel for the defender's attack on the case grounded on negligence was, understandably, focussed on denial of the existence of a duty of care. Since the action grounded on nuisance was founded on the same averments of *culpa*, that case too was

<sup>1</sup> [2007] CSOH 114, 2007 SLT 772. The Lord Ordinary was Lord Emslie.

<sup>2</sup> 1913 SC (HL) 27, 1913 1 SLT 420.

contended to be irrelevant. This highlights perhaps the most important and certainly the most unsatisfactory element of the case. This is the view taken of the relationship between nuisance and negligence, as demonstrated by the pursuer's reliance on the same pleadings on *culpa* for both grounds. On this view the pursuer will be entitled to succeed on the ground of nuisance if it can prove the defender's negligence, and the defender will evade liability if it can establish that no duty of care was owed. If this is a correct view of the law, then the question arises: in what sense does nuisance provide an alternative ground of claim to negligence? If the pursuer is undertaking to prove the same thing, the grounds merely duplicate each other.

This issue was addressed by the First Division in *Kennedy v Glenbelle*.<sup>3</sup> The problem lies in the way in which Lord President Hope's opinion in that case is being interpreted. In *Viewpoint*, counsel for the pursuer noted that cases of nuisance and negligence might run side by side. He quoted Lord Hope:<sup>4</sup>

[L]iability for nuisance [does] not arise merely *ex dominio* and without fault. The essential requirement is that fault or *culpa* must be established. That may be done by demonstrating negligence, in which case the ordinary principles of the law of negligence will provide an equivalent remedy.

It is not hard to see how this passage could be taken as supporting the view that one can establish fault in nuisance by proving negligence, and this interpretation is accepted by the court in *Viewpoint*.<sup>5</sup> However, when the (unquoted) remainder of the *dictum* is examined in the context of Lord Hope's entire opinion, it appears that this is not the only possible interpretation and may well not be the best interpretation. As Lord Hope was providing an analysis of *culpa* and delictual liability in general, it is suggested that the passage quoted above means that liability *in delict* may be established by proof of negligence, not liability in nuisance.

Lord Hope's analysis in *Kennedy* begins by setting out the need to differentiate between nuisance and negligence:<sup>6</sup>

But the analysis of authorities... [in *RHM Bakeries v Strathclyde Regional Council*]<sup>7</sup> did not go into the difficult question as to what types of delictual conduct on the part of the defender, amounting to *culpa* or fault on his part, are actionable on the ground of nuisance and what types are actionable by reference to the ordinary principles of negligence.

Thus, the grounding of an action on either negligence or nuisance is dependent upon the form taken by *culpa*. Having stated that fault might be established in terms of negligence, Lord Hope continued by listing other forms of culpable behaviour.<sup>8</sup> A party may be at fault because of malice, because of deliberately conducted acts done in the knowledge that harm to the other party would result, because of recklessness, or because of conduct giving rise to a special risk of abnormal damage. If Lord Hope is

3 1996 SC 95.

4 2007 SLT 772 at para 9. The quotation can be found in 1996 SC 95 at 100.

5 Para 21.

6 1996 SC 95 at 98.

7 1985 SC (HL) 17.

8 1996 SC 95 at 99.

to be allowed to succeed in distinguishing nuisance from negligence, then the proper interpretation of his words must surely be that fault in the form of negligence gives rise to a claim grounded on negligence, while a claim grounded on nuisance will arise where fault takes some form other than negligence. Such an interpretation disposes of the muddled concept of negligent nuisance, allows clear differentiation between the alternative grounds of action, and restores nuisance to relative coherence.<sup>9</sup> If, however, the view is taken that *Kennedy* allows recovery in nuisance where negligence is proved, then Lord Hope has conspicuously failed to achieve what he set out to do.

The availability of nuisance as an alternative ground of action allows recovery where *culpa* takes some form other than negligence. In an action grounded on negligence it is necessary to show that a pre-existing duty of care was owed the pursuer by the defender, and unnecessary to demonstrate that the harm amounted to nuisance. Conversely, in an action grounded in nuisance, it is not necessary to establish a duty of care, but it is necessary to establish that the harm complained of amounted to nuisance, i.e. that it was *plus quam tolerabile* in the circumstances. Arguments arising from factual circumstances are available in nuisance claims that would not be available in a claim based on negligence.<sup>10</sup> In short, there are differences in the requirements for liability and in the available arguments, such that being able to determine which ground is appropriate in a given situation is of some consequence. Certainly claims for both may run together, but they should run as true alternatives.

## B. STRICT LIABILITY

Having made no such case in pleadings, counsel for the pursuer's contention that liability might be strict was not entertained. However, the defender appeared to concede that there might have been a case in strict liability had one been pled.<sup>11</sup>

The basis in law for such a case may be outlined as follows. In *Caledonian Railway v Greenock Corporation*<sup>12</sup> the defender appealed a majority decision of the Inner House which had held it liable in damages to two railway companies whose stations were flooded as a consequence of an overflow at a culvert constructed by the defender. In the House of Lords a *dictum* of Lord Justice-Clerk Hope in *Kerr v Earl of Orkney*,<sup>13</sup> which appeared to support liability without specification of fault, was approved and the appeal was dismissed. On this basis *Caledonian Railway* has been seen as authority for the view that those who interfere with natural watercourses may be held liable without proof of fault in the event that flood damage results from their operations.<sup>14</sup>

9 Reparation in nuisance on grounds of negligence is doctrinally incoherent: see N R Whitty, "Nuisance", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2001) paras 17, 77, 89, 104, 105, 106.

10 Whitty (n 9) paras 43, 67.

11 2007 SLT 772 at para 5(iv).

12 [1917] AC 556.

13 (1857) 20 D 298 at 302. See [1917] AC 556 at 567 per Lord Finlay LC.

14 E.g. E M Clive, "Note on the Thirteenth Report of the Law Reform Committee for Scotland" 1964 JR 250 at 256-257.



There are problems with this interpretation, which may result from the way in which the decision was reported. The opinion of the Lord Ordinary (Dewar), critical to an understanding of the case, is not reported at all, while the speeches in the House of Lords are given in full only in *Appeal Cases*. The rubric in the Scottish reports<sup>15</sup> gives prominence to the approval of Lord Hope's *dictum* in *Kerr*, yet its relevance to the decision in *Caledonian* is obscure.<sup>16</sup> Far from being found liable without fault, Greenock Corporation was indeed culpable. Although the pursuer argued that fault could be inferred, it successfully proved negligence in the Outer House.<sup>17</sup> Lord Dewar, moreover, identified an additional aspect of fault which was affirmed in the House of Lords. In culverting a hill burn liable to spate and in making the public road the natural conduit for any overflow, the defender was at fault in constructing its works in the first place.<sup>18</sup>

*Caledonian Railway* has been misunderstood. But while it does not vouch for liability without fault, it serves usefully, along with other authorities, as a recognition of a duty of care imposed on a public body constructing or in occupation and control of works on watercourses. This, it is submitted, ought to have been its relevance to *Viewpoint*. *Caledonian Railway* is also significant, along with other authorities, in identifying an aspect of fault different from negligence: where harm is the inevitable and known consequence of an action then the action itself is culpable.<sup>19</sup>

### C. CONCLUSIONS

In considering the averments in *Viewpoint* it can be seen that more than one form of *culpa* could be supported. There is initial negligence on the part of the defender's predecessors who constructed a culvert to a specification which breached their duty to make sufficient provision for water flow. By allowing the continuation of a state of affairs within its control over a period of some thirty years, heedless of advice and regardless of known consequences for others, the defender moved beyond negligence to recklessness. On this basis there is scope for supporting the action with separate pleadings of *culpa* for each ground.

Although nuisance appears to have given rise to confusion, no change in the law is required to provide coherence and limitations on its scope. The points raised in this note have been discussed in legal literature.<sup>20</sup> What does not appear to have

15 1917 SC (HL) 56, (1917) 2 SLT 67.

16 See G D L Cameron, "Strict liability and the rule in *Caledonian Railway Co v Greenock Corporation*" (2000) 5 SLPQ 356.

17 Unreported opinion of the Lord Ordinary (Dewar), HL Appeal Cases 1917, vol 656 at 108A-B.

18 At 107B per Lord Dewar, approved [1917] AC 556 at 578-579 per Lord Shaw.

19 Constructive knowledge will suffice: *Anderson v White* 2000 SLT 37.

20 C Smith, "Scots law of nuisance: *Kennedy v Glenbelle*" (1995) 8 *Greens Environmental Law Bulletin* 4; E Reid, "The basis of liability in nuisance" 1997 JR 162; J Thomson, "Liability in damages for nuisance" 1997 SLT 177; F McManus, "*Culpa* and the law of nuisance" 1997 JR 259; F McManus, "Liability for *opera manufacta* in Scots law" 1998 JR 281; E Reid, "Liability for dangerous activities: a comparative analysis" (1999) 48 ICLQ 731 at 748; Cameron (n 16); Whitty (n 9) paras 17, 77, 89, 91-93, 104-106, 108; G D L Cameron, "Making sense of nuisance in Scots law" (2005) 56 NILQ 236. See also G D L Cameron, "Land", in J Thomson (ed), *Delict* (2007) paras 14-45-14-54.

happened is the filtering to the profession and the courts of such arguments as have been presented. The proper interpretation of *Kennedy v Glenbelle* could usefully be debated. It is also time that the strict liability myth of *Caledonian Railway* was laid finally to rest.

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## Private Law and Human Rights

How is the ECHR's property clause (art 1 of the First Protocol) to be interpreted? Three points must be borne in mind. The first is that the English text is incoherent. The second is that the French text is differently incoherent.<sup>1</sup> The third is that the Strasbourg<sup>2</sup> court pays little attention to either anyway. No doubt that is wise. But whether it has built a better edifice by what everyone likes to call its jurisprudence may be doubted.

The decision of the Grand Chamber in *J A Pye (Oxford) Ltd v United Kingdom*<sup>3</sup> is the end of a battle about the ownership of 50 acres of grazing land in Berkshire. The company (Pye) lost in the High Court.<sup>4</sup> It won in the Court of Appeal.<sup>5</sup> It lost in the House of Lords.<sup>6</sup> It won (by a four to three majority) in the European Court of Rights (Chamber).<sup>7</sup> And now it has lost (by a ten to seven majority) in the Grand Chamber.<sup>8</sup> The London side of the litigation culminated in a decision that Pye had lost ownership of the property. The Strasbourg side culminated in a decision that no compensation was payable in respect of that loss.

Planning law is all that stands between an over-crowded country and one that would be a single city from coast to coast. Even so, rural land is sometimes re-zoned for development, and if that happens its value rockets. Indeed, the value rises even with the mere possibility that the planning status might one day change, and development companies often either own or have options on such land. The potential rewards are so large that companies are prepared to take a very long-term view.

1 The Convention is authentic in English and French. The texts differ. The Human Rights Act 1998 s 1(3), says that "The Articles are set out in Schedule 1." But that is only half true. So what, precisely, is the text of the Convention that has been "incorporated" into UK law? The same issue arises for the Scotland Act 1998 s 29(2)(d) read with s 126(1).

2 The traditional English-language form is, both in spelling and pronunciation, a happy medium between Strasbourg and Strassburg.

3 *J A Pye (Oxford) Ltd v United Kingdom*, 30 Aug 2007.

4 [2000] Ch 676.

5 [2001] Ch 804.

6 [2003] 1 AC 419.

7 (2006) 43 EHRR 3.

8 30 Aug 2007.

Pye was one such company. In its land bank were 50 acres in Berkshire. Title was registered in the Land Registry. While engaged in the long-term process of seeking planning permission, it let the land out to local farmers, Mr and Mrs Graham. After some years the company, fearing that this might be affecting its chances of obtaining planning permission, terminated the tenancy. But the Grahams carried on grazing their beasts anyway. The years came and went. After twelve had passed, the Grahams claimed the land under the law of limitation. They had possessed it for twelve years,<sup>9</sup> and since they had not been paying rent they had not been possessing as tenants. In the ensuing litigation, fought to the House of Lords, the Grahams ultimately succeeded.<sup>10</sup> But it was clear that many of the judges did not like the result, and, had the facts of the case not pre-dated the Human Rights Act 1998, they would have held that the legislation was incompatible with Pye's Convention rights. In the House of Lords, Lord Bingham said:<sup>11</sup>

In the case of unregistered land, and in the days before registration became the norm, such a result could no doubt be justified as avoiding protracted uncertainty where the title to land lay. But where land is registered it is difficult to see any justification for a legal rule which compels such an apparently unjust result, and even harder to see why the party gaining title should not be required to pay some compensation at least to the party losing it.

#### A. DECISION OF THE GRAND CHAMBER

Given comments such as these, it is not surprising that Pye took their case to Strasburg. Although the facts of the case pre-dated the Human Rights Act 1998, the UK was of course already bound by the Convention. In this new phase of litigation, the defendant was not the Grahams – whose title to the land could no longer be questioned – but the UK Government. Pye sought damages equal to the value of the land, which it estimated at £10,000,000, plus the £800,000 costs which it had lost in its litigation with the Grahams. As already mentioned, it won by a four/three majority. The Government sought and obtained a rehearing in the Grand Chamber, which is hardly surprising, for two reasons. One is the close split in the Chamber decision – and it may be added that the dissenting minority expressed themselves fairly forcefully about the majority view. The other is that the case had a downside for the Treasury.<sup>12</sup> It would mean that it would be liable to pay compensation not just to Pye but to anyone losing land by the running of time.

9 The relevant period under s 15 of the Limitation Act 1980.

10 The key issue was whether the Grahams had had sufficient possession. The High Court said yes, the Court of Appeal said no, and the House of Lords said yes. The case is important for the English law of adverse possession.

11 [2003] 1 AC 419 at 426. For a similar approach, see *Neuberger J* at first instance: [2000] Ch 676 at 710. For the opposite view, see *Mummery LJ* in the Court of Appeal: [2001] Ch 804 at 822.

12 No doubt it was for this reason that the Irish Government made a third-party submission supporting the UK position. The submission is good and, given the narrowness of the eventual decision, possibly even had decisive effect.

Nothing will be said here about the Chamber decision.<sup>13</sup> In the Grand Chamber a great and puzzling change of approach took place. According to the Chamber decision, there had been a deprivation of property. In other words, the second sentence of the first Article of Protocol 1 had been infringed.<sup>14</sup> In the Grand Chamber the majority took the view that Pye's loss of the property was not a case of "deprivation" but one of "control of the use of property" as governed by the third sentence of the first article of Protocol 1.<sup>15</sup> Since deprivation of property was precisely what had happened, this volte-face is a strange one. It is true that the Court has repeatedly classified deprivations as mere controls of use,<sup>16</sup> but usually one can find at least some basis for such an approach.<sup>17</sup> What that basis is here would be hard to explain. The majority says:<sup>18</sup>

The applicant companies did not lose their land because of a legislative provision which permitted the State to transfer ownership in particular circumstances (as in the cases of *AGOSI*, *Air Canada*, *Gasus*), or because of a social policy of transfer of ownership (as in the case of *James*), but rather as the result of the operation of the generally applicable rules on limitation periods for actions for recovery of land.

Whether this was intended as an explanation why there was no "deprivation" is hard to say. At all events, the passage is hard to understand. All legislation, except for private and local statutes, is "generally applicable". That is as true of the legislation in the *AGOSI*,<sup>19</sup> *Air Canada*,<sup>20</sup> and *Gasus*<sup>21</sup> cases as it was in *Pye*. If one strips out the words "generally applicable" what is left? It seems that there is no "deprivation" if either (a) it is not the state that has taken the property or (b) the loss of property has not resulted

13 For Scottish reactions, see D Johnston, "J A Pye (*Oxford*) Limited v United Kingdom: deprivation of property rights and prescription" (2006) 10 EdinLR 277; K Swinton, "Prescription, human rights and the Land Register: *Pye v UK*" (2005) 73 SLG 179; K G C Reid and G L Gretton, *Conveyancing 2005* (2006) 65-72; G L Gretton, "Pye: a Scottish view" (2007) 15 *European Review of Private Law* 281.

14 "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." "Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international." The equation of "possession" with "propriété" is an issue I have attempted to discuss in "The Protection of Property Rights" in A Boyle et al (eds), *Human Rights and Scots Law* (2002) 275.

15 "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." "Les dispositions précédentes ne sortent pas atteinte au droit que possèdent les états de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes."

16 And much less commonly has classified controls of use as deprivations.

17 For example, in *AGOSI v United Kingdom* (1987) 9 EHRR 1, gold belonging to AGOSI was misappropriated by someone who then sought to smuggle it out of the UK. The gold was found and confiscated under applicable law. In an unsuccessful action against the UK by AGOSI, it was held that this was a "control of the use of property" case.

18 Para 65.

19 *AGOSI v United Kingdom* (1987) 9 EHRR 1.

20 *Air Canada v United Kingdom* (1995) 20 EHRR 150.

21 *Gasus Dossier und Fördertechnik GmbH v Netherlands* (1995) 20 EHRR 403.

from legislation implementing “social policy”. The first of these makes sense. But the second? Can one distinguish social policy legislation from other legislation? Matters become more inextricable when a few lines later the majority tells us that *the law of property* itself implements “social policies.”<sup>22</sup>

The only passage that actually bears to be an explanation is the following:<sup>23</sup>

The provisions of the 1925 and 1980 Acts which were applied to the applicant companies were part of the general land law, and were concerned to regulate, amongst other things, limitation periods in the context of the use and ownership of land as between individuals. The applicant companies were therefore<sup>24</sup> affected, not by a “deprivation of possessions” within the meaning of the second sentence of the first paragraph of Article 1, but rather by a “control of use” of land within the meaning of the second paragraph of the provision.

The minority<sup>25</sup> agrees with this approach,<sup>26</sup> but offers no more explanation than does the majority. Only Judges Loucaides and Kovler, in a separate dissent, say that they “incline” to think the case one of deprivation, but they do not argue the point.

At the end of the day, it may not matter much anyway. That is because a “control” can also be ECHR-incompatible. It is, as ever, a question of fair balance, proportionality, the public interest, margin of appreciation and so on. For the majority, the margin of appreciation was an important issue. “Even where title to real property is registered, it must be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration.”<sup>27</sup> “Such arrangements fall within the State’s margin of appreciation, unless they give rise to results which are so anomalous as to render the legislation unacceptable.”<sup>28</sup> A relevant consideration was also how old and well-known the legislation is:<sup>29</sup>

The fact that the rules contained in both the 1925 and the 1980 Acts had been in force for many years before the first applicant even acquired the land is nevertheless relevant to an assessment of the overall proportionality of the legislation. In particular, it is not open to the applicant companies to say that they were not aware of the legislation, or that its application to the facts of the present case came as a surprise to them.

Does this imply, as it seems to imply, that a change in the law on such matters can affect only those who acquire after the law is changed? Does it imply, as it seems to imply, that legislation of this sort may be ECHR-compatible for those who know about it but ECHR-incompatible for those who do not? These would be remarkable new doctrines.

22 Para 74.

23 Para 66.

24 This use of the word “therefore” is an innovative one.

25 With the possible exception of Judges Loucaides and Kovler. Even though I do not agree with it, their separate dissent is clearer and better argued than either the majority or the minority opinions.

26 Para 6.

27 Para 74.

28 Para 83.

29 Para 77.

## B. IMPLICATIONS FOR SCOTLAND

What about the Scottish law about positive prescription? In one respect the Scottish rules are more unfavourable to the paper owner than the English ones considered in *Pye*. The possessory period here is shorter, being ten as opposed to twelve years.<sup>30</sup> In another respect they are less unfavourable, for in Scotland, unlike England, the period does not begin to run unless and until there has been a registration<sup>31</sup> in the possessor's favour, a factor which helps at least to some extent to alert the paper owner, though admittedly the significance of this is limited by the fact that the Keeper is not allowed to let the paper owner know what is happening.<sup>32</sup> The role of the Keeper, as a public official, in accepting the original registration might conceivably itself be used as a ground of challenge. Of course, if the Keeper does not know that the applicant's right is a bad one, his decision cannot be objected to, but if he does know, it might be claimed that he was acting in a way calculated to undermine the paper owner's Convention rights. (If he does know, he will normally reject the application anyway – but there are exceptions.<sup>33</sup>) But this argument is an upside-down one: it involves the absurdity of saying that the Scottish system would be ECHR-incompatible precisely because of its enhanced protection of the owner's rights. One final argument would be that because of the way that s 3 of the Land Registration (Scotland) Act 1979 is framed, the Keeper's acceptance of the application will immediately divest the true owner. But this is a point of technique rather than of substance. Normally the registration will be reversible until prescription has run and even if it is not the Keeper would normally compensate the ex-owner. There can be little doubt that the Scottish system is compatible with the Convention as interpreted by the majority in *Pye*.<sup>34</sup> But given that the decision was a close one, and given that the Strasbourg court is free to depart from its own decisions, the issue of Convention-compatibility will have to be borne in mind whenever the rules of positive prescription are revised in future.

By positive prescription it is possible to acquire a servitude. This does not cause a loss of ownership, but it does normally cause an uncompensated lessening in the value of the servient land. Time can start to run without any entry on the Register. But standing the Grand Chamber decision, Scots law is probably ECHR-compatible. What about negative prescription, and limitation? It is true that a challenge to the loss of a claim by the running of time was rejected in *Stubbings v UK*,<sup>35</sup> but that case

30 *Pye* dealt with the English rules as they existed before the Land Registration Act 2002, which makes it much more difficult to acquire a title by possession.

31 In the form of an *a non domino* title.

32 Land Registration Rules 2006, SSI 2006/485, r 18(2). In cases involving the foreshore, this is subject to s 14 of the Land Registration (Scotland) Act 1979.

33 *Registration of Title Practice Book*, 2<sup>nd</sup> edn (2000) para 6.4. So if the property had been in Scotland the Keeper would almost certainly have rejected such an application. The Land Registration (Scotland) Act 1979 provides little guidance to the Keeper on such matters, so his practice is largely a non-statutory one.

34 For wider discussion of the 1979 Act's compatibility with the ECHR, see the Scottish Law Commission's Discussion Paper on *Land Registration: Miscellaneous Issues* (Scot Law Com DP No 130, 2005; available at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)) paras 6.8 ff.

35 (1996) 23 EHRR 213.

turned on art 6, not on Protocol 1. The loss of a personal right may be as costly as the loss of a real right.

The minority opinion in *Pye* contains the curious statement that:<sup>36</sup>

In judging the proportionality of the measures it is in our view a highly material factor that the relevant legislative provisions went further than merely precluding the registered landowners from invoking the assistance of the courts to recover possession of their land, by depriving them of their beneficial ownership of it.

A right of ownership that is unenforceable against a third party in possession would be worthless, and yet the minority suggests – without actually asserting it – that if *Pye* had had such a right then everything would have been fine.<sup>37</sup> Applying the same reasoning, perhaps the minority would likewise be prepared to accept the limitation of actions but not extinctive prescription. It is not easy to make sense of this.

Prescription is not the only way in which private law may allow involuntary expropriation or a severe financial loss. Most systems say that if X sells Z's goods to Y, Y being in good faith, then, in at least some types of case, Z is expropriated, without compensation other than a claim against X, who may be unsuable. All systems have rules about good faith acquisition for negotiable instruments. Can we still take the ECHR-compatibility of such rules for granted? Again, what of the power of rescission on the law of contract, which can be economically disastrous to one party?

The Strasburg court's willingness to extend the ECHR into private law stands in contrast to the attitude of the US Supreme Court. That court is second to none in its cavalier attitude to legislative texts and in its enthusiasm for politicised decision-making. Yet it has been very reluctant to re-write private law. Not so Strasburg. In *Pye* the Grand Chamber dabbled the footbrake. But the handbrake remains off.

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## Short-term Benefit and the Lands Tribunal

*McPherson v Mackie*,<sup>1</sup> the first decision of the Court of Session on part 9 of the Title Conditions (Scotland) Act 2003, considers the extent to which the prevention of short-term disturbance qualifies as a benefit.

In 1990 Cala Management Ltd imposed a deed of conditions on a new housing estate, Queen's Point, comprising eleven houses. The deed contained a number of standard real burdens requiring *inter alia* that nothing should be done that may be

<sup>36</sup> Para 14; the same idea can be found at para 7.

<sup>37</sup> In the Chamber decision, the majority makes the same suggestion at para 55.

<sup>1</sup> [2007] CSIH 7, 2007 SCLR 351. The opinion of the court was delivered by Lord Eassie.

deemed a “nuisance or occasion disturbance to the adjoining proprietors”. In 2006 Mr Fraser was granted planning permission to build an adjacent development, to be known as King’s Point. Due to the lack of access to the site, Fraser entered into an agreement with Mr and Mrs McPherson, the owners of No 7 Queen’s Point, by which their house would be demolished to allow the necessary access. As the demolition would be contrary to burdens in the deed of conditions, the McPhersons applied to the Lands Tribunal for their discharge. The Tribunal refused the application,<sup>2</sup> and the McPhersons and Fraser appealed to the Inner House.

A main argument for the appellants was that the Tribunal had given too much weight to the disturbance which would be caused by construction traffic. Section 100(b)(i) of the 2003 Act requires the Tribunal to consider the “extent to which the condition confers benefit on the benefited property”, and the Tribunal had found that the conditions protected against “disturbance involved in the proposed development” which included “not only the actual construction work at the subjects but also the construction traffic using the estate road”. To the Tribunal, this seemed a tangible benefit.

The Inner House disagreed with this approach, finding that the Tribunal’s consideration of “the extent to which [the conditions] protect against disturbance was flawed”.<sup>3</sup> In coming to this conclusion the court was influenced by the recent English Court of Appeal case of *Shephard v Turner*.<sup>4</sup> The decision in *Shephard* turned on an interpretation of section 84(1A)(1)(aa) of the Law of Property Act 1925, which requires the Lands Tribunal to be satisfied that the covenant in question impedes the reasonable user of land and “does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them”. Like the previous law in Scotland,<sup>5</sup> but in contrast to the 2003 Act, the English legislation requires applicants to squeeze their application into one or more specific grounds. Scotland’s previous law was reformed to avoid this difficulty. Under section 100 of the 2003 Act a number of factors are to be taken into consideration and weighed against each other in the determination of whether an application is reasonable.

This structural difference between the English and Scottish legislation is acknowledged and then disregarded by the Inner House in *McPherson*.<sup>6</sup> What is not acknowledged is that much debate has surrounded the interpretation of the word “substantial” under the English legislation.<sup>7</sup> Before *Shephard* two cases, *Re Kershaw*<sup>8</sup> and *Re Tarhale Ltd*,<sup>9</sup> had expressed conflicting views. Academic commentators proposed that, as a rule of thumb, the prevention of short-term interference is

2 2006 GWD 27-606. The full transcript is available at <http://www.lands-tribunal-scotland.org.uk/title.html>.

3 2007 SCLR 351 at para 17.

4 [2006] EWCA Civ 8, [2006] 2 P & CR 28.

5 Contained in ss 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

6 Para 16.

7 See the discussion by Carnwath LJ in *Shephard* at paras 19-25.

8 (1975) 31 P & CR 187.

9 (1990) 60 P & C R 368.



not to be regarded as a substantial benefit.<sup>10</sup> This approach influenced the court in *Shephard*, where the Court of Appeal found that the prevention of short-term disturbance by construction traffic was not a “substantial” benefit which the covenant secured and thus could not be taken into account in the determination of the application.<sup>11</sup>

The court in *McPherson* echoed the logic of *Shephard* by stating that the title conditions “in the present case are directed towards continuing long-term user – the ultimate user – rather than transitional matters such as construction disturbance.”<sup>12</sup> Yet it is doubtful whether this application of *Shephard* is entirely appropriate. Granted both cases concern discharging burdens (or covenants) to allow development. However, due to the different structure of the Acts, and the absence in Scotland of any threshold requirement of the benefit of the title condition being “substantial”, it seems that *any* benefit secured by a title condition should be brought into consideration, and balanced against the other factors listed in section 100. Once the prevention of short-term disturbance is classed as a benefit, the Tribunal can then determine its relative weight. This weight will vary in accordance with the length and intensity of the disturbance against which the condition seeks to protect.<sup>13</sup>

In addition, it is important to keep in mind that decisions of the Lands Tribunal are fact-specific. In *Shephard*, the development in question consisted of the erection of one single-storey house, the construction disturbance of which would last for a few months. In *McPherson* the proposed development involved not only the demolition of an existing house but the erection of sixteen new houses with related construction disturbance which could last for up to four years. Arguably, the prevention of the development in *McPherson* might have qualified as a “substantial” benefit even under the English legislation.

Upon finding that the Lands Tribunal analysis was unsound, the Inner House in *McPherson* granted the appeal and remitted the application back to the Tribunal for reconsideration. However, the case settled on 25 April 2007 – the burdens were discharged and the development will go ahead – so that it remains to be seen how this Inner House decision is interpreted and applied by the Tribunal. Although Part 9 of the 2003 Act should be welcomed as simplifying the law, it is important that it does not result in a too-easy loss of title conditions preserving amenity and setting. Yet, as *McPherson* seems to put a limit on what is defined as a “benefit”, the already high chance of success for developers seeking to discharge burdens is further increased.<sup>14</sup>

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10 See C H S Preston and G L Newsom, *Restrictive Covenants Affecting Freehold Land*, 9<sup>th</sup> edn (1998) 255.

11 Para 53 per Carnwath L J.

12 Para 16.

13 This view was taken by the Lands Tribunal at first instance.

14 For previous discussion of the definition of a “benefit”, see K G C Reid and G L Gretton, *Conveyancing 2006* (2007) 21, where other aspects of this case are also considered.

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## Fatal Accident Inquiry: Expenses against the Crown?

*Lord Advocate, Petitioner*<sup>1</sup> is a petition for judicial review of Sheriff Cowan's decision to grant an award of expenses against the Crown at a fatal accident inquiry.<sup>2</sup> The case was heard by Lord Kinclaven who, after a lengthy debate and in a judgment spanning some 370 paragraphs, granted the petition.

### A. BACKGROUND

The history attending the underlying fatal accident inquiry is unusual. William Smith, an employee of an oil and gas drilling contractor, died in July 2001 after an accident at work. One of his employer's sister companies was prosecuted for alleged breaches of the Health and Safety at Work etc Act 1974. The case proceeded to a trial before a sheriff and jury in January 2004. The Crown case was heard over ten days, at the end of which a plea of no case to answer was upheld and the accused acquitted. In April 2004, the Crown initiated a fatal accident inquiry. At a preliminary hearing, the fiscal depute was asked why, there already having been a lengthy criminal trial, an inquiry was sought.<sup>3</sup> The Crown indicated it wished to canvass matters not covered at trial. The inquiry was held over various dates in 2004. The interested parties<sup>4</sup> became dissatisfied with the Crown's conduct of the inquiry and moved for expenses relative to part of it.

The sheriff accepted the interested parties' submission that the motion, while unusual, was competent, stating that the sheriff court has an inherent power to deal with expenses and that, if Parliament intends to limit that power, it must do so expressly. The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 had not done so.<sup>5</sup> Turning to the question of whether an award was appropriate in the particular case, the sheriff questioned the Crown's motives in holding the inquiry and was strongly critical of the way in which proceedings had been conducted.<sup>6</sup> The Sheriff stated that, while the Crown's decision to hold the inquiry did not quite

1 2007 SLT 849.

2 *Fatal Accident Inquiry Into Death of William Geddes Smith* 2005 SCLR 355 (henceforth *Inquiry into Death of William Smith*).

3 In such circumstances the Lord Advocate will often utilise s 1(2) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, which permits the Crown not to request an inquiry "where criminal proceedings have been concluded . . . and the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established".

4 The deceased's employer, the sister company which had been acquitted at trial, and a colleague of the deceased.

5 *Inquiry into Death of William Smith* at 359B-E.

6 These criticisms are referred to, but not set out at length, in *Lord Advocate, Petitioner*. They are reported in full at *Inquiry into Death of William Smith* from 362C onwards.

amount to oppression, the manner in which the inquiry had been conducted had been oppressive and vexatious. The sheriff acknowledged that “an award of expenses against the Crown in a fatal accident inquiry will be very rare given the necessity for such inquiries in the public interest.”<sup>7</sup> Nevertheless, she concluded that, in the exceptional circumstances of the case, the public interest required an award to be made.

### B. THE PETITION FOR JUDICIAL REVIEW

The Lord Advocate petitioned for a judicial review on the basis that the award of expenses in a fatal accident inquiry was incompetent. In brief,<sup>8</sup> the Crown accepted that the sheriff court has an inherent power to award expenses,<sup>9</sup> but contended that the sheriff was wrong to believe that only an express provision could abrogate the power; it could also be excluded by necessary implication. The Crown presented a number of different lines of argument designed to establish that a proper, purposive interpretation of the 1976 Act would lead the court to the conclusion that the sheriff’s inherent power had indeed been excluded by necessary implication.<sup>10</sup>

The interested parties attacked the Lord Advocate’s argument on necessary implication by contending that this committed the Crown to the impossible task of having to establish that the making of any award of expenses in any circumstances in any fatal accident inquiry would defeat the whole purpose of the 1976 Act.<sup>11</sup> In addition, they argued that an expenses jurisdiction would provide an effective means of funding interested parties’ participation in inquiries, and that the availability of such funding, desirable as a matter of public policy, was a requirement of the European Convention on Human Rights.

The petition was granted and the award of expenses reduced. Lord Kinclaven stated that his reasons were “essentially those outlined by the petitioner . . . subject to certain qualifications.”<sup>12</sup> This, however, seems rather to understate the extent to which the court departed from the Crown’s position. The court’s primary line of reasoning was that, while the sheriff has an inherent power to grant expenses in civil proceedings, the sheriff does not have such a power in relation to fatal accident inquiries. Although the reasoning underlying this aspect of the judgment draws upon several of the Crown’s arguments, this conclusion is a position for which the Crown does not appear to have contended. The court’s secondary line of reasoning proceeded on an *esto* basis: that, if the sheriff court does have the inherent power to award expenses, the Crown was correct in arguing that the 1976 Act had excluded it by necessary implication. Lord Kinclaven also considered the Crown’s position to

<sup>7</sup> *Inquiry into Death of William Smith* at 364F-G.

<sup>8</sup> The petitioner’s submissions are set out in summary at *Lord Advocate, Petitioner* at paras 140-193.

<sup>9</sup> *Lord Advocate, Petitioner* at para 172.

<sup>10</sup> These included submissions directed towards the overall scheme of the Act, the *sui generis* nature of inquiry proceedings, and public policy considerations including the potential “chilling effect” of allowing expenses.

<sup>11</sup> The submissions are set out in summary in *Lord Advocate, Petitioner* at paras 195-227.

<sup>12</sup> *Lord Advocate, Petitioner* at para 230.

be supported by the public interest<sup>13</sup> and rejected the interested parties' arguments on funding on the basis that awards of expenses were an unreliable method of paying for participation, and that if there was an unmet need in relation to legal aid for representation at fatal accident inquiries that deficiency was best addressed by parliament.<sup>14</sup>

### C. SOME FIRST THOUGHTS

The case raises a host of issues only some of which can be touched upon, briefly, in this note.

#### (1) A remarkable omission

Leaving to one side the court's actual decision on the point, it is remarkable that a question as important as, "is an award of expenses competent?" should not have been expressly addressed in the 1976 Act, particularly when other matters bearing upon the powers of the court were.<sup>15</sup> This case highlights a certain casualness in the preparation of what is, on any view, an important Act of Parliament. Given the number of inquiries held under the Act since its entry into force, it is also remarkable that the courts have so seldom been asked to adjudicate upon this matter.<sup>16</sup> Perhaps that is a silent tribute to the "traditionally fair and even-handed"<sup>17</sup> approach of the Crown, or perhaps it is indicative of a lack of imagination, or a reluctance to "rock the boat", on the part of legal practitioners.<sup>18</sup>

#### (2) No inherent power?

Lord Kinclaven's reasons for concluding that the sheriff court has no inherent power to make an award of expenses in fatal accident inquiries are expressed shortly.<sup>19</sup> He seems to found principally upon two factors, namely, that while expenses are generally sought and awarded in civil proceedings, they have not generally been sought and awarded in fatal accident inquiries; and the fact that fatal accident inquiries are non-adversarial proceedings of a *sui generis* nature. His conclusion may also be fortified by the belief – expressed shortly after the passage in which he concludes that no inherent

13 Paras 349-364.

14 Paras 318-329.

15 See e.g. 1976 Act s 4(7).

16 Counsel's researches suggest that this was only the second occasion when an award of expenses had been sought: the first was in *Inquiry Into Death of George Keggans*, unreported, discussed in *Lord Advocate, Petitioner* at para 162. In the Brent Spar and Cormorant Alpha inquiries, the court was asked not to make an award of expenses in the traditional sense but to make a declaration that the expenses of certain interested parties should be met out of public funds: see *Lord Advocate, Petitioner* at para 208.

17 *Inquiry into Death of William Smith* at 364F.

18 In a similar vein see Sir Gerald Gordon's commentary on *Starrs v Ruxton* 1999 SCCR 1052 at 1107C-D.

19 *Lord Advocate, Petitioner* at paras 238-246.

power exists – that fatal accident inquiries are more similar to criminal trials than to civil proceedings, and that, as with criminal trials, the public interest warrants that there should be no award of expenses.<sup>20</sup>

The first of these reasons is unconvincing. As we have already seen, there are a number of reasons why interested parties may have refrained from moving for awards of expenses in the past. Nor does the mere fact that a court has seldom been asked to use a power mean that it does not exist at all: a court's powers are not muscles which atrophy when not exercised.

Regarding the second factor, fatal accident inquiries are modelled on ordinary civil proceedings<sup>21</sup> and, to that extent, it is hard to understand why Lord Kinclaven expressed the view that they more closely resemble criminal proceedings than civil ones. Be that as it may, fatal accident inquiries do indeed differ markedly from regular civil proceedings, and Lord Kinclaven is justified in describing the inquiry as a proceeding *sui generis*. Yet it does not follow that the sheriff court has a different set of inherent powers associated with each form of proceedings. While the matter is not free from doubt and would benefit from a closer analysis than is possible here, there is much to be said for the view that the inherent power on expenses is not tethered to a particular set of proceedings but is enjoyed by the court *qua* court.<sup>22</sup>

### (3) Exclusion by necessary implication

Turning now to the court's alternative argument, we need first to acknowledge that the sheriff oversimplified the position by stating that only an "express provision" could oust the inherent power of the court: a statutory provision can over-ride the common law by necessary implication as well as expressly. This, however, tells us little in itself: the question remains, did the 1976 Act actually do so? It is suggested that it did not, and that there was considerable force in the interested parties' submission that a necessary implication can only be drawn if, in its absence, the legislation becomes unmeaning: in this context, that a fatal accident inquiry simply could not serve its function if an award of expenses was ever competent in any circumstances. This submission was founded upon the authority of *Lord Advocate v Dumbarton District Council*,<sup>23</sup> but an even more helpful authority is *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax*, which provides a definition of "necessary

<sup>20</sup> Para 259.

<sup>21</sup> 1976 Act s 4(7).

<sup>22</sup> From the standpoint of inherent power, this may be true in the criminal context as much as the civil one. Any discussion of the inherent power of the court cannot be confined to present practice, which is primarily governed by statute law and a set of increasingly archaic-looking constitutional presumptions in favour of the Crown, but by the underlying common law. This discloses that at least in courts of inferior jurisdiction, expenses were not uncommonly awarded against the procurator fiscal in cases of gross irregularity or oppression: see Hume, *Commentaries* ii, 134 f.

<sup>23</sup> 1990 SC (HL) 1.

implication” which strikes at the very heart of the Crown’s submissions in *Lord Advocate, Petitioner*.<sup>24</sup>

A necessary implication is not the same as a reasonable implication ... A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

It is understood that *Lord Advocate, Petitioner* is to be appealed. The Inner House’s views on these matters will make for very interesting reading.

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## “Similar Facts” Evidence in Scots Law?

### A. INTRODUCTION

The Criminal Procedure (Scotland) Act 1995 Act sections 274 and 275 protect the complainant in sexual offence cases from being asked about previous sexual history or character, unless it would be “contrary to the interests of justice” to exclude such questioning. These provisions were subject to challenge in *M v HM Advocate (No 2)*<sup>1</sup> but both the trial judge and the appeal court rejected the claim that they were incompatible with the European Convention on Human Rights. *HM Advocate v DS*,<sup>2</sup> the subject of the present note, revolves around section 275A, which states that if, in the interests of justice, the accused is allowed by the court to question the complainant about her previous sexual history or character, his own previous conviction(s) for sexual offences will be put to the court unless he can show in turn that this would be “contrary to the interests of justice”.<sup>3</sup>

In *DS* the accused’s argument was that he should not be deterred from questioning the complainant about her previous sexual history by the threat of having his own previous conviction for a sexual offence put before the court. This, he alleged, was incompatible with his right to a fair trial under article 6 of the ECHR. The Judicial Committee of the Privy Council upheld the appeal court’s decision that section 275A was not contrary to the accused’s article 6 rights. This is highly significant, given the traditional antipathy of Scots law to the disclosure of an accused’s criminal record.

<sup>24</sup> *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at para 45 per Lord Hobhouse.

<sup>1</sup> 2007 JC 131.

<sup>2</sup> [2007] UKPC D1, 2007 SC (PC) 1.

<sup>3</sup> As inserted by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 s 10(4).

What is also interesting is the creative way in which the Judicial Committee justified its decision and, *ex post facto*, provided a principled rationale for a politicised and muddled piece of legislation.<sup>4</sup> In order to deflect any implication that section 275A was designed simply as a “deterrent threat” to discourage the accused from questioning the complainer about her previous sexual history,<sup>5</sup> the Judicial Committee emphasised the relevance of the accused’s own previous conviction for a sexual offence. In effect, it introduced, albeit within narrowly defined circumstances, something akin to the doctrine of “similar facts evidence” which is widespread in Commonwealth jurisdictions but which in Scotland has previously manifested itself only within the very limited scope of the *Moorov* doctrine.<sup>6</sup>

### B. A QUESTION OF BALANCE

In *DS* Lord Hope said that it was reasonably clear from the consultation document which gave rise to section 275A,<sup>7</sup> and from subsequent statements by the Scottish Executive, that evidence of previous convictions was to be allowed in the interests of “balance”.<sup>8</sup> Lord Rodger also concluded that the purpose was to provide an “element of parity or balance”.<sup>9</sup> Put simply, the Judicial Committee agreed that section 275A was designed to ensure that what is sauce for the goose should be sauce for the gander: if the accused is allowed to bring up the complainer’s previous sexual history, she should be given a reciprocal right. Lord Hope further explained that the admission of previous convictions was not new.<sup>10</sup> Section 266(4) of the 1995 Act, which originated in the Criminal Evidence Act 1898, allows the prosecutor to question the accused, if he gives evidence, about his previous convictions (and even previous charges) where he has attacked the character of the complainer. Section 270 allows the prosecutor to lead such evidence irrespective of whether the accused takes the stand if the defence has attacked the character of any prosecution witness (including the complainer). Lord Rodger added that evidence of previous convictions had frequently been led under the common law prior to the Criminal Procedure (Scotland) Act 1887.<sup>11</sup> He suggested that the infrequent use of sections 266 and 270 is precisely why section 275A lays an obligation upon the prosecution to place the

4 See Scottish Parliament, *Official Report*, col 9928-9935 (6 March 2002). In *DS* Lord Rodger commented (at para 70) of ss 274-275A: “Unfortunately, experience has indeed shown that these provisions are not drafted with the clarity and precision which are to be expected in legislation.”

5 In the parliamentary debate Pauline McNeill MSP had suggested that this was one intention of the Executive: see *Official Report*, cols 9928 (6 March 2002).

6 See P Duff, “Towards a unified theory of ‘similar facts evidence’ in Scots law: relevance, fairness and the reinterpretation of *Moorov*” 2002 JR 143.

7 Scottish Executive, Consultation Document on *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials* (2000; available on <http://www.scotland.gov.uk/consultations/justice/rtb-00.asp>) paras 135-138.

8 *HM Advocate v DS* 2007 SCLR 222 at para 40.

9 Para 85.

10 Para 31.

11 Para 64.

accused's convictions before the court, and also why there is the presumption that such disclosure is in the interests of justice.<sup>12</sup>

In a revealing passage, Lord Hope noted that "the same concept, that of balance" underlies the English doctrine of similar facts evidence, while cautioning that Scots law has never admitted this type of evidence.<sup>13</sup> I would argue that in effect Scots law does admit such evidence, albeit under the restricted rubric of the *Moorov* doctrine.<sup>14</sup> After reviewing the new English statutory regime contained in the Criminal Justice Act 2003, Lord Hope concluded that section 275A is closest to the English provision which allows evidence of "bad character" to be admitted where "it is relevant to an important matter in issue between the defendant and the prosecution".<sup>15</sup> As Lord Hope noted, the English legislation further defines this test by stating that the matter at issue includes "the question whether the defendant has a propensity to commit offences of the kind with which he is charged",<sup>16</sup> and this can be established by similar previous convictions unless the court holds that this would be unjust whether because too long has elapsed since the conviction or for any other reason. It is clear from the above that similar facts evidence in England does not simply go to credibility but may comprise substantive evidence against the accused.<sup>17</sup> It is to the Judicial Committee's views on this matter that I now turn.

### C. CREDIBILITY OR RELEVANCE?

In discussing the legislative history of section 275A, Lord Hope commented that "it is not easy to identify . . . precisely why it was thought that the accused's previous conviction for a sexual offence might be relevant to the charge that had been brought against him".<sup>18</sup> He noted that it had been thought "too sweeping" automatically to place the accused's record before the court because of the danger that the jury might make too much of it "even if it was not really that similar". From this he deduced that implicit in the legislation is the view that a previous conviction might be used to support a finding of guilt, albeit that this would be "an innovation" in Scots law. He continued: "Although Scots law does not admit similar facts evidence, the proposition that evidence of previous convictions has a bearing only on the accused's credibility seems to me . . . to understate the use that may legitimately be made of it".<sup>19</sup>

This view was strengthened by two further facts to which Lord Hope drew attention. First, the provision applies irrespective of whether the accused has made a statement or gives evidence at trial; hence it cannot relate primarily to his credibility.

12 Para 69.

13 Para 33.

14 Duff (n 6).

15 Para 36. In England the common law on similar facts evidence was replaced by the Criminal Justice Act 2003. The provisions quoted were s 101(1)(d), (g).

16 Criminal Justice Act 2003 103(1)(a).

17 There has never been any doubt about this whether under the previous common law regime or the new statutory rules: see P Roberts and A Zuckerman, *Criminal Evidence* (2004) ch 11.

18 *HM Advocate v DS* 2007 SCLR 222 at para 40.

19 Para 41.



Second, since the previous convictions must relate to sexual offences and not to offences of perjury and the like, the main intention underlying the provision cannot have been to cast doubt on the accused's credibility. Hence, section 275A "must be approached on the basis that the main reason why previous relevant convictions are to be disclosed . . . is because they may be regarded as relevant to the accused's propensity to commit other sexual crimes".<sup>20</sup>

Similarly, Lord Rodger argued that one of the purposes of the rule which forbids questioning the complainer about previous sexual history is to "counteract" the view that such evidence almost always has a bearing on her credibility. Thus, where such evidence is admitted under the exception in section 275A, the jury must be entitled to take it into account when deciding whether the Crown has proved the accused's guilt. For instance, the fact that she had engaged in sex with the accused before might "cast light" on whether she had consented on the instant occasion.<sup>21</sup> If this type of evidence is to be used in this way, by the same token the disclosure of the accused's previous convictions "would not be intended to have a bearing only on his credibility".<sup>22</sup>

It is also worth noting the robust stance taken by Lord Brown. In his view, the accused has no "fundamental right" to keep his previous record from the jury, and there is nothing "intrinsically unfair or inappropriate" in admitting this as evidence.<sup>23</sup> He deplored "the fiction which to my mind disfigured the administration of criminal justice in England and Wales for far too long" whereby previous convictions went only to the accused's credibility. He gave the example of an accused with a conviction for rape now charged with a similar offence and contesting this on the basis of consent. In his view, the previous conviction demonstrates the accused's "propensity . . . to have his way with a woman whether or not she consents" and "its real and substantial relevance is as to the likelihood of his having committed this fresh offence".<sup>24</sup> In his view, section 275A could be criticised as admitting evidence of previous convictions only where the accused had been allowed to question the complainer about her previous sexual history. He thought previous convictions were frequently "plainly relevant evidence" and should be disclosed to the court in a much wider range of circumstances.<sup>25</sup>

#### D. CORROBORATION?

The next point of interest relates to the Judicial Committee's view that an accused's previous convictions cannot act as corroboration. In discussing Hume's views of evidence of bad character, Lord Hope commented:<sup>26</sup>

<sup>20</sup> Para 43. Lord Rodger made much the same point at para 84.

<sup>21</sup> Para 78.

<sup>22</sup> Para 83.

<sup>23</sup> Para 103.

<sup>24</sup> Para 104.

<sup>25</sup> Para 105. For what it is worth, I agree with this view but do not have space to elaborate on the point here.

<sup>26</sup> Para 33.

It cannot, of course, provide corroboration in support of the case which is being made by the prosecutor. But aiding proof of the offence in other ways is another matter. The law is open to development in that respect

He made a similar comment when discussing the directions that should be given to jurors about relevant previous convictions.<sup>27</sup> After quoting approvingly from a recent English case<sup>28</sup> – where jurors were warned that while they could take “propensity into account when determining guilt”, they should not place “undue reliance” upon it – Lord Hope added as if it were obvious: “A jury in Scotland would, of course, be told that propensity to commit offences cannot provide corroboration in support of the Crown’s case.” Similarly, Lord Rodger was equally emphatic that the accused’s previous convictions can never “constitute corroboration of the evidence given by the complainer” or any other prosecution witness.<sup>29</sup>

Thus, the present position is that relevant previous convictions in sexual offence cases can support a finding of guilt but cannot act as corroboration. With all due respect, this seems somewhat illogical.<sup>30</sup> After all, if similar facts evidence may act as corroboration under the *Moorov* doctrine, why should it not do so in this context? To illustrate, take two cases. In case 1, A is being prosecuted for two similar offences of indecent assault committed in 2005 and 2007. Under the *Moorov* doctrine, these offences may corroborate each other. In case 2, A is being prosecuted for an indecent assault committed in 2007; he attacks the complainer’s character and, as a result, the prosecution reveals to the court that he was convicted of a similar indecent assault in 2005. In this instance, according to the Privy Council, the latter incident cannot corroborate the former. This is surely illogical – the value or weight of the supporting evidence is equal in each case. Indeed, one can easily hypothesise a situation where the similarities between the two offences are much greater in case 2 than in case 1, yet in case 1 the previous incident may corroborate and in case 2, where the similar facts evidence has more evidential value or weight, it may not.

#### **E. PRESUMPTION THAT DISCLOSURE IS IN THE INTERESTS OF JUSTICE**

Section 275A(7) stipulates that the court is to presume that disclosure of previous conviction is in the interests of justice “unless the contrary is shown”.<sup>31</sup> In Lord Hope’s

<sup>27</sup> Para 53.

<sup>28</sup> Para 35. The phrases quoted come from the directions in an English case (*R v Hanson* [2005] 1 WLR 3169) which, Lord Hope, suggested might provide appropriate guidance.

<sup>29</sup> Para 86. Lord Rodger also observed that the accused’s previous convictions “are not evidence that he committed the crime with which he is charged”; rather they are “a factor which the jury would be entitled to take into account in deciding whether to accept the evidence led in support of the Crown’s version of events”.

<sup>30</sup> Sir Gerald Gordon makes a similar point: “if it is relevant evidence it is difficult to see why it should not be available as corroboration” (Commentary on *HM Advocate v DS* 2007 SCLR 222 at 257 para 5).

<sup>31</sup> This falls short of the automatic disclosure which had been suggested in Scottish Executive, *Redressing the Balance* (n 7) Q 15.

view, this has to be read as being compatible with article 6 of the ECHR and, consequently, it does no more than set out “the default position”.<sup>32</sup> There is no burden upon the accused to do anything other than raise the objection and thereafter the court should simply determine the weight to be given to the opposing factors on their own merit. In particular, “the presumption should be disregarded by the court once it has decided what weight it should attach to the objection”. In effect, as Sir Gerald Gordon observes, the Judicial Committee has “read” the presumption “out of the Act altogether”.<sup>33</sup> Lord Hope observed that the Scottish provision, unlike the English, does not identify the factors to be taken into account in determining where the “interests of justice” lie but, in his view, the test should be read as directed at the accused’s right to a fair trial.<sup>34</sup> Thus the correct balance needs to be drawn between “the use that may properly be made of the conviction with regard to the accused’s propensity to commit the offence” and “the risk that the jury may attach a significance to the conviction . . . it cannot properly bear”. This bears a striking resemblance to the now superseded English common law position as regards similar facts evidence which was admitted if its “probative value” outweighed its “prejudicial effect”.<sup>35</sup>

Lord Hope further noted that, under current practice, the judge would not have the information necessary to make the decision. All that is normally available is the category of the offence (e.g. rape, indecent assault).<sup>36</sup> In Lord Hope’s view, section 275A does not prevent the judge from asking for details about the nature and circumstances of the conviction if this is needed in order to rule upon the objection. Thus, he argued, the practice should be developed whereby the judge is provided with a copy of the charge narrating the offence of which the accused was convicted. Again, one can see that this opens up the possibility of the type of debate that arises in *Moorov* cases, or in similar facts cases throughout the Common Law world, over whether the previous offence is sufficiently similar to the present offence, or reveals an “underlying unity”,<sup>37</sup> to allow it to be put as evidence by the prosecution. As Lord Hope said, it is difficult to see how section 275A can work unless the judge has access to detailed information about the previous offence.

## F. CONCLUSION

In *HM Advocate v DS* the Judicial Committee has given section 275A of the 1995 Act coherence in terms of legal principle. For this, it should be congratulated. Where an accused in a sexual offence case is permitted to question the complainer, his

<sup>32</sup> Para 48.

<sup>33</sup> Commentary (n 30) at 257 para 4.

<sup>34</sup> Para 49.

<sup>35</sup> *DPP v P* [1991] 2 AC 447 at 461. It is interesting to note that these authoritative *dicta* emanated from a Scottish judge, Lord Mackay of Clashfern. The Criminal Justice Act 2003 s 101(3) now stipulates that similar facts evidence, which is admissible under the tests set out in s 101(1), will be excluded “if it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”.

<sup>36</sup> Para 51.

<sup>37</sup> *Moorov v HM Advocate* 1930 JC 68 at 73 per Lord Justice-General Clyde.

previous conviction(s) for relevant sexual offences may be placed before the court. According to the Judicial Committee, the rationale for this is that his previous sexual misdemeanour(s) may comprise relevant evidence against him. While this notion has previously been largely unknown in Scotland, such “similar facts” evidence has long been admissible across most of the Common Law world. If the accused challenges the disclosure of his previous convictions, the trial judge will have to weigh up the probative force of the evidence against its prejudicial effect or, in an alternative formulation, the likelihood of it impinging upon the accused’s article 6 right to a fair trial. The intention of the Scottish Parliament was clearly to make it difficult for the trial judge to exclude such evidence, but the effective abolition of the presumption in the legislation leaves the question much more open. I fear that the traditional antipathy of Scots lawyers to the admission of previous convictions, combined with very real concerns about breaching the ECHR’s guarantee of a fair trial, may mean that such evidence is rarely allowed to be placed before the jury.<sup>38</sup>

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## Victim Statements in Scotland

*An Evaluation of the Pilot Victim Statement Schemes in Scotland*<sup>1</sup> is an interesting and in-depth study of the use of victim statements, as piloted in the sheriff courts of Ayr, Kilmarnock and Edinburgh, and in the High Court sitting in Kilmarnock and Edinburgh, between 25 November 2003 and 24 November 2005. The scheme involved an initial contact with eligible victims, by letter, giving them the opportunity to complete a victim statement, i.e. a statement in which the victim describes the effect of the crime on him or her. Under the scheme, if the accused was convicted, the prosecutor was obliged to present the statement to the judge, who was in turn obliged to take it into account in passing sentence.

As part of the evaluation, the statements were collated and analysed, and telephone and face-to-face interviews were undertaken with a relatively small sample of victims – both statement-makers and non-statement-makers. A number of criminal justice and related personnel were also interviewed to provide a broader spectrum of views

<sup>38</sup> A new study bears out these concerns: see M Burman et al, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: an Evaluation Study* (2007) ch 6.

<sup>1</sup> Scottish Executive Social Research, 2007; available at <http://www.scotland.gov.uk/Publications/2007/03/27152727/0>. The authors were F Leverick, J Chalmers and P Duff.

on the scheme.<sup>2</sup> Following on from three, very broad, objectives set down in the Scottish Executive's *Invitation to Tender* document,<sup>3</sup> the research team has produced an evaluation which states clearly its factual and statistical findings across six main headings: response rates; victims' views; criminal justice professionals' views; content of statements; impact of the scheme on workload and court processes; and the outcome of cases where a victim statement was made. The report also considers the implications of these findings, both in their own terms and, more importantly, in terms of the value of a permanent scheme covering the whole of Scotland.

Overall, this is a thorough, and eminently sensible, piece of research. It is candid as to the practical difficulties which were encountered in relation to the collection of data from the two remote sites – Ayrshire and Edinburgh – and, more importantly, as to the mechanisms by which these were resolved. Sometimes this involved analysing particular elements of the data to eliminate the possibility that it had been skewed. For example, the pilot scheme was not administered identically in both places. In Edinburgh, the Victim Information and Advice Service handled the scheme's management. In Ayrshire, where, at the time of the pilot, no such service was available, administration was the direct responsibility of the Crown Office and Procurator Fiscal Service. The dichotomy was not intended as two different administration mechanisms;<sup>4</sup> to establish whether it had any unintended effect on its findings, the research team analysed the response rates across all three sites, and the relative uniformity which this revealed suggested that the differences in administration had not impacted on the data.<sup>5</sup>

Again, the information provided on the offence with which the accused was charged was not identical. The Edinburgh site used general category headings whilst those in Ayrshire provided specific information, thereby making direct comparisons in this respect more or less impossible.<sup>6</sup> This discrepancy had an impact on the final evaluation in that, in order to make use of the data, it was necessary to reclassify the specific information from the Ayrshire sites into the general Edinburgh category headings.<sup>7</sup> In terms of correlating specific offences with the likelihood of making a victim statement, this could only be done in relation to the 2382 individuals on whom the detailed offence information was held.<sup>8</sup>

The main point here, however, is that the research team analysed the differing data appropriately, allowing for its lack of uniformity so that, in the end, its unevenness made no difference to what is, clearly, the main finding of the research: that there is a noticeably greater take-up of the opportunity to make a victim statement where the crime charged is serious. Even the general category headings applied by the Victim

<sup>2</sup> *Evaluation* para 2.1

<sup>3</sup> *Evaluation* para 1.8: (1) to establish how the schemes worked in each pilot area; (2) to evaluate the impact of victim statements on court processes; and (3) to investigate the characteristics of victims and their statements.

<sup>4</sup> Para 1.5 n 7.

<sup>5</sup> Para 11.9.

<sup>6</sup> Para 2.5.

<sup>7</sup> Para 4.17; table 4.5.

<sup>8</sup> Para 4.19; table 4.6.

Information and Advice Service at the Edinburgh site allow the ranking of offences by seriousness.<sup>9</sup> Against an overall take-up rate of 14.9% to the offer of the opportunity to make a statement (which the team acknowledge as low in comparison with victim statement schemes in other jurisdictions)<sup>10</sup> is set a 60% response rate to charges of both murder and causing death by dangerous driving.<sup>11</sup> This point is of significance in relation to several of the evaluation's findings and is noted, in various forms, in at least ten places.<sup>12</sup> The researchers recognise that this may colour other findings such as that a sentence of imprisonment was slightly more likely in cases where a victim statement was made,<sup>13</sup> or that fewer cases were deserted where a victim statement had been lodged.<sup>14</sup> The statistics indicate that both of these statements are true; the authors note the presence of the victim statement as one possible driving factor in such decisions whilst simultaneously noting that the greater seriousness of the offence may, in fact, be the decisive factor.<sup>15</sup> This is an example of the thoughtful way in which the data is analysed throughout the report. In general, the statistics are allowed to speak for themselves but this is always done with discernment and there is no haste to leap to premature conclusions.

One of the strengths of this piece of work is that it never loses sight of its status as an "evaluation" rather than, simply, a report. It therefore pays close attention both to the purpose which victim statements are intended to play within the Scottish criminal justice system and to their impact on the rights of the accused. Most Common Law-based legal systems provide victims with the opportunity to make a statement concerning the crime.<sup>16</sup> These may be either victim impact statements, which ought simply to apprise the court of the effect which the crime has had on the victim – whether financially, emotionally or physically – or victim opinion statements, which allow the victim to express a view as to the appropriate outcome, usually in relation to sentence. The latter type has caused some difficulties in the United States, particularly in relation to capital cases,<sup>17</sup> and it is arguable that the possibility exists of the victim making a statement which, in certain respects, might be unfairly prejudicial to the accused. Catherine Guastello, for example, suggests that impact statements "seem to be a way for the family [of a homicide victim] to express their loss and anger and ask for justice based on the satisfaction of their need for revenge rather than evaluation of the specific harm caused by the defendant and his moral culpability."<sup>18</sup> On the other hand, the system set up in Scotland required victims to avoid expressing

9 For example, a "non-sexual offence of violence" is, generally, more serious than "theft by house-breaking" (para 2.5).

10 Para 11.3.

11 Para 4.20.

12 At p 5; para 3.16; para 4.4; para 4.7; para 4.20; para 4.28; para 5.4; para 5.10; para 5.13; paras 11.3-11.4.

13 Para 5.13.

14 Para 5.7.

15 Paras 5.8, 5.13.

16 J Chalmers, P Duff and F Leverick, "The pilot victim statement scheme in Scotland" 2007 SLT (News) 103 at 103.

17 See C Guastello, "Victim impact statements: institutionalized revenge" (2005) 37 *Arizona State Law Journal* 1321.

18 At 1331.

any view on the appropriate outcome.<sup>19</sup> It is encouraging for the involvement of lay people in the criminal process that the majority of statement-makers (72%) followed, and complied with, the written instructions and restricted their accounts to the effect of the offence.<sup>20</sup>

Equally, in both Scotland, and England and Wales, there has been much political rhetoric on the issue of “balance” between victim and offender. Though many academic commentators are, rightly, critical of the idea that it is somehow possible to create a zero sum by adding rights to the victim’s side of the equation to balance the due process rights which the accused has always enjoyed,<sup>21</sup> it is fair to say that, previously, the victim’s only role was as a prosecution witness and that the only information disseminated to him or her concerning the case was that which related directly to giving this evidence. It is interesting that a major concern of some of the sheriffs who were interviewed as part of this research was that victim statements might be actively unfair to the accused, allowing victims to introduce prejudicial elements into the case which would not otherwise be relevant.<sup>22</sup> This was an issue in the case of *HM Advocate v JM* in 2004, and the authors have included Sheriff Stoddart’s judgment on this point as an annex.<sup>23</sup> It is apparent from this and, indeed, from the comments of the criminal justice professionals who were interviewed, that sheriffs regard themselves as having the skills to exclude from the decision-making process comments by victims which are unfairly prejudicial, whether as to conviction or sentence, and that they make judgments of this nature on a regular basis, albeit not previously in relation to victim statements.<sup>24</sup> In covering this point, the authors have ensured that they address an important concern of commentators on the criminal justice system.<sup>25</sup>

Taken together, this leads to the view, which is expressed slightly more strongly by the authors of the evaluation in a subsequent article,<sup>26</sup> that victim statements might provide a mechanism for enhancing victim participation and satisfaction with the criminal process without unduly detracting from fairness to the accused. The evaluation emphasises the point that, following the conclusion of their cases, a majority of statement-makers (86%) took the view that making a statement was “definitely” or “probably” the correct decision.<sup>27</sup> There may be a variety of reasons

19 Section 14(2) of the Criminal Justice (Scotland) Act 2003 (the primary legislation setting up the scheme) specifies that the statement must be “as to the way in which, and degree to which, th[e] offence... has affected and... continues to affect, [the victim]”. In addition, the instructions on the statement form itself stated that views about the accused person or the appropriate sentence should not be included.

20 Para 8.5.

21 See, e.g., I Edwards, “An ambiguous participant: the crime victim and criminal justice decision-making” (2004) 44 *Brit J Criminol* 967.

22 Paras 7.20, 7.21, 7.30-7.41.

23 Annex 10.

24 Para 7.38.

25 See e.g. A Ashworth “Victim impact statements and sentencing” [1993] *Crim LR* 498 at 507.

26 See J Chalmers, P Duff and F Leverick “Victim impact statements: can work, do work (for those who bother to make them)” [2007] *Crim LR* 360.

27 Para 6.41; table 6.16.

for this but, given that only 53% of those who declined the opportunity to make a statement were similarly content with their decision at the same point in the process,<sup>28</sup> it seems fair to say that victims, those whom the scheme was designed to benefit, had gained from being offered the chance. Even a majority of respondents who described making the statement as upsetting (20/34) found that, overall, going through that process made them feel better.<sup>29</sup> Again, the evidence from the evaluation indicates that victims want primarily to be kept informed rather than to influence the outcome of the case.<sup>30</sup> Accordingly, if victim statements only cause a small ripple in the waters of fairness to the accused, rather than the expected tidal wave, and if, at the same time, they increase, even minimally, victim satisfaction with the criminal process, there are clear benefits in rolling the scheme out nationwide. The evaluation's authors are to be commended for a balanced piece of research on which such a conclusion could be based. The Scottish Government is still considering their findings and has not yet determined whether the scheme should be extended or not.<sup>31</sup>

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## Classification of Delictual Damages – *Harding v Wealands* and the Rome II Regulation

In Scottish – or English or Northern Irish – private international law, damages have traditionally been regarded as a mixture of substance and of procedure.<sup>1</sup> Although it is difficult to draw a dividing line, it has generally been agreed that the heads of damage are an issue of substance and should be governed by the *lex causae*, while the quantification of damages is an issue of procedure and should be decided according to the *lex fori*.<sup>2</sup> However, the division between substance and procedure is not clear-cut. Whether ceilings on damage awards are covered under the “heads of damage” or the “quantification of damages” is particularly controversial. These issues have been examined in a number of recent English cases.<sup>3</sup> The latest decision, by the House of Lords in *Harding v Wealands*,<sup>4</sup> might have been expected to be the last word.

28 Para 6.65; table 6.27.

29 Para 6.48.

30 Para 6.79.

31 <http://www.scotland.gov.uk/Topics/Justice/criminal/18244/17068/7188>.

1 *McElroy v McAllister* 1949 SC 110 at 133 per Lord Keith; *Boys v Chaplin* [1971] AC 356 at 379 per Lord Hodson.

2 *Dicey, Morris and Collins: Conflict of Laws*, 14<sup>th</sup> edn, by L Collins et al (2006) paras 7-035, 35-053.

3 *Edmunds v Simmonds* [2001] 1 WLR 1003; *Roerig v Valiant Trawlers Ltd* [2002] 1 WLR 2304; *Hulse v Chambers* [2001] 1 WLR 2386.

4 [2006] UKHL 32, [2007] 2 AC 1.



However, despite the high status and careful exposition of a unanimous decision, its importance is greatly limited by new European legislation. Contrary to the existing Scottish (English) rules, the Rome II Regulation provides that the assessment of damages or remedy claimed is governed by the *lex causae*.<sup>5</sup>

### A. *HARDING v WEALANDS*

#### (1) The facts

In *Harding v Wealands*, the claimant, Mr Harding, an Englishman, was rendered tetraplegic following an accident in New South Wales caused by the defendant, Ms Wealands, an Australian national. Mr Harding brought an action in England and Ms Wealands conceded liability. Under the law of New South Wales, the Motor Accidents Compensation Act 1999 imposes a restriction on the damages for injuries suffered in motor accidents. There is no such restriction in English law. It was unanimously agreed in the Court of Appeal,<sup>6</sup> and not questioned in the House of Lords, that the applicable law on the substance was the law of New South Wales. In the Court of Appeal the question came down to the classification of assessment of delictual damages. If this was classified as a question of substance, the law of New South Wales law applied, to the advantage of the defendant; if it was classified as procedure, English law applied, to the advantage of the claimant. A majority of the Court of Appeal decided that assessment of damages was an issue of substance. The House of Lords unanimously held that assessment of damages is procedural, that a cap on damages is an issue of assessment of damages, and therefore that English law applies to that issue as the *lex fori*.

#### (2) The issues

In delivering the leading speech, Lord Hoffmann considered the old choice of law cases, and concluded that the traditional rule regarded matters of remedy as procedure which is governed by the *lex fori*.<sup>7</sup> This common law approach had not been affected by part III of the Private International Law (Miscellaneous Provisions) Act 1995.<sup>8</sup> Lord Hoffmann then concluded that statutory ceilings on damages are matters of procedure rather than substance.<sup>9</sup> Although a report by the Law Commissions on *Choice of Law in Tort and Delict* had stated that “a statutory ceiling on damages is a substantive issue for the applicable law in tort or delict rather than a

5 Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), OJ 2007 L199/40, art 15(c).

6 [2005] 1 All ER 415.

7 [2007] 2 AC 1 at para 24.

8 Paras 31-38. See the similar reasoning of Lord Rodger at paras 62-69. Only Lord Carswell, at paras 79-83, felt it necessary to rely on a statement to this effect in the House of Lords during the passage of the Act by Lord Mackay of Clashfern, then Lord Chancellor.

9 Paras 39-53. On the question of whether a cap on damages is a matter of procedure Lord Woolf (para 10) conceded that the answer was not “obvious”, while Lord Hoffmann (para 51) hinted that it might not be the best result but that his job was to preserve the common law rule that “Parliament intended to preserve” by the 1995 Act.

procedural issue for the *lex fori*,<sup>10</sup> Lord Hoffmann saw this as inconsistent with the view in the same report that no changes should be brought to the common law rules on the question of damages.<sup>11</sup> Since the common law classifies all matters relating to remedies as procedure, this basic principle should apply.

The House of Lords' reasoning is controversial. The substance-procedure line in the common law is ambiguous and unclear. As Lord Pearson said in *Boys v Chaplin*, "I do not think there is any exact and authoritative definition of the boundary between substantive law and procedural (or adjectival or non-substantive) law".<sup>12</sup> There is no doubt that in the 1995 Act Parliament intended assessment of damages to continue to be classified as procedure. However, there is nothing in Lord Mackay's statement, or elsewhere in the *travaux préparatoires*, to indicate that caps on damages fell within assessment of damages. Hence the Law Commissions' statement – following on from Dicey's view that "statutory provisions limiting a defendant's liability are prima facie substantive; but the true construction of the statute may negative this view"<sup>13</sup> – creates a strong case for believing that Parliament would have thought that caps on damages were classified as substance.

### (3) The effects

In adopting a wide definition of procedure, the House of Lords employed a strict reading both of the legislative text and of the pre-1995 common law. Even if *Harding* is correct in law, the appropriateness of this broad classification of procedure seems questionable as a matter of policy.

First of all, it may not be fair to apply different laws to the existence of liability and to the remedy. If a cause of action is unknown in Scotland but exists in the *lex causae*, it is hard to use Scots law to assess damages.<sup>14</sup> In other cases, the *lex causae* may adopt strict liability but at the same time introduces a limitation to the remedy in order to provide a reasonable balance,<sup>15</sup> while in the *lex fori* liability may be based on negligence or even fault, with higher damages being awarded to reflect the higher level of wrongdoing. It is unfair for the defender to be subject both to the strict liability of the *lex causae* and to the higher damages of the *lex fori*.

Secondly, it may be argued that the rule fails to observe the function of the applicable law and the *lex fori*.<sup>16</sup> The main rationale for classifying an issue as

10 Law Commission and Scottish Law Commission, Report on *Private International Law: Choice of Law in Tort and Delict* (Law Com No 193, Scot Law Com No 129, 1990) para 3.39. See also Dicey and Morris: *Conflict of Laws*, 13<sup>th</sup> edn, by L Collins et al (2000) para 35-055.

11 Report on *Private International Law* para 3.38.

12 [1971] AC 356 at 395.

13 This first appeared in the 7<sup>th</sup> edition of Dicey's *Conflict of Laws* (ed J H C Morris, 1958) 1092, and was still in the editions which were current at the time of the Law Commissions' Report (11<sup>th</sup> edn, by L Collins et al (1987) 188) and of the 1995 Act (12<sup>th</sup> edn, by L Collins et al (1993) 184). Lord Hoffmann does a careful job of analysing the cases on which the proposition in Dicey was based and concludes (paras 42-48) that it "was too widely stated" and had no application to tort rather than contract damages.

14 Dicey, Morris & Collins (n 2) para 35-056.

15 C Dougherty and L Wyles, "*Harding v Wealands*" (2007) 56 ICLQ 443 at 452.

16 P Rogerson, "Quantification of damages – substance or procedure?" (2006) 65 CLJ 515 at 516-517.

procedure, thus bringing in the *lex fori*, is convenience.<sup>17</sup> However, there is no reason why applying the foreign law to assess damages should cause more inconvenience than applying the foreign law to decide whether a tort is actionable in the first place.<sup>18</sup>

Thirdly, it is doubtful whether this classification is up-to-date or whether it is compatible with the current practice in the world<sup>19</sup> or in other areas of Scots law. The Rome Convention, which has been implemented by the Contracts (Applicable Law) Act 1990, provides that the assessment of damages, insofar as governed by rules of law, is governed by the *lex causae*.<sup>20</sup> This ambiguous provision separates the assessment of damages into two categories, namely the rules of law and the questions of fact. The first category, which surely covers statutory restrictions on damages, is classified as substance and governed by the *lex causae*.<sup>21</sup>

Fourthly, the inclusion of statutory restrictions on damages as procedure makes the scope of procedure unreasonably wide. The classification can be seen as a parochial device to limit the effects of the *lex causae* by extending the application of the *lex fori*,<sup>22</sup> when, as Anton notes, “the constant aim of the Scottish courts should be to restrict” the domain of procedure. “To classify a foreign rule as procedural is to except it from its normal application in Scotland and, on general principles, exceptions are to be strictly interpreted.”<sup>23</sup>

Fifthly, the current approach may open the door for forum shopping, especially when discretion to decline jurisdiction has been largely barred by the European jurisdiction system.<sup>24</sup>

## B. ROME II REGULATION

About twelve months after the decision in *Harding v Wealands*, the Rome II Regulation was adopted by the Council of the European Union and approved by the

17 See Anton’s test of applying the foreign rules unless it is “impracticable” to do so within the terms of Scottish procedures: see *Private International Law*, 1<sup>st</sup> edn (1967) 542. See also *Roerig v Valiant Trawlers Ltd* [2002] 1 WLR 2304 at para 26 per Waller LJ; J Carruthers, “Substance and procedure in the conflict of laws: a continuing debate in relation to damages” (2004) 53 ICLQ 691 at 692; C M V Clarkson and J Hill, *The Conflict of Laws*, 3<sup>rd</sup> edn (2006) 470.

18 Lord Woolf points out in *Harding* (para 11) that the New South Wales Act has “provisions which it would be very difficult, if not impossible, to apply in proceedings brought in this country”.

19 See the shifts away from the traditional English approach on treating assessment of damages as procedural in Canada and Australia, acknowledged by Lord Rodger in *Harding* (para 69) as “ammunition, or food for thought, for critics of the policy adopted by Parliament in the 1995 Act”.

20 Art 10(1)(c).

21 M Giuliano and P Lagarde, Report on the *Convention on the law applicable to contractual obligations*, OJ 1980 C282, 33; *Dicey, Morris & Collins* (n 2) para 32-301; *Cheshire and North: Private International Law*, 13<sup>th</sup> edn, by P M North and J J Fawcett (1999) 88; Clarkson & Hill, *Conflict of Laws* (n 17) 469-470; Dougherty & Wyles (n 15) at 451.

22 G Panagopoulos, “Substance and procedure in private international law” (2005) 1 *Journal of Private International Law* 69 at 71.

23 A E Anton, *Private International Law*, 1<sup>st</sup> edn (1967) 542, in stark contrast to the tendency in England to give a broad construction to procedure: see Panagopoulos (n 22) at 71.

24 See Panagopoulos (n 22) at 71; *Harding v Wealands* [2007] 2 AC 1 at para 64 per Lord Rodger; Case C-128/01 *Owusu v Jackson* [2005] ECR I-1383.

European Parliament.<sup>25</sup> It will apply from 11 January 2009, replacing the national choice of law rules in non-contractual obligations which fall within its scope. Like the traditional Scottish (and English) rules, the Rome II Regulation divides substance and procedure, and leaves the issue of procedure to the law of the forum.<sup>26</sup> However, it further provides that “the existence, the nature and the assessment of damages or remedy claimed” should be governed by the *lex causae*.<sup>27</sup> No guidance is provided as to what constitutes “the assessment of damages or remedy claimed”, but the words used are wide enough to cover all matters relating to damages, including what have been traditionally classified as procedural issues in Scotland. Under the Rome II Regulation the issue of damages is no longer a mixture of substance and procedure, but a unitary package, which is classified as “substance” and governed by the *lex causae*. As a result, the importance of *Harding v Wealands* has been greatly limited.

### (1) Observations on the Rome II classification

The Rome II Regulation overturns the highly controversial rules in the UK. By classifying all matters relating to damages as substantive, it adopts a narrow definition of “procedure”, which is compatible with the practice in most of continental Europe. As already mentioned, it is not the best solution to classify assessment of damages as procedure. In addition, there are both theoretical and pragmatic reasons to classify remedies as substance. First of all, the remedy is an inseparable part of the right.<sup>28</sup> The restriction of assessment of damages can be regarded as a restriction of the right itself.

Secondly, applying the *lex causae* to both the heads and the assessment of damages is more desirable for the purposes of private international law. The function of choice of law is to select a law that is “most appropriate” to decide a dispute. The *lex causae* should have a wide scope of application and only in exceptional circumstances should its effect be declined. While the *lex fori* is often an “appropriate” system of law to govern a dispute, this is not always the case because exorbitant rules of jurisdiction still exist and because an acceptable basis of jurisdiction, such as the defender’s domicile, is not usually as appropriate a law to govern a delictual dispute as the law of the place of damage (the main rule in article 4 of Rome II).

Thirdly, the unitary solution provided by the Rome II Regulation avoids the vexed issue of how to draw a line between substance and procedure within damages. In most cases the lines between the heads of damage, the remoteness of damage, and the assessment of damage are vague. There are a number of borderline issues in addition to ceilings and floors of damages.

<sup>25</sup> n 5.

<sup>26</sup> Art 1(3).

<sup>27</sup> Art 15(c).

<sup>28</sup> Panagopoulos (n 22) at 77.

## (2) Some problems

Although the Rome II Regulation brings simplicity and clarity into a traditionally vexed area, certain new problems are also created. One of the reasons that the UK Parliament classified the assessment of damages as procedure and applied the *lex fori* was to avoid excessive awards of damages. In the debate on the 1995 Act, the Lord Chancellor, Lord Mackay of Clashfern, warned against bringing “American scales of compensation into English courts”.<sup>29</sup> The *lex causae* may award punitive damages or even just levels of damages classified as compensatory but at excessively high levels by Scottish standards. By classifying assessment of damages as a matter of substance, the Rome II Regulation creates the possibility that Scottish courts will have to make extremely high damages awards when applying certain foreign laws. The difference between two legal systems on the assessment of damages will not be considered excessive or unendurable in most cases. However, when this difference is so extreme that it would be contrary to the fundamental policy or public interest of the forum, the forum should be able to find a way to reduce the level of damages awarded to a level consistent with its public policy.

The public policy exception in the Rome II Regulation has to be read in the light of recital 32. It provides that:

the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

This recital is drafted in a way that seeks to avoid the European Court of Justice giving a uniform interpretation of when excessive damages are contrary to public policy by saying that the issue is not only case-specific but also varies depending on the “legal order of the Member State of the court seised”. Part of the sensitivity here is that several legal systems in the EU award exemplary or punitive damages in certain cases. Thus it was unacceptable to categorise all exemplary or punitive damages as contrary to public policy but only “excessive” damages in those categories. A telling omission from the recital is the idea that public policy could be used to reduce damages awards that are compensatory under the *lex causae* but excessively beyond the amount that the *lex fori* would regard as necessary to compensate the victim. This might lead courts to classify the part of a damages award they believe to be excessive as exemplary or punitive even though it would be classified as compensatory by the *lex causae*. This is an unfortunate temptation to keep playing the classification game.

Another problem with applying the *lex causae* to assessment of damages is that the awards might be much lower than under the *lex fori*. This might result in those living in the forum receiving inadequate compensation because the higher costs in that jurisdiction are not anticipated by the applicable law.<sup>30</sup> The European Parliament,

<sup>29</sup> Quoted in *Harding v Wealands* [2007] 2 AC 1 at para 37.

<sup>30</sup> Lord Rodger highlights this problem in *Harding v Wealands* [2007] 2 AC 1 at para 70.

concerned about this problem in the context of traffic accidents, introduced recital 33 providing as follows:

According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.<sup>31</sup>

The problem with this recital is that it does not link to any substantive provision of the Regulation. It attempts to say what national substantive law should do, whereas the Regulation only helps to determine which law applies to the dispute and not what the content of that law should be.

### (3) Some exceptions

The Rome II Regulation provides a different classification for the assessment of damages than the prior Scots law. However, some non-contractual obligations, notably defamation and other privacy-related delicts, are excluded,<sup>32</sup> and the *Harding* classification will continue to apply. This means that, while the assessment of damages will be classified as substance and governed by the applicable law in most delictual cases, such as traffic accidents, product liability, and environmental damages, in cases such as defamation the assessment of damages will continue to be classified as procedure. It is doubtful whether such mixed and inconsistent rules are appropriate in the future, and the UK legislatures should think carefully about the best solution in areas outside the scope of Rome II when repealing part III of the 1995 Act. However, the political lobby that ensured defamation was outwith the scope of Rome II is likely to prevent the extension of the Rome II rules by UK legislation.

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## The Scottish Parliament Elections 2007 – what kind of hackery is this?\*

To put electoral law at the front and centre of popular discourse is no mean feat, and rarely bodes well. Before polls closed across Scotland on 3 May 2007,

<sup>31</sup> The Commission made a Statement at OJ 2007 L199/49 that it will make a study, to be submitted to the European Parliament and Council before the end of 2008, on “the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence”. This study will take account of the variation in levels of compensation awarded to victims of road traffic accidents in different Member States and will pave the way for a Green Paper.

<sup>32</sup> By art 1(2).

\* Thanks and apologies to Amy Winehouse for the subtitle.

problems with postal voting surfaced, to be followed by concerns regarding the novel system of electronic ballot counting. With the first results in, it became clear that the quantum of spoilt ballot papers was a matter of deep concern, if not outrage. Quickly initiated were processes of reflection, recrimination and much else besides. Initial allocations of blame were tentative but questions were inevitably asked of the Electoral Commission (the public body principally charged with voter education/information, and with a significant advisory role in the administration of elections), the Scotland Office (responsible for electoral law and policy pertaining to Holyrood), its then Secretary of State (Mr Douglas Alexander MP), and the Scottish Executive (responsible for most aspects of electoral law and policy pertaining to Scotland's 32 local councils). Suspicions of venality were not far from the surface of some criticisms.

On 4 May the Electoral Commission announced that it would expand its statutory duty to report on the administration of Scottish Parliament elections<sup>1</sup> to include an independent review of the "the high number of rejected ballots; the electronic counting process; and the arrangements for postal voting". A senior Canadian electoral administrator, Mr Ron Gould, was appointed to head the review. Before delivering its final report on 23 October 2007,<sup>2</sup> the independent review took submissions from various individuals and organisations,<sup>3</sup> engaged in a public consultation exercise,<sup>4</sup> assessed images of rejected ballot papers,<sup>5</sup> and evaluated the Electoral Commission's public awareness campaign.<sup>6</sup>

Commencing with an outline of the legal context of the Holyrood elections, this note outlines and scrutinises the principal findings of the independent review. Comprehensive and determinedly even-handed, the report contains a number of prescriptions worthy of attention, not merely for the improvements to the electoral system that they may yield, but also for the looseness of certain of our constitutional arrangements that they reveal.

### A. LEGAL CONTEXT

The law pertaining to Scottish Parliament elections is, of course, specifically reserved to Westminster, in schedule 5 of the Scotland Act 1998. In and of itself, this is not a matter of great relevance for the smooth running of such elections – the contests of 1999 and 2003 were run without major incident. As has been noted, in matters relating to the franchise, electoral system, electoral administration and party

1 Political Parties, Elections and Referendums Act 2000 s 5.

2 *Independent Review of the Scottish Parliamentary and Local Government Elections 3 May 2007* (The Electoral Commission, 2007), available at <http://www.electoralcommission.org.uk/templates/search/document.cfm/20316> (henceforth the Gould Report). The terms of reference of the review are to be found at appendix E.

3 Gould Report, appendix A.

4 Appendix B.

5 Appendix D. For reasons of voter anonymity, only images of ballot papers, not the ballot papers themselves, were viewed by the review: Gould Report 8.

6 Appendix C.

finance, “[t]he Scottish Parliament must wait upon Westminster to act.”<sup>7</sup> Fortunately, Westminster has indeed acted. Electoral law has been something of a growth area since 1997 with each of the above-mentioned areas being regulated by recent Acts of Parliament,<sup>8</sup> and with detailed rules to accommodate the Scottish approach to electoral administration and conduct being generated through Westminster statutory instruments.<sup>9</sup>

By contrast, the law pertaining to Scottish local government elections is a devolved matter (except for the franchise), governed principally by the Local Governance (Scotland) Act 2004, which introduced the single transferable vote system. A major innovation brought about by Liberal Democratic presence in the 2003-7 Scottish Executive coalition, the new voting system led in turn to the introduction of electronic counting for use in both Holyrood and local government elections.

A further addition to the electoral landscape since the 2003 election has been the Arbuthnott Report,<sup>10</sup> which arose from the Boundary Commission for Scotland’s 2004 review recommending a reduction in Scottish Westminster constituencies from 72 to 59.<sup>11</sup> Charged with considering the issues arising from non-coterminous boundaries as between Westminster and Holyrood constituencies, and the four different voting systems in Scottish elections,<sup>12</sup> the Commission reported in January 2006. For present purposes, the key recommendation was that the Scottish Parliament ballot papers should be redesigned to reflect better the way the additional members system of voting works.<sup>13</sup>

The Report received a somewhat tepid welcome from the then Secretary of State, Mr Alistair Darling MP, who noted that, “should I decide to take forward any legislative changes these *could not be made* before the Holyrood election in 2007.”<sup>14</sup> Given that an election was less than 18 months away, this cautious approach was certainly defensible – single transferable voting was on the way in and the necessary reforms of the Electoral Administration Act 2006<sup>15</sup> were already well in train.

7 H Lardy, “Devolution and democracy”, in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006) 89 at 95.

8 Representation of the People Acts 1983, 1985 and 2000; Scotland Act 1998; Political Parties, Elections and Referendums Act 2000; Electoral Administration Act 2006.

9 E.g., the Representation of the People Regulations (Scotland) 2001, SI 2001/497.

10 Commission on Boundary Differences and Voting Systems, *Putting Citizens First: Voting, Boundaries and Representation in Scotland* (2006) (henceforth the Arbuthnott Report).

11 The reduction was effected by the *Scottish Parliament (Constituencies) Act 2004*.

12 Namely, the d’Hondt method of proportional representation for the European Parliament, plurality (or first past the post) for the House of Commons, additional members system for the Scottish Parliament, single transferable vote for local government.

13 Arbuthnott Report (n 10) 73, recommendation 7; para 4.52. The report made a large number of other recommendations, relating *inter alia* to voter information, “open” regional lists, and greater use of new technologies.

14 Press Release, *Arbuthnott Commission Reports to Darling*, Scotland Office, 19 January 2006. Emphasis added.

15 A response to the problems with postal voting at the 2005 general election, and the secret loans to political parties, the Act also made numerous amendments to the electoral administration and registration process. Further legislation, the Local Electoral Administration and Registration Services



However, with Mr Darling's departure from Dover House in May 2006 went the circumspection. The new incumbent, Mr Douglas Alexander, brought with him a change in approach. Indicating a desire to take forward the redesign of the ballot paper by introducing a single sheet – in the two previous Scottish Parliament elections, electors were provided with separate papers for constituency and regional list races<sup>16</sup> – the Scotland Office requested the Electoral Commission to undertake public opinion research in order to assess the impact of any possible change in format. The research was both small-scale and inconclusive (as well as returning a rejection rate of 4%),<sup>17</sup> and on 16 August 2006, the Electoral Commission highlighted the need for further consideration on the matter of a combined ballot sheet.<sup>18</sup> In a departure from the Arbuthnott Report's suggestion that the Electoral Commission take the lead on the issue of ballot redesign, the Commission's participation in the process ended here and the project was moved forward on an inter-party consultative basis. With the major parties in agreement,<sup>19</sup> Mr Alexander announced the combined ballot paper on 22 November 2006.<sup>20</sup> The Scottish Parliament (Elections etc) Rules 2007 were debated in Westminster in February 2007 although, contrary to past practice, the resultant Order did not include a prescribed form of the combined ballot sheet.<sup>21</sup> It is unclear why this particular recommendation of Arbuthnott was singled out for legislative attention, nor why the "no new legislation" policy of the previous Secretary of State was reversed, nor indeed why a single sheet ballot paper was thought the best way to clarify the equal status of regional list MSPs.

A possible consequence of a single sheet ballot paper is the minimisation of "leakage". This is the process in an additional members system election whereby electors vote for one party in the constituency race, but select another for the regional list, thereby "leaking" support away from their "home" party. Larger parties suffer most from leakage, being much more likely to contest both constituencies and regions. The hypothesis is that the propensity for leakage is diminished with a combined ballot paper, as electors find it cognitively difficult to mark support for different parties on a single sheet. Gould, however, finds no evidence that the inter-party discussions were motivated by such considerations.

As to the consultation process, Gould remarks that "it . . . seems that it had been the intention of the Scotland Office to proceed with using one combined ballot sheet since nearly the beginning of the planning stage."<sup>22</sup> Moreover, the absence

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(Scotland) Act 2006, was required to replicate the provisions for the Scottish local government elections.

16 Press Release, *E-Counting to be Used in 2007 Elections*, Scotland Office, 9 June 2006 ("I want a single ballot paper [to remove] any confusion that a vote on the regional list is less important, or a second choice").

17 Gould Report (n 2) 39.

18 Gould Report 39 n 10.

19 The Labour, Liberal Democratic and Scottish Nationalist Parties all approved the single ballot sheet. The position of the Conservatives is elusive.

20 Press Release, *Douglas Alexander Announces 1 Page Ballot Paper for May Elections*, Scotland Office, 22 November 2006.

21 The Scottish Parliament (Elections etc) Order 2007, SI 2007/937.

22 Gould Report 40.

of a prescribed form for the combined ballot sheet<sup>23</sup> meant that the Scotland Office worked alone with the commercial company producing the ballot papers “without adequately communicating its decisions on the combined ballot paper to returning officers, who are legally responsible for ensuring that ballot papers are legally compliant.”<sup>24</sup> Indeed, it was not until 17 April 2007 – six days after the close of nominations, and a mere three weeks before polling day – that the Scotland Office provided returning officers with a written explanation of the changes to the ballot paper. This is but one instance of the damagingly compressed timetable for the administration of the election.

### B. THE MESS

Before considering whether any of the above contributed to the debacle that was the Scottish Parliament election of 2007, it is worth briefly revisiting the episode.

**Table 1.** Rejected Ballots in Scottish Parliament Election 1999-2007

	1999	2003	2007
<i>Constituency races</i>			
Number	9,210	12,810	85,644
% of all ballots	0.39	0.66	4.08
<i>Regional races</i>			
Number	7,268	12,482	60,455
% of all ballots	0.31	0.67	2.88

These simple figures capture the qualitative difference in the rate of rejected, or spoiled, ballots as between 2007 and previous Scottish Parliament elections, with rejection rates approximately five times higher than in the past. The total number of ballots cast that did not count is approximately equal to the electorate of the City of Dundee. Further, analyses show considerable variations within these figures across Scotland (see table 2, overleaf).

In seeking to explain such wide variations, some analyses have focused on socio-economic factors.<sup>25</sup> Whilst one might hypothesise that electors in areas of multiple deprivation are more likely to spoil their ballot papers inadvertently, other factors may be at play. Election expenditure returns to the Electoral Commission show that the Labour incumbent in Glasgow Shettleston expended only one third of his limit, indicating a modest campaign. In neighbouring Glasgow Govan – a constituency with its own social challenges – the hard-fought contest was a gain for the SNP’s Ms Nicola

23 In accordance with article 89 of the Scottish Parliament (Elections etc) Order 2007, the Scotland Office could change the style “with such variations as the circumstances may require.”

24 Gould Report 40.

25 For an early, and sophisticated analysis, see C Carman, J Mitchell and R Johns, “The unfortunate natural experiment in ballot design: the Scottish Parliament elections of 2007”, presented at the EPOP group of the Political Studies Association, 2007, Bristol, England.

**Table 2.** Lowest and Highest Level of Rejected Ballots in Scottish Parliament Election 2007 (constituency races)

Stirling	1.90%
Eastwood	2.29%
Roxburgh and Berwickshire	2.31%
Glasgow Pollok	9.79%
Glasgow Maryhill	10.18%
Glasgow Shettleston	12.09%

Sturgeon MSP, whose campaign was notable for its exhaustive voter-information efforts, with an attendant low ballot rejection rate. Be that as it may, however, such factors do not explain the heightened rate of rejection as compared with 1999 and 2003. Enter Gould.

### C. GOULD'S CRITIQUE

The Gould Report has much to recommend it, not least its rigorous focus on delay as the central failing of the key players. Starting with the ill-considered decision to make a major change to the electoral system less than twelve months before polling day, delay affected all aspects of the timing and preparation of the election. It is remarkable that, even as late as 19 December 2006, the Electoral Commission was drawing the Scotland Office's attention to the fact that key provisions in the Parliamentary Order (relating to the combination of elections) still required re-drafting.<sup>26</sup> With the Scottish Parliament (Elections etc) Order not coming into force until 14 March 2007, the implementation was only ever likely to contribute "to an air of uncertainty among all the stakeholders involved"<sup>27</sup> making it "difficult... to meet subsequent deadlines relating to the printing and distribution of the ballot paper".<sup>28</sup> Most damningly (and not accounted for in the figures given above), these delays "quite probably contributed to disenfranchising a number of postal voters, who may not have received or been able to return their ballot papers on time."<sup>29</sup> The report continued:<sup>30</sup>

Across Scotland, 5,413 parliamentary postal ballot papers (1.24% of those issued) and 5,204 local government ballot papers (1.2%) were too late to be included in the count. In three areas, the number of late ballot papers exceeded 5% of postal ballot papers issued.

These are remarkable figures, revealing the price electors paid for political incompetence. For this the report is not slow to attribute responsibility:<sup>31</sup>

<sup>26</sup> Gould Report 16.

<sup>27</sup> At 29.

<sup>28</sup> At 40.

<sup>29</sup> At 49.

<sup>30</sup> At 66.

<sup>31</sup> At 30.

[I]t became clear that both the Scotland Office and the Scottish Executive were frequently focused on partisan political interests in carrying out their responsibilities, overlooking voter interests and operational realities within the electoral administration timetable.

“What is characteristic of 2007”, the report added, “was a notable level of party self interest evident in Ministerial decision-making (especially in regard to the timing and method of counts and the design of ballot papers).”<sup>32</sup> As a result, “months of partisan political discussion and debate wasted valuable time which could otherwise have been used to establish a ballot paper which all voters could easily understand.”<sup>33</sup>

On the question of single transfer votes and their potential for causing voter confusion, Gould concludes that the combination of voting systems on 3 May was not responsible for the higher rejection rates in the Scottish Parliament elections, but rather, that “[t]here is very strong evidence to suggest that the combined Scottish parliamentary ballot sheet was the main cause of this problem.”<sup>34</sup> It should be noted that the “very strong evidence” is the review’s own analysis of the rejected ballot paper images – details of which are at Appendix D of the Report. Whilst space does not permit this paper to scrutinise that analysis, its methodology and findings are deserving of further attention.

An additional cause of voter confusion was the use of party descriptions on the ballot paper – “sloganisation” in the language of the report. For example, the practice of adopting “Alex Salmond for First Minister” (similarly deployed by Margo MacDonald and Tommy Sheridan) to gain a favourable position on the ballot paper reportedly confused voters.<sup>35</sup> The Electoral Commission will be launching a consultation on the issue of such descriptions in the course of this year.

#### D. CONCLUSIONS

The above has sought to contextualise and summarise a detailed account of a complex episode. Space has not permitted consideration of numerous important issues to which Gould rightly applied his mind, such as the critical role of returning officers, and their recruitment, training and lines of reporting.<sup>36</sup> Similarly thoughtful are the remarks on legislative and administrative practicality and the important suggestion that no new legislation comes into effect in the six months prior to polling day.<sup>37</sup> This is not to suggest that the report be swallowed whole – certain findings appear to be the product of (Canadian) cultural path dependency. For instance, the creation of a Chief Returning Officer for Scotland, responsible for the hiring and training of returning officers, the administration of elections, the public information campaign and much else besides, would generate a permanent bureaucracy somewhat at odds with the existing modes of Scottish electoral administration, without being

<sup>32</sup> At 17.

<sup>33</sup> At 48.

<sup>34</sup> At 52.

<sup>35</sup> At 45, 56.

<sup>36</sup> At 25-27.

<sup>37</sup> At 112.

obviously more effective. Other suggestions seem under-argued, such as the “strong recommendation” against e-voting in 2011 (as recommended by Arbuthnott), on the basis that there were problems with e-counting.<sup>38</sup> These are entirely separate technologies and to run them together is curious. Indeed, the report appears to have something of a technological blind spot, with the impact of new technologies (in voter information in particular) barely gaining a mention. Standing in a sports hall in the middle of the night waiting for results is another cultural practice on which Gould was not overly keen, calling for the abolition of overnight counts. Given that the fatigue resulting from this practice very nearly resulted in the list decision being wrongly called by the returning officer for the Highlands and Islands in 2007, a bit of cultural insensitivity may, perhaps, be a good thing on occasion.

The initial response to the report from the latest Secretary of State for Scotland appears to accept the wisdom of de-coupling the Scottish Parliament and local government elections, and of returning to separate ballot papers. Rightly, the possibility of a Chief Returning Officer for Scotland is to be given consideration.<sup>39</sup> The knottier question of legislative competence is of course left to be battled over between the governments at Holyrood and Westminster.

As to questions of constitutional governance, electoral law is foremost amongst those areas where the capacity for political self-dealing is greatest, and most damaging. The Gould Report does not accept that such practices were present in the instant case, but nor is it able to reassure us as to their absence. The Scottish Parliament elections of 2007 will long carry the connotation of politicians-as-hacks. The task of restoring confidence (and competence) must now be a priority.

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## Planning for Aquaculture

Recent years have seen a prolonged process of planning law reform in Scotland, culminating in the Planning etc (Scotland) Act 2006. While most of that Act has yet to be brought into force, provisions already in force<sup>1</sup> have implications for the landmark case of *Argyll and Bute District Council v Secretary of State for Scotland*<sup>2</sup> and change the limits of local authorities’ jurisdiction in relation to planning. This note describes the process which resulted in an extension of planning controls to aquaculture in Scotland and considers the implications of the change.

<sup>38</sup> At 120.

<sup>39</sup> HC Deb 23 Oct 2007, cols 165 ff.

<sup>1</sup> Relevant parts of s 3, pertaining specifically to marine fish farming, and the whole of s 4 were commenced on 1 April 2007 by the Planning etc (Scotland) Act 2006 (Commencement No 2) Order 2007, SSI 2007/130.

<sup>2</sup> 1976 SC 248.

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**A. ARGYLL AND BUTE DISTRICT COUNCIL v SECRETARY OF  
STATE FOR SCOTLAND**

In *Argyll and Bute District Council v Secretary of State for Scotland*, which concerned the construction of fixed moorings on the bed of Loch Fyne, the Second Division held that planning jurisdiction was restricted to the area above the low water mark of tidal waters. Lord Justice-Clerk Wheatley was prepared to accept that the general jurisdiction of a local authority might extend below the low water mark,<sup>3</sup> but considered that an authority's jurisdiction may not be the same for all purposes. If the word "land", defined in the Town and Country Planning (Scotland) Act 1972 as including land covered with water, were to be taken to include land covered by seawater, not cut off at any point, it would logically cover the extremes to which jurisdiction could be stretched. Lord Wheatley could not imagine "that the planning code has been extended by Parliament to that extent", and such a proposition seemed, contrary to the concept of town and country planning. In the court's opinion, therefore, the inference to be drawn from the 1972 Act was that the terminus of the jurisdiction was the low water mark.

At the time, Himsworth doubted whether this view of the territorial limitations on planning powers was universally accepted.<sup>4</sup> Young did not think that an extension of the jurisdiction to activities below low water mark was contrary to the general purpose of town and country planning.<sup>5</sup> He noted that development carried out below low water mark would almost always be subject to some form of control – in particular, the need for the consent of the Crown Estate Commissioners. Such control, however, generally lacks any democratic element, and the considerations taken into account by the bodies exercising it are less likely to be as wide-ranging as those which can properly concern a planning authority. Notwithstanding these concerns, however, the point was not further tested, and the decision in *Argyll and Bute District Council* came to be treated as settled law.

**B. EXTENSION OF PLANNING REGIME TO AQUACULTURE**

Aquaculture is growing faster than any other means of animal food production worldwide and is expected to double in the next two decades.<sup>6</sup> In Europe alone, the output of marine fish farming has developed a thousand-fold since 1970, and, within the European Union, the United Kingdom is the largest producer of farmed and shell fish, with ninety per cent coming from Scotland.<sup>7</sup> In this respect, aquaculture makes

3 It was argued for the planning authority that, since the *solum* of Loch Fyne below low water mark (in which the Crown had vested rights both patrimonial and fiduciary) formed part of the realm, it fell within the jurisdiction of the appropriate local authority and, accordingly, of the appropriate planning authority.

4 C M G Himsworth, "The limits of the planning realm" [1977] JPL 21.

5 E Young, "Planning jurisdiction in Scotland" (1977) 42 JLS 22, 61 at 62.

6 M Holm et al, *The Environmental Status of Norwegian Aquaculture* (The Bellona Foundation, report 7:2003; available at [http://www.bellona.org/reports/Norwegian\\_Aquaculture](http://www.bellona.org/reports/Norwegian_Aquaculture)).

7 The Fisheries Research Services estimate there are 280 active marine salmon and 332 active shellfish farms in Scotland: see *Scottish Fish Farms Annual Production Survey 2005*.

an important contribution to Scotland's rural economy, providing significant numbers of jobs, often where alternative employment opportunities are scarce.<sup>8</sup>

A proprietary right in the sea bed within the limits of the territorial waters is vested in the Crown, and therefore the Crown Estate must provide a lease before a fish farm can operate.<sup>9</sup> This has resulted in a dual role for the Crown Estate Commissioners, as the owner of the sea bed and also as the regulator of marine fish farming development. Concerns were increasingly expressed about whether, in considering applications for fish farm developments, sufficient attention was being paid to potentially conflicting uses and environmental impacts. The lack of a democratic element in the decision-making processes was also criticised.<sup>10</sup> The solution was to extend planning controls to marine fish farming. This intention was first announced by the then Scottish Office Minister, Lord Sewel in November 1997. At that time, however, it could not have been envisaged that it would take ten years to be put in to practice.<sup>11</sup>

In July 2000, the Scottish Executive consulted on the extension of planning controls to marine and shellfish farming.<sup>12</sup> Three main themes emerged from the responses: concern from the industry, support from other bodies, and the role of fish farming in the economy.<sup>13</sup> Overall, however, the broad principle was considered acceptable, although it was clear that the detail needed to be worked through.<sup>14</sup> Enabling powers to bring marine fish farms into the land use planning system for transitional water and coastal water were included, by amendment, in the Water Environment and Water Services (Scotland) Act 2003.<sup>15</sup> The necessary framework having been established, work then began on the detail. An extensive round of consultations by the Scottish Executive was followed by lobbying on behalf of interested parties, particularly the aquaculture industry, environmentalists and the wild salmon sector. Over this period too, the views relating to regulation and protection of the marine environment began to change, with calls coming from many quarters favouring the development of a comprehensive marine act.<sup>16</sup>

The political commitment having been made, work continued on the implementation. The aim was to provide a system of planning control for aquaculture

8 Scottish Executive, *Scottish Planning Policy: Planning for Fish Farming* (SPP 22, 2007; available at <http://www.scotland.gov.uk/Publications/2007/03/29102058/0>).

9 *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1976 SC 161.

10 M G Lloyd, "A strategic approach to fish farming in the UK?" (1990) 31 *Scottish Planning Law and Practice* 67.

11 An interim scheme was introduced in 2000 which enabled the relevant local authorities to comment on proposed marine fish farm developments. The planning authorities developed non-statutory framework plans to provide a policy context for decision-making.

12 Scottish Executive Development Department, *The Extension of Planning Controls to Marine Fish Farms and Shellfish Farming* (2000).

13 Scottish Executive Development Department, *The Extension of Planning Controls to Marine Fish Farming: Analysis of Responses* (2001).

14 A M Slater, "Planning for Scottish aquaculture: the story thus far" (2005) 16 *Water Law* 122.

15 Section 24(2) (a) amends the definition of "development" in section 26(6) of the 1997 Act to include fish farming in coastal waters and transitional water. The relevant sections of the 2003 Act were commenced by the Water Environment and Water Services (Scotland) Act 2003 (Commencement No 5) Order 2007, SSI 2007/50, and came into force on 31 March 2007.

16 See for example Slater (n 14) at 127-128.

which was as close as possible to the existing system for land-based regulation, but which accommodated the differences of the marine location. This proved to be a prolonged and somewhat difficult process. The Scottish Executive sought to be inclusive and open in its consultation,<sup>17</sup> but views on some key aspects were polarised.<sup>18</sup> Examination of the emerging proposals highlighted legal problems and an entrenching of views by stakeholders.<sup>19</sup> A fresh opportunity for legislation was provided by the Planning etc (Scotland) Act 2006. Although parliamentary discussion was limited, MSPs generally accepted that the extension of the planning regime to fish farming should be to the twelve nautical miles limit.<sup>20</sup> The Act also recognised that a change of species of fish within an existing fish farm, which might not require any change in equipment, could lead to environmental impacts and so should be the subject of planning control.<sup>21</sup>

The Scottish Executive continued to refine the processes and procedures, and to consult key stakeholders, right up until aquaculture became part of the planning system on 1 April 2007.<sup>22</sup> The effect is that all new fish farms, or modifications to existing ones, require planning permission from the appropriate local authority. All coastal local authorities have been divided into marine planning zones extending to three nautical miles, with each designated as the planning authority for the purposes of marine fish farming within a particular zone.<sup>23</sup> The jurisdiction of planning authorities has thus been extended beyond the low water mark for the first time, but only in the limited circumstances of fish farming.

In practice, only planning authorities on the west coast and Northern Isles are affected.<sup>24</sup> Furthermore, it is anticipated that the aquaculture industry will increasingly be typified by larger but fewer farms.<sup>25</sup> It is therefore not expected that the number of applications for new fish farm sites will be high.<sup>26</sup> There also

17 Scottish Executive Development Department, *Extending Planning Controls to Marine Fish Farming and Defining Marine Boundaries for Fish Farming* (2007).

18 For example, Scottish Executive Development Department, *Extending Planning Controls to Marine Fish Farming and Defining Marine Boundaries for Fish Farming* (2007) para 18.

19 Slater (n 14).

20 Planning etc (Scotland) Act 2006 s 3(1), amending the Town and Country Planning (Scotland) Act 1997 s 26. It is anticipated that Ministers will consult on the boundaries between the 3 and 12 nautical mile limit in due course, but due to the current technical state of the fish farming industry, it is unlikely that applications for planning permission between will be lodged within this area in the near future.

21 Planning etc (Scotland) Act 2006 s 3(1), amending the Town and Country Planning (Scotland) Act 1997 s 26.

22 The Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007, SSI 2007/268 came into force 1 April 2007 (other than art 13 which came into force on 2 April 2007).

23 Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007 art 5.

24 These are: Argyll and Bute, Dumfries and Galloway, Highland, North Ayrshire, Orkney Isles, Shetland Isles, Western Isles, and Loch Lomond and the Trossachs National Park. Scottish Ministers introduced a presumption against aquaculture development on the north and east coasts in 1999 to safeguard migratory fish species.

25 Scottish Executive, *Planning for Fish Farming* (n 8).

26 Research by Mr Ole W Pedersen on behalf of the author in September 2007 indicates that only Highland Council and Shetland Island Council have received applications for new farms under the new regime. Argyll and Bute have received one application for a change of species from finfish to shellfish.



remains the issue of the incorporation of all the existing fish farms into the planning regime. A point of great contention in the consultation phase,<sup>27</sup> this appears to have been resolved reasonably satisfactorily. Scottish Ministers will decide whether existing fish farms can continue to operate. A non-statutory advisory panel is in the process of being established and all pre-1999 fish farms will go through a review process and all post-1999 farms will be audited.<sup>28</sup> In coming to a decision as to whether to grant planning permission, the Scottish Ministers will consider the likely impact of the development on any European site<sup>29</sup> and the environment generally, as well as any other relevant planning matter. It is anticipated that most farms will be granted planning permission, with appropriate environmental or other conditions. The panel is expected to commence work towards the end of 2007.

The development of planning law on aquaculture has not been an isolated phenomenon. Recent years have seen an almost bewildering plethora of initiatives, strategies and pilot projects on the marine environment.<sup>30</sup> The rhetoric and policy development on its governance has, however, come a long way. The report on *Safeguarding Our Seas: A Strategy for the Conservation and Sustainable Development of our Marine Environment*<sup>31</sup> sets out the UK government's vision for "clear, healthy, safe, productive and biologically diverse seas" and describes a long-term strategy for the conservation and sustainable development of the marine environment. Furthermore, in Scotland, the Executive produced a paper in 2005 entitled *Seas the Opportunity: A Strategy for the Long Term Sustainability of Scotland's Coasts and Seas*,<sup>32</sup> while in 2007 the UK Department for Environment, Food and Rural Affairs published *A Sea Change: a Marine Bill White Paper*.<sup>33</sup> It is expected that a draft marine bill will be published by UK government, and the Scottish government has promised a marine bill to cover devolved matters.<sup>34</sup> Marine spatial planning has been central to all these developments and will become the accepted regulatory regime for development beyond the low water mark.<sup>35</sup>

27 Slater (n 14) at 128.

28 The difference in treatment is because post-1999 farms were already required to satisfy the requirements of the Environmental Impact Assessment (Fish Farming in Marine Waters) Regulations 1999, SI 1999/367.

29 Within the meaning of the Conservation (Natural Habitats etc) (Scotland) Regulations 1994, SI 1994/2716, reg 10.

30 Scottish Parliament, Environment and Rural Development Committee, Report on *Inquiry into the Marine Environment* (SP Paper 774, 2007; available at <http://www.scottish.parliament.uk/business/committees/environment/reports-07/rar07-04-00.htm>) col 5.

31 <http://www.defra.gov.uk/Environment/water/marine/uk/stewardship/index.htm>.

32 <http://www.scotland.gov.uk/Publications/2005/08/26102543/25444>. It announced the establishment of an Advisory Group on Marine Spatial Strategy to provide better leadership and good governance in Scotland's marine area.

33 Cm 7047; available at <http://www.defra.gov.uk/corporate/consult/marinebill-whitepaper07/marinebill-whitepaper.pdf>.

34 Mr Richard Lochhead, Rural Affairs and Environment Cabinet Secretary, announced on 19 July 2007 that the Scottish Government would produce a Marine Bill: see [www.scotland.gov.uk/News/Releases/2007/06/19112631](http://www.scotland.gov.uk/News/Releases/2007/06/19112631).

35 A M Slater, "A Marine Act: implications for Scotland" (2007) 18 *Water Law* 5.

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### C. CONCLUSION

The rather tortuous implementation of the political pledge to incorporate aquaculture into the planning regime has now been completed. The result is somewhat incongruous as, although planning, or indeed land-use planning as it is often described, has been extended into the Scottish marine environment for the first time, it is aquaculture, alone in that environment, which is part of the planning regime. Decisions will be considered in the context of the development plan, with affected planning authorities being required to incorporate appropriate policies into their new plans. These development plans can, however, only deal with aquaculture, and the isolation of fish farms within a swathe of other regulatory regimes does not suggest a decision-making process which is properly integrated.

This important, if somewhat clumsy, change may be short-lived. If, as is anticipated, marine spatial planning is introduced as a regulatory regime for Scotland's coasts and seas, aquaculture will become part of that more comprehensive system. The late Lord Wheatley would perhaps have disapproved of the extension of the planning regime beyond the low water mark, even for development which is so clearly marine in nature. The transfer of aquaculture to the planning system, however, may yet be regarded as the vanguard of marine spatial planning in Scotland.

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