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Foreword

The *Southampton Student Law Review* aims to showcase some of the very best work of our students, both undergraduate and postgraduate. The content of this volume covers a wide range of topics examining some of the most pressing contemporary legal issues. From the subtleties of vicarious liability, to the role of employment law, through the tort of nuisance, land registration, the regulation of fishing, assured shorthold tenancies, resulting trusts and child maintenance, the *Student Law Review* clearly demonstrates diversity of scholarship undertaken by Southampton Law students and their enthusiasm for their work. This edition has also now fulfilled one of the founding aims of the Journal by providing a space for articles written and dedicated to the review alongside the dissertations written as part of the Legal Research and Writing module. As such the *Review* now allows potential authors to publish articles that extend beyond the narrow confines of their academic modules and to test ideas that have no other outlet.

The journal provides the perfect forum for collaboration between postgraduate and undergraduate students who are engaged in research, and also allows for the dissemination of their ideas and expertise to an audience far beyond the confines of Southampton Law School. As well as enhancing the learning and understanding of the journals readers this collaboration has fostered the cross fertilisation of ideas amongst those responsible for its production. The opportunities this offers are manifold, relating not just to the writing process but also in the development of new skills such as editing and online publishing. Nevertheless, the production of this Journal has been an onerous task for the editorial team and the authors, for which they are to be commended. Although supported by academic staff in the Law School, predominantly Dr Oren Ben-Dor, the success of this enterprise is due mainly to the commitment of the student led editorial team. I am delighted to celebrate the publication of this volume, and look forward to future editions and further developments of the *Southampton Student Law Review*.

Hazel Biggs

Professor of Healthcare Law & Bioethics

Head of Southampton Law School

August 2012

Is there room for a new 'Bosman'? The Latest developments in European Law on Cross – Border Broadcasting of Sports

Arshak Mkrtchyan

EU's continuing bid to create a Single Market through further harmonisation of new areas such as copyright, together with Union's new founded competence in sport (established by virtue of Article 165 TFEU), creates a certain tension with the desire of intellectual rights holders in media products and services to maintain a national territory-based licensing system.

This paper examines the possible outcomes of the application of EU provisions on freedoms of movement of goods and services as well as competition rules to the cross-border satellite broadcasting of sports through Conditional Access (CA) devices, by critical assessment of the judgment delivered by the Grand Chamber of the Court of Justice of the European Union (CJEU) in the joined cases of *Football Association Premier League Ltd and Others v. QC Leisure¹ and Others* and *Karen Murphy v. Media Protection Services Ltd²*.

Introduction

This paper intends to analyse the questions of compatibility of EU provisions on free movement of goods and services as well as competition rules with the territorial licensing of sport broadcasting rights, as referred to the CJEU by the High Court for a preliminary ruling by Burton LJ in the *Murphy³* case and Kitchin LJ in the case of *QC Leisure⁴*.

The *Murphy* case was an action against licensees or operators of four UK pubs that had shown live Premier League matches broadcasts through decoder cards provided by the defendants in the *QC Leisure* case, obtained in Greece and elsewhere and intended for private domestic use. These cards enabled the unauthorised reception of non-Sky satellite channels, including NOVA and ART operating in Greece and in North Africa.

¹ Case C-403/08

² Case C-429/08

³ *Murphy v Media Protection Services Ltd*, [2008] EWHC 1666 (Admin).

⁴ *Football Association Premier League Ltd v QC Leisure*, [2008] EWHC 1411 (Ch).

Prosecution in both cases took place under sections 277-279 of Copyright, Design and Patents Act (CDPA) 1988. These sections were incorporated into the Act pursuant to the EC Conditional Access Directive, objective of which has been outlined in Article 1 as “approximation of provisions in the Member States concerning measures against illicit devices which give unauthorized access to protected services.”⁵

This paper agrees with the view expressed by the CJEU that “the definition of illicit devices in Article 2(e) of the Directive refers only to equipment that has been manufactured, manipulated, adapted or readjusted without the authorisation of the service provider, and it does not cover the use of foreign decoding devices.”⁶

However, the real importance of this judgment for the future of cross-border sports broadcasting lies in the paragraphs of the ruling which deal with the question on whether “on a proper construction of Articles 34, 36, 56 TFEU, those articles preclude legislation of a Member State which makes it unlawful to import into and sell and use in that State foreign decoding devices which give access to an encrypted satellite broadcasting service from another MS that includes subject-matter protected by the legislation of that first state.”⁷

In reply to the above question, the CJEU stated that “sporting events, as such, have a unique and original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate by the various domestic legal orders.”⁸

Nevertheless, the Court considered the fact that premiums had been paid for obtaining the decoder cards in Greece as “going beyond what is an necessary to ensure appropriate remuneration for the right holders.”⁹

This paper respectfully disagrees with that view and argues in Chapter I that the economic nature of sport broadcasting requires separate exploitation contracts adapted to the specific value of each content on each national or linguistic market¹⁰, so the content market in Europe needs to remain segmented because it is priced according to the utility which varies among different Member States. It is argued that the current system of territorial licensing is objectively justified and necessary, and the intervention by the ECJ will be contrary to Article 2(5) TFEU, superseding Member States’ (MS) competence in these areas.

⁵ Directive 98/84 (you need to report the full details of the directive, including where it is published)

⁶ Joined Cases C-403/08 and C-429/08, CJEU Grand Chamber, 2011 WL 4550196, at para. 64

⁷ *Ibid.*, at para. 76

⁸ *Ibid.*, at para. 100

⁹ *Ibid.*, at para. 116

¹⁰ Study on the impact of the Conditional Access Directive, on behalf of European Commission Directorate General for Internal Market & Services, 2007, at p. 64

Addressing the anti-trust issues referred by the English High Court, the CJEU held that “exclusive license agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition prohibited by Article 101 TFEU where they oblige the broadcaster not to supply decoding devices enabling access to that rights holder’s protected subject-matter with a view to their use outside of the territory covered by that license agreement.”¹¹

In order to address the interpretation of the Treaty rules on competition under Article 101 TFEU to date, a careful consideration of EU’s competence in sport is conducted and Commission’s investigations concerning antitrust provisions of Article 101 TFEU are referred to, particularly the cases of *UEFA*¹² and *FIA*.¹³ Based on the rationale of the judgment of the ECJ in the case of *Coditel*,¹⁴ the ‘specific characteristics of the relevant market’ are considered and sport broadcasting is examined in detail in order to see whether such separate, independent market, which can be validly differentiated from general broadcasting, exists and to establish whether it requires extra territorial protection in comparison to other broadcasting services. An attempt is made to distinguish a unique ‘European model of sport’,¹⁵ which, in spite of being subject to the principle of freedom of movement of services, is justifiably exempt from its certain aspects.

Following the above criteria of classification, it is submitted that the current geographically divided market structure is an “essential mechanism of maximizing revenue and ensuring it is shared between all clubs in order to preserve the balance required for a competitive league”¹⁶ and therefore it is further submitted that cross-border football broadcasting should also be granted an exemption from the enforcement of competition under Art. 101(3)TFEU.

The potential impact of the abolishment of exclusive territorial licensing and introduction of pan-European licensing on interests of football clubs and associations is examined within this chapter. EU’s developing competence in the area of sport outlined in Article 165 of the EU Treaty is scrutinized in the final part of the paper.

The Court’s Attitude towards Expanding the Internal Market for IP Related Products

The CJEU’s extreme reluctance to allow any deviations from the principle that an intellectual property right cannot be relied on to oppose parallel imports of goods which have been placed on the market in a Member State (MS) by or

¹¹ *Ibid.*, at para. 146

¹² 2002/C 196/03

¹³ 2001/C 169/03

¹⁴ *Coditel SA v Cine Vog Films SA* (262/81) ECJ,1982, E.C.R. 3381

¹⁵ The Helsinki Report on Sport, Brussels, 1999, IP 99/918

¹⁶ S. Weatherill, ‘The Sale of Rights to Broadcast Sporting Events under EC Law’, 3-4 *ISLJ* 3 in ‘*European Sports Law, Collected Papers*’, T.M.C Asser Instituut, at 292

with the consent of the right-holder, regardless of whether he had an opportunity to obtain a just reward in the country of the first sale, has led to a number of harsh judgments, where the right-owners were refused protection, as the Court's attitude has been that "the intellectual property owner must take the rough with the smooth"¹⁷ and being conferred the benefit of the access to the common market, should adjust its territorial pricing accordingly. As with other areas of free movement of tangible goods, this has overall led to a further integration of national markets and subsequently to overall consumers benefit.

The CJEU most probably saw the current cases as an opportunity to further develop the common market in the area of intellectual property and include copyrighted services such as cross-border broadcasting within its realms too. This tendency was especially strongly reflected in AG Kokott's Opinion, where she argued that "the marketing of the broadcasting rights on a territorially exclusive basis amounts to profiting from the elimination of the internal market"¹⁸ and that "there is no reason to treat such agreements any differently from agreements intended to prevent parallel trade"¹⁹.

However, the CJEU Grand Chamber chose to arrive to its judgment without making references to some of the rather arguable points raised in AG Kokott's Opinion, such as the view that "the exclusive right in copyright subject matter was exhausted when it had been lawfully distributed on the market in a Member State by the actual proprietor of the right or with his consent."²⁰ Despite the fact that the principle of exhaustion of rights has so far been only applied in the case of goods rather than services such as broadcasting, AG argued that "restrictions on the fundamental freedoms must, as a rule, be justified by reference to the same principles."²¹

It is submitted that this view was erroneous. The Copyright Directive for instance says in Recital 29 that "the question of exhaustion does not arise in the case of services and on-line services in particular."²²

In numerous decisions²³ the ECJ has held that the provisions concerning the freedom of movement of goods govern the trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals,²⁴ and the importation, distribution and theatrical exhibition of films

¹⁷ D. Keeling, *Intellectual Property Rights in EU Law*, (Volume I –Free movement and Competition Law, Oxford University Press, 2003) at p. 102

¹⁸ Opinion of Advocate General Kokott, Cases C-403/08 and C429/08, at para. 192

¹⁹ *Ibid.*, at para. 248

²⁰ *Ibid.*, at para. 180

²¹ *Ibid.*, at para. 182

²² Directive 2001/29/EC on harmonization of certain aspects of copyright

²³ Case 155/73 *Saachi* [1974] ECR 409; Case 52/79 *Procureur du Roi v. Debauve* [1980] ECR 833; Case C-260/89 *Elliniki Radiophonia Tileorassis Anonimi Etairia v. Dimotiki Etairia Pliroforissis and others* [1991] I ECR 2925,

²⁴ D. B. Winn, *European Community and International Media Law*, (Graham&Trotman/Martinus Nijhoff, 1994) at p. 67

for the purposes of public performance is governed by the freedom to provide service provisions.²⁵

The Court, unsurprisingly, chose a different line of argument. By Recognising the existence of a subject matter of an intellectual property right in the broadcasts in question, the CJEU referred to recital 10 in the preamble to the Copyright Directive and recital 5 in the preamble to the Related Rights Directive, which envisage only 'appropriate remuneration' for each use of the protected subject matter.²⁶

The Court analysed the current practice of granting absolute exclusivity in return for the premium paid (the remuneration) and found it to "give rise to irreconcilable differences with the fundamental aim of the Treaty, which is completion of the internal market as the premium cannot be regarded as forming part of the appropriate remuneration."²⁷

It is submitted in this paper that this assessment is not objective, as it does not take into account specifics of the European football broadcasting market.

Reasons behind the territorial nature of sports broadcasting rights:

A recent study on the effects of the CAD²⁸ conducted on behalf of the Commission, views the licensing of sports events broadcasting rights along national territorial lines as a cultural and economic necessity. The study recognizes that the original objective of the Directive was to facilitate the free crossing of information all over Europe, but unlike AG Kokott, it examines the reasons behind such segmentation of the broadcasting market in Europe. It submits that, "the economic nature of information goods requires separate exploitation contracts adapted to the specific value of each content on each national or linguistic market. The content markets in Europe are segmented because content is priced according to their utility and this utility strongly varies among countries."²⁹ As a practical example it submits that, "the Lithuanian football championship has little value in Spain. The German Bundesliga is better valued in Sweden, compared to Italy or in France, where the national championship relies on a few local teams."³⁰

Therefore, unlike many other subject matters of copyright it is impossible to determine what appropriate remuneration for a particular football broadcast would reflect a fair value in every Member State. Such value does not exist.

²⁵ *Ibid.*, See General Programme for the abolition of restrictions on freedom to provide services, Title V C(c), OJ, Sp. Edn., (Second Series), IX, p.3; Council Directive 63/607/ EEC OJ Sp Edn

²⁶ Joined Cases C-403/08 and C-429/08, CJEU Grand Chamber, 2011 WL 4550196, at para. 108

²⁷ *Ibid.*, at para 115

²⁸ Study on the impact of the Conditional Access Directive, on behalf of European Commission Directorate General for Internal Market & Services, 2007

²⁹ *Ibid.*, at p.114

³⁰ *Ibid*

It is submitted that the narrow examination of the cross-border football broadcasting market, based on the analysis of the English Premier League (arguably the best and most watched league in Europe) does not reflect the market in general where the only way to determine appropriate remuneration is to allow separate exploitation contracts adapted to each national and linguistic market.

This view is also reflected in the White Paper on Sport which was published by the European Commission in 2009, after the cases in question were heard in the High Court, once again confirming that “with regard to the geographic markets the Commission has held thus far that the downstream markets are of a national character or at least confined to linguistic regions. This is due to the national character of distribution as a result of national regulatory regimes, language barriers and cultural factors.”³¹

In such circumstances it remains to be seen how else European broadcasting licensing could be arranged. The potential solutions put forward by AG Kokott, such as “offering transmission rights only in the most lucrative market in the European Union—the United Kingdom” or “making the service offered on the other markets conditional on the charging of prices similar to those in United Kingdom”³² do not offer a realistic solution. Advocate General herself admits that “it could make access to transmissions of football matches more difficult.”³³

An alternative outcome where the FAPL would license its broadcasts on a pan-European basis could severely affect the interests of consumers in less affluent Member States, who simply would not afford to pay an average European price, which will undoubtedly be higher than what they are being charged now.

As Dan Sabbagh observed in the Guardian,

[A]ll media rights from books to films, could be affected – and the result would be the same. Rather than the consumer benefiting from piles of cheap imported books and DVDs printed and produced in Eastern Europe, the result would almost certainly be tighter pan-European control of rights by the big media groups, while the remaining small local players would get squeezed further.³⁴

Pan-European license, envisaged as a Common-market alternative, could, after all, result in one organisation acquiring the rights for all of the continent, thus potentially limiting competition to accommodate freedom of movement of services, harming the interests of smaller broadcasters and affecting media plurality in the Union.

There is only one broadcaster, with sufficient presence in many parts of

³¹European Commission, “White Paper on Sport –Annex I: Sport and EU Competition Rules”, 3.1.1.3.1, at p. 12

³² Opinion of Advocate General Kokott, , Cases C-403/08 and C429/08, at para. 201

³³ *Ibid*

³⁴ Sabbagh D., ‘*It’s a game of two halves, several pints, and a Greek kebab...*’, The Guardian, Monday, 7 February 2011, Media Guardian, at p. 4

Europe and the resources to expand to the remainder of it, able to complete such acquisition of broadcasting rights, which, ironically, is News Corporation/ Sky holding of Rupert Murdoch, which until recently was trying to complete the full takeover of BSkyB, the party suing Karen Murphy.

One is left to wonder how a decision that could effectively result in obstacles for MS citizens to access premium sport content from other European countries and harming competition between European broadcasters could be a desirable solution from the point of view of European law.

Based on the above arguments, it is submitted that the current system of territorial licensing is objectively justified and necessary, and the intervention by the ECJ will be contrary to Article 2(5) TFEU, superseding Member States' (MS) competence in these areas.

Competition Issues

When in 1994 the German Cartel Office decided that it was going to take away the marketing of broadcast rights for matches played by teams from Bundesliga and that the teams themselves owned the rights for them, the German government interfered and granted the Bundesliga an antitrust exemption, citing the US experience.³⁵ The reason behind the decision was the fact that money generated from the sale of these rights was divided equally among the Bundesliga teams, regardless of their popularity.

This type of cooperation between competing entities can only exist in the world of sports and this specific characteristic of it needs to be recognised. As Szymanski describes this phenomenon,

[I]n almost any market existing producers will benefit from the exit of one of their number. Exit by firms reduces competition, may enable the remaining firms to raise prices, increase market share and raise profits. The same cannot in general be said of rival teams in a sports league. Exit may harm the "sporting competition" and may undermine the quality of play. Fans may not like their rival teams, but they need them in order to support their own team.³⁶

Weatherill also comments on the issue of interdependence in sport, noting that

[I]n a sports league the horizontal relationship prevailing between the clubs is not the same as that which one finds in a normal market and the law must take account of that, or else risk mishandling the peculiar economic context in which the sports league operates.³⁷

³⁵ S. Szymanski, A. Zimbalist, *How Americans play baseball and the rest of the world plays soccer*, (Brookings Institution Press 2006), at p.165

³⁶ S. Szymanski, 'Collective selling of broadcast rights to sporting events', (2002) *I.S.L.R.* 3

³⁷ S. Weatherill, 'The Sale of Rights to broadcast sporting events under EC Law', (2006) 3-4 *International Sports Law Journal* at para. 6

The connection between the collective selling of broadcasting rights by sports organisations and exclusive territorial licensing

In July 2001 the Commission sent a Statement of Objections to UEFA³⁸, the Union of European Football Associations, complaining that its arrangements for the sale of broadcasting rights to the ‘Champions League’ –the most prestigious European football tournament- were an infringement of Article 81 EC (now Art. 101 TFEU). UEFA sells rights collectively on behalf of participating clubs and has always preferred to sell to broadcasters on an exclusive basis, for extensive periods of time. The statement from the Commission stated that it considered this arrangement to be a substantial restriction on competition because of foreclosure of the market to potential new entrants and, although stating that it recognized the need for redistribution of wealth within football, found the exclusive territorial licensing to go beyond what was necessary to achieve these legitimate ends.

The investigation by the Commission was duly concluded in July 2003, resulting in a formal Decision³⁹ which stated that the collective selling arrangements restricted competition within the meaning of Article 81(1) EC (now Article 101 TFEU). It was not a set of arrangements that were indispensable for the organization of sport, but rather a commercial choice with significant implications for the competitive process. The recognition of the special relation of interdependence, in the Commission’s view, did not justify treating an agreement to sell the broadcast rights in common as anything other than a restriction on competition.

What is extremely important for the requirements of this paper though is that the deal was deemed to be exempted under Article 81(3) EC. The reason behind the exemption was the economic gains that collective buying delivered, such as the elimination of the need for broadcasters to deal with many different clubs in different jurisdictions, which would invariably increase the transaction costs.

The *UEFA* case was of course an instance of a horizontal relationship between the clubs and the association. The collective selling of broadcasting rights must be distinguished from the anti-competitive issues in acquiring such rights by the broadcasters in other Member States – the vertical relationship. Nevertheless, as Nitsche submits, the two are “intertwined to a certain extent.”⁴⁰ And rightfully so, it seems logical that when rights are bought on an exclusive basis by the broadcasters, it would make sense to sell them exclusively as well in order to keep transaction costs down and secure their investments as exclusivity will guarantee income. The exclusivity in the vertical relationship between the rights owners and the broadcasters provides considerable profits to the owners, who can afford to pay higher prices for the rights acquired. In their turn the sporting associations, by obliging individual clubs to abstain from extracting the highest possible profit for their matches,

³⁸ IP/01/1043, 20 July 2001

³⁹ Decision 2003/778, OJ 2003 L 291/25

⁴⁰ Nitsche I., *Broadcasting in the European Union*, (T.M.C. Asser Press, Hague, 2001), at p.168

are able to “cross-subsidize between more and less wealthy clubs, maintain a competitive balance and fund the training of the youth, often called the ‘grass roots’ argument.”⁴¹

For a comparison of how this relationship works, one can compare the relevant markets in England, where the rights are bought and sold on an exclusive basis, with Spain where the clubs are allowed to market their rights independently. As some author argued, “[i]n England, for every £1.50 earned by the Premier League's top club those at the bottom get £1. In Spain it is a €80/€1 ratio in earnings from television revenue between the top and bottom.”⁴² In 2008-2009 Barcelona and Real Madrid sold their rights for 280 million euros, the same as all other 18 teams put together according to Professor Jose Maria Gay of Barcelona University.⁴³

These figures are illustrative of how the mechanical application of competition rules to sport can backfire, by stifling sport rivalry and reducing the bottom clubs' chances to catch up with the top, which in itself is anticompetitive in nature. No wonder that the latest proposals are for the rights to be sold collectively by the Spanish league, with Real and Barca keeping 17% each. Although this is still a high proportion compared to the English League, most Spanish clubs, who are desperate for money, have agreed.⁴⁴

The Commission seems to have always been aware of this delicate balance between encouraging economic competition and hampering sport rivalry. As Nitsche notes, “it is unclear how narrow the exclusivity needed to be defined not to require justification.”⁴⁵ And even when breach of Article 81(1) EC (Art 101 TFEU) was assumed, on a number of occasions, the Commission deliberated its way into finding a justification under Article 81 (3) EC (Art. 101(3) TFEU).

In the case of *FIA*,⁴⁶ there were two categories of broadcasting agreements concluded for Formula One competitions. For free-access television the contracts were typically concluded with one broadcaster in a territorially defined area and with certain limited exclusivity granted for a duration of between one and five years except for a small number which were for 10 years. For pay television, FOA (Formula One Administration Limited) entered into pay TV contracts for the ‘supersignal’ — a service provided by FOA using state-

⁴¹ *Ibid*

⁴² Sam Wallace: *Everyone wants to be like Barça but if Arsenal play the team and not the myth they might just win*, The Independent, 14/02/2011, <http://www.independent.co.uk/sport/football/news-and-comment/sam-wallace-everyone-wants-to-be-like-bara-but-if-arsenal-play-the-team-and-not-the-myth-they-might-just-win-2213900.html>, accessed on 14/02/2001

⁴³ D. Conn, ‘*Why Qatar deal has taken the shine for Barca's halo*’, The Guardian Sport, 16/02/2011, at p.6

⁴⁴ *Ibid*

⁴⁵ Nitsche I., *Broadcasting in the European Union*, (T.M.C. Asser Press, Hague, 2001), at p.168

⁴⁶ Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163 — Notification of FIA Regulations, COMP/36.638 — Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776 — *GTR/FIA & others* (2001/C 169/03)

of-the-art digital technology to produce six separate channels. The duration of these agreements was up to 11 years.

Commission sent its objections to the parties, which included competition issues concerning the media rights in 1999. From April 2000 to January 2001 the FIA and FOA submitted proposals to modify the notified arrangements in order to meet the concerns expressed by the Commission. The Notice published by the Commission in 2001 confirmed their acceptance of the proposed corrections, which amongst others removed from FOA standard contract the provision whereby broadcasters received a discount of 33% if they did not broadcast any other form of open wheeler racing and the duration of exclusive rights for terrestrial broadcasting was limited to a maximum of five years in the case of host broadcasters and a maximum of three years in all other cases.

At the same time, the Commission recognized the motor sport and especially Formula One as “a particularly complex technical activity requiring important investments in technological research and development”⁴⁷ and found it to be “indispensable for all participants to agree on the way the series are organized” and “impossible to market the individual rights of each team participating in a race.” Hence, the arrangements for FOA to be the commercial rights holder for the FIA Formula One World Championship and to sell the broadcasting rights were not deemed to be anti-competitive, although the broadcasting agreements would bring periods of exclusivity granted to individual broadcasters for a reasonable length of time, “in view of the nature of the rights and obligations and investments undertaken by broadcasters, given the specific features of sport.”⁴⁸

Commission’s assessment clearly demonstrates the link between the collective selling of broadcasting rights by the individual teams, which is necessary due to the complicated technical nature of the organization of the particular sport, and the subsequent exclusive territorial licensing, in view of the investment made by the broadcaster, which makes technological research and development possible.

As the 2009 Commission White Paper on Sport advises,

[I]t is important to note that there is no “standard” or “one-size-fits-all” approach that applies to cases involving sports media rights. The Commission will have to carefully assess each individual case in order to determine, where necessary, the appropriate remedy or remedies, taking into account the specific facts and circumstances, in particular also considering the technological developments of the relevant markets.⁴⁹

⁴⁷ *Ibid.*, ‘The notified agreements’.

⁴⁸ *Ibid.*, ‘The Assessment’

⁴⁹ European Commission, “White Paper on Sport –Annex I: Sport and EU Competition Rules”, Conclusion, at p.18

Subsequently, it is submitted that if a detailed analysis is conducted by the Court into the current market of football broadcasting, it will become obvious that “by obliging the individual clubs to abstain from extracting the highest possible profit from their matches and, instead, cross-subsidizing between more and less wealthy clubs, the funding of the training of the youth and the existence of smaller clubs is safeguarded.”⁵⁰ In their turn, the broadcasters who acquire these rights on a collective basis, paying a high premium for the privilege, “need to minimize the business risk and limit supply on the market of broadcasting rights”⁵¹ and in order to achieve it they need to be able to grant exclusive territorial licenses in each MS, according to the inherent value of a particular competition for a particular nation.

As Weatherill submits, collective selling of television rights and exclusive distribution of broadcasting rights are still seen by the Union as “essential mechanisms of maximizing revenue and ensuring it is shared between all clubs in order to preserve the balance required for a competitive league”.⁵²

Therefore, it is submitted that although as a result of such arrangements competition is restricted as the number of the suppliers on the market is reduced, sport broadcasting should be granted an exemption under Art. 101(3) TFEU, taking into consideration the above mentioned characteristics of the European sport broadcasting market. Moreover so, as by the newly introduced Art. 165 of the TFEU, there is now a provision in the Treaty itself recognizing that sport cannot simply be treated as another “business”, without reference to its specific characteristics (the ‘specificity of sport’).

What does the future hold for cross-border broadcasting of sports?

Article 165 TFEU and Football Authorities

It is clear that with the adoption of the Treaty of Lisbon, the European Community has decided to assert more regulatory responsibility in sport and Article 165 of the Treaty envisages “developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.”

The European football authorities see this emerging new competence of the Union as both an opportunity and a threat. UEFA recognises that ‘the absence of a clear legal framework and the resultant “case-by-case” approach has a destabilizing effect on sport, creating a sense of ambiguity and legal uncertainty’,⁵³ but at the same time invites the European authorities “to

⁵⁰ Nitsche I., *Broadcasting in the European Union*, (T.M.C. Asser Press, Hague, 2001), at p.168

⁵¹ *Ibid.*

⁵² S. Weatherill, ‘The Sale of Rights to Broadcast Sporting Events under EC Law’, 3-4 *ISLJ* 3 in ‘European Sports Law, Collected Papers’, (T.M.C Asser Instituut), at p. 292

⁵³ UEFA’s position on Article 165 of the Lisbon Treaty, at p. 3

recognise that sports federations have a wider public interest role and that EU law should be applied in a way that does not prejudice their ability to discharge their legitimate and statutory functions, including rule-making and application of sporting sanctions.”⁵⁴

And what UEFA is particularly worried about is how this new competence will affect the established system of football broadcasting, as the sale of audiovisual media rights is a major source of income for European sport.

UEFA’s argument reflects the rationale of this paper. The European football authority submits that

[I]n most Member States, the federation or league sells the rights centrally in order to maximise efficiency and provide the necessary financial solidarity. By sharing revenues generated between the participating teams and by directing a proportion of it to the “grass roots”, the governing bodies are able to promote fairness in competitions, train referees and coaches, combat doping, racism and violence, fund social projects and, more broadly, contribute to the sustainable development of their sport. Additionally, just as the organisation of sport is deeply rooted at local level, broadcasting of competitions follows the principle of territoriality, with respect for the cultural diversity of the EU member states.

By recognising the dangers posing the established system by the anticipated judgments in *Murphy* and *QC Leisure*, UEFA invited the European Commission, the European Parliament, the Council of the EU and the Member States to express their full support for the system of the centralised, exclusive and territorial sale of audiovisual rights for sports competitions.⁵⁵ But are such expectations of UEFA from the Union justified?

EU’s Provisional Roadmap for the Development of Sport in years 2014-2020,⁵⁶ which is to be adopted in November 2011 gives a hint of how the Union is going to approach its new powers under Art. 165.

It recognizes that “the main questions surrounding the licensing of sports rights concern the protection of IPRs from unauthorised use, the maintenance of practices based on exclusive territorial licenses and the balancing between the sale of media rights and the public's right to information.” It states that any action to be taken by the Union will need to be justified on the grounds of subsidiarity, and no action should go beyond this very ‘soft’ competence on sport awarded by Art. 165.

According to the Roadmap, such actions should only amount to “supporting, coordinating or supplementing measures in addition to the actions of the Member States, as authorised in the sport provisions of the new Treaty.”

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at p.5

⁵⁶ http://ec.europa.eu/sport/library/doc/a/provisional_ia_roadmap_sport_2014_2020.pdf, accessed on 14/02/2011

However, at the same time, the Roadmap submits that “the mainstreaming of sport into other EU policies and programmes in areas such as competitiveness, regional development, education and training and social cohesion should continue.”

It remains to be seen how much and how fast the EU will decide to assist such ‘mainstreaming’ of sport into the general framework of competitiveness, as the real effects of the CJEU judgment on sport are hard to ascertain at this point.

Previous attempts by the Commission to force multi-territory licensing mechanisms in other areas of copyright, such as online use of musical works through the 2005 Recommendation⁵⁷ on online management of music rights, have caused discontent in the music industry as well as the European Parliament.

In March 2007, the European Parliament adopted a Resolution⁵⁸ in response to the Commission's Recommendation. The Resolution clearly expressed the Parliament's opposition towards the grant of an exclusive mandate on the part of major rights holders to a single collecting society of their choice, empowered for the entire European territory. Parliament argued strongly that collecting societies should not lose their role in protecting smaller rights holders that clearly do not handle the same bulky *repertoire* as held by the majors. As Tim O'Shea observes, “[t]he Parliament's concern was that the Commission's approach would give larger collecting societies and large rights holders license to consolidate to the exclusion of smaller rights holders and societies, therefore reducing cultural diversity and choice.”⁵⁹

As already argued above, this point is equally valid for the sport broadcasting market, as the current judgment favoring a pan-European licensing system can potentially result in draconian repercussions for smaller national broadcasters and less affluent football clubs.

Conclusion

Physical attributes of media goods are fast disappearing; time and space are becoming increasingly irrelevant for delivery and pricing of media. However the same cannot be said about the cultural preferences of people of Europe. European integration has not developed to a level that would justify an eradication of territorial lines in copyright, especially in sports broadcasting. The careful language used in Article 165 and Commission's traditional unwillingness to classify sports in purely economic terms, which reflect the public policy concerns over sport's ‘grass roots’, allowed hope that the CJEU

⁵⁷ Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services 2005/737

⁵⁸ European Parliament Resolution adopted on March 13, 2007 in response to the Commission's Recommendation on collective cross-border management of copyright and related rights for legitimate online music services (005/737/EC)

⁵⁹ T. O'Shea, ‘Commission Communication on creative content online in the Single Market - music to the ears of the industry?’, (2008) *Ent. L.R* 83, at p. 84

would not create a new '*Bosman*' out of Karen Murphy and would view these cases as ones where an exemption from the usual stringent Community rules on freedoms of movement and competition was justifiable. Especially so, when many commentators were of the opinion that "the addition of 12 new Member States in the last five years may weaken the pressure for harmonisation at all costs, particularly in the ECJ where new judges will be keenly aware that removal of barriers may increase costs and reduce choice for consumers in their own countries."⁶⁰

However, the judgment shows that the CJEU has not lost any of its appetite for harmonization at all levels and at any price. It now remains to be seen what the repercussions for the European broadcasters and consumers are going to be as a result.

⁶⁰ Stothers C, '*Copyright and the EC Treaty: music, films and football*', 2009, E.I.P.R. 272, at p. 282

The Threat to Indefeasibility of Title under the Land Registration Act 2002

Ross W. Martin

The Land Registration Act 2002 introduced a system of electronic conveyancing into English law without a clear hierarchy of norms and as such constituted a system that is highly threatening to the principle of indefeasibility of title. Specifically, the provision of open network access and automatic registration of title have been introduced without safety mechanisms to prevent potential abuse. Through comparative analysis this essay will show how other jurisdictions maintain indefeasibility of title while giving effect to other norms, and show how none of these safety mechanisms is present in England and Wales. As such the law is flawed and should be reformed.

'The problem with a system of land registration is that when the Indians attack your little town in Oklahoma and burn down the post office, the whole thing goes to hell.'

– My father

Introduction

The system of electronic conveyancing envisioned in the Land Registration Act 2002 is a complete mess and should be abandoned or at least heavily reformed. Its problem is that it does not know what its priorities are; rather, it is a jumble of ideas that sound good in isolation but do not fit together at all. The fundamental norm of any system of land registration is the state's guarantee of indefeasibility of title by registration. The laws created under that system are supposed to give effect to that norm. Unfortunately, the system of automatic registration, when combined with other provisions related to network access and electronic signature, does not guarantee that indefeasibility. To (mis-)appropriate the terminology of Hans Kelsen, the law does not create a strict hierarchy of norms, whence its incoherence. This full argument will be examined after I have discussed one other problem I have identified in the law, viz., its treatment of executory contracts.

The Doctrine of Anticipation and Executory Contracts

One apparent advantage of the new system of registration is the elimination of the registration gap, a period of time under the old law between completion of the transaction and the registration of title. As legal title is acquired only by registration, a constructive trust arises under the doctrine of anticipation, whereby the property is held by the vendor on constructive trust for the purchaser until such time as the title is registered in the purchaser's name. Equity steps in to mitigate the harshness of the common law; the vendor's conscience is affected, and equity looks on as done that which ought to be done. This prevents him from selling the property again. The simultaneity of completion and registration under the LRA 2002 removes the need for a cumbersome constructive trust.¹ The implications of this are discussed later in this essay.

Hopkins identifies the effects of electronic conveyancing on equitable interests later in his book,² but in the mind of this author does not go far enough in identifying the problems that might arise from the introduction of electronic conveyancing, specifically the Act's effects on *executory* contracts. Most discussion of the doctrine of anticipation focuses on situations between completion and registration, imagining completion to be one event when the contract is signed and the purchase money and title are exchanged. But a somewhat distinct type of constructive trust arises under the doctrine of anticipation if there is a gap between signature and exchange, i.e., when the parties effect an executory contract. This trust is of an 'unusual' nature; it entitles the vendor to occupational rent from the purchaser, while the purchaser is entitled to the capital benefits of the property. Hopkins presents authority critical of this trust,³ but the existence of this trust is defensible on the grounds of commercial convenience; market conditions might dictate that a purchaser should sign a contract when the time is ripe, and arrange financing afterwards.

The LRA 2002 s93(2) throws the baby out with the bathwater. That section declares that a contract is valid only when electronically communicated to the registrar and the purchaser is registered as proprietor.⁴ Thus, an executory contract would be void until its registration, section 93(2) effectively abolishing the doctrine of anticipation as regards executory contracts in its attempt to close the registration gap. This is deleterious to the law not only on practical commercial grounds but also for doctrinal reasons. Despite the awkwardness of this trust, it has an old and well-developed doctrine supporting it. Abolishing it creates space for injustice in the area of executory contracts, and might promote the practice of 'gazumping', which is the ability of the seller to suddenly increase the price of the property because the formality requirements of the transaction had not been fulfilled. This space is perhaps to be filled with proprietary estoppel – the 'estoppel boom' predicted

¹ MacFarlane, Ben, Nicholas Hopkins and Sarah Nield (2009), *Land Law: Text, Cases and Materials*, Chapter 12, generally.

² *Ibid* 536-537

³ *Ibid* 380

⁴ Elizabeth Cooke, *The New Law of Land Registration* (Hart Publishing 2003) 162

by Martin Dixon.⁵ Stretching proprietary estoppel, perhaps by derogating from its requirement of detrimental reliance, would damage the doctrine and introduce uncertainty about its future development. Meanwhile, the abolition of the doctrine of anticipation for executory contracts is entirely unnecessary for reasons *inter alia* that it does not express the fundamental norm of land registration, viz., indefeasibility of title. As such, the LRA 2002 is flawed in this regard and should be amended to preserve this doctrine. We will now return to analysis of standard contracts for sale.

Network access

In most common law jurisdictions access to the relevant land registry network is regulated and typically restricted to solicitors and other professional conveyancers for the purpose of reducing both the number of mistakes made in the conveyancing process and more importantly reducing the scope for fraud. This reduces the need to invoke alteration and rectification and improves the overall integrity of the network, reflecting the principle that the register is to be an accurate reflection of ownership and strengthening the state's guarantee. However, the devil is in the details.

In England, the network is given statutory footing under LRA 2002 s92(1), which references Schedule 5 of the same act. The provisions of the legislation are as follows. Under the Land Registration Network Access Rules 2007 the registrar would grant different levels of access to different classes of individual, e.g., greater rights of access for professional conveyancers and solicitors than for their clients. There are three types of network access agreements. Full access is available for professionals. The criteria to qualify for full access are confidentiality, competence and adequate indemnity insurance.⁶ Full access includes notably the right to register new legal titles. Read-only access is available to for private buyers and sellers. Signature access is available to enable private clients to complete their conveyancing.⁷ These levels of access are comparable with other jurisdictions (*q.v. sub*). These levels of access demonstrate Land Registry control over the use of the system. Furthermore, the network access agreement requires the user to comply with network rules, notably the duty to disclose overriding interests, even if the client does not wish the legal interest to be registered,⁸ privileging the conclusiveness of the register over other norms such as client confidentiality. A significant issue in the use of a land registry network is registration to use the network. To my knowledge, the registration issue was never fully settled in England prior to the suspension of electronic transfers;⁹

⁵ Martin Dixon, 'Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability' in Elizabeth Cooke (ed) *Modern Studies in Property Law*, Vol. 2 (Hart Publishing 2003) 163

⁶ Charles Harpum and Janet Bignell, *Registered Land – The New Law* 165-166.

⁷ Haim Sandberg, 'Real estate e-conveyancing: vision and risks' (2010) 19(2) *Information and Communications Technology Law* 101, 106; Land Registration (Network Access) Rules 2008 Sch 1

⁸ Harpum and Bignell (n6) 168, 170

⁹ Rouhshi Low, 'Maintaining the integrity of the Torrens System in a digital environment: a comparative overview of the safeguards used within the electronic land systems in Canada,

one response in the 2010 Response Paper recommended the use of an external accreditation system to manage the credentials presented by a prospective user upon application for a network access agreement.¹⁰

The network access provisions in other jurisdictions are broadly similar or somewhat more restrictive. Ontario takes a criteria-based approach to access qualification, similar to that of the United Kingdom, including provisions for indemnity insurance.¹¹ The electronic system of the Australian state of Victoria, and the Australian nationwide system known as NECS that is based on the Victorian system, resemble Ontario and England, in that it uses objective criteria that can only be met by conveyancing professionals to restrict access.¹² In mild contrast, New Zealand's LINZ system restricts access to solicitors and professional conveyancers explicitly.¹³ In terms of registration, most jurisdictions use rigorous systems of identity verification, employing external certification authorities. All jurisdictions require the establishment of a user account with that certification authority. Ontario's Teranet system employs a Personal Security Package, consisting of a floppy disk (i.e., a token-based form of security) and a pass phrase (a knowledge-based form). New Zealand employs solely a digital certificate, whereas the Singaporean STARS system uses a user ID and password (solely knowledge-based).¹⁴ The outliers are British Columbia and NECS. British Columbia uses a login/password system similar to Singapore's, but more importantly, does not employ a system of independent verification of identity; rather, BC's Juricert system, as well as Australia's NECS system, works on the basis of referrals. Low considers this to be inferior to the certification systems used in the other systems.¹⁵

The principle behind restriction of access is rather simple; restricting access restricts fraud to insiders.¹⁶ Low (2009) discusses issues of fraud and security as regards access to the system in detail. Specifically, restricted access makes fraudulent alteration of title documents impossible, while it does little to prevent identity fraud, which is more dependent on the vigilance of the certification authority itself. As mentioned, Low believes that an independent certification authority is a superior institutional form compared to the referral system used in British Columbia and Australia. Finally, he believes that authentication of identity based on a combination of token-based methods (digital certificates) and knowledge-based methods (passwords), as used in Ontario, is better than the use of solely one or the other.¹⁷ Clearly rigorous security methods regarding registration and access based on complex software

New Zealand, United Kingdom and Singapore' (2005) 11(2) Australian Property Law Review 155, 17 (author's own pagination)

¹⁰ *Report on responses to e-conveyancing secondary legislation part 3*, page 25 (my own pagination). Henceforth known as the 2010 Response Paper.

¹¹ Sandberg (n7) 107-108, Low (2005) (n9) 4.

¹² Sandberg (n7) 109; Rouhshi Low, 'From Paper to Electronic: Explorign the Fraud Risks Stemming from the Use of Technology to Automate the Australian Torrens System' (2009) 21(2) Bond Law Review 107, 16 (author's pagination).

¹³ Low (2005) (n9) 10.

¹⁴ *Ibid* 16-17

¹⁵ *Ibid* 21. Low (2009) (n12) 5-6

¹⁶ Low (2009) (n12) 11.

¹⁷ *Ibid* 11-12

are needed, despite the inconvenience of complying with these methods. As such, the scepticism over certification expressed in the 2010 Response document should be discounted.¹⁸

In terms of the users qualified to access the system, the jurisdictions above restrict access to professionals. Most of the jurisdictions use objective criteria which can be fulfilled only by professionals, whereas New Zealand explicitly restricts access to solicitors and conveyancing professionals. The 2008 Rules essentially replicate these restrictions as regards full access. However, the LRA 2002 contains provisions for Do It Yourself conveyancing,¹⁹ whereby the Land Registry is to provide terminals at its offices, as well as advice on using the system, for the use of individuals who do not wish to employ the services of a solicitor to conveyance their property. It itself, this provision is eminently justified; it breaks the institutional monopoly the legal profession had over conveyancing, turning conveyancing into a specialised profession akin to diagnostic radiography vis-a-vis medicine. But this development does not exist in a vacuum; it interacts with the system of automatic registration, discussed below. The basis of comparison is New Zealand, which also has automatic registration. Automatic registration is rather dangerous, despite its convenience; it enables the user to change an entry on the land registry, i.e., enables the user to change the state's guarantee of title. As such, New Zealand explicitly restricts use of the system to qualified professionals such as solicitors, placing responsibility for the registry on their credentials as professionals and their indemnity insurance. There is no place for DIY conveyancing in a system of automatic registration.

Electronic signatures

The issue of electronic signatures has proven controversial among both practitioners and academics. The controversy centres on two main issues: security issues relating to the signatures themselves and the issue of practitioners signing documents on behalf of their clients. As a preliminary matter, all e-conveyancing systems use a system of electronic signature known as Public Key Infrastructure (PKI), which divides the key into public and private keys, the private key being used to identify the signatory. The private key is either stored on the user's computer or is accessed via other means, notably ID and password. The PKI system is used in all comparable jurisdictions and has been used in England for both e-conveyancing as well as online banking purposes. Electronic signatures were given legal effect in the United Kingdom under the Electronic Communications Act 2000, which implemented the European Union Electronic Signatures Directive (1999/93/EC).²⁰

¹⁸ The Land Registry, *Report on response to e-conveyancing secondary legislation part 3* The Land Registry March 22, 2010. page 26 (my own pagination)

¹⁹ LRA 2002, Sch 5 para 7

²⁰ Tim Wright, 'Electronic signatures – not worth the paper they are written on?' (2006) 8 ELB 5, 7

Raymond Perry provides a thorough criticism of the entire issue.²¹ He is worried about the security of the private key and challenges the assumption that a digital signature is equivalent to a conventional signature; the private key shows only access to the private key, not the actual identity of person with that access. Second, he criticises the practice of solicitors signing on behalf of their clients, which requires proof of their consent to that signature, claiming that the paper copy that clients sign to grant that consent defeats the purpose of electronic conveyancing. Finally, he is worried about the cost. Although his criticisms are useful in elucidating the issue, his second concern can be dismissed out of hand as mistaken reification;²² the purpose of introducing electronic conveyancing is not to make conveyancing exclusively electronic; it is to access the benefits that an electronic medium provides, such as convenience. That there would still exist a paper copy of consent does not defeat that.

The issue of conveyancers executing documents on behalf of their clients is however larger than this. The statutory basis for such signature is provided by the LRA 2002 s91(6), establishing a principal-agent relationship between client and solicitor. The LRA is silent on the issue of the actual method of granting authority, but according to Harpum and Bignell creates a presumption of authority, deeming the solicitor to be acting on the authority of his client.²³ In this context there is the immediate concern for fraud committed by the conveyancer,²⁴ but most authorities agree that a conveyancer would be very foolish indeed for committing fraud in such an obvious manner.

Nonetheless, problems remain with the arrangement, such as negligent misuse or disputes concerning the scope of authority. A comparative perspective is useful in this regard: most foreign jurisdictions provide for additional rules to control delegation of authority. For example, Ontario requires two signatures from practitioners: a completeness signature and a release signature. Both of these signatures can be delegated to conveyancers; the completeness signature ensures the conveyancer's assurance, backed by indemnity insurance, of the soundness of the documents.²⁵ British Columbia, Singapore and New Zealand are even stricter, restricting signature to conveyancers, though they use a system with only one signature.²⁶ All systems are supported by documentation signed by the client granting the conveyancer authority to sign on behalf of the client. In New Zealand this is called an Authorisation and Instruction Form,²⁷ whereas in Ontario it is called an Acknowledgment and Direction.²⁸ Low goes so far as to conclude that systems where title documents may be signed only by professional conveyancers are

²¹ Raymond Perry, 'E-Conveyancing: Problems Ahead?' [2003] 67 Conv 215, 217-220.

²² Benito Arruñada, "Electronic Titling: Potential and Risks" (2010) *New Zealand Law Journal* 115, 11 makes the same criticism.

²³ Harpum and Bignell (n6) 171

²⁴ Harpum and Bignell (n6) 171, Low (2005) (n9) 25, Low (2009) (n12) 16, Perry (n21)

219

²⁵ Low (2005) (n9) 24-25

²⁶ *Ibid* 24.

²⁷ *Ibid* 11

²⁸ *Ibid* 4

superior to ones where clients may sign on their own; auditing the documents is substantially easier with a smaller number of PKI key pairs, enabling the registry to identify mistakes and more importantly fraud more quickly and easily.²⁹ Furthermore, the practice of conveyancer signature reduces the scope for identity fraud by clients. A rogue client would have to establish a false identity with the conveyancer by conventional means such as impersonation and forgery.³⁰ A system such as the one in Ontario which places the responsibility on the conveyancer to ensure the validity of all documentation adds an extra layer of protection against fraud and provides incentive for heightened vigilance.

Regarding the security of the electronic signatures themselves, it should be noted that all of the Commonwealth jurisdictions under consideration use PKI technology, as does the United States under the Uniform Real Property Electronic Recording Act 2004, which applies the validity of electronic signatures developed in earlier legislation to real estate.³¹ PKI is approved of in the American Bar Association Digital Signature Guidelines.³² The use of single-use PKI signatures was envisioned in the EU Electronic Signatures Directive 1999,³³ which was implemented by the ECA 2000. At the risk of engaging in *argumentum ad populum*, the use of PKI technology is common practice around the world. The normative question is whether electronic security increases the scope for fraud, and Low is correct in claiming that electronic signatures impose new obligations on users, in that they must additionally ensure security for the certificates used to effect digital signatures. Many jurisdictions have imposed best practice guidelines on users to discourage irresponsible password practices; for example, both Ontario and New Zealand have imposed such guidelines on conveyancers.³⁴ This provides further support for the argument of limiting signature to professional conveyancers; the Law Society and individual law firms could impose additional rules on conveyancers in a way that they could not with private clients.³⁵

In the 2010 Response Paper, the Land Registry notes that the Council of Mortgage Lenders is hostile to the idea of delegated signing on behalf of borrowers, whereas the Law Society is receptive to the idea.³⁶ The scope for mistake and fraud arising from the technical system of electronic signatures can only be determined empirically, and at this point in time it is too soon to tell. But in light of the arguments made above regarding delegated electronic signatures, and reflecting basic principles of precaution (and following the example of New Zealand), maintaining a system of electronic signature held exclusively in the hands of professional conveyancers is likely to be the best course of action. This gives conveyancers a strong incentive to ensure the cleanliness of the documents they submit. Conversely, adopting a system like

²⁹ *Ibid* 25.

³⁰ Low (2009) (n12) 2

³¹ Sandberg (n7) 104-105

³² <http://www.abanet.org/scitech/ec/isc/dsgfree.html> Accessed 15 January 2012.

³³ Electronic Signatures Directive (1999/93/EC)

³⁴ Low (2009) (n12) 15

³⁵ Low (2005) (n12) 25

³⁶ Land Registry (n18) 27 (my own pagination)

that of Ontario, where private parties are allowed to sign on their own behalf, but where that signature is guaranteed by the professional, is a viable alternative. Nowhere in the literature is there an argument justifying client signature on its own.

Automatic Registration

As mentioned above, s93 of the LRA 2002 provides for simultaneous completion and registration. Internationally, the institutional choice is between mere electronic lodgement of documents and proper automatic electronic registration. In the early 2000s, England 'dematerialised' its land register by scanning documents and removing the need for paper titles. Unfortunately, this resulted in a massive increase in fraud due to poor institutional design; entire mortgage documents were available online and accessible anonymously. Fraudsters were thus able to copy homeowners' handwritten signatures and appropriate their property. This has since been reformed, but has left a bad taste in the mouths of many solicitors. Nonetheless, the convenience of online title searches is not in dispute and the relative openness of the English Land Registry remains intact.

Systems of electronic lodgement exist in Ontario, British Columbia, Australia, and Singapore, and resemble what now exists in England. Virtually all systems now provide pre-formatted electronic forms and enable the automatic population of fields in those forms. These forms are then submitted to the municipal land registry for review. E-lodgement creates an electronic copy of the data in the entry on the registry (cf. scans of documents). The main distinguishing feature of electronic lodgement is manual review by land registry staff prior to registration, which replicates the way paper-based land registries function. It is possible that manual intervention by land registry staff reduces errors.³⁷ Because all submissions are reviewed by staff, lodgement remains open in that non-lawyers may submit notices;³⁸ a basic principle of land registration is that a notice protects priority but not necessarily validity. E-lodgement exhibits flexibility in submission method and the content of submissions, while ensuring state control over guarantee of title under the Torrens system. The main disadvantage is the time it takes for the municipal land registry to review submissions.

Automatic registration of title is the goal of the LRA 2002 s93(2). This system already exists in New Zealand. Assuming issues of network access are dealt with, and electronic signatures are properly affixed to the document, a user of the land registry network has the ability to register legal titles directly on the land registry, i.e., to change the legal title directly without intervention from registry staff. This is certainly convenient from a conveyancing perspective, but it should raise red flags from a legal perspective, as the state guarantee of legal title, i.e., the state's definition of property rights, is being controlled by private parties. To mitigate this danger, New Zealand has a number of checks in place. First, New Zealand's Landonline system employs a number of pre-

³⁷ Low (2005) (n9) 26.

³⁸ Arruñada (n22) 5

registration checks: pre-validation, to ensure that the eDealing will pass registration when submitted; the use of templates with pre-defined fields; and Landonline's own automated checks for errors.³⁹ Moreover, New Zealand requires certification of the legality of the submission, i.e., transferring the responsibility of maintaining the integrity of the system from registry staff to the legal profession itself, who have become de facto land registrars. As noted above, access to the system in New Zealand is restricted to conveyancing professionals, who are the only people allowed to affix electronic signatures.⁴⁰ Arruñada says that the effects of the New Zealand system are too new to be assessed. He cites New Zealand Law Commission data that indicate an increase in the number of errors. He also discusses a trade-off regarding risk of fraud: there is a reduction in fraud due to the restriction of access and the removal of duplicate certificates of title, but possible increases in fraud due to registration prior to completion among other reasons. He cites problems regarding rightholders' consent and uncertainty surrounding settlements. He concludes by saying that the increased risk of fraud is correlated with an increase in the average quality of conveyancing, due to the responsibility placed on conveyancers.⁴¹

The normative implications of automatic registration are clear. The normative basis of the Torrens system of land registration is indefeasibility of title, i.e., state guarantee of title. Correction of the register indicates a lower quality title, the register ideally being conclusive as to title. In New Zealand, the system rests on a system of automatic checks and the responsibility (and possible sanctions) placed on the legal profession. To be fair, the English system also includes a number of these security provisions, though, as discussed below, they interact poorly with other provisions. But the rationale behind automatic registration is twofold: the elimination of the registration gap and simple expediency.

In an e-lodgement system, the registration gap is de facto, if not de jure, eliminated. Deeds, charges and transfers of purchase money are all filled out using pre-existing forms. The documentation created upon completion could be submitted electronically to the land registry immediately. One can imagine a system where protection of priority would be based solely on electronic submission to the land registry.⁴² Upon submission, its priority would be protected, even if legal title does not pass immediately. It is in that way that the negative effects of the registration gap, e.g., the granting of an easement or lease during the gap period,⁴³ are eliminated. If a rogue vendor then sought to grant some other legal interest in the land after the earlier submission, and if prospective validity of such a grant were dependent on electronic submission, such a grant would be flagged by the electronic system and the second purchaser would be informed immediately. The constructive trust under the doctrine of anticipation would have arisen upon the first submission, and

³⁹ Low (2005) (n9) 26, Arruñada (n22) 6.

⁴⁰ Low (2005)(n9) 26-27, Arruñada (n22) 6-7

⁴¹ Arruñada (n22) 8

⁴² It is unknown to me whether Ontario has such a system, but my guess is that it does. Ontario does use a system of notification of rightholders upon lodgement: Arruñada (n22) 5.

⁴³ *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [2001] Ch 733 CA

would bind the would-be bona fide purchaser as he would be made aware of it by the system. Both the first and second purchasers would be protected. Priority by (electronic) lodgement instead of title by (electronic) registration.

If the registration gap is not an issue then the only advantage automatic registration has is expediency. That expediency must be weighed against the risks of mistake and fraud that damage the indefeasibility of title. The question thus becomes one of measures in the law to prevent mistake and fraud. In this author's mind, the measures that England has in place do not compare well with New Zealand, and do not justify the expediency of the system. This is discussed below.

Analysis and Conclusions

As stated in the introduction, the system of electronic conveyancing as envisioned in the LRA 2002 is a jumble of ideas that sound good in isolation but do not fit well together, i.e., do not fit well into a hierarchy of norms. Land registration does indeed have an identifiable *Grundnorm*, viz., the indefeasibility of title. The indefeasibility is created by the declaration of the conclusiveness of the register. That conclusiveness is expressed in the three classic principles: the mirror principle, the curtain principle, and the insurance principle. The mirror principle shows the prospective purchaser what legal estates and interests affect the land. The curtain principle and the overreaching mechanism ensure that the purchaser is able to take free from equitable interests in the land. Finally, the insurance principle is the state's back-up when something goes wrong, compensating the dispossessed when mistakes are made. The system works and the hierarchy is intact.

There are several other identifiable norms in the LRA 2002 and specifically in the system of electronic conveyancing.⁴⁴ One such norm is a desire to close the registration gap, which, as discussed above, seems to stem from a misunderstanding of the possible functioning of the doctrine of anticipation under an electronic system. Another such norm is expediency. Reducing the time it takes to conveyance a property is *per se* a good idea; it assists commercial transactions by reducing transaction costs, i.e. the time it takes to wait for the title to be transferred. This norm is expressed in the system of automatic registration. Arruñada notes that the increase in mistakes and fraud attendant to a system of automatic registration should lead the registry to 'exercise greater powers of correction.'⁴⁵ Indeed, the LRA 2002 itself has renewed provisions for what is euphemistically called 'alteration', of which correction of mistake is a subset.⁴⁶ The guarantee of any system of land registration is not foolproof and scope for correction is necessary, but discussions of this sort directly contradict the conclusiveness a system is supposed to have.

⁴⁴ To be fair, the LRA 2002 did reduce the number of overriding interests, thereby increasing certainty of title.

⁴⁵ Arruñada (n22) 7

⁴⁶ LRA 2002 ss20-21

New Zealand counteracts the possible ill effects of automatic registration by instituting a rigorous system of control over who may access the network and who may sign electronically. No other system under consideration in this essay uses automatic registration, yet they too maintain various degrees of control over the machinery of land registration. All systems give the legal profession an incentive to maintain the integrity of the system by requiring certification and imposing sanctions and obligatory insurance. Yet in England, another norm is introduced: citizens' empowerment. The monopoly of the legal profession over conveyancing should be broken, private citizens should be able to conveyance their own property, and conveyancing should become a retail service ('Tesco law'). Again, this sounds good in isolation. I am no fan of entrenched bureaucratic interests, and I am not even convinced that electronic signatures are any more susceptible to fraud than physical signatures. To be sure, furthermore, the Land Registration (Network Access) Rules 2008 do enact provisions controlling access and use of electronic signatures. But other systems carefully guard access to the system, not to maintain the monopoly of the legal profession,⁴⁷ but to maintain the integrity of the system, i.e., to preserve the conclusiveness of the register. In other words, those rules are subordinate to the primary norm. In England, that norm is functioning independently.

When combined with automatic registration, open network access is potentially disastrous to the guarantee of the register, the imputed Kelsenian *Grundnorm* of land registration. This is because, specifically, the different norms as expressed in the system do not fit together. But more importantly, the law was drafted without a clear hierarchy. The Law Commission in 1998⁴⁸ 'denied the contrast between the "machinery" of land registration and the "substantive law of the land",'⁴⁹ and in that regard they were entirely correct. The machinery certainly gives effect to the substantive law, the content of the law, the principles that the law hopes to express. Here, the Law Commission gave effect to several different principles without regard to the vandalism they were doing to the fundamental principles of land registration. If the Law Commission and the Parliament intend for the principles of commercial expediency and citizens' empowerment to be more important than the principle of indefeasibility of title, that is their prerogative. But in that case they should abandon registration entirely, privatise the Land Registry, and have England head off into the Wild West of deeds registration, title insurance, and indeed cowboys and Indians.

⁴⁷ Or not entirely.

⁴⁸ Law Commission and HM Land Registry, 'Land Registration for the Twenty-First Century: A Consultative Document' (Law Com No 254, 1998) [1.5]. Quoted in Nair 266.

⁴⁹ Nair 266

'Personal injury damages have no place within the tort of nuisance': A critical analysis of the validity of Professor Newark's assumption

Bekki Flood

There is a belief that personal injury damages should be recoverable within the tort of nuisance. However, Professor Newark emphatically rejects this. By considering the two key questions of who can sue and what is actionable, and analysing the way in which both the academics and the judiciary have approached the normative question as to whether PI damages should be recoverable in nuisance law, this article will assess the validity of Newark's rejection. This article argues that Newark was correct in his submission with regard to private nuisance, but in his search for a categorised system of law erred in his assumption that both private and public law protect the same interests, and thus was incorrect with regard to public nuisance. The article further argues that until the judges truly ask the question of whether PI damages should be recoverable and thereby balance the interests of the parties, certainty has won the battle against justice.

Introduction

The question of 'What is nuisance?' is immersed in undefined certainty.¹ The prime cause of this, according to Professor Newark, is that the boundaries of the tort are blurred. The aim of Newark's article is to show how many of our present troubles concerning nuisance are due to an improper extension of the term² and ultimately, that personal injury (hereafter PI) damages have no place within the tort.

In order to critically discuss Newark's seminal statement, it is first necessary to expose its hidden internal assumption, that nuisance is a tort of land and not of the person. The validity of this assumption will be analysed by consideration of two key questions: 'Who can sue?' and 'What is actionable?' Furthermore, it will also be necessary to analyse the way in which both the academics and judiciary have approached the normative question, 'Should PI damages be

¹ Erle C.J.'s undelivered judgement in *Brand v Hammersmith* (1867) L.R 2 Q.B. 223, 247

² Newark, 'The Boundaries of Nuisance' (1949) 65 *LQR* 480, 481

recoverable in nuisance law?', in order to submit an informed response as to whether Newark is in fact correct in his denial of their recoverability.

There are two forms of nuisance that will be of concern during this article, namely, 'private' and 'public'. It has been continually suggested that the only common characteristic shared by these two nuisances is their name,³ thus it appears necessary to distinguish between them and consider each separately throughout. For reasons of brevity and the differing approaches of classification of *Rylands v Fletcher* as either a sub-set of negligence or alternatively nuisance, discussion will not be directed towards this topic.

Private Nuisance

Private nuisance lacks in any exact definition, but has been described as "unlawful interference with a person's use or enjoyment of land, or some right over, or in connection, with it";⁴ a description that has received subsequent approval.⁵ The tort can take three forms, by: '(1) encroachment on, (2) direct physical injury to, or (3) interference with the quiet enjoyment of a neighbour's land.'⁶

Who can sue?

For many years it has been settled law that only those with a property right may sue in private nuisance; *Malone v Laskey*.⁷ An exception was generated in *Khorasandjian v Bush*,⁸ where the Court of Appeal held that that a woman, despite having no legal interest in the property, was entitled to sue. However, this exception was later duly rejected in *Hunter v Canary Wharf Ltd*.⁹ It is necessary to take a closer look at the judgments expounded in this case.

What is actionable?

The majority judges illustrated great apprehension to the idea of PI damages within private nuisance and declined to shift the boundaries through fear of significant practical difficulties;¹⁰ subsequently holding that only damage to land was recoverable. Giliker and Lee¹¹ both suggest that this confinement is due to the court's conscious aim to return the tort to its origins of protection of the use and enjoyment of *land*.¹²

Lord Hoffman, reflecting on the history of the law, felt that the very idea of the recoverability of PI damages had resulted from a misunderstanding of the case

³ Gearty, C, 'The Place of Private Nuisance in a Modern Law of Torts', (1989) 48 *CLJ* 214, 214

⁴ Rogers, Winifield and Jolowicz on Tort (14th edn, 1994), 404

⁵ *Read v Lyons* [1947] A.C. 156, Scott LJ

⁶ *Hunter v Canary Wharf* [1997] A.C. 655, per Lord Lloyd

⁷ [1907] 2 KB 141

⁸ [1993] Q.B. 727

⁹ (fn 6)

¹⁰ Oliphant, K, 'Unblurring the Boundaries of Nuisance', (1998) 6 *Tort L Rev* 21, 25

¹¹ Lee, M, 'What is Private Nuisance?', (2003) 119 *LQR* 298, 299

¹² Giliker, P, 'Hunter: A Return to the Roots of Private Nuisance', (1997) 48 *NILQ* 389, 391

of *St. Helen's Smelting Co. v. Tipping*,¹³ namely, that cases causing 'sensible personal discomfort' included PI.

The furthest Lord Hoffman would accede was that, in addition to damages for injury to land, a claimant may be able to recover damages for consequential loss, but 'inconvenience, annoyance or even illness suffered by persons on land'¹⁴ do not fall within this category. As noted by Oliphant, this willingness to allow claims for consequential damage and thus the protection of other distinct interests, in fact potentially threatens the torts status as a 'tort of land'.¹⁵ Lord Hoffman further intimated that PI damages require no additional protection as they are already subsumed within the tort of negligence.¹⁶

This is an extremely naïve viewpoint when, as Cane and Lee¹⁷ persuasively argue, the substantive issues should be carefully balanced rather than this formulaic search¹⁸ for the tort that the harm fits most neatly into. Further, as Palmer and Fordham illustrate, due to its infant development¹⁹ and the flawed nature of the tort, negligence may not be the the most adequate tort to offer this protection.

Gearty argues that the criterion of physical damage has crept its way into the tort of nuisance and should now be returned to its rightful home of negligence;²⁰ a suggestion that Newark offered also. Consistent with the approach of the majority, Gearty argues that the function of private nuisance is to 'protect occupiers against non-physical interference with the enjoyment of their land',²¹ which can be interpreted as direct support for Newark's contention.

Conversely, after stating that PI damages are clearly established in public nuisance, Lord Cooke claimed that he could see no sensible difference between the two types of nuisance in order to justify the difference in the kind of actionable harm and further, that the nature of the injury is irrelevant; the focus should be placed on the *use* and *enjoyment* of land.²² Palmer provides support, questioning "Why users of a highway should...enjoy a level of bodily security not enjoyed by private landowners?"²³

Lord Cooke referred to the writings of Davies in order to draw further support for his stance. Whilst aspects of Davies' article appear somewhat outdated in

¹³ (1865) 11 H.L. Cas. 642

¹⁴ (fn 6) 707

¹⁵ (fn 10) 28

¹⁶ (fn 6) 707

¹⁷ (fn 11) 299

¹⁸ Cane, P, 'What a Nuisance!', (1997) 113 *LQR*.515, 520

¹⁹ Fordham, M, 'The roll of the negligence bandwagon: What role for public nuisance?', (2003) 11 *Tort L Rev* 26, 37

²⁰ (fn 3) 218

²¹ (fn 3) 218

²² (fn 6) 679

²³ Palmer, R, 'PI in Private Nuisance: The Historical Truth about Actionability of 'Bodily Security', (2009) 21 *ELM* 302, 310

light of Dyson LJ's authoritative statement that 'PI damages are not recoverable in private nuisance',²⁴ he does make some very interesting observations.

Davies stated that in *some* circumstances a cause of action in nuisance does not rest upon fault and therefore is a strict liability offence;²⁵ a submission supported by Cross,²⁶ thus placing a claimant in an advantageous position as to the choice in which tort to base their claim. However, there is also support to be found for the fact that nuisance has lost its identity as a strict liability tort and been assimilated, in all but name, into the fault-based tort of negligence.²⁷

Palmer, interpreting Newark's stance as being based on 2 arguments; one of history (of which he feels is an inaccurate account) and the other jurisprudential, of what the position ought to be in the modern day, provides *his* alternative recollection of the history of the tort with bodily security resting at its heart. He argues, amending Lord Cooke's argument slightly, that nuisance is concerned with protecting the *enjoyment* of rights *not* of land itself, but against neighbours.²⁸

In balancing the weight of the judgements, it is difficult not to be negatively swayed in light of the weak support provided by Lord Cooke, especially, as will be discussed later in greater detail, his suggestion that public and private nuisance are the same.

It appears he chose not to embark upon the question of fault that Davies alludes to and in fact misinterpreted Davies' article which appears to state that severe consequences are the likely result of allowing PI damages within private nuisance.

Furthermore, from the majority's affirmation that nuisance is to be regarded as a tort against property and the lack of solid argument against it, coupled with the Court of Appeal's subsequent approval of this approach in *Corby*,²⁹ it is possible to find support for Newark's belief, at least in so far as private nuisance is concerned.

'Should'

However favourable the outcome of the majority in *Hunter*³⁰, it appears they pursued a policy of certainty³¹ in asking whether recoverability logically flowed from the history. It seems that just like Newark, they 'prefer their hedges neat

²⁴ *In re Corby Group Litigation* [2009] Q.B. 335

²⁵ Davies, M, 'Private Nuisance, Fault and Personal Injuries', (1990) *W. Austl. L. Rev.* 129, 133

²⁶ Cross, G, 'Does Only the Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance', (1995) 111 *LQR* 445, 459

²⁷ *British Road Services v Slater* [1964] 1 WLR 498, 504 per Lord Parker

²⁸ (fn 23)

²⁹ (fn 24)

³⁰ (fn 6)

³¹ (fn 12) 399

and their boundaries tightly drawn'.³² Whilst these may appear wholly legitimate goals and despite the overwhelming weakness in his arguments, Lord Cooke's approach appears far more appropriate as one that considers the normative question of whether they *should* be recoverable, in order to strengthen the 'justice and utility of the law'.³³ As he himself points out, this approach may not always conduce to tidiness, 'but tidiness has not had a high priority in the history of the common law'³⁴.

Palmer does not say overtly that PI damages *should* be recoverable, but argues that whilst the law must adapt with the modern day, a change should have its foundations based 'not on myths arising from Newark's influential but thin analysis'.³⁵ His article can be interpreted as in direct opposition to Newark's submission, through his dissatisfaction with the development of the law and ultimately his belief that 'security of property and security of person are so deeply interconnected at law that it is conceptually difficult to divorce one from the other'.³⁶

From consideration of the prominent academics surrounding this issue, it is clear that there is a common theme running through each of the opposing arguments. Gearty, who proposes similar arguments to those of Lord Hoffman and Newark, focuses on the categorisation of the harm rather than the balancing of the interests between the parties in order to create certainty and prevent the tort from escaping its boundaries. Palmer, Cane and Lee, who support PI damage recoverability, look more to the substantive question at hand and afford greater weight to the importance of this normative question in the search for a fair and just outcome.

Thus it appears those in favour of strict boundaries stand in opposition, whilst those in favour of the exploration of the prominent issues at hand support PI recoverability.

Public Nuisance

In the case of *R v Rimmington* and *Goldstein*³⁷ the definition of public nuisance was confined to a person who: "(a) does an act not warranted by law or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or discomfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all her Majesty's subjects."

³² Pointing, J, 'Public Nuisance Re-visited?', COBRA 2010 Conference Paper

³³ (fn 6) 711

³⁴ (fn 6) 711

³⁵ (fn 23) 310

³⁶ (fn 23) 305

³⁷ [2006] 1 AC 459

Who can sue?

Public nuisance can be divided into 3 categories: (1) “amalgamated” private nuisances, (2) nuisances that affect a sufficient class of people, actionable by an individual suffering “special damage”, and (3) cases relating to the highway, all in which the claim is brought by the Attorney General.³⁸ Importantly, an interest in land is not required.³⁹

What is actionable?

Historically, public nuisance began as a criminal writ belonging only to the Crown and was generally restricted to obstructions of public highways and waterways. However, over time, there has been rapid expansion of what is to be considered a public nuisance, resulting in Spencer describing the offence as, "...a rag-bag of odds and ends".⁴⁰

The leading case in relation to public nuisance is *Corby*.⁴¹ The claimants in this case were claiming in negligence, public nuisance and breach of statutory duty in relation to birth defects allegedly caused by their mothers' exposure to toxic material during pregnancy.

The Council argued that cases which had resulted in the award of damages for PI must have been wrongly decided in light of *Hunter*⁴² and *Transco plc v Stockport MBC*.⁴³

Reference was also made to the writings of Newark in order to argue that in both public and private nuisance ‘the interest of the plaintiff which is invaded is not the interest of bodily security, but the interest of liberty to exercise rights over land in the amplest manner’,⁴⁴ and thus it would follow that the rule of non-recoverability of PI damages must apply to public nuisance also.

The Court of Appeal accepted that damages for PI should not be recoverable in private nuisance, but refused to strike out the claim stating that the long-established principle of PI recoverability in public nuisance had not been impliedly reversed nor criticised in either of those cases.

By way of dismissal, it was noted that the cases referred to, which in fact arose in private nuisance, did not concern damages for PI, and the most that could be said was that *Hunter*⁴⁵ had raised the serious possibility that the House of Lords might in the future adopt the reasoning of Newark, but it was not open for the Court of Appeal to take this step.⁴⁶

³⁸ Steele, J, *Tort Law: Text, Cases and Materials* (Oxford University Press, Oxford, 2010), 668

³⁹ (fn 24) 345

⁴⁰ Spencer, J.R, “Public Nuisance - A Critical Examination” [1989] 55 *CLJ* 73

⁴¹ (fn 24)

⁴² (fn 6)

⁴³ [2004] 2 AC 1

⁴⁴ (fn 2) 489

⁴⁵ (fn 6)

⁴⁶ (fn 24) 347

Dyson LJ authoritatively stated that the definition of the crime of public nuisance 'says nothing about enjoyment of land... some public nuisances undoubtedly have nothing to do with the interference with enjoyment of land...';⁴⁷ a statement in direct opposition to the definition expounded by Newark, and further stated that PI is an obvious consequence of the interests that the tort seeks to protect.

Pointing provides support in this regard stating that public nuisance is to be viewed as a 'separate, rights-based tort from private nuisance: one that does not depend on the victim having a proprietary interest in land'.⁴⁸

From this case, it is undoubtable that PI damages are available in public nuisance. Throughout this discussion and by way of Dyson LJ's judgement it is obvious that private and public nuisance are not of the same genus. This appears to be the fundamental mistake made by Newark when stating that both were involved in the protection of land and consequently in his application of argument to both. As the arguments against the recoverability of PI damages in private nuisance all focused on its founding nature as a tort against land, it is clear that none of these arguments apply here.

'Should'

In public nuisance, as opposed to private nuisance, there is considerably less controversy, and thus less academic discussion, surrounding the issue of whether PI damages should be recoverable. The difference in approaches can be attributed to the effect that PI recoverability would have upon each tort.

In private nuisance, PI recoverability would extend the boundaries of the tort to include a new type of interest, thus resulting in the controversial approach to the element of 'should' by both the academics and judiciary.

Whereas in public nuisance, where it has long been established that PI damages are recoverable, the effect would have been to limit the boundaries of the tort. The approach of Dyson LJ appears to be to ask whether there was sufficient evidence to show that a different approach was needed to that which history had constructed.

Once again the argument of history is facilitated, but this time in a very different fashion. With reference to private nuisance, the validity of historical cases was used in order to illustrate that the tort should not be extended, but in public nuisance when the history does not appear to support the limitation of the tort, those in favour of strict categories argue that the history must therefore be incorrect.

⁴⁷ (fn 24) 345

⁴⁸ (fn 32)

Conclusion

During this article the founding basis of both private and public nuisance have been uncovered in order to analyse the proposed statement.

Throughout this discussion, it has become clear that the underlying debate of whether nuisance is a tort against land or the person is critical in answering the question of recoverability. But also beneath this, lies a greater struggle between substantive justice and the need for certainty; two paradoxical ideas which influence dramatically the way in which both the academics and the judiciary have interpreted this question of '*should*'. Those who oppose recoverability, concern themselves with the logical flow from the history of the law, whilst those who support, focusing on serving future justice.

It would appear that in weighing up the evidence, Newark was correct in his submission with regard to private nuisance, but in his search for a categorised system of law erred in his assumption that both private and public protect the same interests, and with this in mind was incorrect with regard to public nuisance.

The more certain and rigid the law becomes the less just the outcomes tend to be, so the more the judges push for cases to fit into strict boundaries, the more likely the substantive issues that are at stake in cases are likely to be overlooked.

It appears that until the judges truly ask the question of whether PI damages '*should*' be recoverable and balance the interests of the parties, that certainty has won the battle against justice, at least for the time being.

The future of child maintenance: *Laissez-faire*

Samuel Salter-Galbraith

In its recent Green Paper *Strengthening families, promoting parental responsibility: the future of child maintenance*, the Government indicated that they would “reform the system to encourage families to reach their own solution on contact and maintenance wherever possible. However, where parents are not able to make maintenance arrangements themselves the Government will provide a strong and cost-effective service to transfer money to support children.” Using evidence from case-law and legislative provisions introduced since 1993, as well as the experiences of other jurisdictions, this essay critically evaluates whether the Government’s recent proposals on child maintenance are likely to succeed in achieving positive outcomes for families and children as well as the tax-payer. This essay hypothesises that this Green Paper proposal provides only the barest of bones for the child support scheme and if it were set in motion as it currently stands, it would fail. It places too much faith in parents that they will assume responsibility and proposes a back-up service. Past evidence has shown that all preceding systems have failed.

Introduction

In the UK there is approximately £3.7 billion in outstanding child support arrears owing to families. The “simply disastrous performance”¹ of the past eighteen years of legislation continues to allow the issue of child support system to blight the society we live in. More than ever “the onus is now firmly on the government....to bring forward legislation to provide a genuinely fresh start for child support.”²

Recently, the Government announced that they would “reform the system to encourage families to reach their own solution on contact and maintenance wherever possible. However, where parents are not able to make maintenance arrangements themselves the Government will provide a strong and cost-effective service to transfer money to support children.”³ This proposal forms part of the new move towards “the Henshaw model”⁴ and further develops

¹ Wikeley, N ‘Child Support- Back to the Drawing Board?’ [2006] Fam Law 312, at 314

² Wikeley, N ‘Case Commentary: A Duty but not a Right: Child Support after R (Kehoe) v Secretary of State for Work and Pensions’ [2006] 18 (2) CFLQ 287, at 302

³ Green Paper *Strengthening Families, Promoting Financial Responsibility: The Future of Child Maintenance* (2011) Cm 7990, at p. 17

⁴ Wikeley, N ‘Child Support Reform- Throwing the Baby out with the Bathwater?’ [2007] 19 (4) CFLQ 434, at 456

upon the partially-implemented Child Maintenance and Other Payments Act 2008⁵.

In order to critically evaluate the proposals it requires a separate and focused look at the encouragement of private arrangements and the creation of a 'strong and cost-effective service'.

Hindsight is a wonderful thing and hence it is invaluable to consider the previous child support legislation and case law, as well as the experiences of other jurisdictions. At first glance, if the past is anything to go by then the likelihood of success in achieving positive outcomes for families, children and tax-payers in the future must be rather low.

Private Arrangements

"The clear policy of the law today is to encourage couples to resolve between themselves."⁶ Private arrangements in child support have always been an option for all those not on income-related benefits, but recent legislation has cleared the way so that everybody can now partake in this proposal.⁷

It was deplorable that "not all parents were treated in the same way under the schemes [Child Support Act 1991⁸ and Child Support, Pensions and Social Security Act 2000⁹]. Those that could afford it and reach agreement were enabled to opt out of it altogether."¹⁰ The confirmation by the proposal that "the system will no longer discriminate against people simply because they are poor"¹¹ is a "commendably egalitarian measure"¹².

In allowing parents to come to their own arrangements over maintenance and contact it allows them to avoid the "byzantine labyrinth"¹³ of child support systems put in place over the past 18 years. No longer will parents be forced to attempt to tackle the "series of mathematically obtuse calculations in innumerable unintelligible Schedules"¹⁴ used in the formulas of the CSA 1991 and the CSPSSA 2000 systems.

Furthermore, parents can bypass a system where "arrears are not just substantial but endemic in the CSA system."¹⁵ With a dismal case compliance of 70% under the CSA 1991 and 63% under the CSPSSA 2000¹⁶, it follows that

⁵ Hereafter, "CMOPA 2008"

⁶ Wikeley, N *Child Support: Law and Policy* (Hart, Oxford, 2006), at 185

⁷ Section 15 CMOPA 2008, repealing section 6 Child Support Act 1991

⁸ Hereafter CSA 1991

⁹ Hereafter CSPSSA 2000

¹⁰ *R (Kehoe) v. Secretary of State for Work and Pensions* [2003] EWHC 1021 (Admin), per Wall J, at Para 92

¹¹ HC Deb 4 July 2007, Vol 462, col 981

¹² See note 4 above, at 444

¹³ Mostyn, N *The Green Paper on Child Support- Children First: A New Approach to Child Support* [1999] Fam Law 95, at 96

¹⁴ *Re C (A minor)(Contribution Notice)* [1994] 1 FLR 111, per Ward J, at 117

¹⁵ See note 4 above, at 438

¹⁶ DWP, *CSA Quarterly Summary Statistics: June 2007*, Table 7.1- Even in these cases only 66% are fully compliant under the CSA 1991 and 43% under the CSPSSA 2000, Table 8.2

“just because we need child support, it does not necessarily mean that we need a Child Support Agency”¹⁷. It is a positive outcome that families be allowed to avoid these failings.

Additionally, families will largely be able to avoid the complexities of the court system as evidenced in *DWP v. Roach*¹⁸. Despite the parent with care’s¹⁹ claim of “fear of retribution” by the non-resident parent²⁰ she was compelled to go through the Child Support Agency²¹ in virtue of her receipt of income support. The court held that the PWC had been lying and exaggerating to allow the NRP to evade financial responsibility and, therefore, a reduction in income support was valid²². The case detracted from the central issue of child support receipt and added stress to what was already a fractious situation. The proposal to allow private arrangements would mean that a PWC in Ms Roach’s position would be allowed to conduct herself as she saw fit, still receive income support and avoid litigation. Consequently, it may “also help to avoid the costs associated with protracted litigation, which can increase exponentially once the parties are actually in court.”²³

Unquestionably, private arrangements allow for increased parental autonomy. Furthermore, by “giving the people the opportunity to support their children...in a private arrangement...it both reinforces and respects parental responsibility.”²⁴ Currently, “the Child Support Agency removes responsibility for negotiating the level of child maintenance...which may limit the potential for reasonableness and generosity.”²⁵ This is evident in the issue of shared care. Currently, a child must stay with the NRP for more than 104 nights a year under the CSA 1991 and for more than 52 nights a year under the CSPSSA 2000 in order for the NRP’s liabilities to be reduced. As well as the consternation caused by the differing thresholds, this system “fuels continued conflict between parents over contact arrangements”²⁶. Indirectly, the legislation promotes the negative idea of cash-for-contact. Parental autonomy in private arrangements provides the opportunity to incorporate shared care issues into negotiations, whilst reducing the tensions that issues of contact may bring. Furthermore, “research shows that voluntary arrangements tend to have better compliance rates and higher amounts in payment.”²⁷

The explicit encouragement of private arrangements reaffirms the notion that “financial responsibility [such as child support] has traditionally been seen as primarily a private, rather than a public, responsibility.”²⁸ A potential increase

¹⁷ Wikeley, N Child Support: Looking to the Future [2006] Fam Law 360, at 361

¹⁸ [2006] EWCA Civ 1746

¹⁹ Hereafter, “PWC”

²⁰ Hereafter, “NRP”

²¹ Hereafter, “CSA”

²² Under s. 46 CSA 1991

²³ See note . 6 above

²⁴ Parkinson, P Reengineering the Child Support Scheme: an Australian Perspective on the British Government’s Proposals [2007] 70 (5) MLR 812, at 817

²⁵ Davis, G, Wikeley, N and Young, R, et al. *Child Support In Action* (Hart, Oxford, 1998), at 208

²⁶ See note 4 above, at 441

²⁷ Wikeley, N Child Support: The Brave New World [2008] Fam Law 1024, at 1027

²⁸ Barnes, H, Day, P and Cronin, N *Trial and Error: A Review of UK Child Support Policy* (Family Policy Studies Centre, London, 1998), at 63

in private arrangements would help alleviate some of the public responsibility that the taxpayer has been burdened with under the heavily-used CSA systems. The most positive outcome for the tax-payer would, be “the main savings [for the taxpayer] arising...from reducing the volume of parents who rely on the statutory scheme to obtain maintenance for their children.”²⁹

Undoubtedly, the success of the private arrangement proposal will largely centre around the ‘Gateway’ of support and advice that would be developed as part of the proposal³⁰. However, apart from the founding of the Child Maintenance Options Service in 2008 the child support system has taken little notice of the claim that “information provision is a relatively low-level feature in the current child support system.”³¹

“In the absence of adequate advice and support services...any existing power imbalances between parents will simply be reinforced”³². To not successfully address this ‘power imbalance’ may result in fulfilling the suspicion that NRPs “...will be able to hug knowledge and information that the PWC will not have and which will allow them, to a degree, to control what they pay.”³³ There is a high likelihood that PWCs may be forced to accept private arrangements set by the NRP as “there is ample evidence that many parents feel under intense pressure to compromise on unsatisfactory terms in order to avoid further stress or conflict.”³⁴

Invariably “the trade-offs involved in private settlements...will involve some diminution in what would otherwise be the appropriate cash transfer by way of child support.”³⁵ Whilst “appropriate voluntary maintenance arrangements”³⁶ is taken to mean that there will be “a level of support of payment not less than the formula CSA amount”³⁷ the term ‘own solution’ could easily be interpreted as having no boundaries of payment at all. The worst case scenario is that the boundary-less proposal would result in either non-payment or, “the percentage of those with no arrangements will increase.”³⁸ Worryingly, even under the current systems, it has been found that 49% of eligible PWCs have no child support arrangements in place at all³⁹.

An increase in non-arrangements may not only have an adverse impact on families but also an effect on the tax-payer. Households with no maintenance agreement in place are less likely to own their own home, with 51% of those with no maintenance arrangement being social housing tenants compared

²⁹ Walsh, E *Newline Extra: Child Maintenance Proposals* [2011] Fam Law 434, at 434

³⁰ See note 3 above, at 8

³¹ DWP, *Recovering Child Support: Routes to Responsibility* (2006), Cm 6894, at 24- This paper is otherwise known as ‘the Henshaw Report’

³² See note 27 above

³³ HL Deb 7 February 2008, vol 698, col GC 622

³⁴ See note 17 above, at 363 referring to Wasoff, F *Mutual Consent: Separation Agreements and the Outcome of Private Ordering in Divorce* [2005] 27 JSWFL 237

³⁵ Wikeley, N *Private Cases and the Child Support Agency* [2001] Fam Law 35, at 35

³⁶ Child Maintenance and Other Payments Bill 2007, cl. 4

³⁷ See note 4 above, at 443

³⁸ See note 24 above, at 823

³⁹ White Paper, DWP, *A New System of Child Maintenance* (2006), Cm 6979, at 36

with 30% of those with a maintenance arrangement in place being in social housing.⁴⁰

The lack of enforceability of private agreements is also a major issue. In the past a “national online register”⁴¹ of private arrangements has been intimated but no such device has been mentioned in this proposal. The absence of a simple and effective enforcement mechanism “is likely to act as a major disincentive for some parents who might otherwise opt for a ‘voluntary’ agreement.”⁴²

Furthermore, the case of *Kehoe*⁴³ makes questionable the enforceability of private arrangements in the courts. Mrs Kehoe had complained against the fact that she was unable to take her own enforcement action in pursuing child support arrears and was forced to rely on the Secretary of State who had apparently been derelict in his duty. The court held that the “essential aspect”⁴⁴ of the CSA 1991 meant that Mrs Kehoe had no legal right to personally enforce maintenance payments. This case “does not sit comfortably with the new policy emphasis on parents assuming greater parental responsibility”⁴⁵, which “implies that PWCs should be able to enforce orders of their own initiative.”⁴⁶

The government may hold the view that “collaborative agreements....are better for everyone involved”⁴⁷ but “child support.....operates in a highly charged and emotional arena.”⁴⁸ After the break-up of a relationship, there is rarely an opportunity to have a rational and reasonable discussion and only a few people are amicable enough to make their own arrangements. Research has shown that 46% of non-CSA PWCs on friendly terms with their ex-partner had a private agreement, compared with just 3% of those with no current contact with the other parent.⁴⁹ The success of the proposal largely depends upon the question of “how many parents will really be in a position to negotiate private arrangements?”⁵⁰ The “co-operative Nirvana”⁵¹ the proposal seeks will, in all likelihood, only be obtained by a minority of parents which makes the relative positive outcomes of the proposal somewhat limited.

‘Strong and Cost-effective Service’

The strength and cost-effectiveness of this proposed service is tantamount to the success of the proposal as a whole. “The success...of the new strategy of

⁴⁰ DWP, *Child Maintenance: The Eligible Population in Britain* (2007)

⁴¹ See note 39 above, at 38

⁴² See note 4 above, at 446

⁴³ *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48

⁴⁴ *Ibid.*, (Lord Bingham) at Para 30-35

⁴⁵ See note 4 above, at 455

⁴⁶ *Ibid*

⁴⁷ See note 3 above, at 5

⁴⁸ See note 28 above, at 82

⁴⁹ CMEC, *Promotion of Child Maintenance: Research on Instigating Behaviour Change: Volume 1- Main Report* (2011), at 22

⁵⁰ See note 27 above, at 1028

⁵¹ See note 24 above, at 822

encouraging and prioritising voluntary arrangements will depend on three principal factors: the amount of benefit disregard; the level of support provided for private arrangements; and C-MEC's own reputation for efficiency."⁵² From April 2010 there has been a universal disregard of benefits and the private arrangements have been discussed previously. This leaves the evaluation of the latter factor and the government's claim that they will provide a 'strong and cost-effective service' if private arrangements fail to materialise. Due to the fact that the service has as its objectives two distinguishable qualities, it is appropriate to evaluate each individually.

‘Strong’

“Effective mediation, like other private ordering ‘in the shadow of the law’, requires a strong alternative for those whom mediation is not desired or appropriate.”⁵³ Hence, the government has laid the ground work for the current systems to be replaced with “a new organisation that is simpler but tougher on parents who do not pay up”⁵⁴. The CMOPA 2008 has introduced greater enforcement powers to C-MEC and future services. There has been an extension of Deduction from Earnings Orders⁵⁵ and the introduction of regular deduction orders⁵⁶, lump sum deduction orders⁵⁷, administrative liability orders⁵⁸, freezing orders⁵⁹, the ability to revoke passports⁶⁰ and also to place curfew orders⁶¹ upon those NRPs who fail to pay child support arrears.

These enforcement measures are “a shift away from the court-based enforcement to the administrative recovery action.”⁶² According to the government the benefit of administrative-based sanctions is that it bypasses judicial necessities where applying to court “is a slow process that takes on average more than 100 days to complete.”⁶³

Furthermore, the new sanctions avoid the possibility of another case similar to DSS v Butler⁶⁴. Here, the CSA were prevented from using a ‘freezing order’ on the assets of an NRP who was trying to escape child support liability. However, the legislative authority to use freezing orders now means that child support authorities would be successful in applying for a freezing order in the same situation. In this respect, the extension of enforcement powers has undoubtedly given more strength to C-MEC.

⁵² See note 4 above, at 445

⁵³ Myers, F and Wasoff, F *Meeting in the Middle: A Study of Solicitors’ and Mediators’ Divorce Practice* (Scottish Executive Central Research Unit, 2000), at 150

⁵⁴ Hutton, J (Secretary of State), quoted in DWP Press Release (24 July 2006)

⁵⁵ S 20 CMOPA 2008, amending s29 CSA 1991

⁵⁶ S22 CMOPA 2008, inserting s32A-32D in to CSA 1991

⁵⁷ S23 CMOPA 2008, inserting ss32E-32K in to CSA 1991

⁵⁸ S25 CMOPA 2008, inserting s 32M in to CSA 1991

⁵⁹ S24 CMOPA 2008, inserting s32 L in to CSA 1991

⁶⁰ S 27 CMOPA 2008, inserting ss39 B- 39G in to CSA 1991

⁶¹ S28 CMOPA 2008, inserting ss39H-39 Q in to CSA 1991

⁶² Wikeley, N Child Support: Carrots and Sticks [2008] Fam Law 1102, at 1108

⁶³ See note 39 above, at 73

⁶⁴ [1996] 1 FLR 65

Theoretically, the new enforcement sanctions should force more people to comply with an authority's actions. Perhaps this is why the government has shown a greater willingness to use their enforcement measures. They have been used in 51,945 cases in 2008/2009, compared to 27,440 cases in 2005/2006.

The increase in enforcement powers may inadvertently benefit tax-payers as well. "From an organizational point of view, these measures should help to make the agency's caseload more manageable"⁶⁵ by increasing the amount of NRPs who wish to make private arrangements due to fear of the child support authorities. Fewer cases mean lower costs which, of course, means less cost to pass on to the tax-payer.

Additionally, the government's proposal to link the proposed service to HMRC could be seen as a strong measure which "would send out a clear signal [to NRPs] that child support liability is mandatory, not an optional extra. It would also distance the child support scheme from the benefits scheme and the associated stigma."⁶⁶ Therefore, one might hope that more NRPs will feel obliged to not go through the government services as with before. Once again the tax-payer would benefit from a further reduction in costs.

However, "the shift towards a greater emphasis on the use of administrative procedures rather than judicial due process...places a great premium on accuracy and efficiency on the part of the both the initial assessment and subsequent enforcement staff, areas in which the CSA itself does not have a happy track record."⁶⁷ Recent figures show that only 46% of people are in actual receipt of child maintenance under the CSPSSA 2000 and 20% under the CSA 1991⁶⁸. Considering the proposed service's role as acting as the fail-safe for those unable to make private arrangements, one may question the viability of the service being strong if previous systems have been so weak in enforcing collection.

The proposed structure of the service also makes questionable its viability. One of the main reasons that the CSA has not been properly suited to carrying out the task of ensuring that parents meet their responsibilities is because of the extreme difficulty it has had in simultaneously acting as "an investigating agency, an adjudicating agency and an enforcement agency"⁶⁹. What other capacity the government thinks that a proposed service will have if private arrangements do not occur is beyond comprehension. Logic would thus dictate that the proposed service would fall down due to the same error.

The IT system that the government announces as part of its proposed service fails to recognise the fact that "the CSAs recent history with major computerisation projects is less than encouraging."⁷⁰ The 'CSCS' computer

⁶⁵ Wikeley, N 'The Strange Demise of the Liable RelativeRule' [2008] Fam Law 53, at 54

⁶⁶ See note 17 above, at 17

⁶⁷ See note 62 above, at 1109

⁶⁸ See note 16 above, Table 13.1

⁶⁹ HC Deb 16 November 2005, vol 439, cols 963 - 964

⁷⁰ Wikeley, N 'Child Support- The New Formula' (2000) Fam Law 80, at 88

system used in the CSA 1991 scheme and the 'CS2' system of the CSPSSA 2000 scheme have both seen catastrophic failures. The CS2 system has over "500 defects that are having a significant impact on staff productivity and maintenance outcomes"⁷¹ and, despite £17 million being spent on recent upgrades, it was announced that over 100,000 cases were still being managed 'clerically'. One should be wary as to the likelihood of a new IT system's success. IT errors may seem insignificant but it is evident that they can cause a potentially strong service to be bogged down with inefficiency and weakness. As well as being of no use to families, weak services are costly to the tax-payer as they quickly become expensive to operate.

Paradoxically, a strong service may have a crippling consequence. The provision of a strong service could mean that PWCs, at the outset, are more likely to aim to go straight to the service rather than seeking a private arrangement if they know that there is a greater chance of collection of maintenance.⁷² A subsequent overflow of applications would have the same debilitating effect on the service as other potential problems. Nonetheless, it is essential to all parties concerned that the service be strong (with a measured balance of success) by dealing with applicants promptly and effectively. To do so will mean that the "the bargaining position of PWCs....will be immeasurably stronger and the [PWC] will be able to say 'cut a deal, or I go to [the service]'"⁷³.

'Cost-effective'

As part of the proposal "as many savings as possible will be driven out....so that the system is as efficient as it can be."⁷⁴ Cost-effectiveness is quintessential to the success of the proposal from a tax-payers perspective and the way that this will be achieved is largely through charging for use of the system. Users of the service will face a standard application charge of £100 and then subsequent collection fees of 7-12% of the maintenance payment in addition to the levying of a 'collection surcharge' of 20% against the NRP.

The government insists charges for use of the service are fair to the tax-payer. The intention is that it will "further, encourage parents to make their own private arrangements, where possible."⁷⁵ Additionally, "a percentage based retention rate.....does not create any more disincentive effects for workforce participation [by the PWC] than are produced by having the modest, absolute disregard that exists at present."⁷⁶ Measures that not only encourage parents to make private agreements but also encourage workforce participation are surely a positive outcome for the tax-payer.

⁷¹ DWP, *Child Support Agency Operational Improvement Plan 2006* (2008), at 28

⁷² See note 24 above, at 823

⁷³ See note 4 above, at 447

⁷⁴ See note 3 above, at 7

⁷⁵ See note 31 above, at 6

⁷⁶ See note 24 above, at 821

Positivity over such measures “perhaps reflects the triumph of hope over experience.”⁷⁷ As well as previous systems proving to be weak rather than strong, they have also been expensive rather than cost-effective. The cost to the State of collecting money has always been relatively high. In 1996 it cost £1.55 to collect £1 in child maintenance⁷⁸, in 2006 it cost £0.56 for every £1 collected⁷⁹ and in 2009 £0.48 for every £1 collected. With the current system of child support currently “running at a net cost to the taxpayer of around £200 million a year”⁸⁰ one would be correct to question why, either the taxpayer or the families, should pay the bill for a proposed service that could easily be weak and costly.

“The absence of any direct financial gain for PWCs on benefit has long been a problem for the child support scheme.”⁸¹ However, the introduction of universal benefit disregard should have “resulted in greater incentives to comply and more money getting through to children in the poorest families.”⁸² Yet the proposed charges potentially undo the improvement in child support. Furthermore, not only will those on low incomes be affected but also the wealthier ones too. The consequence could be that parents “make a realistic cost-benefit analysis of the effort of trying to get blood from stones”⁸³ and in turn “this may result in either households ending up with less child maintenance or no maintenance at all”⁸⁴.

It is important to note that there will be a reduced application charge for people on benefits of £50 and £20 “for the poorest families.”⁸⁵ This may mitigate against the negativity of a charging proposal but it is still an undesirable consequence for families that this is the price for being provided a ‘strong and cost-effective service’.

As well as a charge-reduction initiative, those who are victims of domestic violence shall be exempt from charging fees and will be provided with “particular support”⁸⁶. Despite the high level of abuse in the home and in relationship breakdowns⁸⁷, those constructing child support policy have never attempted to incorporate the issue of domestic abuse. If normal relationship breakdowns are fractious enough, then those domestic violence intensifies the animosity. Those suffering domestic violence are already in a difficult position and charging could easily be a ‘chilling effect’ on them engaging in the child support system. Although the government has afforded no value in their proposal to ‘domestic violence’ the recent case of *Yemshaw*⁸⁸ could be used as

⁷⁷ Wikeley, N Compliance, Enforcement and Child Support- Carrots and Sticks (2000) Fam Law 888, at 890

⁷⁸ See note 4 above, at 438

⁷⁹ House of Commons Work and Pensions Committee, *The Child Support Agency*, HC 920-I (2006), Minutes of Evidence, DWP Memorandum, Table 3

⁸⁰ See note 31 above, at 4

⁸¹ See note 62 above, at 1102

⁸² *Ibid.*, at 1107

⁸³ See note 24 above, at 823

⁸⁴ See note 29 above, at 444

⁸⁵ Miller, M *Families Minister Announcement* (13 January 2011)

⁸⁶ See note 3 above, at 7

⁸⁷ *Crime in England and Wales 2009/10*, Home Office Statistical Bulletin 12/10, 9th Report (2010), at Chapter 3, 3.1, page 45- 7% of women and 4% suffered domestic violence in 2009

⁸⁸ *Yemshaw v. London Borough of Hounslow* [2011] UKSC 3

the yardstick of determination. The court held that it is not just actual violence that constitutes domestic abuse but also “the fear and threat of violence.”⁸⁹ Whilst the proposal is highly positive in incorporating domestic violence, the ‘strong and cost-effective’ system may need to be sacrificed if the *Yemshaw* definition is adopted and the service is inundated with a predictably high amount of domestic violence victims.

The true aim of cost-effectiveness appears to be in promoting the interests of the tax-payer rather than families which could bring about ‘cost-cutting’. The proposal explicitly entails “a new streamlined child maintenance scheme to replace existing CSA schemes.”⁹⁰ This seems far from wise when “history....demonstrates that a system designed for the poor often becomes a poor service.”⁹¹ There should “be real concerns about the capacity...to offer quality services at the levels of public funding that are likely to be available.”⁹² By ‘streamlining’ services “it may increase the pressure on the new body...to pick the low-hanging fruit rather than to reach for and grapple for the hard-to-crack nuts.”⁹³ Hence, cost-effectiveness may bring about a positive outcome for tax-payers but most certainly will not for families and children.

Experiences of other Jurisdictions

The issue of child support is not, of course, unique to the UK. Thus, it is invaluable acknowledging that “the experience of other countries can offer valuable lessons to policy-makers grappling with the same problem.”⁹⁴

UK child support policy, like that of the USA and Australia, is focused on securing private arrangements for the payment of maintenance and can be seen as typically “Anglo-Saxon”⁹⁵. However, “the difficulty lies in anticipating with any reliability the potential success of the proposals as....no robust empirical evidence is available from overseas. “Other Anglophone child support systems usually require PWCs on welfare to apply for child support”⁹⁶ but the repeal of the compulsion for those that are on income-related benefits to go through the CSA system makes the UK slightly different.

The system of combining a universal disregard with a percentage retention rate, as would happen under the government’s proposal, “is a similar approach to that in Australia”⁹⁷ where “arguably, children are much better off...because it reduces the likelihood that the disregarded amount will

⁸⁹ *Ibid*, (Lord Rodgers) at Para 44

⁹⁰ See note. 3 above, at 9

⁹¹ See note 17 above, at 363

⁹² See note 4 above, at 446

⁹³ *Ibid*, at 443

⁹⁴ See note 28 above, at 35

⁹⁵ Millar, J ‘Poor Mothers and Absent Fathers: Support for Lone Parents in Comparative Perspective’ in Jones, H and Millar, J *The Politics of the Family* (Social Policy Association and Avebury Press, Aldershot, 1996)

⁹⁶. See note 4. above, at 444

⁹⁷ See note 24 above, at 819

become a de facto ceiling on agreed child support payments.”⁹⁸ Further, in the US state of Wisconsin an experiment to allow PWCs on benefits to retain all of the monies paid by NRPs in a ‘passing-through’ process found that “NRPs came forward and paid more of the support they owed....and NRPs are more likely to establish lasting patterns of payment and connection with their children.”⁹⁹ Such a result in the UK would be a significant positive outcome for families and children.

The ‘Gateway’ service “of holistic information, advice, support”¹⁰⁰ that the government have announced as part of their proposal is similar to that in Australia where “the philosophy...is that post-separation parenting should not be seen in the first place as a legal issue.”¹⁰¹ Australia opened 15 Family Relationship centres¹⁰² to fulfil this philosophy and usage statistics showed that they those “experienced high demand since their opening day, and that demand has increased considerably over....their operation.”¹⁰³ Evidently, the idea of a ‘gateway’ service could be highly sought after and useful in helping parents make private arrangements.

The idea for using HMRC¹⁰⁴ tax records in order to keep track of an NRPs income also appears to have originated from Australia where tax details have been utilised with great effect since the inception of their child support schemes¹⁰⁵. If the effects of having HMRC records were similar to that in Australia then it could speed up the process of assessment immeasurably because “getting the income details [of NRPs] is one of the most problematic areas for the CSA in the absence of such [tax information] access.”¹⁰⁶

However, as always, “there are dangers to an ‘off the peg’ approach to policy development”¹⁰⁷. The Australian tax system is not directly applicable to the UK. Firstly, not all UK taxpayers have to file an end of year tax return, unlike in Australia. Secondly, whereas tax records in Australia centre around the individual, in the UK they are structured around jobs, held on 12 different regional databases, “with the result that obtaining the full picture of any one person’s income where they have more than one job is less than straightforward.”¹⁰⁸ Transposing the idea of using tax records from the Australian system may seem like an excellent idea but in reality it could be administratively unworkable with our current tax system.

⁹⁸ *Ibid*, at 821

⁹⁹ New York Times (December 1 2007)

¹⁰⁰. See note 24 above, at 825

¹⁰¹ *Ibid*

¹⁰² See the Australian government’s website at: <<http://www.familyrelationships.gov.au>> last accessed 01 May 2011

¹⁰³ Ruddock, R, Attorney-General, ‘speech to the 12th National Family Law Conference’ (October 2006) at

<<http://www.ag.gov.au/agd/WWW/ministerruddockhome.nsf/Page/RWPE1CB97697E7FFCAECA2572210008DF7D>> (last accessed 01 May 2011)

¹⁰⁴ Hereafter, “HMRC”

¹⁰⁵ Child Support (Assessment) Act 1989 (Australia)

¹⁰⁶ See note 24. above, at 816

¹⁰⁷ See note 28. above, at 35

¹⁰⁸ National Audit Office, *HM Revenue and Customs 2006-2007 Accounts*, (HC 626, 2007), at Para 3.42

Parental autonomy in private arrangements may be positive in one sense but other jurisdictions have shown it comes with hidden dangers. Research in Scotland demonstrated that PWCs were often willing to reduce their own “financial claims in order to achieve what they saw as more important ‘relationship’ objectives”¹⁰⁹. The majority of respondents in this research were married home-owners who had access to legal advice but yet “did not feel in control of the process or the outcome.”¹¹⁰ Here, “the risks associated with private arrangements will be that much more where more vulnerable PWCs....are concerned.”¹¹¹

The increased powers of enforcement now available to child support authorities in the UK are also used in other jurisdictions. In the USA¹¹² and Australia “DEOs have long been viewed as a standard means of collecting child support, rather than as an enforcement tool”¹¹³ with 65% of cases in the USA and 40% of cases in Australia using DEOs to collect money from NRPs.¹¹⁴ The likelihood of DEOs being used as a standard method of collection in the UK is, however, significantly impeded by the fact that DEOs cannot be levied against trade or business accounts.¹¹⁵

Furthermore, despite revocation of passports and departure prohibition orders “being used to some effect in the USA, Canada and....in Australia where they have been used to recover nearly AUS \$7 million in child support debt since their introduction”¹¹⁶ the revocation of passports in the UK is not without caveat either. For those NRPs who are not a British citizen or who hold dual nationality¹¹⁷ the sanction will be useless. This is not to say the sanction is forever constrained by national boundaries; in Australia they utilise ‘departure prohibition orders’ rather than the removal of passports, thereby circumventing the issue presented in the UK. This is one lesson, for the benefit of families and children which the government could afford to learn.

Conclusions

This Green Paper proposal “provides only the barest of bones for the child support scheme”¹¹⁸ and if it were set in motion as it currently stands, it would fail. Simply, it places too much faith in parents that they will assume responsibility and proposes a back-up service that fails to fill one with confidence when past evidence has shown that all the systems preceding it have so miserably failed.

Undoubtedly, there is a need for bold and brave reform in order to tackle the problems of child support but the proposal neglects to acknowledge the fact

¹⁰⁹ See note 34. above, at 248

¹¹⁰ *Ibid*, at 247

¹¹¹ See note 4 above, at 447

¹¹² Child Support (Registration and Collection) Act 1988 (US), s 72 A

¹¹³ See note 1 above, at 313

¹¹⁴ *Ibid*

¹¹⁵ ss. 32 A (1) and 32 D (2) CSA 1991

¹¹⁶ See note 17. above, at 365

¹¹⁷ And, thus, have a choice of which passport to travel on

¹¹⁸.See note 70. above, at 80

that “operational effectiveness [should] not take precedence over principle”¹¹⁹. Child support policy must be fully conscious of families and children otherwise it risks returning the child support system to the days where “men fathered a child, and then absconded, leaving the single mother- and the taxpayer- to foot the bill for their irresponsibility.”¹²⁰ Furthermore, the government should not once again commit the mistake of allowing the “treasury [to] come first”¹²¹ as with the implementation of the CSA 1991.

This is not to say that consideration should not be given to the current socio-economic climate and the impact this would have on the proposal. We are deep in the midst of a recession and cuts need to be made for the benefit of the tax-payer. The government has stated that CMEC is to become an executive agency of the DWP rather than the ‘arms-length’ non-departmental body it was originally intended to be¹²². The effect of this is likely to be a reduced effectiveness as there are fewer resources to allocate to compliance, enforcement and collection. The same fate would in all likelihood be assigned to the ‘strong and cost effective’ service suggested in this proposal and thus, the chances of positive outcomes for families and the tax-payer would be increasingly unlikely.

It would be most wise to allow the CMOPA 2008 to have full effect¹²³ before tweaking incessantly once again with child support policy. Current cases, enforcement, compliance and collection are not a focus point under these new proposals and there are improvements that are badly needed ahead of this whole-sale change in child support policy.

The government is left in an unenviable position: It seems impossible to strike a balance between who should be the priority- the tax-payer, or the families and children. Unfortunately, one must accept that both cannot take precedent despite the best laid plans of mice and men. Ultimately, “a win for one interest group in terms of child support policy is a loss for another”¹²⁴. Such lofty dreams as in this recent proposal can often be the precursor for failure.

It would appear that this proposal and the current UK child support systems are not the correct answer to the child support issue. Quite possibly, there is, and never will be, a solution; child support may well be the ‘humpty-dumpty’ of the society we live in. One thing that is certain is that these proposals and the savings they could potentially make for the tax-payer are not worth the private agreements that some families may, or may not make. The last thing that the current child support system, families and the tax-payers need is “the baby [to be] thrown out with the bathwater”¹²⁵ by carrying on with this proposal.

¹¹⁹ See note 4. above, at 457

¹²⁰ Thatcher, M *Downing Street Years* (HarperCollins,1995), at 630

¹²¹ HC Deb 29 October 1990, vol 178, col 732

¹²² The Public Bodies Bill 2010 announced this intention to begin ‘the bonfire of the quangos’

¹²³ Some of the provisions, such as the enactment of the ‘new formula’ of the CMOPA 2008 which uses gross income instead of net income to calculate an NRPs liability, are still yet to be fully-implemented and will not be until at least 2013

¹²⁴.See note 24. above, at 813

¹²⁵.See note 4. above

Case Comment: Should the Leader be Followed? The Decision in The Buana Dua

Mateusz Bek

Introduction

The nature of the relationship between the leading underwriter and the following market has been subject to debate over the past years. The recent decision in *The Buana Dua*¹ is to be seen as a wasted opportunity to clarify that matter.

The Background

The claimant was the owner of the tug *Buana Dua*, insured with three syndicates of whom the leading underwriter was Axa. The policy contained a 'follow leader' clause (LUC) in these terms:

It is agreed to follow Axa HK in respect of all decisions, surveys and settlements regarding claims within the terms of the policy, unless these settlements are to be made on an *ex gratia* or *without prejudice* basis.

The Institute Times Clauses — Hulls (with certain exclusions) were incorporated. Amongst other clauses, Clause 1.1 provided:

It is warranted that the Vessel shall not [...] undertake towage or salvage services under a contract previously arranged by the Assured.

On 26 October 2005 the tug ran aground while en route to render a towage service to a stranded tanker. Subsequently, *Buana Dua* was declared to be a constructive total loss.

Axa agreed to indemnify the owner for the loss. However, the other insurers, including the defendant, rejected liability on the basis of the claimant being in breach of the warranty contained in Clause 1.1 of the ITCH.

¹ *P.T. Buana Samudra Pratama v Maritime Mutual Insurance Association (NZ) Limited* [2011] EWHC 2413 (Comm).

The main issue before the court was whether the decision of the leading underwriter to accept the claim for indemnity came within the scope of the 'follow leader' clause, so as to bind the following subscribers.

The Decision

Teare J. held that since the wording of the clause referred to 'all decisions, surveys and settlements' in respect of claims under the policy, the whole process of claims investigation and settlement by the leader was to be followed.² In addition, the judge held that according to the intention of the parties there were no further exceptions to the clause to be implied beyond the two expressly provided for.³ Therefore, the subsequent insurers had to abide by Axa's decision regarding both liability and quantum. As a result, the question of whether there had *de facto* been a breach of warranty did not need to be answered.

Commercial Purpose

The reason behind the conclusion reached by Teare J. appears to be the business efficacy it yields.⁴ Issues that may arise in the absence of a LUC are innumerable, as highlighted by Sir John Megaw in *The Irish Rowan*.⁵ Teare J. quoted with approval⁶ a dictum of Mance J., as he then was, in *Roar Marine Limited v Bimeh Iran Insurance Co.*⁷, relied upon by Jacobs Q.C. for the claimant, which identified two commercial benefits conferred by such a term. First, the operation of a LUC simplifies administration and claims settlement, saving time and cost. Secondly, it makes co-insurance more marketable and attractive to the potential insureds. Both arguments are equally compelling. Instead of dealing with each underwriter separately, it suffices for the assured to approach the leader in cases requiring cooperation. Bearing in mind that a particular slip may be scratched by a great deal of syndicates, the potential difficulty avoided should not be underestimated. Consequently, the assured who adheres to the duty of *uberrimae fidei* should be afforded the indirect protection bestowed on him by the LUC.

Construction

Having established that business efficacy is an underlying consideration for the use of LUCs, Teare J. approached the construction of the clause in question with the aim of giving it its commercial purpose. Although a LUC is

² *ibid.*, at [26(i), (ii) and (iii)].

³ *supra*, n. 1, at [26(iv)].

⁴ *ibid.*

⁵ *Irish Shipping Limited v Commercial Union Assurance Co. Plc. and Alliance Assurance Co. Plc.* [1989] 2 Lloyd's Rep. 144, at 155.

⁶ *supra*, n. 1, at [19], [24] and [28].

⁷ [1998] 1 Lloyd's Rep 423, at 427. Hereinafter '*Roar Marine*'.

not analogous to a 'follow settlements' clause in reinsurance contracts⁸, a parallel interpretation is not precluded. His Lordship rightly decided that it is inconceivable to allow the following market to dispute issues as to liability but not quantum since a settlement will necessarily include consideration of both.⁹ If the defendant accepts that the leading underwriter was in the position to agree upon the value of a particular claim, he cannot subsequently deny the capacity of the leader to determine whether the claim itself was covered by the policy.

Furthermore, in *The Buena Dua* the broad wording of the LUC supported such logical contention. It is worth noting that the scope of the clause in the present case was not as wide as in *Roar Marine*, a decision which seems to have largely influenced Teare J's reasoning.¹⁰ Yet, it was not as narrow as in *The Leegas*¹¹, where the actions of the leader were, however, held to come within the scope of the LUC. In any event, the judgment in the instant case confirms the long-standing view that the outcome of a particular dispute depends upon the specific facts and interpretation accorded to them.

Agency?

With the view to the ongoing debate as to the nature of the relationship between the leading underwriter and the following market it is to be regretted that the judge did not express his opinion on that matter. Even though the reasoning proposed and the conclusion reached by Teare J. sound plausible, one can sense the lack of an underlying theory behind the decision. It is the submission of the author of this paper that the conflict between the dicta of Kershaw J. in *Roadworks (1952) Limited v Charman*¹² and Rix J., as he then was, in *Mander v Commercial Union Assurance Co Plc*¹³ should be resolved in favour of the former. The reasoning in the latter case should be either confined to open covers or disregarded altogether.¹⁴ Treating LUCs as contracts of agency collateral to the main agreement is in accordance with the market practice and observes the reason for their existence.¹⁵ Analysis based on the "trigger mechanism" is too vague and obscure to find general application. Needless to say, an opinion of a High Court judge in the instant case would not in all probability dispose of the problem in entirety, yet it

⁸ *ibid*, at 430. See also *American International Marine Agency of New York Inc. v Dandridge* [2005] Lloyd's Rep. I.R. 643, at 655 (Richard Siberry Q.C.).

⁹ *supra*, n. 3.

¹⁰ Compare and contrast: *supra*, n. 7, at 430; *supra*, n. 6.

¹¹ *Barlee Marine Corporation v Trevor Rex Mountain* [1987] 1 Lloyd's Rep. 471, at 475 (Hirst J.). Hereinafter "*The Leegas*".

¹² [1994] 2 Lloyd's Rep. 99, at 105. Hereinafter '*Roadworks*'.

¹³ [1998] 7 Lloyd's Rep. I.R. 93, at 143-144. Hereinafter '*Mander*'. Rix J. in that case relied upon the authority of *The Tiburon* [1990] 2 Lloyd's Rep. 418.

¹⁴ The decision in *Mander* was based on an interpretation of the function of an open policy.

¹⁵ *supra*, n. 12, at 104-106. See also *The Leegas*, at 475 (Hirst J.) and *Bank of America National Trust and Savings Association v Taylor Stasima Maritima Co. Limited* [1992] 1 Lloyd's Rep. I.R. 316, at 323 (Waller J.).

would have contributed to the existing state of authorities on the subject. Examination of the issue by an appellate court is desirable.¹⁶

¹⁶ As observed by the Court of Appeal in *Unum Life Insurance Co. of America v Israel Phoenix Assurance Co. Limited* [2002] 1 Lloyd's Rep. I.R. 374, at 380 (Mance L.J.), whether a leading underwriter is an agent for the following market or acts merely as a trigger in a way which has the effect that the following market is bound to follow his action, is irrelevant to the question of construction of a particular LUC. However, it is submitted that determining the nature of the relationship between the two would allow the courts to impose a structure upon the assessment of their liabilities vis-à-vis each other.

Comment: A Critical Assessment of Assured Shorthold Tenancies

Louise Cheung

This article looks at how an assured shorthold tenancy (under the HA 1988, as amended by the HA 1996) is created and can be brought to an end. It critically comments on the extent of security of tenure offered by assured shorthold tenancies. It is proposed that ASTs have led to many tenants with nearly no security of tenure per se. ASTs remain a default type of tenancy, whilst assured tenancies offer greater protection. Evidently, it would be preferable for the underlying policy of ASTs bringing 'Control, Choice and Freedom' to tenants to be combined with greater security for the vulnerable. This article is adapted from an assignment for the LLB optional module 'Renting Homes: Law & Policy' taught by Dr. Emma Laurie.

Introduction: How an assured shorthold tenancy is created and brought to an end

Assured shorthold tenancies (henceforth ASTs) were established by the Housing Act 1988, replacing protected shorthold tenancies. Under the 1988 Act 'Old-style' AST, the landlord was obliged to give the tenant clear and reasonable notice before the grant of the tenancy that it was an AST.¹ However, this is radically different to the situation under the Housing Act 1996. Since 26 February 1997, the requirement for the landlord to serve such notice was removed. All new tenancies are automatically default ASTs unless otherwise specifically agreed.

ASTs are a type of assured tenancy which allow landlords to recover possession without demonstrating the usual grounds of possession. Firstly, ASTs must satisfy the usual assured tenancy criteria (*inter alia* not a licence, let as a separate dwelling, tenants or joint tenants must be individuals,

¹ S. 20 Housing Act 1988, Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1988, SI 1988 no. 2203, Form 7, Cases: *Panayi v Roberts* (1993) 25 HLR 421, *Andrews v Brewer* (1998) 30 HLR 203, *York and Ross v Casey and Casey* (1999) 31 HLR 209, *Clickex Ltd v McCann* (2000) 32 HLR 324, *Manel v Memon* (2001) 33 HLR 24 demonstrate the level of accuracy necessary.

principal home, rent must be at least £1000 p.a. in London, £250 p.a. elsewhere and as from October 1, 2010, the rent limit is £100,000 p.a.²).

ASTs may be terminated using the same grounds for possession under assured tenancy,³ but the contentious s.21 is an additional mandatory ground for possession. Section 21 allows the landlord to recover possession by simply giving two months' written notice stating that s/he requires possession of his property.⁴ Once the landlord has served the order correctly, courts have no discretion to suspend or consider the reasonableness of the court order. There is no minimum fixed term, but the court cannot order possession during the first six month moratorium period⁵ (the only exception is forfeiture or a power of re-entry). The six months period begins from grant of original tenancy. It cannot arise by virtue of agreement with the landlord or a statutory or periodic tenancy under s.5 Housing Act 1988.

'Eviction from an AST is one of the most common reasons for households becoming statutorily homeless.'⁶ The relative new ease of bringing a tenancy to an end using 'new style' ASTs has undoubtedly affected tenants adversely. The deregulation of the private rented sector (henceforth the PRS) has led to 68% of all English PRS tenancies being ASTs.⁷

One can pinpoint the political, social and economic factors which led to the developing prevalence of ASTs in the PRS market. The availability of secure council housing decreased due to the greater uptake of owner-occupation through right-to-buy mortgages.⁸ Moreover, there is less social (council) housing being developed to meet demand. Additionally, there is greater availability of buy-to-let mortgages; consequently, more people have the means to invest in property and become long-term landlords. Accordingly, first-time buyers remain in the PRS as they cannot obtain properties within their price range. These factors contributed to the increase of ASTs in the PRS. The rationale for the existence of ASTs is that the short-term nature and insecurity of tenure is convenient for young mobile professionals and students.

If a landlord wishes to grant security under an assured tenancy, it is necessary that this is created specifically. The landlord can obtain possession by giving two months' notice when entitled to do so contractually (once the fixed term

² s.1 Housing Act 1988

³ Prevention from Eviction Act s.98 and Housing Act 1988, schedule 2 (Grounds 1 – 17)

⁴ s.21(1)(b), (4)(a)

⁵ s.21 (5) – (7) Housing Act 1988, as amended by the Housing Act 1996 s.99

⁶ Citizens' Advice Bureau (D. Crew), 'The tenant's dilemma – Warning: your home is at risk if you dare complain' June 2007 p.5

⁷ DCLG (2008a) Housing Statistics 2007, Department for Communities and Local Government, London, available at:

www.communities.gov.uk/documents/housing/pdf/housingstatistics2007.pdf [accessed 12-11-2010] Table 6.6

⁸ There has been a total of 2 million sales of local authority council houses through private sales (inc. RTB), 2,600 in 2009-10.

<<http://www.communities.gov.uk/housing/housingresearch/housingstatistics/housingstatisticsby/socialhousing-sales/livetables/>> accessed 06-04-2011

has terminated⁹). The accelerated possession procedure¹⁰ uses a court order, but court hearings are not necessary in many cases relating to both fixed term and periodic ASTs, and certain compulsory grounds for possession. 74% of applications are granted giving tenants fourteen days to leave.¹¹ Clearly, it is easy for landlords to evict AST tenants. However, under s.215 Housing Act 2004, the landlord cannot use the s.21 notice¹² if tenancy deposit provisions are not complied with.

The Good, the Bad and the Ugly features associated with the security of tenure offered

The principle of ASTs is to provide flexibility for landlords, and to offer tenancy which suits the young mobile population. The balance between the Landlord and Tenant is usually regarded as equal. The typical tenant profile is that of a tenant under 35, who has moved in the last year more than 10 miles away from their previous home.¹³ Demographics often adjust to serve employment needs around the country. Consequently, it can be argued that the current tenancy framework is adequate for purpose and ASTs serve an important role.

However, the reports from Citizens' Advice Bureau (CAB) and Shelter demonstrate the fundamental flaws of the AST for families in the PRS, who legitimately require greater security of tenure. Some tenants expect to be housed on a long-term basis. Indeed, ASTs can and for the most part continue for longer than six months and are not necessarily always ended against tenants' wishes. For example, most student-let ASTs typically last 12 months.

Nevertheless, social policy in the housing community typically criticises the security of tenure offered by ASTs. Morgan has analogised the building insecurity in housing with the process of 'casualisation' in employment law. The casual workforce is dominated by the weakest members of the labour force, earning the lowest pay in inferior conditions and living in areas with high levels of unemployment.¹⁴ Morgan submits that these characteristics are prevalent in AST tenants, which restrict the security of tenure in the PRS.

Many vulnerable tenants in ASTs are paying the highest rents for the lowest quality properties.¹⁵ Families wish to seek greater security of tenure in social housing (run by quasi-social housing associations), since those hoping to find permanent homes are often left with the lack of security offered by ASTs. This is disappointing for the social capital of communities, as research shows that

⁹ s.21(1)(a),(4) Housing Act 1988

¹⁰ Came into force on 1 November 1993, SI 1997/1837 r.7(1), N.B. the requirement for a written tenancy agreement before the accelerated proceedings: Civil Procedure Rules, sch. 2 County Court Rules Order 49 r.6A(3)(c)(i).

¹¹ Shelter, 'Safe and Secure?' (2005) p.11

¹² Under Housing Act 1988

¹³ Analysing the statistics of Shelter, Safe and Secure? (2005) p. 13, table 5

¹⁴ Morgan J (1996) "The Casualisation of Housing" JSWFL Vol. 28, No. 4, at p.445

¹⁵ Department of Communities and Local Government, 'Housing and Planning Statistics 2010' (December 2010)

AST tenants become less engaged with the community, for example, they are less likely to be on the electoral register.¹⁶

The Law Commission's report, *Renting Homes: The Final Report*¹⁷ suggests reform of the security of tenure offered is even less welcomed by the housing community. The removal of the six month moratorium period¹⁸ could lead to a disproportionate imbalance between the rights of tenants and landlords. Proposals include a simplification of the system with only two types of security of tenure; secure (substantial security) and standard (fixed-term or periodic similar to ASTs). This reform of tenancy agreements endorses the consumer perspective protection approach.¹⁹

The increased flexibility of contractual length combined with the existing fixed term agreements of six or twelve months could be advantageous for both tenants and landlords. For example, it can suit tenants who are short term renting, since they are 'in a chain' whilst waiting to buy a home. The removal of the artificial lease-licence distinction, which stands as a more technical and semantic feature of housing law, allows for laypeople to understand abstract housing law concepts. This would improve knowledge and understanding which is beneficial in a less regulated housing market.

The proposed consumerist nature and market framework of tenure is key to the Law Commission's report. The underlying principle being that PRS tenants do not wish to be housed long-term on ASTs, consequently, the State is not required to guarantee long-term tenure. The previous Labour government saw the structure of both assured and assured shorthold tenancies as working well.²⁰

History demonstrates Conservative governments typically favour deregulation. This is particularly clear from the Thatcher years and the deregulation shown between 1980 and 1996.²¹ However, the current Coalition government may be more open to changes proposed which simplify the types of tenure to two (secure and standard) and remove the six month moratorium period. The Law Commission's years of work may not be in vain. It allowed a gathering body of opinion to promote change in market regulation, which could result in future re-legislation.

A potential solution to the problems identified concerning the security of tenure offered by the AST would be the creation of more social housing to support those who evidently need greater security of tenure. Although, ASTs suit the young and mobile, it is evident that this 'culture of insecurity'²² does not suit all types of tenants in the PRS with ASTs. Families and those who live

¹⁶ Shelter, *Safe and Secure?* (2005) p. 25

¹⁷ Law Commission, *Renting Homes: The Final Report*, Vol 1: Report Law Com No 297, Cm 6781 (May 2006)

¹⁸ *Ibid.* at p.21 (1.51)

¹⁹ Martin Partington, 'Where next for the Private Rented Sector?' (2010) JHL 26 at p.29

²⁰ DETR (2000), *Quality and Choice: A Decent Home for All: The Housing Green Paper*, Department of the Environment, Transport and Regions, London

²¹ Housing Acts 1980, 1988 and 1996

²² Rugg J and Rhodes D (2008) *The Private Rented Sector: Its Contribution and Potential*, Centre for Housing Policy, The University of York, York

in rural settings are especially vulnerable with this insecure tenure. One in seven AST tenants move not due to the tenant's desire but are forced by the landlord.²³ This is exemplified by the fact that a greater 22% of AST tenants claim housing benefit.²⁴ The vulnerable families within this percentage (rather than the short-term low paid workers) arguably warrant homes in social housing, which can offer them greater security of tenure.

If a family with an AST were to live in a rural area were evicted, choices of finding suitable alternative accommodation are limited. This places a greater burden on the state to find short-term housing for them under homelessness provisions. This could be solved through better planning of the housing structure and social housing to support tenants who cannot find sufficient security of tenure in the PRS.

Many believe that courts should have discretion in s.21 notices. According to CAB research, tenants are afraid of informing landlords about disrepair as this could lead to eviction. This presents a catch-22 situation. Tenants may inform their landlord, which could lead to a retaliatory eviction. Alternatively, tenants live in poor quality housing which fails the 'decent home standard'. They may pay for any disrepair from their deposit as a breach of their obligations from often draconian tenancy agreements.²⁵ Another underlying problem with the security of tenure offered by ASTs is that written tenancy agreements are not required. Consequently, protracted arguments over the exact nature of obligations of oral contracts may ensue. Other potentially difficult situations are highlighted in assured tenancy cases,²⁶ for example, families may rely on housing benefit for rent which may be paid late due to administrative error. If landlords evict such tenants, the State bears greater burden unnecessarily to re-house these tenants in social housing, when they had good homes in the PRS, which the State undoubtedly prefers.²⁷

Academics and practitioners argue 'the development of a truly integrated rental structure that is going to work fairly and with adequate security, particularly for those at the bottom end of the rental market.'²⁸ This can perhaps be achieved through integration of private and public sector management and funding using the current Housing Association structure.

Conversely, a question from the PRF task force has been: 'Would better security of tenure assist low income groups in the private rented sector?'²⁹ The

²³ Shelter, *Safe and Secure?* (2005) p. 13, table 5

²⁴ *Ibid.*

²⁵ See example; British Property Federations Standard form contract – Section E (tenants' responsibilities) include 51 obligations, whilst Section F (landlords' responsibilities) include only 13 obligations, of which 4 are negative responsibilities.

²⁶ *North British Housing Association v Matthews* [2004] EWCA Civ 1736 under the Housing Act 1988

²⁷ This is radically different from the regime under council housing where accrual of rent arrears resulting from factors outside the applicant's control (e.g. delays in housing benefit) are not considered serious enough to constitute unacceptable behaviour (Law Commission, *Renting Homes* No. 284 (November 2003) para. 4.22)

²⁸ Martin Partington, 'Editorial – taking renting seriously' (2009) J.H.L. 1 p.7

²⁹ Michael Ball, JRF programme paper: Housing Market Taskforce, 'The UK private rented sector as a source of affordable accommodation' November 2010 University of Reading p. 15

Rugg Report³⁰ argues that ‘a climate of uncertainty is generated for tenants far out of proportion to actual notices to quit’. Arguably, the perceived problems with ASTs are dubious. There are huge costs associated with long-term tenant security. This benefits few households and damages the prospects of others. On a macro level, looking at international comparisons, the existence of greater security of tenure in other countries is perhaps an outcome of rent controls³¹ (which are not currently legislated in the UK). There are market mechanisms to control security of tenure. Landlords have an incentive to attract and value good tenants to avoid a vacant property, thus are usually happy to allow good tenants to remain in occupation of the property.

Conclusion

In conclusion, ASTs have led to many tenants with nearly no security of tenure *per se*. ASTs remain a default type of tenancy, whilst assured tenancies offer greater protection. Evidently, it would be preferable for the underlying policy of ASTs bringing ‘Control, Choice and Freedom’ to tenants to be combined with greater security for the vulnerable.

On a brighter endnote the increased use of ASTs has not heralded all doom and gloom for these PRS tenants with lack of secure tenure. The recession had led to many landlords with buy-to-let mortgages unfortunately to have arrears, which nevertheless led to advantages for their tenants. Lenders who recover possession from landlords usually retain tenants due to the falling market. Additionally, County court judges have a power to delay mortgage possession, where there are tenants in the property.³² The increased number of properties available in the PRS and decreased rents can counter Morgan’s “casualisation” leading to increased security of tenure for AST tenants

³⁰ See note 21 above at p.42

³¹ See note 19

³² s.1 Mortgage Repossessions (Protection of Tenants) 2010

The Restriction of the Power of the Courts to Stay Proceedings in Favour of More Appropriate International Courts: The Decision in *Owusu v Jackson*

Surekha Rodrigo

The judgment in *Owusu v Jackson* has provided an answer to the controversy over whether courts of EU Member States have discretion to stay proceedings in favour of courts of non-Member States. Specifically, the European Court of Justice established that the doctrine of *forum non conveniens* could not be used so as to refuse jurisdiction and stay the English court proceedings in favour of the Jamaican courts, in this case. The question to be considered is whether this restriction on the ability to stay proceedings in favour of courts of non-Member States extends to other bases of jurisdiction provided for in the EC Regulation 44/2001. This article seeks to explore the extent of the decision in *Owusu v Jackson* alongside an analysis of the academic commentary and case law in the area, which attempt to mitigate the restrictions, brought about by the judgment.

Introduction

*Owusu v Jackson*¹ answered the hotly debated question of whether a Member State court was permitted to stay the proceedings against a defendant on the grounds that the non-Member State was a more appropriate forum for trial.² The decision overturned the previous case law and by restricting the Member States from staying proceedings or declining jurisdiction, in favour of more appropriate forums, has raised a number of debates. The main issue has been the question as to how far this restriction extends. The Court specifically referred to Article 2 of the EC Regulation 44/2001 (the Regulation) and thus it is questionable as to which other provisions of the Regulation this decision applies.³ The other provisions are

¹ Case C-281/02 *Owusu v. Jackson* [2005] 2 WLR 942.

² C.M.V. Clarkson and Jonathan Hill, *The Conflict of Laws* (4th edn OUP, New York 2011) 138.

³ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O. J. L012/1.

particularly Articles 22, 23, 27 and 28, which are exceptions to the mandatory jurisdiction of Article 2.⁴ If the decision is said to apply to these provisions, the restrictions and injustice caused by the strict application of the decision may cause further confusion. On the other hand, academic opinion introduces different interpretations of the decision, which seek to mitigate the strictness of the decision. These issues will be analysed in this essay.

The position before *Owusu v Jackson*

Prior to *Owusu v Jackson*, in *Re Harrods (Buenos Aires) Ltd*⁵, the European Court of Justice held that the English court could grant a stay if the defendant satisfied the court that a non-Member State was a more appropriate forum. In the aftermath of *Re Harrods* the English courts developed the view that a discretion was available to them not to exercise Regulation jurisdiction through the doctrine of *forum non conveniens* and any other valid legal basis which suggested that a non-Member State would be a more appropriate court for hearing the case at hand.⁶

However, this case was surrounded by controversy and it was recognised that the issue would be referred to the European Court of Justice again. It was subsequently overturned by *Owusu v Jackson*.⁷

Owusu v Jackson

In this case the Court of Appeal asked the European Court of Justice whether the English courts were permitted to stay the proceedings against the first defendant on the ground that Jamaica was a more appropriate forum for trial.⁸ This was to be considered by way of the doctrine of *forum non conveniens*; the Jamaican court was seen to be more appropriate because, even though both the claimant and the defendant were domiciled in England, the defendant carried on the main part of its business in Jamaica and the incident giving rise to the proceedings also took place in Jamaica.⁹

Nevertheless, the Court concluded that where a national court has jurisdiction under Article 2, it is precluded from declining that jurisdiction on the ground that a non-Member State would be a more appropriate forum for the trial. The Court emphasised three main points:

1. The jurisdiction conferred by Article 2 was mandatory.
2. The principles of legal certainty would be undermined if national courts were permitted to stay proceedings on a discretionary basis.

⁴ Ibid.

⁵ *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72.

⁶ Edwin Peel, *Forum non conveniens and European Ideals* [2005] LMCLQ 363.

⁷ James Fawcett, Janeen M. Caruthers and Peter North (ed), *Private International Law* (14th edn OUP, New York 2008) 138.

⁸ *Owusu v Jackson* (n1) 944.

⁹ Ibid 945.

3. As the doctrine of *forum non conveniens* is not found in the laws of all the Member States, there would be an adverse effect in allowing its use by some Member States and not others, as the uniform application of the jurisdiction system would then fail to be uniform as such.¹⁰

Thus the effect of the decision made it clear that national courts, such as the English courts, would not be able to apply common law legal doctrines, such as *forum non conveniens*, at their discretion when conferred mandatory jurisdiction under Article 2.¹¹

As the court referred specifically to Article 2, it is logical to say that the decision may not extend to situations involving other bases of jurisdiction under the Regulation. The Regulation provides for the staying of proceedings in situations exempt from the mandatory jurisdiction of Article 2. The issue lies in the fact that the Regulation does not have any provisions which specify the staying of proceedings in favour of a more appropriate jurisdiction in the court of a non-Member State. Logically it would seem that these exemptions to Article 2 should be applicable to the courts of non-Member States. If not, there could be the unfavourable outcome of sacrificing flexibility in being able to stay proceedings in favour of more appropriate forums for the sake of supposed certainty.¹²

The Court of Appeal, in a second question to the European Court of Justice, asked whether it was inconsistent with the Regulation to decline jurisdiction in favour of the courts of a non-Member State in all circumstances, or only in some; and, if so, which? However, the court declined to answer this question on the basis that it was unnecessary to resolve the dispute in *Owusu v Jackson*.¹³ If the court had in fact answered the question they may have resolved several disputes surrounding this area.

How far does the decision in *Owusu v Jackson* extend?

The main issue is whether the *Owusu v Jackson* decision applies to the three types of cases arising under Article 22 (exclusive jurisdiction), Articles 27 & 28 (the avoidance of parallel or related proceedings) and Article 23 (jurisdiction agreements). The Article 23 issue of jurisdiction agreements will be discussed in more detail.

Lawrence Collins LJ in *Masri v Consolidated Contractors International (UK) Ltd (No 3)*¹⁴ stated that it would be odd if the Regulation did not permit the English court to stay its proceedings in the types of situations identified by the Court of Appeal in its second question to the European Court of Justice. It is

¹⁰ Ibid 944.

¹¹ Ibid 944.

¹² Yvonne Baatz and Alexander Sandiforth, *Forum non convenient further constrained* [2010] 6 JBL 527.

¹³ *Owusu v Jackson* (n1) 944.

¹⁴ *Masri v Consolidated Contractors International (UK) Ltd (No 3)* [2009] QB 450.

thus expected that these types of cases could merit a stay of proceedings or a declining of jurisdiction in favour of a non-Member State.

Likewise, a more unrestrictive approach to the *Owusu v Jackson* decision would be favourable. The European Court of Justice and Advocate General Leger took pains to make clear that they were not purporting to provide an answer to the second question submitted by the Court of Appeal.¹⁵ Thus it may be reasoned that the decision in the *Owusu v Jackson* case does not extend to these other provisions relating to jurisdiction by reason of these arguments.

Several English authorities have also rejected the notion that the *Owusu v Jackson* doctrine applies to the types of cases identified by the Court of Appeal's second question to the European Court of Justice.

In *JKN v JCN*¹⁶ the judge decided that the *Owusu v Jackson* decision should not extend to cases where parallel litigation is pending in a non-Member State; in this type of case, it was said that the court retains its discretion to stay the English proceedings.

The legal basis of retaining such discretion to stay proceedings or decline jurisdiction could possibly be found in giving reflexive effect to the relevant provisions of the Regulation.¹⁷

Reflexive effect was proposed by Mr Droz, who suggested that a court might justify its refusing to hear a claim brought against a local defendant by applying the logic of the jurisdiction provisions in the Regulation.¹⁸ In effect, the Member States would be obliged to decline jurisdiction if there was an Art 22 connection with a non-Member State, if the parties had agreed to the exclusive jurisdiction of the courts of a non-Member State, or if proceedings had already been commenced in the courts of a non-Member State between the same parties and in the same cause of action.

However, there are arguments against reflexive effect in that it may be too rigid in its application, resulting in unacceptable results.¹⁹ Peel is one of the advocates in favour of the theory of limited discretion in place of reflexive effect.

Peel has argued that in disallowing the English courts to use its discretionary doctrine of forum non conveniens the European Court of Justice may have deprived the English courts of a practical tool. In accepting the decision in *Owusu v Jackson*, Peel then favours the idea of limited discretion being exercised regarding the other jurisdiction provisions in the Regulation (Articles 22, 23, 27 and 28). He proposed that it would be better if the courts were allowed to engage in a balanced consideration of whether it is more appropriate for two sets of proceedings to continue or for the English

¹⁵ C.M.V. Clarkson and Jonathan Hill (n2) 141.

¹⁶ *JKN v JCN* [2011] 1 FLR 826.

¹⁷ Peel (n6) 372.

¹⁸ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, New York 2008).

¹⁹ Jonathan Harris, *Stays of proceedings and the Brussels Convention* [2005] ICLQ 54(4) 946.

proceedings to be stayed in favour of the non-Member State proceedings.²⁰ He distinguishes this limited discretion of the national courts from giving reflexive effect to provisions in the Regulation.

Briggs also argues in favour of the limited discretion of the English courts continuing in saying that the restrictiveness of reflexive effect actually supports the theory of limited discretion.²¹

If neither the reflexive effect nor the limited discretion theories were allowed in relation to these exceptions to Article 2, it would be highly impractical for Member States to rigidly follow the *Owusu v Jackson* doctrine which disallows national courts from staying proceedings or declining jurisdiction in favour of a non-Member State. This restriction would be impractical because 'countries outside Europe with whom the Community must nevertheless deal could hardly then be expected to look favourably on the Community, if its courts were to apply what would certainly come to be regarded as blatantly chauvinistic jurisdictional practices against the rest of the world.'²²

This statement would be particularly relevant when considering what the position is, if a defendant is domiciled in an EU Member State and if the parties have agreed on the courts of a non-EU Member State.

***Owusu v Jackson* and Jurisdiction Agreements for the Courts of Non-Member States**

The relationship between this situation and the Regulation is not yet resolved. The basic principle is that, as the legislative organs of the EU have no right to compel the courts of non-Member States to accept jurisdiction according to the terms of a jurisdiction agreement or per the Regulation, it will be up to the court first seized to determine whether to give effect to a jurisdiction agreement in favour of a non-Member State. This was stated by Professor Schlosser; he admits at least one basis upon which the courts of a Member State may decline to exercise jurisdiction in favour of the courts of a non-Member State. He states that as the Regulation does not discuss the inadmissibility or the validity of such agreements, it will be up to the national courts to make a decision as to the jurisdiction agreement in question.²³

Likewise, in *Coreck Maritime GmbH v Handelsveem BV*²⁴ the European Court of Justice accepted the idea that a Member State court may give effect to a jurisdiction agreement in favour of the courts of a non-Member State. It seems as though the Court is entitled to give effect to this type of jurisdiction

²⁰ Peel (n6) 374.

²¹ Adrian Briggs, *Forum Non Conveniens* and *Ideal Europeans* [2005] LMCLQ 378.

²² Edwin Peel, *Forum non conveniens and European Ideals* [2005] LMCLQ 368, citing P Kaye, *The EEC Judgments Convention and the Outer World: Goodbye to Forum Non Conveniens* [1991] JBL 47 [50].

²³ Report by Professor Schlosser on the Convention of 9 October 1978 on the Convention on Jurisdiction and the enforcement of judgments in Civil and Commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ 1979 C 59, p. 71, paragraph 176.

²⁴ Case-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337.

clause under its national law, whether or not its own jurisdiction is derived from the Regulation provisions or not.

Furthermore in *Winnetka Trading Corp v Julius Baer Intl Ltd*²⁵ it was held that the English court may stay its proceedings where the dispute falls within the scope of a jurisdiction agreement in favour of a non-Member State court, notwithstanding whether jurisdiction was derived from the Regulation or not. Obiter comments to a similar effect were stated in *Konkola Copper Mines Plc v Coromin*.²⁶

However, the issue of the legal basis of such discretion arises again. The question is whether the national courts should apply its own law or be restricted by Article 23 of the Regulation by way of giving it reflexive effect. Gaudemet-Tallon was of the opinion that national courts need not be restricted by the Article 23 requirements, as these are applicable to Member States only. Non-Member States have no obligation to follow the requirements of Article 23 and as such it would be more practical to allow the national courts to consider jurisdiction agreements in their own systems on a discretionary basis.²⁷

As such it may be said that to the extent that *Owusu v Jackson* decision is interpreted in the manner discussed above, Member States may stay proceedings or decline jurisdiction owing to a jurisdiction agreement in favour of a non-Member State. In effect, national courts may exercise the limited discretion discussed by Peel and Briggs in relation to the doctrine of forum non conveniens.

Conclusion

The arguments clarify that this area in law is convoluted to say the least. *Owusu v Jackson* has left more unanswered, rather than resolved, questions in its wake. The arguments above show an attempt to mitigate the restrictive approach taken in the case towards jurisdiction provisions in the Regulation in relation to non-Member States. The reflexive approach is seen to be too rigid and a more useful interpretation of it may be that of limited discretion. Limited discretion may allow national courts to stay proceedings or decline jurisdiction under Articles 22, 23, 27 and 28 in favour of non-Member State courts. However, whilst there are many practical reasons for allowing stays in such circumstances, the European Court of Justice's ruling in *Owusu* has made the argument for defendants favouring non-Member States difficult. It is possible that the European Court of Justice may eventually hold that the inability of a court to stay its proceedings under Article 2 in favour of the courts of a non-Member States applies in all scenarios.²⁸

²⁵ *Winnetka Trading Corp v Julius Baer Intl Ltd* [2009] 2 All ER (Comm.) 735.

²⁶ *Konkola Copper Mines Plc v Coromin* [2005] 2 All ER (Comm.) 637.

²⁷ Adrian Briggs (n18) 295.

²⁸ Jonathan Harris (n19) 948.

The Problem with Intention: Is the Resulting Trust Approaching Extinction?

James Richards

Although the resulting trust is widely used in a large array of distinct situations; the theoretical basis of the doctrine is often overlooked. This study will evaluate the two prevailing views upon the foundation of the trust: Lord Browne-Wilkinson in *Westdeutsche* and Megarry J in *Vandervell*, consider the different factual scenarios in which the resulting trust is said to arise, and consider whether the trust is still the most effective way to settle the evidential gap in ownership. For instance, in the realm of cohabitation where the common intention constructive trust is now preferred, as a more malleable doctrine, to the new challenges of the law.

The current theoretical understanding of the Resulting Trust

Resulting trusts are used as a mechanism to return property to the settlor in circumstances where the ownership of property is in doubt. There are two recognised categories of resulting trust: presumed and automatic, which arise in different situations. However, there has been difficulty in explaining the basis of such an instrument. Lord Browne-Wilkinson endeavoured to reconcile the entirety of the law of resulting trusts under a foundation of intention¹. Nevertheless it should be realised that this is not sufficient because the resulting trust is a complex ideal and thus, cannot be comfortably confined to a simple model of intention.

In the realm of presumed resulting trusts, Lord Browne-Wilkinson suggests that the presumption is based upon the intention of the settlor. In accordance with this, Swadling discussed the presumption – e.g. that a contribution to the purchase price of a property is not a gift – and concludes that the inherent presumptions are ‘true’.² Therefore they are inferred and ‘arise because of the existence of the secondary fact is the most likely inference to draw from proof by evidence of the basic fact’³. This presumption has been recognised regularly

¹ *Westdeutsche v Islington BC* [1996] A.C. 669, 708.

² Swadling, W., ‘Explaining Resulting Trusts’, 2008 Law Quarterly Review 72, 74.

³ n.2, 74

by the judiciary as representing a ‘consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn in the absence of evidence to the contrary’.⁴ However, the presumption is now very old since it became orthodox by the 18th century, *Dyer v Dyer*.⁵ Yet, if the presumption was strong then it could act in an unprincipled manner, contrary to the settlor’s intent. Instead, it is ‘rebutted by evidence of any intention inconsistent with such a trust, not only by evidence of an intention to make a gift’⁶ and the formerly active presumption of advancement.⁷ The ease of rebuttal has often been shown.⁸

Though, Chambers has argued that presumed intentions are fundamentally flawed as it is inconsistent with the necessary requirement for certainty of intention for creating a trust: ‘unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think the court ought not to be astute to discover indications of such an intention’.⁹ Nonetheless, this assertion is doubted because the intention is indeed certain as the presumption acts merely as a time saving device and is easily rebutted by any divergent evidence – realising the widely accepted fact that a presumed intention cannot prevail over an actual intention.¹⁰

Additionally, the legislature have realised the importance and practical use of resulting trusts by relaxing the formal requirements required for their operation.¹¹ The intention basis of the resulting trust has strongly been accepted in several cases: ‘Resulting trusts are as firmly grounded in the settlor’s intent as are express trusts, but with this difference – that the intention is inferred, or is presumed as a matter of law from the circumstances of the case’.¹² Nonetheless, Piska argues that the presumptions adopted by the courts in earlier centuries are now outdated and thus, the constructive trust has been preferred to the anachronistic resulting trust in the division of family homes.¹³ He subsequently asserts that the presumptions no longer represent the intentions of the parties and the continued operation of presumed resulting trusts are therefore unprincipled and don’t represent any appreciable policy.¹⁴

⁴ *Pettitt v Pettitt* [1970] A.C. 777, 823 (per Lord Diplock).

⁵ (1788) 2 Cox Eq. Cas. 92.

⁶ n.1, 708.

⁷ Equality Act 2010, s.199 – Abolished the presumption of advancement.

⁸ E.g. *Vajpeyi v Yusuf* [2003] All E.R. 128. Presumption was rebutted because money advanced seen as a loan.

⁹ Chamber, R., *Resulting Trusts* (Clarendon Press, Oxford 1997), 34. Quotation from Parcq LJ in *Re Schebsman* [1944] Ch. 83.

¹⁰ E.g. Australian case: *Muschinski v Dodds* [1985] 160 C.L.R. 583.

¹¹ Law of Property (Miscellaneous Provisions) Act 1989, s.2(5): ‘nothing in this section affects the creation or operation of resulting, implied or constructive trusts’.

¹² *Rathwell v Rathwell* (1978) 83 D.L.R. (3d.) 289, 303. (Per Dickson J)

¹³ *Stack v Dowden* [2007] UKHL 17. Area where the presumption is most widely used.

¹⁴ Piska, N., ‘Two Recent Reflections on the Resulting Trust’, [2008] Conveyancer and Property Lawyer 441, 448.

Common Intention Constructive Trust

The presumed resulting trust has been saved from complete abolition by Lord Neuberger, however, confined to the commercial context¹⁵. Substituting the obsolete resulting trust with the constructive trust is a necessary step because the former no longer ‘truly reflect[s] the parties’ beliefs,’¹⁶ because ‘the expectations of us moderns – at least when young – is that we will throw in our lots together for richer or poorer.’¹⁷ Therefore, the presumed resulting trust no longer accurately realises the settlor’s intention and its imposition resulted in situations too ridiculous to contemplate.¹⁸ Thus, it was replaced with a mechanism based upon the common intention of the parties, which has been dubbed a cloak for the search of fairness¹⁹. Here, clearly the view of the judiciary is that the resulting trust is no longer based upon the parties’ intentions as expressed by Lord Browne-Wilkinson. Perhaps because the judicial presumptions adopted in prior centuries are no longer the correct summation of the common position: ‘the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era’.²⁰

The second category of resulting trust has always been the most difficult to reconcile with principle; however it is argued that it is indeed based on intention as envisaged by Browne-Wilkinson: ‘both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intention of the trustee but gives effect to his presumed intention’.²¹ It is submitted that this view would make cases like *Hodgson v Marks*²² impossible to explain and also arguments that resulting trusts operate independently of intention archaic.²³

In contrast, Megarry J in *Vandervell*,²⁴ paraphrasing Lords Upjohn and Wilberforce in *Vandervell v IRC* voiced a dissenting opinion: ‘if the beneficial interest was in A and he fails to give it away effectively to another or others or charitable trusts it must remain with him’²⁵ as the ‘beneficial interest cannot remain in the air: the consequence in law must be that it remains in the settlor’.²⁶ These opinions don’t speak of intention but of an automatic consequence at law for a failed disposition: if property is not effectively

¹⁵ *Abbott v Abbott* [2007] UKPC 53 and dissenting in *Stack* [96]-[158].

¹⁶ Piska, N., ‘Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*’, [2008] 71(1) *Modern Law Review* 120, 124.

¹⁷ Sparks, P., ‘How Beneficial Interests Stack Up’, [2011] 2 *Conveyancer and Property Lawyer* 156, 160.

¹⁸ n.17, 159, Resulting trust would lead to a 85:15 split in *Stack*.

¹⁹ n.13, [131]. Adoption of this movement towards fairness and its dissent can be explained if you realise the legal backgrounds of Baroness Hale, in family law, and Lord Neuberger, in property.

²⁰ n.4, 824.

²¹ n.6, 708.

²² [1971] Ch 892.

²³ *Re Gillingham Bus Disaster Fund* [1958] Ch. 300.

²⁴ *Re Vandervell’s Trusts (No.2)* [1974] Ch. 269.

²⁵ [1967] 2 A.C. 291, 313.

²⁶ n.25, 329.

disposed in a manner recognised in law, i.e. the three certainties required are not realised or the trust breaches the rule against perpetuity, then it remains with the settlor.²⁷ However, this analysis of the resulting trust is flawed: the property does not remain with the settlor but the resulting trust creates a new interest which is consistent with the intention of the settlor.²⁸ Nonetheless, this assertion is challenged in *Air Jamaica*²⁹: the resulting trust arises 'whether or not the transferor intended to retain a beneficial interest – he almost always does not – since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient'³⁰. The decision of Lord Millett in this instance was based upon an idea of unjust enrichment which was first contemplated by Chambers.³¹

Unjust Enrichment

The third school of thought is placing the resulting trust under the bracket of unjust enrichment. This has been raised effectively in cases of mistaken payment.³² According to Birks³³ and Chambers 'all resulting trusts effect restitution of what would otherwise be the unjust enrichment of the recipient'.³⁴ This analysis could explain the troublesome *Quistclose*³⁵ trust. Watt has noticed that this basis of resulting trusts is fallacious because the inherent prerequisite is that enrichment must be 'unjust'³⁶. Thus, the terminology is manifestly out of place.³⁷ For example, take a simple trust: from B to A for C for life. Consequently, upon the death of C, a resulting trust arises from A to B. Hence, it is artificial to think in terms of unjust enrichment. Additionally, it has been suggested that refocusing the law of trusts in terms of unjust enrichment 'belies the essential proprietary nature of trusts'.³⁸ Finally, all the cases supporting this view are not directly involved with trust claims but are more naturally associated with equitable wrongdoing³⁹ and many are obiter opinions. Therefore, unjust enrichment is clearly an erroneous foundation of the resulting trust.

²⁷ For a recent example of the requirement of three certainties and the absence of perpetuity, see *Mohammed v Khan* [2005] EWHC 599 (Ch), [131].

²⁸ n.2, 100.

²⁹ *Air Jamaica Ltd v Charlton* [1999] 1 W.L.R. 1399 (PC).

³⁰ n.29, 1412.

³¹ n.9.

³² *Chase Manhattan Bank v Israel-British Bank (London) Ltd* [1981] Ch. 105; *Trustor AB v Smallbone (No.2)* [2001] 2 B.C.L.C. 436.

³³ Birks, P., *Unjust Enrichment* (OUP, Oxford 2005).

³⁴ n.9, 220.

³⁵ *Barclays Bank v Quistclose* [1970] A.C. 567 realised by Lord Millett: *Twinsectra v Yardley* [2002] UKHL 12.

³⁶ Watt, G., *Trusts and Equity* (4thedn, OUP, 2009) 150.

³⁷ n.36, 151.

³⁸ Chong, A., 'Common Law Choice of Law Rules for Resulting and Constructive Trusts', [2005] *International & Comparative Law Quarterly* 855, 871.

³⁹ E.g. *Kuwait Oil Tanker Co SAK v Al Bader (No 3)* [2000] EWCA Civ 160.

Conclusion

The resulting trust as Watt contemplates is based upon ‘an automatic consequence of a transferor’s failure effectively to dispose of beneficial ownership in the asset purportedly transferred. The integrity of property law and the inviolability of proprietary rights automatically raise a presumption that a beneficial owner intends to retain his beneficial ownership unless he transfers it effectively in a manner that is recognised by property law’.⁴⁰ The resulting trust therefore is simply property laws response to ownerless property: averting the worse possible outcome – *bona vacantia* to the crown.⁴¹ Thus, the resulting trust is not unprincipled as it has a clear role to play within the law: it is the ‘last resort to which the law has recourse when the draftsman has made a blunder or failed to dispose of that which he has set out to dispose of.’⁴²

The resulting trust is clearly not based upon intention as Harman J acknowledged: it doesn’t ‘rest on any evidence of the state of mind of the settlor, for in the vast majority of cases no doubt he does not expect to see his money back...The resulting trust arises where that expectation is, for some unforeseen reason, cheated of fruition, and is an inference of law based on after-knowledge of the event.’⁴³ Several cases⁴⁴ show that a resulting trust is often imposed despite being the last thing the settlor proposed. Therefore, the resulting trust cannot be pinned to one basis and needs to be flexible to be applicable in a plethora of situations – begging the need to ask why resulting trusts are confined to such traditional grounds.⁴⁵ Lord Upjohn acknowledged this situation in *Vandervell*: ‘in reality the so-called presumption of resulting trust is nothing more than a long stop to provide an answer when the relevant facts and circumstances fail to yield a solution.’⁴⁶

Confining the operation of resulting trusts to the guise of intention is superficial and insufficiently realises the practical purposes of the trust: it arises by operation of law when certain circumstances manifest themselves. Thus, it is perfectly natural to conclude as Watt⁴⁷ and Megarry J⁴⁸ do that the settlor should recoup their interest unless it is alleged to be abandoned outright.⁴⁹ This practical realisation of the exercise of resulting trusts clearly suggests that although ‘the automatic resulting trust defies legal analysis’⁵⁰ it still holds an appropriate place in the law.

⁴⁰ n.35, 144.

⁴¹ *Re West Sussex Constabulary’s Widows, Children and Benevolent Fund Trusts* [1971] Ch. 1 (CA).

⁴² *Re Cochrane’s Settlement Trusts* [1955] 1 All E.R. 222 (per Harman J).

⁴³ n.23, 310.

⁴⁴ *IRC v Broadway Cottages Trust* [1955] Ch. 20; *Vandervell*.

⁴⁵ Segal, N., ‘The Westdeutsche Decision in the House of Lords – The Availability of Equitable Proprietary Remedies’, [1998] *Insolvency Intelligence* 33, 35.

⁴⁶ n.26, 313D.

⁴⁷ n.35, 154.

⁴⁸ n. 24.

⁴⁹ n.40.

⁵⁰ n.2, 102.

Assessing the strengths and weaknesses of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

Deji Sasegbon

Introduction

The world's fisheries are on the brink of collapse. It is estimated that 75 per cent are significantly depleted, over exploited or fully exploited¹. Behind these stark figures there lie the stories of numerous families whose livelihoods have all but been destroyed by the rapid dwindling of the once-bountiful ocean resources. One of the most important factors undermining the efficacy of global co-operation and management of straddling and migratory stocks and fisheries on the high seas is the pervasiveness of illegal, unreported and unregulated fishing². These phenomena are the target of a recent UN Food and Agricultural Organisation instrument which seeks to make a contribution to the achievement of sustainability in global fisheries. As per the above question, this essay will begin by examining the strengths and weaknesses of this recently approved Instrument (the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported Fishing – not yet in force). Subsequently, in addressing the second part of the question, it will be argued that the drafters of the instrument can be said to have treated the problem of Illegal, Unreported and Unregulated fishing as undifferentiated in at least two respects: by directing every single measure contained within the agreement simply at Illegal, Unreported and Unregulated fishing, notwithstanding the fact that each of these types of fishing calls for its own unique solution³ and, by adopting an excessively narrow instrument (concerned solely with Port State measures) which overlooks the fact that each type of fishing, be it Illegal, Unreported or Unregulated, is itself multi-layered and complex, and requiring an approach which, as well as being unique, is also broad, thereby targeting all

¹ K. Rigg, R. Parmentier, D. Currie, HALTING IUU FISHING: ENFORCING INTERNATIONAL FISHERIES AGREEMENTS (2003) citation imcompleted

² Ibid.

³ A. Serdy *Simplistic or Surreptitious? Beyond the Flawed Concept(s) of IUU Fishing* in SUSTAINABLE FISHERIES: MULTI-LEVEL APPROACHES TO A GLOBAL PROBLEM pg. 253-279 (American Fisheries Society, 2011)

of its segments⁴. The essay will go on to argue and conclude that, for these reasons, the Agreement is unlikely to make any significant contribution to combating the problem of Illegal, Unreported and Unregulated fishing.

The Problem

Illegal, Unreported and Unregulated fishing is an international problem which has considerable social, economic and environmental consequences⁵. In addition to contributing to the depletion of fish stocks, these phenomena also threaten habitats, thereby exerting a negative cross boundary influence on areas under national jurisdiction and the high seas⁶. The highly globalized nature of fishing activities and fisheries means that any decrease in fish catch in one part of the world (irrespective of the cause) will inevitably threaten the food security of fish-importing states and thus the global food supply. Numerous reports by the UN Food and Agricultural Organisation (FAO) have indicated the serious state of decline of the majority of commercially harvested fish stocks⁷. In this respect, Illegal, Unreported and Unregulated fishing has been identified as the “main obstacle in achieving sustainable fisheries in both areas under national jurisdiction and the high seas”⁸ and as “one of the most severe problems affecting world fisheries”⁹. Moreover, developing countries are particularly vulnerable to this type of fishing. In 2006, a study was undertaken by the Marine Resources Assessment Group (MRAG) Ltd. estimating that the total loss by Illegal, Unreported and Unregulated fishing to Angola, Guinea, Kenya, Liberia, Mozambique, Namibia, Papua new Guinea, Seychelles, Sierra Leone and Somalia amounted

⁴ S. Stokke, D. Vidas *Regulating IUU Fishing or Combating IUU Operations*, in FISH PIRACY: COMBATING ILLEGAL, UNREPORTED AND UNREGULATED FISHING (OECD, 2004) pg. 22; see fig. 1

⁵ M. Tsamenyi et al. *The European Council regulation of Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective INT'L J OF MARINE AND COASTAL LAW 25 (2010) 5-31*; see generally

MRAG Ltd., *Illegal, Unreported and Unregulated Fishing on the High Seas: Impacts on Ecosystems and Future Science Needs* (Report prepared for the High Seas Task Force and the Department for International Development, United Kingdom 2005) <http://www.high-seas.org/docs/Ecosystem_Impacts_IUU_Final_Report_MRAG_2005.pdf> accessed 17 April 2011; MRAG Ltd., *Review of Illegal, Unreported and Unregulated Fishing on Developing Countries* (Report prepared for the High Seas Task Force and the Department for International Development, United Kingdom 2005) <http://www.high-seas.org/docs/IUU_DFIG_Final_report_MRAG_2005.pdf> accessed 17 April 2011; and D. Agnew, C. Barnes, *ECONOMIC ASPECTS AND DRIVERS OF IUU FISHING: BUILDING A FRAMEWORK* (Report prepared for OECD Workshop on Illegal, Unreported and Unregulated (IUU) Fishing Activities 2004, AGR/FI/IUU(2004)2) <<http://www.oecd.org/dataoecd/17/7/29468002.pdf>> accessed 17 April 2011

⁶ Ibid.

⁷ FAO, *The State of World Fisheries and Aquaculture* (Rome 2006)

<<http://www.fao.org/docrep/009/A0699e/A0699e00.htm>> accessed 17 April 2011

⁸ UNGA, *Sustainable Fisheries, Including Trough the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish stocks, and Related Instruments: Report of the Secretary-General* (2004) UN GAOR 59th Session UN Doc A/59/298, 13.

⁹ UNGA, *Oceans and the Law of the Sea: Report of the Secretary General* (1999) UN GAOR 54th Session UN Doc A/54/429, 42.

to \$372 million which is 19 per cent of their combined total catch value and 23 per cent of the declared value of their catch¹⁰. It is for this reason that Illegal, Unreported and Unregulated fishing operations have been described as “stealing food from some of the poorest people in the world”¹¹.

The Solution?

Several efforts have been made by the international community, through the FAO, United Nations General Assembly (UNGA) and Regional Fisheries Management Organisations (RFMO), to combat Illegal, Unreported and Unregulated fishing¹². Fairly recently, the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated fishing had been negotiated and concluded by the FAO. This instrument, although not yet in force, is the first international legally binding response to illegal, unreported and unregulated fishing¹³ and has been described as “the most significant international treaty dealing with fisheries since the 1995 UN Fish Stocks Agreement”¹⁴.

Strengths of the Agreement

This Port State Measures Agreement has a number of identifiable strengths:

Cost-effectiveness

Firstly, the potential application costs of the Agreement are likely to be extremely low on account of the fact that it focuses solely on port state measures which do not require significant resources to implement. Articles 9 and 11 of the Agreement are illustrative in this regard. They provide that when a party has sufficient proof to suggest that a vessel has engaged in IUU fishing, or fishing related activities supporting such fishing, it shall deny the vessel entry into its ports and, where the vessel is already in port, the “use of its ports for landing, trans-shipping, packaging and processing of fish and for...refuelling and resupplying, maintenance and dry docking”¹⁵. Indeed, perhaps the only notable cost in regards to the Agreement relates to the

¹⁰ Supra fn 5 MRAG Ltd., *Review of Illegal, Unreported and Unregulated Fishing on Developing Countries*

¹¹ Environmental Justice Foundation, *Pirates and Profiteers: How Pirate Fishing Fleets are Robbing People and Oceans* (London 2005), 3

<www.ejfoundation.org/pdf/pirates_and_profiteers.pdf> accessed 17 April 2011

¹² M. Tsamenyi et al. *The European Council regulation of Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective INTL J OF MARINE AND COASTAL LAW 25 (2010) 5-31*

¹³ R. Daley, *New agreement establishing global port state measures to combat IUU fishing* AUS J OF MARITIME AND OCEAN AFFAIRS (2010) Vol. 2(1) 28-31

¹⁴ Ichiro Nomura, UN FAO Fisheries Department Assistant Director-General, UN FAO Media Centre *Groundbreaking treaty on illegal fishing*

approved<<http://www.fao.org/news/story/en/item/37627/icode/>> accessed 13 April 2011

¹⁵ Articles 9 and 11 of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, UN FAO Conference, 36th session C 2009/LIM/11-Rev 1.

inspection regime which states are obliged to introduce. The overall effect of such minimal port state requirements, namely denial of port access and services, is to address the issue of Illegal, Unreported and Unregulated fishing operations in a manner which is highly cost effective and, as such, represents “a promising avenue for implementation by developing states”¹⁶. This is considerably in line with the recognition by the drafters of the need to ensure the effective involvement of the developing states parties. In this respect, the agreement provides, in Article 21, that parties are to provide assistance (technical and otherwise) to developing states parties in order to enhance their ability to develop a legal basis and capacity, to facilitate their participation in any international organisation that promotes the effective development and implementation of the port state measures, and strengthens their development and implementation of port state measures. Moreover, the Agreement provides for the establishment of an ad hoc working group for the purpose of assessing the needs of developing states parties and making recommendations on the establishment of funding mechanisms, “including a scheme for contributions, identification and mobilisation of funds, the development of criteria and procedures to guide implementation, and progress in the implementation of the funding mechanisms”¹⁷. The measures in Article 21 are premised upon the realisation that an implementation failure by one state would invariably jeopardise the effectiveness of the entire agreement. That is to say, it would result in the development of ports of convenience, thereby allowing perpetrators in Illegal, Unreported and Unregulated fishing a haven at which they can offload their ill obtained catch and take on essential supplies.

Reversal of the Burden of Proof

The cost-effectiveness of the Agreement is further enhanced by the fact that, instead of obliging the port state to prove that the catch was taken in contravention to its provisions, it places an onus on the owner or operator of the vessel to adduce sufficient evidence, as determined by the port state, that it was in fact taken in conformance with the relevant conservation and management measures. Accordingly, Article 11 provides, *inter alia*, that a Party shall deny a vessel the use of its port services, if:

The party has reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or fishing related activities in support of such fishing...unless the vessel can establish:
that it was acting in a manner consistent with relevant conservation and management measures; or
in the case of provision of personnel, fuel, gear and other supplies at sea, that the vessel that was provisioned was not, at the time of provisioning, a vessel referred to in paragraph 4 of Article 9.¹⁸

¹⁶ J. Swan, *Port State Measures To Combat IUU Fishing: International and Regional Developments* 7 SUSTAINABLE DEV. L. & POL'Y 38 2006-2007; see also Food and Agriculture Organisation Of the United Nations, *Report of the FAO/FFA Regional Workshop to Promote the Full and Effective Implementation of Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Nadi, Fiji*, 28 August-1 September 2006

¹⁷ *Supra* fn 15, Article 21(6)

¹⁸ *Supra* fn 15, Article 11, emphasis added

As well as contributing to the cost-effectiveness of the agreement, this reversal of the burden of proof, as is already a feature of the IPOA-IUU,¹⁹ also has the effect of facilitating its enforcement by the states who are no longer placed on the back foot in seeking to hold perpetrators of Illegal, Unreported and Unregulated fishing to account.

Information keeping and sharing

In accordance with Article 15 of the Agreement, Parties are to transmit results obtained from their inspection of certain vessels to the flag state of the inspected vessel and, as appropriate, to other states, RFMO's and International Organisations. To supplement this duty, Article 16(2) provides:

To the extent possible and with due regard to appropriate confidentiality requirements, Parties should co-operate to establish an information-sharing mechanism, preferably co-ordinated by FAO, in conjunction with other relevant multilateral and intergovernmental initiatives, and to facilitate the exchange of information with existing databases relevant to this Agreement.²⁰

Such a joint effort has already been taken by the North East Atlantic Fisheries Commission (NEAFC), the Northwest Atlantic Fisheries Organisation (NAFO) and the South East Atlantic Fisheries Organisation (SEAFO) and vessels listed by any one of these organisations are mutually recognised as IUU vessels²¹. Urging States to develop a central depository of relevant information in this way, should undoubtedly constitute a necessary step against illegal, unreported and unregulated fishing by aiding the enforcement process and thereby strengthening the Agreement. Its usefulness in this regard, however, is entirely dependent on the Agreement being ratified by a sufficient number of States.

Targeting 'fishing related activities' in addition to IUU fishing

That the Agreement, in addition to Illegal, Unreported and Unregulated fishing, targets 'fishing related activities' in support of such fishing is undoubtedly to its merit. This is because one of the ways by which the vast majority of Illegal, Unreported and Unregulated fishing operations evade detection – prompting some commentators to identify it as “arguably the biggest loophole in fisheries management agreements”²² – is by vessels never, or only very rarely, entering the ports of countries which are assiduous in maintaining adequate port state measures. It has been recognised that the

¹⁹ See para. 63 which provides: “Such port State measures may prohibit landings and transhipment of catch unless the identified vessel can establish that the catch was taken in a manner consistent with those conservation and management measures”, Paragraph 63 of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing (IPOA; FAO 2001).

²⁰ Supra fn 15, Article 16(2)

²¹ International Commission for the Conservation of Atlantic Tunas (ICCAT), *Report for Biennial Period, 2006-07 Part I (2006)*

²² Supra fn 1, p. 7

largest vessels have the potential to remain at sea for months or even years (provided that they are re-supplied at sea)²³. Their catch is simply offloaded to reefer (transport) ships. Transshipping their catch in this way essentially means that the ill-obtained catch is 'white washed' in that it is allowed to be landed and introduced into the market. Therefore,?

The advance towards customary status of the rule in Article 18 of UNFSA

In accordance with Article 11 paragraph 1(a) of the Agreement, a party is obliged to refuse services to a vessel which has entered one of its ports when:

the Party finds that the vessel does not have a valid and applicable authorisation to engage in fishing or fishing related activities required by its flag state [which need not be party to the 2009 Agreement]²⁴

It has been recognised that this paragraph in particular reinforces the advance towards customary status of the rule in Article 18, paragraphs 2 and 3(a) and (c) of UNFSA which makes it clear that it is no longer sufficient for States to leave their own domestic high seas fishing in a state of deregulation; instead, they are required to positively authorise the actions of each vessel which seeks to make use of the freedom of fishing. They must (at least in an indirect sense) make themselves accountable for the actions of these vessels²⁵. As a measure which attacks the lack of regulation of fishing, this provision is to be welcomed.

Minimum Measures

Finally, it is necessary to briefly emphasise that the Agreement merely seeks to impose minimum measures, thereby allowing Party States to apply stricter measures than those in the Agreement²⁶. This too is to be welcomed.(this paragraph is over-simplified, a more deeply comment is preferred)

Weaknesses of the Agreement

Unfortunately, just as the Port State Measures Agreement has several strengths, so too does it come packaged with numerous weaknesses,(rephrasing) all of which threaten to undermine its potential effectiveness.

The Unsatisfactory Definition of Illegal, Unreported and Unregulated Fishing

Ambiguity

²³ Ibid.

²⁴ Supra fn 15, Article 11(1)(a)

²⁵ Supra fn 3, p. 265

²⁶ This point was stressed by the European Community during the negotiations - Report of the Technical Consultation to Draft a Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, FAO Fisheries and Aquaculture report. No. 914 (2009) [14]

The speed at which a consensus was reached in regards to the Agreement is indicative of the international community's increasing sense of urgency to establish minimum port state measures in response to the phenomena of Illegal, Unreported and Unregulated fishing operations. Unfortunately, however, the focus on speeding in the negotiations had the consequence that drafting proposals and original expectations which favoured the introduction of a precise definition of Illegal, Unreported and Unregulated fishing, suitably fitting for a legally binding instrument, largely went unfulfilled²⁷. Instead, the Agreement merely incorporates the ambiguous definition of IUU fishing contained within the non-legally binding International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated fishing (IPOA-IUU). As such it provides in Article 1(e) that:

illegal, unreported and unregulated fishing' refers to the activities set out in paragraph 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated fishing...²⁸

The ambiguity of the IPOA-IUU definition of Illegal, Unreported and Unregulated fishing largely stems from the lack of clarity as to the precise scope of paragraph 3.3 (concerning unregulated fishing) ²⁹. This is very much compounded by paragraph 3.3.1 of the definition of unregulated fishing which provides:

[unregulated fishing refers to fishing activities] in the area of application of a relevant regional fisheries management organisation that are conducted by vessels without nationality, or by those flying the flag of a state not party to that organisation, or by a fishing entity, in a manner *that is not consistent with or contravenes* the conservation and management measures of that organisation.³⁰

The reference in paragraph 3.3.1 to “consistency” and “contravention” in particular has been recognised by the commentators as extremely problematic. As Serdy explains:

If a state is neither a member of the relevant commission nor a formally co-operating non-member, then it defies a basic principle of the law of treaties – the idea that treaties (and by extension obligations arising under treaties such as international fisheries regulations) bind only the parties to them and not third states without their consent – to say that

²⁷ See Letter from the United States Department of State to Dr. Fabio Hazin, 25 September 2008 at <ftp://ftp.fao.org/FI/DOCUMENT/tc-psm/2009/default_draft_text.htm>

²⁸ Article 1(e) of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, UN FAO Conference, 36th session C 2009/LIM/11-Rev 1.

²⁹ R. Daley, *New agreement establishing global port state measures to combat IUU fishing* AUS J OF MARITIME AND OCEAN AFFAIRS (2010) Vol. 2(1) pg. 30

³⁰ Supra fn 19, Paragraph 3.3.1, emphasis added

either the state or the fishing by its vessels thereby “contravenes” such measures.³¹

The ambiguous nature of the definition of Illegal, Unreported and Unregulated fishing contained within the IPOA-IUU, however, is offset somewhat by the fact that, as was recognised by Canada in the negotiations, any ambiguity would ‘afford those parties that wish to take a robust approach to deter IUU fishing the opportunity to do so, particularly when it came to vessels engaged in fishing in high seas areas not regulated by a RFMO.’³²

Paragraph 3.4 of the IPOA-IUU definition

Also unsatisfactory is the insistence in paragraph 3.4 of the IPOA-IUU, that not all unregulated fishing is necessarily bad:

Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner that is not in violation of applicable international law and may not require the application of measures envisaged under the IPOA.³³

The rationale behind this paragraph is that a large number of fisheries and/or high seas waters remain unregulated by RFMOs.³⁴ Examples of these, as identified by Agnew and Barnes, include the toothfish fishery on the northern Patagonian shelf edge, and the orange roughy/alfonsino fishery in the Southern Indian Ocean.³⁵ Despite the exemption of this aspect of fishing from the definition of unregulated fishing in the IPOA-IUU, however, it is still very much part of the problem and thereby needs to be addressed.³⁶ In fact, it has been argued that no areas of high seas fishing exists which could be considered legitimately unregulated³⁷. This is because, even in the absence of regulations, there is an obligation on states, imposed by the Straddling Stocks Agreement and UNCLOS, to take efforts to ensure that such stocks are managed.³⁸ As such, whilst such fisheries are currently considered ‘legitimately unregulated’, this is not the case, and they should certainly become regulated. Para. 3.4, however, can be said to legitimise the failure on the part of RFMO’s to put their own houses in order. In this respect, therefore, the Port State Measures Agreement fails to condemn the lack of regulation of fishing, and, as such, arguably contributes to the proliferation of this undesirable phenomenon.

Problematic States

As is the case in regards to all treaty-based advances in international fisheries management, one weakness of the Agreement is that it is likely to be only the

³¹ Supra fn 3, p. 258

³² Report of the Technical Consultation to Draft a Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, FAO Fisheries and Aquaculture report. No. 914 (2009) [22]

³³ Supra fn 19, Paragraph 3.4

³⁴ D. Agnew, C. Barnes *The Economic and Social Effects of IUU/FOC Fishing* (A Report for the Organisation for Economic Cooperation and Development) February 2003, p. 5

³⁵ Ibid. at p. 6

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

states diligent in carrying out their conservation obligations will become parties. The more problematic states, i.e. those who consistently take little interest in fisheries conservation despite that their vessels and nationals actively participate in high seas fishing, are unlikely to follow suit and, as such, it has been recognised that these states ‘will become bound only by the slow and uncertain process by which those norm-creating rules within them that are of sufficient generality to do so achieve the status of custom.’³⁹

The Legally non-binding nature of the IPOA-IUU

Yet another disadvantage which flows from using the IPOA-IUU definition of Illegal, Unreported and Unregulated fishing was highlighted by Japan during the negotiation process. As was explained, such an approach has the potential to result in yet more legal uncertainty because the IPOA-IUU is “a legally non-binding document and, theoretically, subject to change in the future through ‘less legal’ process”⁴⁰.

Arguably, however, the most significant weakness of the Port State Measures Agreement stems from its drafters having treated the problem of Illegal, Unreported and Unregulated fishing operations as undifferentiated. As was briefly noted in the introduction, this can be said to be the case in at least two respects:

Failure to adequately distinguish between Illegal, Unreported and Unregulated fishing (distinct problems, each calling for its own distinct solution)⁴¹

Highly regrettably, the drafters of the Agreement seemingly failed to understand the complexity of the problem which they were seeking to remedy. This much is evident from their failure to adequately distinguish between Illegal, Unreported and Unregulated fishing. Such a lumping together of Illegal, Unreported and Unregulated fishing has been the subject of much academic debate over the years, with some commentators strongly against it⁴² and yet others arguing that the consequent equation of “unregulated fishing” with “illegal fishing” constitutes a necessary condition for any lasting solution to the problems facing high seas fisheries⁴³.

As a result of the failure by the drafters to recognise the distinction between the three types of fishing operation, *all* of the measures within the Agreement are aimed simply at ‘IUU fishing’. It is clear, however, that a number of these measures touch only on one or two of these elements. One good illustration in this regard necessitates looking at the phenomenon of unreported fishing (which, for the purposes of the Agreement, includes fishing activities which

³⁹ Supra fn 3, p. 265

⁴⁰ Supra fn 32.

⁴¹ Supra fn 3 p. 272

⁴² See Ibid.

⁴³ See G. Munro, *The Management of Shared Fish Stocks* in PAPERS PRESENTED AT THE NORWAY-FAO EXPERT CONSULTATION ON THE MANAGEMENT OF SHARED FISH STOCKS- BERGEN, NORWAY, 7-10 OCTOBER 2002 (Rome: FAO, 2003; FAO Fisheries Report)

have been misreported). The essence of such fishing is that false information as regards the catch is provided (one possible reason for this being the desire to legitimise an illegitimate catch⁴⁴) by the perpetrating vessel. When couched in these terms, it is difficult to see what effect the measures contained within Articles 9 and 11, namely denial of port access and services, could possibly have against this type of fishing. Indeed, the application of both Articles is substantially dependent upon the pre-arrival information issued by the vessel. It is largely based on this information that a port state will decide whether to allow or deny entry and services. As the catch that has been misreported appears *prima facie* legitimate, it is unlikely to raise very many suspicions when the pre-arrival information is submitted. As such the perpetrating vessel would be granted access to the port and permitted to use its services thereby allowing the offload of the vessel's ill-obtained catch. Perhaps the only measure contained within the Agreement which has a realistic chance of success in regard to unreported fishing is Article 12 which imposes upon states an obligation to inspect a certain number of vessels per year. It is only by inspecting these vessels that the misreported nature of their catch becomes apparent allowing the denial measures in Article 18(1)(b) of the agreement to be exercised. However, whether or not such a vessel engaged in misreported fishing is actually flagged for inspection is likely to be a mere chance. The priorities for inspection provided in Article 12(3) (vessels that have been denied entry or use of a port in accordance with the Agreement, vessels for which a request for inspection has been entered, and other vessels for which there are clear grounds for suspecting that they have engaged in IUU fishing or fishing related activities in support of such fishing) provide little assistance in this regard. As a matter of fact, they serve to decrease the likelihood that a vessel which has engaged in misreported fishing will be inspected and thereby discovered. This is due to the features of such fishing are unlikely to bring it within any of the high priority categories. Even Article 12(3)(c) which, it could be argued, serves as a catch-all is unlikely to be of any help on account of the fact that, as regards mis-reported fishing, there will by definition not be any "*clear grounds* for suspecting that they have engaged in IUU fishing or fishing related activities in support of such fishing."⁴⁵

Unaffected by Articles 10 and 11 and ranked low on the list of priorities for inspection, therefore, it is inevitable that numerous incidents of mis-reported fishing will escape detection and punishment. These difficulties may well have been avoided had the drafters recognised that each element of the term Illegal, unreported and Unregulated fishing requires its own individual attention. Had this been the case, perhaps measures contained within the Agreement would have been adequately tailored to the particular elements which they stand the best chance of combating.

The inability of the Agreement to adequately address the problem of unreported fishing is likely to also decrease its effectiveness in regards to the other two types of fishing which it seeks to combat. This is because, currently, a large proportion of illegal catch around the world is also unreported (or misreported), especially where measures are in place against illegal fishing,

⁴⁴ This form of misreported fishing also falls within the category of illegal fishing under Paragraph 3.3.1 of the IPOA-IUU.

⁴⁵ *Supra* fn 15, Article 12(3)(c).

and this may also be the case in regards to some instances of unregulated fishing.

Production of a narrow instrument which overlooks the fact that Illegal, Unreported and Unregulated fishing operations are multi-layered and complex, requiring a broad approach

In addition to having failed to adequately distinguish between Illegal, Unreported and Unregulated fishing operations, the drafters can be said to have underestimated the complexity of the problem with which they were dealing in yet another respect. Their apparent diagnosis of the problem as centred solely around fishing activity and vessel operations ignores the fact that its main drivers, just as its facilitators, are to be found outside the realm of fishing, and the consequent narrowness of the instrument which they eventually produced is largely unsatisfactory. As has been recognised, it is much more accurate to understand the problem as an inter-related chain of various links of which operations ‘at sea’ (i.e. from vessel registration to the landing of catch in a port) are but a mere part⁴⁶. In fact, one academic has identified three segments of an IUU fishing operation; fishing vessel operations (this is the segment ‘at sea’ and largely corresponds to what is commonly understood as IUU fishing), logistical activities of the operation and catch/product in international trade and market⁴⁷. Whilst such an analysis of the problem is indeed more accurate than viewing it as centred solely around the realm of fishing, this essay, bearing in mind the very real distinction between Illegal, Unreported and Unregulated fishing operations which necessitates unique approaches to each⁴⁸, would seek to develop this further. In this regard, it is submitted that each of these types of fishing operation can be further subdivided into the segments identified above (see fig. 1). To address IUU fishing operations effectively, an instrument must essentially deal with all three of these segments within all three of these types of fishing operation. In other words, in addition to introducing a distinct solution to combat each type of fishing operation⁴⁹, such an instrument must also ensure that each distinct solution makes use of a broad range of measures. Such a broad approach is enshrined in the general objectives of the IPOA-IUU which, although failing to emphasise the need for a distinct solution in regards to each type of fishing, calls for the adoption of “a comprehensive and integrated approach [according to which] States should... use all available jurisdictions in accordance with international law, including port state measures, coastal state measures, market related measures and measures to ensure that nationals do not support or engage in IUU fishing”⁵⁰. Unfortunately, however, the complexity of the problem in this regard also seems to have been overlooked by the drafters of the Port State Measures Agreement who have produced an excessively narrow instrument concerned solely, as its name suggests, with Port State Measures. As such, its

⁴⁶ Supra fn 5, p. 20

⁴⁷ Ibid. pg. 22

⁴⁸ ?

⁴⁹ ?

⁵⁰ Supra, fn 19.

effectiveness, and the likelihood that, on its own, it will succeed in reducing the instances of IUU fishing around the world is hampered⁵¹.

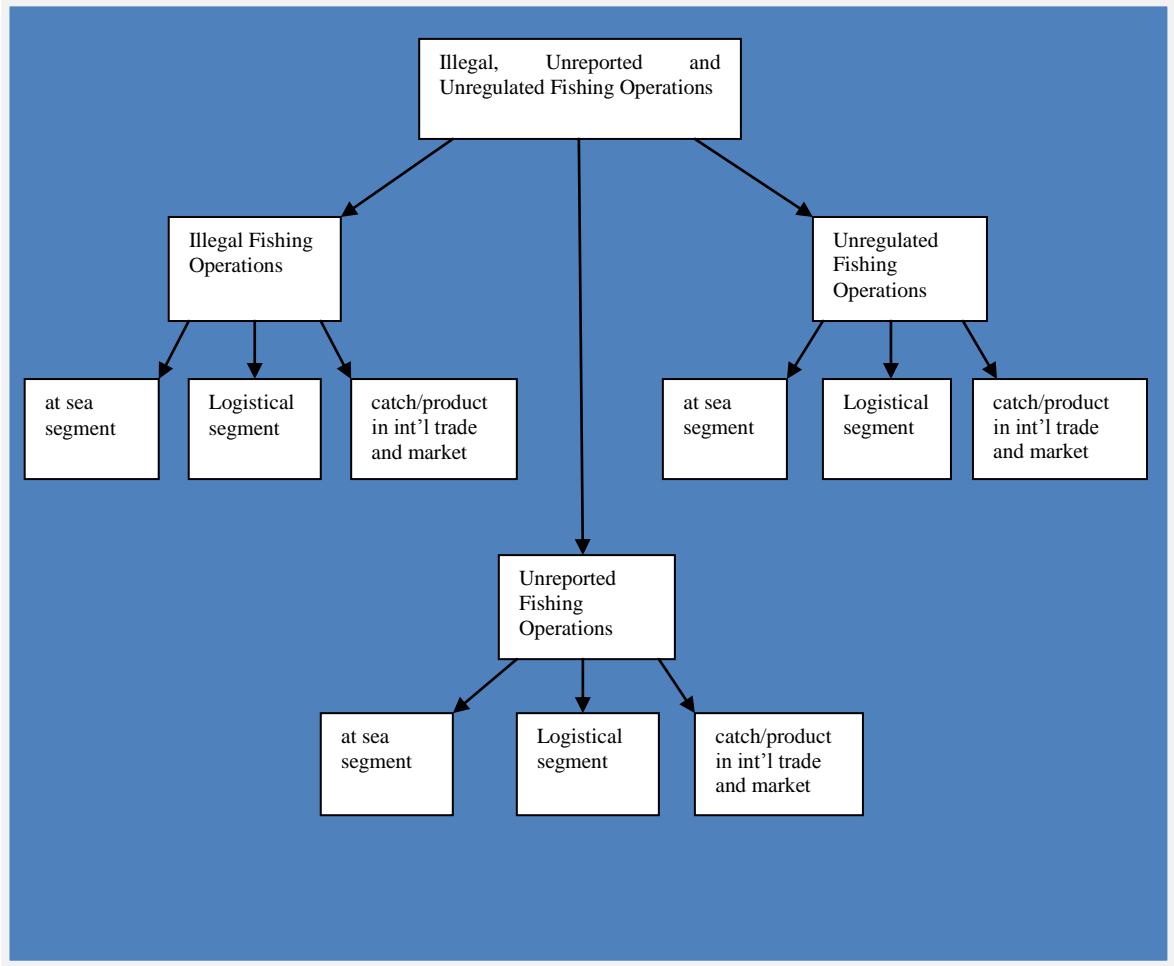
Conclusion

It is evident to see, therefore, that the recent FAO Agreement, having failed to adequately distinguish between Illegal, Unreported and Unregulated fishing operations, and concerned as it is solely with Port State Measures, is unlikely to make anything but a minimal contribution to combating *any* of the elements of Illegal, Unreported and Unregulated Fishing. Perhaps if more attention had been paid by its drafters to the highly complex, multilayered nature of the problem before them (and they had been able to come up with a less ambiguous, more satisfactory definition of Illegal, Unreported and Unregulated fishing operations), the Agreement might have been able to build upon its extensive list of strengths and, consequently, would have stood a chance of living up to the high expectations of the international community which have seen it referred to as “the most significant international treaty dealing with fisheries since the 1995 UN Fish Stocks Agreement”⁵²

⁵¹ This is despite the cost-effectiveness which will inevitably flow from focusing solely on Port State Measures (see above)

⁵²Supra fn 14.

Fig. 1.



Undergraduate Dissertations

The following are some of the best undergraduate dissertations from the 2011-2012 academic year.

These dissertations have not been edited.

Sport is the Art of Balance: The Impact of Employment Law on the Financial and Competitive Balance in Professional Sports. A Comparison of the National Hockey League and the Barclays Premier League

Tyson Hallan

This paper examines the impact of employment law on the business economics and competitive balance of professional sports. Through comparing and contrasting the employment structure of professional ice hockey in the National Hockey League (NHL); under a collective bargaining agreement (CBA), to that of English football in the Barclays Premier Football League (BPL), which operates on the basis of the open labour market and lose regulation model. The author contends that the NHL collective bargaining agreement facilitates greater financial prosperity and competitive balance between franchise clubs and across the league as a whole. The author examines the system of collective bargaining; detailing its operation and special legal status that exempts it from antitrust (competition) laws. The paper then analyzes through the use of both empirical evidence and academic literature, three aspects of employment between both leagues: team and player salary, player contracts and free movement of workers, comparing how each aspects operates to facilitate financial and complete balance within the context of the respective employment structure.

The author submits that the NHL collectively bargained employment structure has created more competitive and financial balance among clubs and across the league, where as the employment structure of the Barclays Premier League, has promoted financial destabilisation and competitive disparity. The paper finds that the NHL CBA model has not righted all of the financial and competitive imbalances experienced within the league, yet the 2005 CBA will be renegotiated in September 2012, and changes will be made to reflect the industry's renewed priorities. The paper establishes that although there are institutional and possible legal barriers to the implementation of a similar CBA employment structure in the BPL, the author contends that in light its unique business model, and the legal framework of the EU, these barriers can

be overcome. The paper concludes that although it is unlikely the BPL could ever adopt a mirror image of the NHL employment model, it should move towards organising its employment structure based upon a singular unified employment agreement. This should be done to protect the long term viability and integrity of this business and sporting entity.

Introduction

Sports and competition serve an important cultural, social and entertainment purpose across all societies. They develop certain attributes and epitomise the values of competition and fair play. However, these values that underpin the ethos of sporting culture take on an entirely different connotation when talking about professional sports. The inescapable reality is that professional sport is a competitive business. Each franchise within a given sports league is its own business entity, but also forms part of the larger business that is the professional league.¹

The success or failure of a business is largely dependent on its ability to perform and compete relative to other firms in the market, and to remain profitable and viable in the long term, a business must increase its share of market revenues.² Professional sports teams, and their respective leagues, generate revenue from a number of sources that include: television broadcast rights, merchandising, ticket sales and advertisement.³

Franchises operating as individual business entities compete against one another to increase their respective share of those revenue streams outlined above.⁴ And so, *inter alia* owing to the combination of market forces, as well as geographical location, demographics and competition from comparable entertainment entities, certain franchises will achieve different levels of

¹ Harry Arne Solberg and Kjetil K Haugen, 'European club football: why enormous revenues are not enough'

(2010) 13(2) *Sport in Society: Culture, Commerce, Media, Politics* 329,338

² Simon Bishop and Mike Waller, *The Economics of EC Competition Law: Concepts, Applications and Measurement* (University edn, 2010 Sweet & Maxwell) 1, 15-16

³ Mike Ozanian, 'The Business of Hockey: Team Values Hit All-Time High' *Forbes.com* (11 November, 2011) 1

<<http://www.forbes.com/sites/mikeozanian/2011/11/30/the-business-of-hockey/>> accessed 5 February 2012

⁴ Tony Keller and Neville McGuire, 'The New Economics of the NHL: Why Canada Can Support 12 Teams'

(2011) Mowat Centre for Policy Innovation University of Toronto 1,3-11

financial success than others.⁵ Therefore, it will always be the case that an imbalance between professional clubs exists because of disparities in the possession and allocation of resources.⁶

Professional sports differ from traditional business models in that with any other business, there is usually no cause for concern when other firms in industry are less efficient or profitable than others.⁷ The feature that distinguishes professional sports from other industries is that individual franchise success is dependant on other clubs being both competitive and financially balanced.⁸ However, the competition amongst teams to develop their own product has drastically altered this position.

Dietl, Duschl and Lang note that ‘the position of a team in ranks is closely related to the team’s financial success because teams with a better position receive more attention from the fans, the media, sponsor, etc.’⁹ There exists a strong correlation in Premier football between what a team spends on player salaries and their on field performance.¹⁰ This has lead to a significant escalation in player wages, and has resulted in the financial and competitive imbalance between football clubs.¹¹

The literature establishes that ‘teams tend to overbid each other for playing talent until they are close to bankruptcy,’¹² and in many professional sports leagues, this has created a two tiered structure of have and have not teams.¹³

A similar situation occurred in North America,¹⁴ and in response to rising player wages and the growing financial and competitive imbalance,

⁵ Keller and McGuire (n 4) 3-11

⁶ Bishop and Waller (n 2) 15-16

⁷ John J. Binder and Murray Findlay, ‘The Effects of the Bosman Ruling on National and Club Teams in Europe’

2011 *Journal of Sports Economics* 000(00) 1-23 1,14

<<http://jse.sagepub.com/content/early/2011/03/10/1527002511400278.full.pdf+html>> accessed 1 February 2012

⁸ Binder and Findlay (n 7) 14

⁹ Helmut M Dietl, Tobias Duschl and Markus Lang, ‘Executive Pay Regulation: What Regulators, Shareholders, and

Managers Can Learn from Major Sports Leagues’ (2011) 13(2) *Business and Politics* 1, 5

¹⁰ Deloitte and Touche Sports Business Group, ‘Highlights: Report Annual Review of Football Finance 2011’ (9th

June 2011) <

http://www.deloitte.com/assets/DcomUnitedKingdom/Local%20Assets/Documents/Industries/Sports%20Business%20Group/uk_sbg_arff11_highlights.pdf> accessed 2 February 2012

¹¹ Stefan Kesenne, ‘The Salary Cap Proposal of the G-14 in European football’ (2003) 3(2) *European Sport*

Management Quarterly 120, 120

¹² Dietl, Duschl and Lang (n 9) 5

¹³ James D. Whitney, ‘Bidding Till Bankrupt: Destructive Competition In Professional Team Sports’ (1993) 31(1)

Economic Inquiry 100,113

professional leagues sought to implement mechanisms to control both team and league finances, as well as strengthen competition through a reorganisation of their employment structure.¹⁵

The purpose of this paper is to examine how employment law impacts on the labour organisation of different professional sports leagues, and what effect this has on financial and competitive stability. Moreover, if there are tangible financial and competitive benefits to be gained from a certain employment model, would its adoption by another professional league improve its competitive balance and financial stability?

This paper, through comparing and contrasting the employment structure of the National Hockey League (NHL), with the Barclays Premier League (BPL), will argue that the mechanism of collective bargaining facilitates financial and competitive balance, and promotes the successful operation of the professional sports business model.

The author also contends that although the BPL operates in part under an employment structure set out by various football regulatory bodies that mandates certain conditions of employment beyond its control, the league's employment model based on an 'overly free market and light touch regulation basis,'¹⁶ has led to financial destabilization and competitive imbalance.¹⁷

The author examines three aspects of employment underneath each labour model: team and player salaries, player contracts and free movement of labour; showing how each of these aspects in the context of their respective league facilitates and or promotes financial and competitive stability.

This paper will conclude that the formalised CBA employment model in the NHL has yielded a number of economic and competitive benefits for the league; its teams and players, yet it has failed to solve all the issues associated with financial and competitive stability. There still exists a significant degree of disparity between teams in terms of their ability to compete in the market and in sport.¹⁸

¹⁴ Johnathan B. Goldberg, 'Player Mobility in Professional Sports: From the Reserve System to Free Agency' (2008)

15(21) Sports Lawyers Journal 21, 44-53

¹⁵ James Richard Hill and Jason E. Taylor, 'Do Professional Sports Unions Fit the Standard Model of Traditional

Unionism' (2008) 29(1) Journal of Labour Research 56,60

¹⁶ Jack Anderson, *Modern Sports Law A Text Book* (Hart Publishing 2010) 1, 360

¹⁷ Anderson (n 16) 360

¹⁸ Paul D Staudohar, 'The hockey lockout of 2004-05' (2005) 128 (December) Monthly Labour Review 23, 28

The 2005 NHL CBA will expire in September 2012, and it is anticipated that with further refinement to the areas discussed in this paper, the new CBA will move **all** parties closer towards an employment framework that encourages and facilitates financial and competitive stability for both the individual franchise business and the larger business entity of the league.¹⁹

The BPL is a vastly popular and profitable sport and entertainment entity;²⁰ however, its labour organisation system and the manner in which clubs operate in the labour market, threaten its long term viability.²¹

The author submits that the relevant decision makers of the Premier League, football regulatory associations and the EU, need to appreciate that the BPL is in the 'business of selling competition. Unlike any conventional industry, clubs must combine together to produce a product. Thus, they also have an interest in upholding the economic health of their rivals...and to ensure that none of them become too dominant.'²²

There are institutional and legal barriers that would need to be overcome in order for a structure of employment based on collective bargaining to be implemented in the BPL. However, the author contends that on basis of the primary and secondary law, and with the support of the relevant actors, a system of employment based on the NHL CBA structure could be introduced into the BPL

In light of the advantages and benefits conferred by collective bargaining in bringing financial and competitive balance to the NHL, the BPL should look towards this model as a base for its own employment structure in order to ensure its longevity as a premier sporting and entertainment industry.

¹⁹ Kevin Paul Dupont, 'What lies ahead for the NHL labour negotiations?' *The Boston Globe* (Boston, 22

January 2012) <<http://bostonglobe.com/sports/2012/01/22/what-lies-ahead-for-nhl-labor-BZlWzJ/story.html>>

accessed 25 January 2012 and Ken Campbell, 'Five issues for 2012' *The Hockey News* (2 January 2012)

<<http://www.thehockeynews.com/articles/43889-Campbell-Five-issues-for-2012.html>> accessed 10 January 2012

²⁰ Deloitte (n 10)

²¹ Ross Emery and Mike Weed, 'Fighting for survival? The financial management of football clubs outside the 'top

flight' in England' (2006) 11(1) *Managing Leisure* 1,1-2

²² Solberg and Haugen (n 1) 338

The National Hockey League and Barclays Premier League: An Overview of League Structure, Labour Organisation and Finances

Before analysing the aspects of employment in the context of both leagues discussed in the preceding sections, and their impact on financial and competitive balance, this paper will explore the legal mechanism of collective bargaining and why its application to the regulation of employment in professional sports leagues is advantageous. Next, the author will outline the organisational structure of both leagues, which will become important in respect of any proposed changes made to the reorganisation of employment in English Premier Football. Additionally, this section will put into context the circumstances that lead to the implementation of the provisions of the 2005 NHL CBA; drawing parallels between the current financial situation of the BPL to that of the NHL, prior to the changes made post 2005.

Collective Bargaining and Collective Agreements: The Structure of the NHL

The NHL is an autonomous professional sports league that comprises thirty professional ice hockey clubs across North America.²³ The 2005 NHL CBA²⁴ is an employment agreement between the NHL Players' Union; the National Hockey League Players' Association (NHLPA), and the NHL; representing the owners of the individual franchise teams.

Catherine Barnard describes collective bargaining as the process 'involving negotiations between individual employers or representatives of employers' organisations and trade union representatives.'²⁵ A negotiated collective agreement of employment between concerned parties determines all terms

²³ NHL, 'FAQ' *NHL.com* (2012) < <http://www.nhl.com/ice/page.htm?id=26369>.> accessed 10 February 2012

²⁴ NHL/NHLPA, *Collective Bargaining Agreement between the National Hockey League and the National Hockey*

League Players' Association (22nd July 2005) < <http://www.nhl.com/cba/2005-CBA.pdf>> accessed 17th October 2011

²⁵ Catherine Barnard, *EC Employment Law* (3rd edn, OUP 2006) 1, 758

and conditions of employment that are to be observed, which include wages, benefits, working conditions etc.²⁶

This process affords all parties a stake in negotiating the terms and conditions most beneficial or advantageous to each of their individual and collective interests.²⁷ Thus, collective bargaining creates a unique and closed employment structure specific to the aims, needs and objectives of a given employer employee relationship for a specific industry.²⁸

In North America, collective bargaining pursuant to the creation of a structure of employment is exempt from antitrust (competition) laws.²⁹ The Sherman Antitrust Act and The Competition Act³⁰ stipulate that any contract or behaviour that restrains trade or commerce is illegal.³¹ However, trade unions are free to pursue 'negotiations, which reduce the competition between employers so long as they do so unilaterally in the context of collective bargaining negotiations.'³²

The author contends that the ability to negotiate working conditions that suit the individual dynamics and complexities of professional sport, as circumstances and needs change, especially in light of the uncertainty in the global economy, is advantageous from a commercial standpoint.³³

Labour Organisation and Structure of the Barclays Premier League

²⁶ Barnard (n 25) 758

²⁷ Dietl, Duschl and Lang (n 9)12

²⁸ Dietl, Duschl and Lang (n 9)12-13, Richard W. Painter and Ann E.M. Holmes, *Employment Law: Cases*

& *Materials* (8th edn, OUP 2010) 1, 680

²⁹ The Clayton Antitrust Act (1914) s. 17 § 6 (Clayton Act) Antitrust laws not applicable to labor organisations,

(Canada): The Competition Act 1985

³⁰ (1890) 15 U.S.C §§1-7; The Competition Act 1985

³¹ (n 30) § 1

³² Hill and Taylor (n 15) 58

³³ Dietl, Duschl and Lang (n 9)13

The Barclays Premier League is a top tier professional football league comprised of twenty club teams operating across England and Wales.³⁴ Unlike the NHL, the BPL is not an autonomous entity, as it comes under the auspices of national, European and international football regulatory authorities.³⁵ Furthermore, both the BPL and its regulatory associations fall under the jurisdiction of the European Union (EU), and as such, they are constrained in their operation by EU law. Thus, the BPL does not enjoy the same absolute freedoms and legal exemptions as does the NHL in North America.³⁶

The institutional arrangement between these actors will be examined further in the proceeding sections in the context of salary regulation, but for the time being, it is important to appreciate that there are inherent complexities to the football regulatory pyramid, and EU law plays a pivotal role in this hierarchy.³⁷

The BPL operates its employment structure largely on the basis of the open market and loose oversight,³⁸ in stark contrast to the rigid structure of the NHL. Premier League players' benefit from union representation,³⁹ and some terms of employment, like standardised player contracts, have been collectively bargained and incorporated into the rules and regulations of both the BPL⁴⁰ and the FA.⁴¹ Although these terms have been collectively negotiated, they do not form part of a CBA employment mechanism.

³⁴ The Barclays Premier League, 'Club Profiles' *premierleague.com* (2012)

<<http://www.premierleague.com/en-gb/clubs.html>> accessed 25 January 2012

³⁵ The Football Association (FA) <http://www.thefa.com/TheFA/WhoWeAre.aspx>; The Union of European Football Associations (UEFA) <http://www.uefa.com/uefa/aboutuefa/organisation/index.html>; International Federation of

Association Football (FIFA) <http://www.fifa.com/>

³⁶ Liz Crolley, Roger Levermore and Geoff Pearson, 'For business or pleasure? A discussion of the impact of

European Union law on the economic and socio-cultural aspects of football' (2002) *European Sport Management*

Quarterly 2(4) 276, 281

³⁷ Crolley, Levermore and Pearson (n 36) 286

³⁸ Anderson (n 16) 360

³⁹ The Professional Footballers Association < <http://www.thepfa.com> > accessed 27 December 2011

⁴⁰ The Football Association Premier League Limited, *Premier League Handbook Season 2011/2012: Player*

Contract Section K (2011) 146 < <http://www.premierleague.com/content/dam/premierleague/site-content/News/publications/handbooks/premier-league-handbook-2011-12.pdf> > accessed 20

November 2011

⁴¹ The Football Association, *Rules and Regulations of the Association Season 2011/2012: C.Rules Relating to*

Players (2011) 107 <

[http://www.thefa.com/TheFA/~/_media/Files/PDF/TheFA/FA%20Handbook%202010-](http://www.thefa.com/TheFA/~/_media/Files/PDF/TheFA/FA%20Handbook%202010-11/FAHandbook-update-1011.ashx/FAHandbook-update-1011.pdf)

[11/FAHandbook-update-1011.ashx/FAHandbook-update-1011.pdf](http://www.thefa.com/TheFA/~/_media/Files/PDF/TheFA/FA%20Handbook%202010-11/FAHandbook-update-1011.ashx/FAHandbook-update-1011.pdf) > accessed 5 January 2012

The right for a trade union to enter into a collective agreement in England and Wales is recognised by the Trade Union and Labour Relations (Consolidation) Act 1992.⁴² Additionally,

D. G. Goyder states that although there is ‘no specific exemption found in the Treaty for agreements that form part of the collective bargaining process within Community law,’⁴³ the European Court of Justice (ECJ) has ruled that collective agreements can fall outside the ambit of EU competition law, as expressed in Article 81 (now Article 101 TFEU).⁴⁴

In the ECJ judgment of *Albany*,⁴⁵ then Advocate General Jacobs held that collective bargaining provides a number of benefits including: ‘**the reduction of transactions costs and a balanced outcome for both parties,**’⁴⁶ and in his opinion, a collective agreement would not violate EU competition laws if it was concluded ‘in good faith on core subjects of collective bargaining such as wages and working conditions which do not directly affect third markets and third parties.’⁴⁷

The Premier League does not enjoy the same outright exemption from domestic and EU competition laws as does the NHL, yet it is possible that a collective labour agreement concluded between the Players’ Union and the BPL could satisfy the *Albany* criteria; allowing for a reorganisation of the employment structure in the Premier League to better suit the commercial and sport interests of the parties concerned. The author contends that a collective employment agreement introduced into the Premier League based on the NHL model could comply with EU competition law, and will be examined when proposals for reforms are discussed in the forthcoming sections.

Crolley, Levermore and Pearson argue that any attempt to implement an economic provision of employment by a regulatory football body would leave it vulnerable to an Article 101 and/or 102 TFEU challenge.⁴⁸ However, the author contends that no serious attempt has been made to test whether such an agreement between the various concerned parties would be accepted by the EU or the football regulatory authorities, and it is premature to speculate on

⁴² s.178-179: Collective agreements and collective bargaining; Whether agreement intended to be a legally enforceable contract

⁴³ D.G Goyder, *EC Competition Law* (4th edn, OUP 2003) 1, 104

⁴⁴ Goyder (n 43)104

⁴⁵ C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751

⁴⁶ C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Opinion of AG Jacobs, para 181 (emphasis added)

⁴⁷ C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Opinion

of AG Jacobs, para 194

⁴⁸ Crolley, Levermore and Pearson (n 36) 286

whether such an agreement would succeed. In light of moves made by UEFA to implement procedures aimed at reigning in club expenses across Europe,⁴⁹ it would seem that there is recognition in the industry that practices must change to accommodate the evolving economic and business model of football.⁵⁰

It is important to reiterate that collective labour agreements create a closed structure of employment that govern all aspects of the general working conditions between parties in a given industry, and are more or less insulated from the scrutiny of domestic or supranational law.⁵¹ The legal protections afforded to these types of agreements make them ideal for achieving industry specific objectives that may require special labour provisions to be incorporated into the employment structure in order to facilitate a prosperous and successful working relationship.⁵²

Any employment structure that exists outside of this system is subject to the legal framework of the relevant jurisdiction(s), and restricts the freedom of the parties to determine in the context of their employment, what is best for their individual and collective interests.⁵³ The author contends that professional sport is best served by a closed model CBA structure because the unique economic factors that characterise its composition are best promoted and protected through restraint.⁵⁴

The proceeding section examines the circumstances that gave rise to the renegotiated provisions of employment under the 2005 NHL CBA; most notably the provision restricting team and player salaries, drawing comparisons between the financial situation of the NHL pre 2005, to that of the BPL currently.

⁴⁹ The Union of European Football Associations, *UEFA Club Licensing and Financial Fairplay Regulations Edition 2010* (10 May 2010) <

<http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/50/09/12/1500912DOWNLOAD.pdf>> accessed 28 November 2011

⁵⁰ UEFA, 'Financial fair play key to football's future' *UEFA.com* (26 January 2012) <<http://www.uefa.com/uefa/>

[footballfirst/protectingthegame/financialfairplay/news/newsid=1744893.html?autoplay=true](http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/news/newsid=1744893.html?autoplay=true)> accessed 27

January 2012

⁵¹ Barnard (n 25) 748

⁵² Goldberg (n 14) 32

⁵³ Goldberg (n 14) 32

⁵⁴ Anderson (n 16) 360

The Implementation of the 2005 NHL CBA

The catalyst to the 2005 CBA was the independent review of NHL finances produced in the Levitt Report.⁵⁵ The CBA signed shortly after the work stoppage in 1994-95 was set to expire in 2004.⁵⁶ The significant increase in player salaries and the growing financial imbalance between teams since 1995, focused attention towards the central issue in the negotiations of a new CBA post 2004; a mechanism for regulating player salaries and revenues.⁵⁷

The Levitt Report assessed the overall viability and business practices of the league and its individual franchises in 2002-03. The report established that over the study period, the league had a combine operating revenue of close to \$1.966 billion USD, but a **net loss of \$273 million USD**.⁵⁸ Furthermore, only eleven of the thirty teams reported operating profits, with the remaining reporting operating losses on average of \$18 million USD.⁵⁹

The report concluded that the relationship between player costs and league revenues was **'inconsistent with reasonable and sound business practices**. Player costs of 1.494 billion or **75%** of revenues substantially exceed such relationships in both the NBA and NFL as those relationships are set forth in their collective bargaining agreements.⁶⁰

Hill and Taylor argue that franchise owners wanted a mechanism in place to control or ease market driven wage growth,⁶¹ and during the 2004-05 lockout season, the NHL wanted to provide 'cost certainty for its teams through **the implementation of a salary cap tied to league revenues**.'⁶² The 2005 CBA introduced such salary restrictive measures, employing what is known as

⁵⁵ Arthur Levitt Jr., *Independent review of the combined financial results of the national hockey league 2002-2003 season* (February 5th 2004) 11 <<http://www2.nhl.com/images/levittreport.pdf>> accessed 25 October

2011
⁵⁶ Joshua M Liebman, 'Tip Your 'Cap' to the Players: 2007-2007 Offseason Reveals NHL's Salary Cap Benefit on

Players (2009) 16 *Sports Law Journal* 91

⁵⁷ Liebman (n 56) 91

⁵⁸ Levitt Report (n 55) 3 (emphasis added)

⁵⁹ Levitt Report (n 55) 21

⁶⁰ Levitt Report (n 55) 23 (emphasis added)

⁶¹ Hill and Taylor (n 15) 60

⁶² Liebman (n 56) 92 (emphasis added)

a 'hard salary cap.'⁶³ A 'hard cap,' is a salary regulatory provision that imposes an absolute maximum and minimum limit on player and team salaries.⁶⁴

The precise operation of the salary cap will be discussed at length in the forthcoming section; however, for the purposes of this section, it is relevant to note that through the 2005 CBA, the salary cap restricts player remuneration to a maximum 57% of league revenues, where those revenues are equal to or exceed \$2.7 billion USD.⁶⁵ Since 2005, the commercial success of the league has been tremendous. The NHL has had five consecutive years of record breaking profits; capped off by nearly \$3 billion USD in revenues for the 2010-11 season.⁶⁶

The Barclays Premier League: Wage Growth and League Finances

A report published in 2011 by the accounting and finance firm of Deloitte and Touché⁶⁷ found that in 2009-10, the Premier League grew its revenues to € 2.5 billion (£2.088 billion),⁶⁸ and team revenues increased by 6%.⁶⁹ However, there was a wide margin of individual financial performance between clubs, with eleven of the twenty teams reporting an average operating loss of £4 million.⁷⁰ The report highlighted that for the second consecutive year wages outpaced league revenue, rising by over 5% to €1.4 billion; representing **68% of league revenues, an all time record.**⁷¹

Backtracking for a moment, the Levitt report concluded that **75%** player remuneration to revenue ratio was inconsistent with sound business practices, and could not be sustained in the long term.⁷² The player remuneration to revenue figure of 68%, while not as high as that of the NHL pre 2005, represents a significant expense, and is substantially higher than other major

⁶³ CBA (n 24)

⁶⁴ Hill and Taylor (n 15) 60

⁶⁵ CBA (n 24) 50.4(b)(i)(D) 193

⁶⁶ NHL, 'News: Best-ever business year highlighted by record revenue' *NHL.com* (April 13th 2011) <<http://www.nhl.com/ice/news.htm?id=559630>> accessed 26 January 2012

⁶⁷ Deloitte (n 10)

⁶⁸ Deloitte (n 10) 8

⁶⁹ Deloitte (n 10) 8

⁷⁰ Deloitte (n 10) 9

⁷¹ Deloitte (n 10) 9 (emphasis added)

⁷² Levitt (n 55) 23.

professional sports leagues in North America operating under a collective bargaining and salary cap structure of employment.⁷³

The Deloitte report further highlighted that ‘there continued to be a strong correlation in the Premier League between league finishing position and a club’s ranking in terms of wages expenditure, implying that, other things being equal, **spending more on wages translates to on pitch success.**’⁷⁴ However, if this gamble proves unsuccessful teams can be left with immense payrolls and diminished returns on their investment.⁷⁵ As was noted above, although individual teams strive to assemble the most competitive product in order to maximise revenue,⁷⁶ a single team cannot ‘produce a marketable product,’⁷⁷ and rely on ‘strong competitors to maximise their revenues.’⁷⁸

Dietl, Duschl and Lang contend that ‘the economic peculiarities of the sports sector have led to the introduction of pay regulations in the major sports leagues...the introduction of salary caps and luxury taxes through collective bargaining leads to an exemption of these measures from antitrust action.’⁷⁹ They further argue that ‘there is wide agreement in the literature that salary caps and luxury taxes improve competitive balance in sports leagues and balances the salary distribution between players and increases club profits.’⁸⁰

The author agrees with this position. The business economics of professional sports has changed dramatically, and as such, a number of professional sports leagues adapted their employment models to meet the underlying business realities of the industry.⁸¹ The collective employment structure has provided professional sports leagues with the framework, flexibility and legal legitimacy needed to have success and prosperity given the unique factors and needs of

⁷³ The National Basketball Association (NBA): **51.15%**- Larry Coon, ‘Breaking down changes in the new CBA’

ESPN.com(28 November 2011) <[http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-](http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compare-last-one)

[compares-last-one](http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compare-last-one)> accessed 18th January 2012; The National Football League (NFL): Based on three revenue

streams; media, NFL revenue and local club revenue none exceeding **55%**-The National Football League, ‘NFL

clubs approve comprehensive agreement’ (21 July 2011) <[http://www.nfl.com/news/story/09000d5d820e6311/](http://www.nfl.com/news/story/09000d5d820e6311/printable/nfl-clubs-approve-comprehensive-agreement)

[printable/nfl-clubs-approve-comprehensive-agreement](http://www.nfl.com/news/story/09000d5d820e6311/printable/nfl-clubs-approve-comprehensive-agreement)> accessed 18th January 2011

⁷⁴ Deloitte (n 10) 9.

⁷⁵ Michael A Leeds and Peter von Allmen, *The Economics of Sports* (3rd edn, Pearson International Publishing 2008)

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⁷⁶ Dietl, Duschl and Lang (n 9) 5

⁷⁷ Dietl, Duschl and Lang (n 9) 5

⁷⁸ Dietl, Duschl and Lang (n 9) 5

⁷⁹ Dietl, Duschl and Lang (n 9) 5-6

⁸⁰ Dietl, Duschl and Lang (n 9) 6

⁸¹ Hill and Taylor (n 15) 60-62

their industry, which they would otherwise not enjoy if operating under the auspices of domestic or supranational law only.⁸²

The remainder of this paper will compare and contrast three terms and condition of employment in the NHL and the BPL: team and player salaries, contract formation and player mobility. In the proceeding sections the papers endeavours to demonstrate that these facets of employment complement the overall financial and competitive balance that the CBA structure brings to the NHL, whereas in the BPL, the absence of a collective agreement in combination with the above factors, promote financial and competitive destabilisation.

Employment in the NHL and Barclays Premier League: Team and Player Salaries The Mechanics of the NHL Salary Cap

The salary cap system in the NHL is exempt from North American antitrust laws by virtue of its incorporation into the collective bargaining agreement between the Players' Union and the NHL.⁸³ As was noted above, a 'hard cap' imposes an absolute maximum and minimum limit on team and player salaries for a given league year.⁸⁴ For the 2011-12 season, the upper salary limit is set at \$64 million USD,⁸⁵ while the lower limit is \$48 million USD.⁸⁶

The upper and lower salary limits are calculated on the basis of the aggregate league revenue from the previous season, as well as the percentage of player remuneration for that same year.⁸⁷ Therefore, the upper and lower cap limit can either increase or decrease depending on the overall profitability of the league, and accordingly, determines the percentage of league revenues players'

⁸² Goldberg (n 14) 32

⁸³ Helmut M Dietl, Egon Franck, Marcus Lang and Alexander Rathke, 'Salary Cap Regulation in Professional Team Sports' (2011) *Contemporary Economic Policy* 1,10

⁸⁴ Hill and Taylor (n 15) 60

⁸⁵ TSN, 'NHL Salary Cap to Increase to \$64 million in 2011-2012' TSN.ca (20 May 2011) <<http://www.tsn.ca/nhl/story/?id=369480>>accessed 28 December 2011

⁸⁶ TSN.ca (n 85)

⁸⁷ CBA (n 24): Section 50.5(b)(i)-Upper and Lower cap calculation

are entitled to receive as remuneration.⁸⁸ The absolute maximum percentage of league revenues players' are entitled to receive for any league year for which actual HRR⁸⁹ is equal to or exceeds \$2.7 billion will be 57%.⁹⁰ At the lower end, in any given year where the HRR is below \$2.2 billion, the players' share will be 54%.⁹¹

This type of payroll arrangement is conducive to the interests of both players' and club owners because 'players face less restrictive caps when the league is more successful financially. At the same time, this practice ensures a leagues' financial viability because salary payments are limited to a proportion to total earnings.'⁹²

The salary cap system in the NHL has effectively taken 'wages out of competition,'⁹³ which means that larger market teams with significant resources are estopped from bidding the full market value for player talent.⁹⁴ This allows for smaller market teams to retain talent because they are not forced to compete for a player's service subject only to market forces.⁹⁵

The author contends that this facilitates greater league wide access to labour, and gives teams' a significant measure of financial security because the maximum and minimum salary thresholds are designed to give no one team a strict payroll advantage, and allows a team to construct a competitive product around a pre determined and affordable salary range.⁹⁶

The counter argument to the imposition of salary restrictive measures is that the open labour market will push teams to 'offer a player a salary equal to his expected marginal revenue product.'⁹⁷ However, as noted the above, professional sports do not behave or function in an equivalent manner to other industries.⁹⁸ In an open market driven labour system, 'competitive bidding for player services has the effect of driving up their valuation to proportions equal to, or exceeding their economic contribution to the team,'⁹⁹

⁸⁸ Andrew Zimbalist, 'Reflections on Salary Shares and Salary Caps' (2010) 11(1) *Journal of Sports Economics* 17, 21-22

⁸⁹ CBA (n 24): Section 50.1(a) 'Hockey Related Revenues' 'HRR' The operating revenue from all sources know or unknown, whether now in existence or created in the future 160

⁹⁰ CBA (n 24): Article 50.4(b)(i)(E) 193

⁹¹ CBA (n 24): Article 50.4(b)(i)(B) 193

⁹² Dietl, Duschl and Lang (n 9) 17

⁹³ Hill and Taylor (n 15) 57-59

⁹⁴ Dietl, Duschl and Lang (n 9) 17

⁹⁵ Dietl, Duschl and Lang (n 9) 17

⁹⁶ Dietl, Franck, Lang and Rathke (n 83) 10-11

⁹⁷ Dietl, Duschl and Lang (n 9) 17

⁹⁸ Binder and Findlay (n 7) 14

⁹⁹ Hill and Taylor (n 15) 59

and this has the knock on result of player salaries rising faster than revenues, leading to a diminishing rate of return for owners.¹⁰⁰

This paper contends that the use of the labour market by the Premier League as the only means to control remuneration, does not facilitate financial or competitive balance, but rather promotes destabilisation and imbalance. An analysis of the empirical evidence and economic literature support this contention.

The Barclays Premier League: Team Salary and Player Wages

It is important to again highlight the distinction between regulating team salaries under a collective bargaining agreement, and an attempt to regulate remuneration outside of such an agreement. An employment structure created through collective bargaining establishes a unique and all encompassing system governing employment in a given industry.¹⁰¹ Thus, salary restrictions under a CBA would be considered legally justifiable, whereas an attempt to regulate salary outside such an agreement would attract possible antitrust action.¹⁰²

The financial report prepared by Deloitte, established that the continuing economic trend in Premier football is one where wage growth outpaces revenue growth.¹⁰³ It was also noted earlier that in other major professional sports leagues the response to this imbalance was the implementation of mechanisms intended to either slow or control wage inflation in order to preserve economic and competitive stability.¹⁰⁴

The BPL does not control team salary through a formal mechanism as does the NHL, but rather allows the market to control it on the basis of 'putting wages in competition'.¹⁰⁵ Yet, many other major professional leagues have

¹⁰⁰ Hill and Taylor (n 15) 59-60

¹⁰¹ Barnard (n 25) 759-760

¹⁰² Dietl, Franck, Lang and Alexander Rathke (n 83) 10-11

¹⁰³ Deloitte (n 10) 9

¹⁰⁴ Hill and Taylor (n 15) 60

¹⁰⁵ Hill and Taylor (n 15) 58

failed to succeed on this model, and as such, adopted a formal control mechanism by way of salary cap under a CBA.¹⁰⁶

In 2009-10, Chelsea F.C. had the highest wage bill in the Premier League at £174 million.¹⁰⁷ In the same year, Blackpool F.C.; who has been relegated out of the Premier League, spent **£13 million** on salary.¹⁰⁸ Although these two teams competed in the same league, the differential of £161 million, the author contends, makes it such that there is no realistic chance the lower aggregate spending team can be remotely competitive against the financial power of a team such as Chelsea.

The culture of Premier football promoting the idea that a club must out bid their opponents for talent regardless of whether or not they can actually afford to do so, has led many clubs into ‘financial ruin gambling on spiralling wages.’¹⁰⁹ This is highlighted by the fact that in 2009-10, pre-tax losses after financing and player trading costs increased to £455 million in the BPL.¹¹⁰

In light of the financial difficulties experienced by some leagues, a number of football associations have introduced control mechanisms ‘aimed at keeping clubs in a healthy financial position. This includes various forms of cost regulation.’¹¹¹ To this end, in 2010 UEFA¹¹² introduced its ‘Financial Fairplay Regulations,’¹¹³ aimed towards improving the financial and economic capabilities of clubs by introducing more discipline and rationality into football finances; **encouraging clubs to operate on the basis of their own revenue**; and advocating responsible spending for the long-term benefit of football.¹¹⁴

Solberg and Haugen contend that these measures are a positive first step in reversing previous behaviour;¹¹⁵ however, they argue that to go one step further and introduce a formal method of salary restraint would require strong

¹⁰⁶ Hill and Taylor (n 15) 60

¹⁰⁷ Deloitte (n 10) 9

¹⁰⁸ David Conn, *Inside sport special report Premier League Finances- In sickness and in wealth: a guide to the*

latest accounts at England’s top clubs The Guardian (19 May 2011)

< <http://www.scribd.com/fullscreen/55741334>> accessed 25 January 2012 (emphasis added)

¹⁰⁹ Dietl, Duschl and Lang (n 9) 5

¹¹⁰ Deloitte (n 10) 9

¹¹¹ Solberg and Haugen (n 1) 339

¹¹² UEFA, ‘UEFA Statutes: Rules of Procedure of the UEFA Congress-Regulations Governing the Implementation of the UEFA Statutes’ (2010)

<[http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/General / 01/47/69/97/1476997DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/General/01/47/69/97/1476997DOWNLOAD.pdf)>accessed 29 November 2011

¹¹³ Fair Play (n 50)

¹¹⁴ Fair Play (n 50) Article 2:Objectives: A-F 2

¹¹⁵ Solberg and Haugen (n 1) 339

regulatory oversight, and would need to be implemented across all European football associations simultaneously for it to be effective.¹¹⁶

The problem with doing so is that it is unknown whether UEFA has the authority to impose such wide sweeping regulations,¹¹⁷ and there is still the question of whether such measures under a CBA system would comply with Articles 101 and 102 TFEU.¹¹⁸

The author accepts that there are some institutional and possible legal barriers to the implementation of any binding financial regulations over Premier football. However, the literature and empirical evidence suggests that the business economics of professional sports can no longer operate under an employment model directed only by the market and the legal framework of the domestic or pan-European jurisdiction.¹¹⁹

The salary cap keeps costs down and prevents teams from buying a strict competitive advantage by recruiting the majority of the top player.¹²⁰ Jack Anderson argues that the ‘criticism of the EU sports model and elite level football is that it operates on an **overly free market and light touch regulation basis** such that the game’s money and talent has become concentrated more and more in a handful of clubs, as epitomised by Chelsea/Manchester United’s recent domination of the Premier League.’¹²¹

In the proceeding sections the analysis shifts to consider player contracts and player mobility in the context of employment, and their impact on financial and competitive balance.

The Structure of Sports Contracts and Their Impact on Financial and Competitive Balance NHL Player Contracts:

¹¹⁶ Solberg and Haugen (n 1) 339

¹¹⁷ Solberg and Haugen (n 1) 339

¹¹⁸ Art.101 TFEU: Provisions prohibited as incompatible with the internal market; Art.102 TFEU: Abuse by

undertakings of a dominant position within the internal market

¹¹⁹ John Vrooman, ‘Theory of The Beautiful Game: The Unification of European Football’ (2007) 54(3) *Scottish*

Journal of Political Economy 314, 342

¹²⁰ Solberg and Haugen (n 1) 338

¹²¹ Anderson (n 16) 360

Player contracts in the NHL incorporate the standardised terms of employment collectively negotiated under the CBA.¹²² Like team salaries, individual contracts are subject to restrictions under the CBA.¹²³ An individual contract cannot exceed 20% of the upper salary cap for any given league year.¹²⁴ To illustrate this rule: if the upper limit of the salary cap is £40 million, a player who signs a three year contract can make no more than £8 million per year in salary and bonuses in any year of his contract.¹²⁵

Dietl, Lang and Rathke establish that ‘the salary cap forces the large club to cut back on expenses, lowering the overall demand for talent, and thus the market clearing cost **per unit of talent**...a more restrictive salary cap helps the large club control costs, because the large club decreases its salary payments.’¹²⁶ In addition to the overall team salary restrictions imposed by the 2005 CBA, the agreement further sets an absolute limit on individual contracts, as player salaries are clubs’ biggest expense, it is in their collective interest to seek further measures regulating player compensation.¹²⁷

Anderson argues that this regulation of the internal labour market and sport economics makes sport exciting for fans because the balanced distribution of wealth and talent is designed to produce uncertainty over what teams will win a given game or a championship.¹²⁸

In terms of financial balance, an individual player contract counts towards a club’s overall salary cap figure; calculated on the average of their salary over the duration of the contract.¹²⁹ Thus, if a player signs a £20 million contract for five years, that player’s ‘cap hit,’ the amount of money that will count towards the club’s upper or lower salary figure, would be £4 million. For each year that that player is under contract with the team, his salary will count as £4 million towards the teams overall salary cap.¹³⁰

¹²² CBA (n 24): Article 11.1: Standard Player Contracts 40

¹²³ CBA (n 24): Article 50.6(a) 218

¹²⁴ Liebman (n 56) 101

¹²⁵ Liebman (n 56) 102

¹²⁶ Helmut M Dietl, Markus Lang and Alexander Rathke, ‘The Combined Effect of Salary Restrictions and Revenue

Sharing in Sports Leagues’ (2011) 49(2) *Economic Inquiry* 447,453

¹²⁷ Joel Maxcy and Michael Mondello, ‘The Impact of Free Agency on Competitive Balance in North American

Professional Team Sport Leagues’ (2006) 20 *Journal of Sport Management* 345, 346

¹²⁸ Anderson (n 16) 360

¹²⁹ Liebman (n 56) 97

¹³⁰ Liebman (n 56) 99

As was noted above, the upper and lower salary limits for the current season are \$48 and \$64 million USD respectively.¹³¹ Thus, in order for a team to abide by the imposed salary restriction and field a competitive roster, club spending becomes much more focused on ‘manipulation of the player draft/budgetary system,’¹³² rather than free for all spending. A manager must strategically plan and organise all of their players’ contracts around set salary figures

Maxcy and Mondello argue that this provides clubs with an incentive to invest in areas such as coaching and player development.¹³³ The author contends that in a system where every team has resources comparable to one another, the business of professional sports becomes much more about how to best utilises your given resources instead of trying to match up dollar for dollar against rival teams. And so, player contracts as a provision of employment under the reformulated structure of the CBA have helped to provide financial and competitive balance in the NHL.

Barclays Premier League Player Contracts

Player contracts in the BPL are largely unregulated and players face almost no impediments on their ability to freely negotiate their value on the basis of the open labour market.¹³⁴ The standard player contract in the Premier League is a 13(A) contract;¹³⁵ duration and remuneration to be decided upon in line with the requirements of FIFA, the exceptions pertaining to players under the age of 18,¹³⁶ and with respect to lump sum payment during the first year of employment.¹³⁷

The FA regulations confirm that player contracts must be drafted to conform to the formality requirements set forth by UEFA and FIFA.¹³⁸ The only additional caveat to the free negotiation of player contracts is imposed by FIFA that insist that a contract can be only for a maximum duration of five years.¹³⁹

¹³¹ TSN.ca (n 85)

¹³² Anderson (n 16) 360

¹³³ Maxcy and Mondello (n 127) 352

¹³⁴ Spiros Bougheas and Paul Downward, ‘The Economics of Professional Sports Leagues: Some Insights on the

Reform of the Transfer Markets’ (2003) 4(2) *Journal of Sports Economics* 87, 95

¹³⁵ Premier League Handbook (n 40): Premier League Contract Form 13(A) 260

¹³⁶ Premier League Handbook (n 40) Section 11.1 Length of Contract: Contracts with Contract Players under the age

of 18 must not be capable of lasting for more than 3 years 147

¹³⁷ Premier League Handbook (n 40): Section 19 148

¹³⁸ Football Association (n 41): C Rules Relating to Players 107

¹³⁹ UEFA (n 112): Article 18 special provisions relating to contracts between professionals and clubs

The law of the European Union pertaining to the free movement of workers under Article 45 TFEU, which will be discussed in detail in the following section, has greatly impacted on football player contracts. Prior to the ECJs decision in *Bosman*,¹⁴⁰ clubs had the security of knowing that the finance they obtained to sign players could be secured against the value of that player in the money they would obtain in transfer fees.¹⁴¹ The change in the transfer fee market post *Bosman*, discussed in the context of player mobility below, changed this practice because smaller less financially viable clubs now have problems drafting player contracts because of liquidity constraints.¹⁴² This favours larger clubs who can obtain financing against their substantial assets, and sign players to more lucrative contracts.¹⁴³

Anderson asserts that the practical effect of this has been that players nearing the end of their contract will 'remind his club that unless better renewal terms are offered or unless his frustrations at not being permitted to move to another club notwithstanding his existing contract are assuaged, he is soon to become a free agent and thus all of the player's inherent value will be lost to the club.'¹⁴⁴ This has effectively shifted bargaining power in favour of the players over that of ownership because 'short, lucrative contracts are negotiated, enhanced and renewed in a contractual environment that is undoubtedly player friendly.'¹⁴⁵

The author contends that player contracts as a facet of employment in the BPL highlights the problems associated with its unregulated nature versus that of NHL under the CBA model. The inability of smaller market clubs to sign big name players to affordable long term contracts because banks are unwilling to extend them overdraft financing, hurts competitive balance, and promotes unhealthy competitive spending.¹⁴⁶

The next section looks at player mobility rights and the implications of free movement of players on finance and competitive stability.

Free Movement versus Restricted Movement: The Battle for Free Agency

¹⁴⁰ Case 415-93 *Union royale belge des sociétés de football association ASBL v Jean- Marc Bosman* [1995] ECR I-4921

¹⁴¹ Stefan Szymanski, *Football Economics and Policy* (Palgrave Macmillian 2010) 1, 41

¹⁴² Szymanski (n 141) 41

¹⁴³ Szymanski (n 141) 41

¹⁴⁴ Anderson (n 16) 336

¹⁴⁵ Anderson (n 16) 337

¹⁴⁶ Dietl, Duschl and Lang (n 9) 5; Szymanski (n 141) 156

Player Mobility in the NHL

Hill and Taylor argue that the earliest labour battles between players and owners had to do with removing 'the reserve clause' allowing players to freely enter the competitive labour market to earn higher pay.¹⁴⁷ The reserve clause was a provision in a player's contract that allowed their contracting team to retain their rights after the expiration of the contract, and they would not release those rights until another team was willing to buy them.¹⁴⁸ This had the effective of suppressing wages below competitive levels.¹⁴⁹

The 2005 CBA retains elements of the 'reserve clause system,' by classifying players as either an unrestricted free agent;¹⁵⁰ or a restricted free agent.¹⁵¹ A player who is designated as a restricted free agent is subject to the exclusive right held by their contracting team to negotiate a new contract should their previous contract expire.¹⁵² If an agreement cannot be reached, another team may make an offer on that player subject to compensation in the form of prospect choices.¹⁵³ The length of the restricted free agency period is based on a number of factors, which include: the age of the player and the number of games played at the professional level;¹⁵⁴ however, a player will generally be considered a restricted free agent until the age of twenty seven.¹⁵⁵

The advantages of this balanced approach to player mobility are twofold. First, as Maxcy and Modello note, restrictions help maintain league wide financial stability because 'restrictions suppress wages, which theoretically equal marginal revenue product in a competitive labour market.'¹⁵⁶ Second, once a player's restricted free agency status has come to an end, a player is considered a free agent,¹⁵⁷ and given their experience and age, their value is consistent with their statistical production and market value.¹⁵⁸

The NHL model, the author contends, provides the best of both scenarios. Players are free to test their value on the open market, but teams also have the

¹⁴⁷ Hill and Taylor (n 15) 58

¹⁴⁸ Hill and Taylor (n 15) 58

¹⁴⁹ Hill and Taylor (n 15) 59

¹⁵⁰ CBA (n 24): Article 10.1 Unrestricted Free Agents 27

¹⁵¹ CBA (n 24): Article 10.2 Restricted Free Agents 29

¹⁵² Jiri Strouhal, 'Reporting and measurement of the of the ice hockey contracts: ideas for the true-and-fair view

reporting of the NHL' (2007) *Journal of International Trade Law & Policy* 3

¹⁵³ CBA (n 24) : Article 10.4 Draft Choice Compensation for Restricted Free Agents 38

¹⁵⁴ CBA (n 24): Article 10.2(a)(i) 29

¹⁵⁵ Strouhal (n 152) 4

¹⁵⁶ Maxcy and Modello (n 127) 346

¹⁵⁷ An unrestricted free agent is a player who is not subject to any exclusive negotiating rights, right of first refusal,

or draft choice compensation in favour of any club (n 139) 3

¹⁵⁸ Bernd Fick, 'The Football Players' Labour Market: Empirical Evidence from the Major European Leagues'

(2007) 54(3) *Scottish Journal of Political Economy* 422, 436-437

option of securing their services under long term contracts; benefiting both the player and the team, as it is in the best financial interests of the club to sign young talent to long term deals rather than lose them in 'unrestricted free agency.'¹⁵⁹

To illustrate this point, Duncan Keith was regarded as one of the best defensive players during the 2009-10 NHL season. His entry level contract with the Chicago Blackhawks was set to expire at the end of that year, and he remained a restricted free agent. His club signed him to a thirteen year \$72,000,000 million USD contract extension, with at an annual cap hit of \$5,538,462 million USD.¹⁶⁰ The Black Hawks were able to retain a marquee talent at a reasonable price, and the player benefited from securing employment with a competitive club for a fairly generous/competitive valued salary.

Moreover, signing young restricted free agents in the salary cap era gives teams the flexibility to have additional salary room and make adjustments to the roster as the season progresses. Teams structure contracts in a 'front loaded' fashion, meaning that the majority of the salary is paid out at the beginning of the contract. To illustrate this, if the upper salary limit was £50 million a player who signs a five year £30 million contract has an annual salary contribution towards the team's payroll of £6 million.¹⁶¹

The team could structure the contract in the following way: year 1-£10 million; year 2-£10 million; year 3-£5 million and year 4 and 5 at £2.5 million respectively.¹⁶² This would give the club the flexibility to access funds in the future, making it possible to buy out the contract in later years, make the player financially attractive as a trade asset, or allow the team to sign additional players to long term deals.¹⁶³

The author submits that the balancing of mobility rights under the CBA allows for the individual player, franchise and league to benefit from restricted and unrestricted free agency. Such restrictions serve to enhance competitive and financial balance,¹⁶⁴ as they produce an artificial depression of wages making talent more affordable to every team., which provides an incentive for clubs to sign young players to long term deals¹⁶⁵ Moving to examine player mobility in

¹⁵⁹ Liebman (n 56) 95-96

¹⁶⁰ CapGeek, 'Salary Cap Charts for 2011-2012: (2012) CapGeek.com
<http://www.capgeek.com/charts_index.php> accessed 3 January 2012

¹⁶¹ Liebman (n 56) 105

¹⁶² Liebman (n 56) 105

¹⁶³ Liebman (n 56) 105

¹⁶⁴ Maxcy and Mondello (n 127) 346

¹⁶⁵ Bougheas and Downward (n 134) 89

the Premier League, the one major difference is that the BPL operates exclusively on the basis of unfettered mobility of players.

Player Mobility in the Premier League: The Impact of *Bosman*

As was previously noted, with respect to the movement of labour in professional football, both the substantive law of the EU and judgments from both England and the European Court of Justice (ECJ) have significantly impacted on the competitive and financial balance of the BPL.

Prior to the ECJs ruling in *Bosman*,¹⁶⁶ a player who was not under contract with his original club, could not sign or be transferred to another club, without the subsequent club paying a 'transfer fee' to the original contracting club for his rights.¹⁶⁷ However, the ECJ ruled that this restricted the free movement of labour and as such held that the transfer rules constituted an obstacle to the free movement of labour under Article 48,¹⁶⁸ now Article 45 TFEU.¹⁶⁹

In England and Wales, prior to *Bosman*, a similar challenge was mounted against the retention transfer system in the case of *Eastham v Newcastle United Football Club Ltd*.¹⁷⁰ In that case, as he was then Mr. Justice Wilberforce acknowledged that 'regard must be had to the special character of the area in which the restraints operate- different from that of industrial employment- and to the special interests of those concerned with the organisation of professional football.'¹⁷¹

Furthermore, Wilberforce J discussed the possibility that in the absence of any rules or regulations governing payer mobility and wages, richer clubs would retain skilled players 'to the detriment of the public as a whole.'¹⁷² It was ultimately held that the restrictions on transfer could not be justified, but the recognition by Wilberforce J of the exceptional nature of professional football is important when talking of possible reform, explored further in the

¹⁶⁶ *Bosman* (n 140)

¹⁶⁷ *Binder* (n 7) 1

¹⁶⁸ *Bosman* (n 140) para,104

¹⁶⁹ Free movement of persons, services and capital: Art.45(1) Freedom of movement for workers shall be secured

with in the Union

¹⁷⁰ [1964] Ch 413

¹⁷¹ (n 170) Mr. Justice Wilberforce, 432

¹⁷² (n 170) *Eastham*

forthcoming section. Post *Bosman*, the position remains that a player under contract can be transferred to another team, as long as the transferee club makes a payment to the transferor club.¹⁷³ However, a team cannot retain a player's rights after the expiry of their existing contract and demand a transfer payment.¹⁷⁴

The ECJ argued that the retention rules akin to restricted fee agency in the NHL were 'not an adequate means of maintaining financial and competitive balance in the world of football. Those rules neither preclude the richest clubs from securing the services of the best players, nor prevented the availability of financial resources from being a decisive factor in competitive sport.'¹⁷⁵ The author accepts the reasoning of the court; however, some seventeen years after *Bosman*, the economics of football has changed drastically.

The rapid commercialisation of football and the amount of foreign investment into the game has changed the business model and sporting aspects of the league.¹⁷⁶ Vrooman notes that 'there is increasing evidence that the polarisation of the EPL (BPL) is the combined result of sportman and championship effects working in the open labour markets of post-*Bosman* Europe.'¹⁷⁷ Furthermore, Bougheas and Downward establish that in the new financial era of football, on the benchmark model 'a team can finance the acquisition of new players through bank lending'¹⁷⁸ against their assets, and can raise the capital required to buy players.¹⁷⁹ However, 'in reality, teams, especially those located at the bottom of the league tables, have limited access to capital markets...the presence of other costs can inhibit the access of poorer teams either to the market for new players or the transfer market. **If players move only to teams that can afford them, then the league's competitive balance could be destroyed.**'¹⁸⁰

In the transfer fee market for the year 2009-10, Manchester City spent £145 million in gross transfer expenditures.¹⁸¹ The next biggest spenders in this area were Sunderland (£37 million) and Chelsea (£25 million) and Aston Villa (£24 million).¹⁸² These figures serve to highlight the disparity in buying

¹⁷³ Eberhard Feess and Gerd Mühlheuber, 'Economic Consequences of Transfer Fee Regulations in European

Football' (2002) 13 European Journal of Law and Economics 223

¹⁷⁴ Fees and Gerd Mühlheuber (n 173) 223

¹⁷⁵ *Bosman* (n 140) para, 107

¹⁷⁶ Nnamdi Madichie, 'Management implication of foreign players in the English Premier football league' (2009)

47(1) Management Decision 24,46

¹⁷⁷ Vrooman (n 119) 342

¹⁷⁸ Bougheas and Downward (n 134) 100

¹⁷⁹ Bougheas and Downward (n 134) 100

¹⁸⁰ Bougheas and Downward (n 134) 100 (emphasis added)

¹⁸¹ Deloitte (n 10) 10

¹⁸² Deloitte (n 10) 10

power, even among top clubs. And so, the balanced approach adopted by the NHL would seem to be the ideal approach with respect to this facet of employment because it promotes even distribution of talent and competitive balance.

Competitive Balance within the NHL and the BPL: Team Spending and Performance

The NHL:

Dietl, Lang and Rathke establish that the introduction of a ‘restrictive salary cap induces a reallocation of talent from large to small clubs. That is, the large club decreases its level of talent by the same amount by which the small club increases its level of talent.’¹⁸³ Furthermore, they argue that under a salary cap ‘the win percentage of a smaller club increases, while the win percentage of the larger club decreases,’¹⁸⁴ thus the salary cap produces a more balanced league.¹⁸⁵

The report by Deloitte and Touché noted a strong correlation between spending and team performance in the BPL,¹⁸⁶ yet there is strong evidence to suggest that under the salary cap structure in the NHL, the inverse holds to be true.

The Florida Panthers play in the South East Conference, and are without question a lower salary cap team, which means that they do not typically exceed the minimum CBA mandated salary expenditure. Their team payroll for the 2011-12 season ranks twenty first among teams in terms of money spent, coming in at just over \$55 million USD.¹⁸⁷ Yet, at the time of writing, the Panthers lead the Southeast Division, and sit 3rd overall in The Eastern Conference.¹⁸⁸

The Boston Bruins were league champions in 2010-11. At the time of writing they sit in 2nd place in the Eastern Conference, one sport ahead of Florida.¹⁸⁹ The Bruins payroll for the current season ranks fifteenth in the league,¹⁹⁰ yet they remain a strong competitive force.

¹⁸³ Diet, Land and Rathke (n 126) 453

¹⁸⁴ Diet, Land and Rathke (n 126) 453

¹⁸⁵ Diet, Land and Rathke (n 126) 453

¹⁸⁶ Deloitte (n 10) 9

¹⁸⁷ CapGeek (n 160): \$55,024,545

¹⁸⁸ NHL, ‘2011-2012 Standings’ (2012) *NHL.com* <<http://www.nhl.com/ice/standings>> accessed 25 January 2012

¹⁸⁹ NHL (n 188)

¹⁹⁰ CapGeek (n 160) \$60,259,368

The New York Rangers at the time of writing have the second most winning record out of the thirty teams in the NHL.¹⁹¹ The Rangers are the second most valuable club in the NHL, with a market value of \$507 million USD.¹⁹² However, their overall payroll places them ninth in dollars spent at \$62,674,953 million USD.¹⁹³

The Nashville Predators play in a smaller non traditional hockey market in the South Eastern United States .¹⁹⁴ Their 2011-12 team salary is just under \$50 million USD, placing them twenty eighth in the league in terms of money spent on payroll,¹⁹⁵ yet at the time of writing, they currently sit in 4th place in the Western Conference.¹⁹⁶

These examples are meant to provide countering evidence to the proposition that money buys a strict competitive advantage. They are meant to highlight that in a system where resources are controlled within a set of parameters, the top teams are not necessarily those who spend the most.¹⁹⁷

The Barclays Premier League

Turning to consider evidence in support of the Deloitte report findings in regards to performance being correlated to spending,¹⁹⁸ if one analyzes the Premier League standings, the evidence suggests that the finding of the report are accurate.

In the Premier League, the ‘big four:’¹⁹⁹ Manchester United; Chelsea; Liverpool and Arsenal; make up the elite teams in terms of payroll spending and competitive dominance. The amount each team spent on salaries in 2010-11 was as follows: Manchester United; £131 million, Chelsea; £174 million,

¹⁹¹ NHL (n 188)

¹⁹² Forbes, ‘NHL Team Values 2010: The Business of Hockey: New York Rangers-\$507 million’ *Forbes.com*

(2012) <[http://www.forbes.com/nhl- valuations/list/](http://www.forbes.com/nhl-valuations/list/)> accessed 10 January 2012

¹⁹³ CapGeek (n 160)

¹⁹⁴ Forbes (n 192) \$163 million valuation

¹⁹⁵ CapGeek (n 160): \$49,848,991

¹⁹⁶ NHL (n 188)

¹⁹⁷ Diel, Land and Rathke (n 126) 453

¹⁹⁸ Deloitte (n 10) 9

¹⁹⁹ Laura Williamson, ‘Arsene Wenger insists the Premier League ‘big four’ could now become a ‘top six’ *Mail*

Online (7 August 2009) <<http://www.dailymail.co.uk/sport/football/article-1204855/Arsene-Wenger-insists-Premier-League-big-six.html> > accessed 10 January 2012

Arsenal; £110 million and Liverpool; £121 million.²⁰⁰ That same season, Manchester United won the Premier League title, Chelsea came in 2nd, Arsenal 4th and Liverpool 6th.²⁰¹

Dating back to 1992, the year the Premier League was formed,²⁰²The League title has not left the company of three of these four teams, save 1994-95 when Blackburn were league champions.²⁰³ Manchester United has won a total of twelve titles; Chelsea three and Arsenal three.²⁰⁴ At the time of writing, Manchester United sits 2nd in the league tables, Chelsea 5th, Arsenal 4th and Liverpool 7th.²⁰⁵

From the evidence, it may be concluded that there is a strong correlation between winning and salary expenditure. In a league where there is no binding salary restrictions as a condition of employment between players' and owners, the dominant teams are those who have the resources to attract marquee talent, and clubs with marginal budgets, the author submits, will only be able to perform relative to their resource base.

Zimbalist argues that a salary cap is ideal for a system where there is wide disparity between clubs based on their financial capabilities, as 'the ability to outbid their competitors for the best free agents and to raise the price on players beyond the means of clubs without related party revenue is heightened, and the issues of competitive imbalance and financial fragility become more pressing.'²⁰⁶

Conclusion

This paper has sought to establish that in the context of professional sports, the framework of employment based on collective bargaining facilitates both financial and competitive stability for franchise clubs and their respective professional leagues. Three core aspects of employment in both the NHL and BPL were examined: team and player salaries, player contracts and player mobility. These facets were explored within the framework of both collective bargaining and the open market system, to show how these features of the

²⁰⁰ Conn (n 108)

²⁰¹ Barclays Premier League, 'About the Premier League: History of the Premier League- An overview of 20

seasons in the Premier League' *Premier League.com* (24 November 2011)<
<http://www.premierleague.com/en->

[gb/about/history.html](http://www.premierleague.com/en-)> accessed 1st February 2012

²⁰² Barclays (n 201)

²⁰³ Barclays (n 201)

²⁰⁴ Barclays (n 201)

²⁰⁵ Barclays Premier League, <http://www.premierleague.com/>

²⁰⁶ Zimbalist (n 88) 26

broader labour organisation served to facilitate financial and competitive balance.

The author submits that owing to the combination of its unique economic structure and prolific commercialisation, professional sports can no longer be supported by an employment model operated on the basis of the BPL open labour market/legal framework design. The collectively bargained employment structure is best suited to support the business and competitive aspects of professional sports. This structure allows parties to tailor provisions of employment to suit their interests independent of external influences. Having said that, the author acknowledges that the in its current form the 2005 NHL CBA has not solved all of the financial and competitive imbalances in the league, and indeed franchises are still struggling under this employment model.

Mike Ozanian contends that in 2010-11, wages in the NHL rose by 11%, and eighteen of the thirty teams lost money before paying down loans or writing off assets compared with sixteen teams the previous season.²⁰⁷ Indeed, if one analyzes teams reported revenue and expenditures sheets, they would find that some of those losses are quite significant. The five teams losing the most money: The Phoenix Coyotes (\$24.4 million USD); The Columbus Blue Jackets (\$13.7 million USD); The Tampa Bay Lightning (\$8.5 million USD); The Anaheim Ducks (\$8.4 million USD) and the New York Islanders (\$8.1 million USD).²⁰⁸ Ozanian contends that 57% of revenues being allocated to players are too high for some teams to be profitable.²⁰⁹

The 2005 NHL CBA expires in September 2012,²¹⁰ and one major point of negotiation will be players' share of league revenues.²¹¹ Ozanian further argues that the new CBA should move towards a player remuneration percentage comparable to that of other professional sports in North America, which sees players under the their respective CBAs receiving between 47-50% of league revenues.²¹²

Additionally, Ken Campbell contends that the salary cap system has neither increased parity nor competitive balance, and in fact, the lower salary limit is proving to be detrimental to smaller clubs because they often struggle to reach the lower threshold salary limit required under the CBA.²¹³

²⁰⁷ Ozanian (n 3) 1

²⁰⁸ Forbes (n 192)

²⁰⁹ Ozanian (n 3) 1

²¹⁰ NHL, 'Collective Bargaining Agreement FAQs' *NHL.com*

²¹¹ Campbell (n 19)

²¹² Ozanian (n 3) 1

²¹³ Campbell (n 19)

The author concedes that these are real and practical problems associated with the salary cap. However, these issues are not associated directly with the collective bargaining structure of employment, rather the individual provisions of the agreement. A central benefit of the collective bargaining is that terms and conditions can be renegotiated to meet changing circumstances and objectives of the industry.²¹⁴

In the NHL, unlike some other professional sports, ice hockey is more difficult to sell in certain markets than in others.²¹⁵ Looking at the above list of teams who lost the most money during 2009-10, three of those teams are located in either Florida or California, where ice hockey is not the traditional sport, thus making it more difficult to sell. Moreover, although the salary cap and other provisions of the CBA discussed in this paper are designed to create greater financial and competitive stability, it is still the case that each individual franchise remains its own business, and its financial success depends on how the team is run, independent of the factors discussed.²¹⁶

As was stated earlier, negotiations for the new CBA will take place leading up to the September deadline. The percentage of revenues players' will receive is a point to be negotiated on between the union and the league. At this juncture, it is difficult to point to a 57% players' share of revenue as the reason for teams losing money, as was suggested by Ozanriian, simply because there are other complex economic and financial factors that impact on a businesses profitability.²¹⁷

In terms of smaller market teams reaching the lower salary limit, while it is understandably burdensome for some teams because the lower salary limit might be costlier than what they paid out for salary prior to the 2005 CBA.²¹⁸ The rationale behind the imposition of a lower salary limit is to have a base figure for spending in order to maintain competition across all clubs.²¹⁹ The author submits that although this might hamper some clubs, in the grand scheme of what the salary cap tries to accomplish, this might be the inevitable price paid in order to achieve more financial and competitive balance.

The author submits that the account of the NHL CBA given by Paul Staudohar aptly describes the positives and benefits of this system. He establishes that, small market teams are better positions to retain players who would otherwise be lost to larger ones that 'bid up their salaries.'²²⁰ Furthermore, 'player

²¹⁴ Dietl, Duschl and Lang (n 9) 12

²¹⁵ Staudohar (n 18) 28

²¹⁶ Strouhal (n 152) 17

²¹⁷ Strouhal (n 152) 17

²¹⁸ Dietl, Lang and Rathke (n 126) 456

²¹⁹ Dietl, Lang and Rathke (n 126) 456

²²⁰ Staudohar (n 18) 28

mobility increases under the new free agency rules, although equalised team payroll limits will prevent salaries from escalating rapidly. While the payroll cap keeps cost under control, it also promotes a partnership between owners and players...the more money the owners make the more money the players can earn.'²²¹

The CBA employment structure makes possible the terms and conditions outlined in this paper. The granting of a legal exemption from the framework of the domestic or supranational jurisdiction has facilitated the growth and stability of this complex and unique industry.²²² Therefore, although the collective bargaining system has not solved all of the competitive and financial issues in the NHL, the author submits that collective bargaining system has shown its propensity in being an effective employment law mechanism; conducive to the success of the new business model of professional sports.

Stefan Szymanski establishes that professional sports leagues in North America are more financially stable than those in Europe,²²³ and Jack Anderson notes that although the open market approach taken by the Premier League has generated huge success, the debt accumulated in the process should serve as a warning about the league's unregulated tendencies.²²⁴

The author contends that there are two major barriers to the implementation of the collective bargaining structure in the BPL: the institutional framework of European Football and the substantive law of the EU.

Dietl, Franck, Lang and Rathke argue that the labour model of North American professional sports is fundamentally different to that of the European model, and that for football 'a salary cap system has to take into account the market heterogeneity within the European football pyramid and all national and Pan-European competitions through a system of promotion and relegation.'²²⁵ Furthermore, 'European football is not compatible with the American labour relations approach. Associations are not one side of a labour market, but sport governing bodies.'²²⁶

Moreover, Szymanski asserts that 'larger clubs fear the idea of sharing with weaker clubs in the case the latter do become strong and cause the relegation of the former at a later date.'²²⁷ The author contends that while the institutional structure of EU football makes it difficult to adopt an exact model

²²¹ Staudohar (n 18) 28

²²² Dietl, Lang and Rathke (n 126) 448

²²³ Szymanski (n 141) 160

²²⁴ Anderson (16) 362

²²⁵ Dietl, Franck, Lang and Rathke (n 83) 10

²²⁶ Dietl, Franck, Lang and Rathke (n 83) 10

²²⁷ Szymanski (n 141) 160

of employment based upon that of the NHL, the system could be adapted to meet these complexities.

In both England and in Europe, professional rugby leagues²²⁸ have embraced salary restrictive measures as a means to improve competitiveness and their long term survival.²²⁹ Although these leagues do not operate these restrictions under a formalised labour system as does the NHL, the author contends such moves signal a willingness to adapt to the underlying business realities, even when operating on the basis of the European sports model.

Additionally, the author contends that the measures implemented by UEFA to control football finances,²³⁰ is an admission that there are financial and regulatory problems in EU and Premier football,²³¹ and serious steps need to be taken to correct it. While these types of regulations are a positive first step they do not go far enough to address the root problem, which is the influx of wealth into football, the lack of any real employment oversight or control mechanisms, and the gap between costs and revenue to the point where cash flow for operations is in danger of being incapable of finance.²³²

The author contends that notwithstanding the institutional complexities of both the competition structure of football, and the football regulatory pyramid, if all of the relevant parties wanted to pursue a type of employment based on the NHL CBA model, it could be achieved. The logical next step after 'Financial Fair Play'²³³ is to impose binding salary restrictions. The author suggests that it is the attitude of the larger clubs combined with an outdated understanding of how the industry works²³⁴ that is really holding back any significant reforms to employment in Premier football, rather than the institutional constraints.

The second main issue for the BPL and the implementation of comprehensive autonomous employment structure is its compatibility with EU law. An attempt was made by FIFA in early 2000 to persuade the European Commission to grant football a statutory exemption from EU law, but it was made clear that such a proposal was unlikely to be voted through.²³⁵ If an outright Treaty exemption for football has been more or less ruled out, what of the collective bargaining route?

²²⁸ Aviva Premiership Rugby (UK) and Stobart Super League (Europe)

²²⁹ Andrew Howarth and T.A Robinson 'The Impact of the Salary Cap in European Rugby Super League' (2008)

3(6) *International Journal of Business and Management* 1, 4

²³⁰ UEFA (n 112)

²³¹ Dietl, Franck, Lang and Rathke (n 83) 10

²³² Szymanski (n 141) 41, 156

²³³ UEFA (n 112)

²³⁴ Solberg and Haugen (n 1) 338; Szymanski (n 141) 160

²³⁵ Crolley, Levermore and Pearson (n 36) 292

Parrish and Mcardle establish that ‘sport operates under different market conditions to other sectors and consequently measures that on first appearance seem anti-competitive actually **positively promote competition**.’²³⁶ Moreover, then Advocate General Lenz in *Bosman* stated that ‘professional football is substantially different from other markets in that **clubs are mutually dependent on one another**. In view of those special features, the possibility cannot therefore be dismissed that certain restrictions may be necessary **to ensure the proper functioning of the sector**.’²³⁷

In light of the judicial recognition afforded to the notion that professional football is unique to that of other industries, the author submits that upon an examination of the *Albany*²³⁸ criteria, a collective bargaining agreement could be concluded between the football players’ union and the Premier League, or with UEFA on a broader pan-European scale.

The author submits that such an agreement would be with the aim of negotiating ‘on core subjects such as wages and working conditions,’²³⁹ and would ‘not directly affect third markets and third parties,’²⁴⁰ as these types of restrictions would serve to promote competition and would be unlikely to adversely impact on industries outside of football.²⁴¹

It is submitted that although it is unlikely that a CBA for the BPL would ever mirror that of the NHL exactly, it would likely mandate ‘rules on financial management and transparency and quasi-salary caps by way of limits on clubs’ expenditures on salaries and transfers as set against a percentage of clubs’ turnover.’²⁴²

Furthermore, Article 101(3) TFEU outlines the instances when this provision will be rendered inapplicable. In the case of: any decision or category of decisions by associations of undertakings, which contribute to improving production or distribution of goods or to promoting the technical or economic

²³⁶ Richard Parrish and David Mcardle, ‘BeyondBosman: The European Union’s Influence upon Professional Athletes’ Freedom of Movement’ 7(3) *Sport in Society: Cultures, Commerce, Media, Politics* 403, 414 (emphasis added)

²³⁷(n 140) Opinion of AG Lenz para, 270 (emphasis added)

²³⁸ *Albany* (n 45)

²³⁹ *Albany* (n 45) Opinion of AG Jacobs para,194

²⁴⁰ *Albany* (n 45) Opinion of AG Jacobs para,194

²⁴¹ Anderson (n 16) 359-360

²⁴² Anderson (n 16) 359

progress.²⁴³ The ECJ acknowledged that for the purposes of this Article, football associations were to be considered ‘associations of undertakings.’²⁴⁴

It is submitted that the evidence points towards the EU legal framework being able to reconcile a CBA employment structure in the BPL. The author submits that it is well established football operates differently to other industries, and it has been judicially recognised that some restriction is desirable to maintain competition and the business integrity of the industry. The author contends that on that basis, the implementation of a CBA structure of employment into the BPL would satisfy the *Albany* criteria, and subsequent European case law suggests that taking a decision to implement this type of employment arrangement could provide the BPL an exemption under Article 101 TFEU.

Therefore, the author contends that the CBA model of employment operating in the NHL is best suited to promote financial and competitive balance in the business of professional sports. The Premier League should move towards implementing a similar structure of employment to protect this £2 billion industry.²⁴⁵ The open employment structure in the BPL serves a self defeating function and is not conducive to the long term success of the league. The implementation of a CBA structure of employment into the BPL would serve to ‘protect the true essence of sport- fairplay.’²⁴⁶

²⁴³ Article 101(3) TFEU: Provisions in paragraph 1 declared inapplicable

²⁴⁴ T-193/02 *Laurent Piau v Commission of the European Communities and FIFA* [2005] ECR II-209 para, 69;

Anderson (n 16) 361

²⁴⁵ Deloitte (n 10) 8

²⁴⁶ Anderson (n 16) 362

‘Creativity, equality and distinction: a political outlook for citizens in a plural, developmental reality’

Iwan Thomas

The character of the citizen under the law is often overlooked by constitutional theory. This article intends to show the importance of the citizen and his or her capacity for creativity in a diverse society. It is well documented that due to developments in technology and communication the modern world is becoming increasingly culturally pluralistic. In the light of this, this essay will seek to deconstruct classical constitutional theory and show that it is essentially violent in its attempt to bring stability into such a diverse world.

Through a process of poïesis balanced with praxis a type of creativity can be employed by citizens of the modern world that was once practiced by the ancients in an environment where they found themselves to be most free. This process of creation ought to be framed by a perception of reality seen as simultaneously developmental and cyclical, this is a movement away from the hegemony of Western ontic, metaphysical and political thought. As a result of this creative activity a political assertiveness that is based on the human condition of plurality, encompassing the duality of equality and distinction, can arise.

Introduction

This article is a discussion of creativity and constitutionalism when applied in the context of social diversity. It is put forward that constitutionalism is irreducibly unjust and a particular type of creative process is necessary for citizens to overcome this. The activities associated with legal citizenship is an area that is often overlooked in legal theory as the vast majority of jurisprudential themes tend to focus at an institutional level to remedy what are perceived as institutional problems. However, it is contended in this paper that violence inflicted by the law upon citizens can be met and remedied at the ground level where the law is applied and understood. Creativity is offered as the human activity through which a response can be made visible.

The first part of this essay is a crystallisation of the value of creativity as a human process and its value to the law. Within this part, Chapter 1 will consider the relationship between freedom and creativity. The genealogy of this relationship will be traced back to ancient Greece where creativity and political engagement were essential parts of the lives of freemen in the polis. It can be seen that a certain genus of creativity has been lost with the active

political life and that this type of creativity might be of assistance should citizens seek to overcome constitutional injustice in a pluralistic society. The second chapter of the essay criticizes the Western creative process that has emerged since the type of creativity employed in the polis. It is argued that this process is based on a misleadingly stable perception of reality that is not of use when applied to the rapid social developments that occur in a diverse global society. Two alternative theories from modern thinkers are offered and synthesised in order to establish a potential frame for the creative process.

Part II is a survey on the authority and legitimacy of contemporary constitutionalism, which is illuminated as inherently violent, particularly when applied to a diverse, kinetic reality. Language as a human creation is of central importance to bringing about constitutionalism that is more just; it is the medium in which creativity is balanced. The final chapter is an application of the theories of reality and creativity in the context of constitutionalism, underscoring the importance of creativity existing in the foreground of contemporary constitutional theory.

Reality and the value of creativity

Freedom and creativity

The aim of this chapter is to show that notions of freedom and creativity are inextricably linked. Where humanity finds itself to be free determines both how and where we engage in the creative process. Two of types of creative activity, praxis and poiesis will be defined for the purpose of analysing the ways in which creativity can be constitutionally employed. The objective of this particular part of the essay is to show that a distinct way of experiencing the very essence of poiesis- as a method of unveiling truth- has become under utilised by modern citizens.

The genealogy of individual political creativity

Creativity in ancient Greece

In ancient Greece there existed a clear difference between the undertakings of poiesis and praxis. The latter can be roughly translated as 'action'; however, praxis more accurately defined is the direct outcome resulting from an action.¹ Following Aristotle, as a connection between senses and the malleable parts of the world its primordial origins rest in biological necessity or in man as part of nature.² This is due to the nearness of praxis to action, praxis arises as the product of a single moment of action; it is the immediate coincidence between will and action. Thus, from this technical definition, action can be seen as the

¹ Hannah Arendt, *The Human Condition* (first published 1958, University of Chicago Press 1998) Chapter 1.

² Giorgio Agamben, *The Man Without Content* (1999 Stanford University Press), § 8.

tangled phronētic link between the desire of mankind and the motion of natural world. What results is in an unnatural cessation of that motion.³

Poïesis, on the other hand, was comprehended as the process of thought transgressing into actuality. The act of attempting to expose a clearing in which truth as a-lethēthia could authentically unfold lay at the heart of poïesis.⁴ While praxis was concerned with constructing a bridge between mankind and the natural world, over which desire could pass, the purpose of poïesis was to illuminate the pre-sensual world; to occupy the gap that was praxis was attempting to bridge. This was a province beyond manipulation; an entity beyond entities Heidegger might call Earth.⁵

The proximity of poïesis to truth meant two things. Firstly, poïetic activity was a fleeting experience. Praxis, through the use of natural material, attained a certain sense of permanence; it was a moment in which the movement of humans and the natural world were seemingly brought to rest.⁶ Poïesis, on the other hand, was a process, it did not seek to manipulate a reality but rather to 'let it be' through the use of technē or technical knowledge.⁷ Therefore, this process submitted to the temporal continuity of a Heraclitean reality, in which arresting aspects of the Earth through direct interpretation would be a distortion of truth.

Secondly, its link with truth meant that poïesis attained a higher position than praxis in the hierarchy of Greek activities. An individual's poïetic ability to comprehend their position in the plurality of the world into which they had been submerged was essential to understanding the conditions of their existence.⁸ In addition to this, poïetic experience could supplement the *vita activa* in the political realm. In order to attain the highest degree of political and personal freedom the Greek citizen had to acquiesce to the condition that simultaneous rule and subjection, through the use of praxis and lexis, was possible in the Agora. This highlights the human condition of plurality alluded to above.⁹ Therefore, not only was poïesis key to political and personal freedom in the polis, it was essential to engaging in appropriate persuasion and legitimate action; it was an empathetic tool in these contexts where conditioned thought is unveiled and led into being.¹⁰ It can be seen that free citizens in the political arena formerly used the two forms of creativity in conjunction with one another: praxis motivated by poïesis.

³ Aristotle, *The Nichomachean Ethics*, J.A.K. Thomson (tr.) (Penguin 2004) Book VI.

⁴ Agamben, *The Man Without Content*, p. 70.

⁵ Martin Heidegger, *Parmenides*, André Schuwer and Richard Rojcewicz (trs.) (1992 University of Indiana Press) pp. 75-77.

⁶ Hannah Arendt, 'The Modern Concept of History' (1958) 20 *The Review of Politics* 570, p. 573.

⁷ Derek H. Whitehead 'Poiesis and the Art of Making: A Way of Letting Be' (2003) 1 *Contemporary Aesthetics* <<http://www.contempaesthetics.org/newvolume/pages/journal.php?volume=1>> accessed 29 February 2012.

⁸ Agamben, *The Man Without Content* pp. 68-71.

⁹ Hannah Arendt, *The Human Condition*, Chapter 1.

¹⁰ Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State* (OUP 2006), Chapter 20.

This is a striking form of creative political engagement; one that Agamben contends has been lost in the modern world.¹¹ It is clear that where citizens once considered themselves to be most free was the domain in which creativity was exercised. Conversely, looking at modern political structure, it can be seen that ordinary citizens do not find themselves at the heart of political affairs in the way free citizens of the Athenian city-state once did, employing the two forms of creative experience together.

This opens up a line of questioning that centers around a need to understand creativity in the modern world. Why and how do individuals create today? Which individuals create and where do they experience creativity? These questions allow the article to move on to discuss individual and public creativity in the modern age. The central feature of this part of the discussion is to point out that the colonisation of the public realm by necessity has caused a division between creativity as unconcealment and creativity motivated by utility.

Poïesis, praxis and political freedom in the modern world

The process of creation still occurs in the public sphere, however, it is no longer carried out by the general public but by elected officials on their behalf. Modern political creativity in the public realm is understood in terms of productivity. Products such as laws created and enacted in parliaments must satisfy the test of utility.¹² This means that the continuance of a creative work is determined by its practical applicability in society, this demonstrates that praxis influences the governmental activities of politicians. Under a democratic political system, a government can be elected or removed on the basis of majority voting regarding the practical applicability of the laws it creates or intends to create. Therefore, praxis has also moved to the forefront of the conceptual arsenal citizens must employ in order to politically engage in modern times.

In modernity, political engagement is of a negative disposition, compared to the more positive engagement of the ancient Greeks.¹³ It is negative in the sense that it is protective rather than assertive. It is protective of the space, following negatively liberal theory that is established in the private sphere for the individual to engage in creative contemplation authentically, free from coercive or unjust laws.¹⁴ The private sphere is now the clearing in which an individual can engage in a form of creativity that addresses matters of truth. The praxis employed in the public sphere is no longer motivated by higher truths but pure applicability. This illustrates the devaluation of public poïesis due to its inability to bring about tangible change. Praxis in its place, seeks to arrest and manipulate this reality, for example by establishing definite legal labels such as 'family life' that are intended to endure and safeguard utilitarian principles.¹⁵

¹¹ Agamben, *The Man Without Content*, p. 68.

¹² Jeremy Bentham, *Of Laws in General* H.L.A. Hart (ed.) (OUP 1970).

¹³ Benjamin Constant, *Political Writings*, Biancamaria Fontana (tr.) (CUP 1988) pp. 308-328.

¹⁴ Isaiah Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (OUP 1969).

¹⁵ Article 8(1), European Convention on Human Rights.

This change in the role of creativity in the public sphere is part of a broader historical phenomenon explained by Hannah Arendt as the colonisation of the public sphere by notions of society, reason and necessity.¹⁶ The *vita activa* of the individual citizen, in becoming shackled by necessity, has resulted in a diminishing of the results of a particular type of political engagement in terms of praxis and *lexis* flowing from *poiëtic* creativity in the public sphere.

The method of creativity behind these previously political activities that attempted to unveil truth- a method that modified and improved what was previously part of political experience- has also faded. Whereas, *poiësis* was once essential to framing praxis to ensure positive, yet just political engagement, praxis has now become a defensive shield for the *poiëtically* creative environment. The creative process of action sets aside an area in which things can be left to be. This shows that the relationship between the two forms of creativity has been subverted in the politics of modernity. The rise of necessity in the public sphere as the manifestation of the needs of the majority has had the effect of replacing truth as *alethēthia* as the framework for creative action, with imperative directions based on notions of community.

When constitutional disputes arise, individuals must employ praxis to bring their reality to a complete stand in order to comply with the fundamental negative freedoms modern constitutionalism intends to ensure. To return to the example of the European Convention on Human Rights, an individual seeking to show that her Article 8 right to the enjoyment of private and family life has been violated must abstract her family into a distinct yet appropriate entity in order to ensure her rights are enforced. A process of active creation, setting a group of kinetic, developing individuals into a legal category, creates a novel entity for the particular purpose of ensuring quiet enjoyment in the private sphere. Praxis as a concrete manifestation, therefore, must comply with that which is necessary; it must be that which ought to be under the law. This raises the issue of the violent disparity between correctness and justice that will be discussed later in the essay.

Showing the rise of praxis, determined by necessity rather than authenticity, and the fall of *poiësis* in the political sphere moves the article towards a discussion concerned with finding exactly what mankind has lost due to this occurrence. The proposal for the following chapter is to show that the subverted relationship between the two forms of creativity can be aligned with the way in which reality has come to be perceived.

¹⁶ Maurizio Passerin D'Entreves, *The Political Philosophy of Hannah Arendt* (Routledge 1994) Chapter 1.

Creativity and reality

One of the aspirations of this chapter is to show that creativity is a process of perpetual continuity. As long as humanity continues to socially exist in a reality that ought to be perceived as developmental, the creative capacity inherent to humans will ensure creativity can endure as a self-concealing experience in the temporal aporia between the concepts of past and present. The overall goal of the chapter therefore, is to show that attempting to arrest reality detracts from the essence of activities such as creation.

Two models of creativity

Looking to studies in the field of creativity, Todd Lubart's analysis of two broad conceptions across cultures can be used to persuasive effect regarding the ideas put forward in the previous chapter. While these conceptions intend to cover creativity in a number diverse and overlapping areas, there are elements of this analysis that strengthen the points to be made in this chapter relating to constitutionalism and the perception of reality.

Western creativity is said to be the ability to produce novel and appropriate work. Novel work in this context is seen to be original in that it is not predicted. The appropriateness of work is derived from the problem-solving component of the work when applied to a particular situation. This points toward a relationship between creator and an observable, distinct product that satisfies a requirement. One can see that in this context praxis is employed, in order to alter circumstances. This idea of creativity commences from a point in which the reality the creator operates in has brought about unforeseen, adverse circumstances that require remedy. The creation is original and unpredictable, as the context in which it is produced could not have been anticipated.

Two things can be noted as this point. Firstly, that things created attempt to reflect the environment in which they are made, as unpredictable. This is due to the fact that they were not foreseen as required, and stems from the requirement that work be innovative. In addition to this, the restorative approach this model takes toward creativity is significant; this is drawn from the requirement of applicability. The latter condition can be seen as an attempt to restore or control reality in order to understand and contain the problem that has arisen. The form the novel creation must take is the appropriate shape of the problem. This strengthens the argument regarding necessity as it originates from the premise that there exists a disruptive 'problem' posed to the human condition of labour. Creating a product that is appropriate subject to practical verification is a modern reflection of engaging in praxis to satisfy labour through work, thus maintaining life.

Lubart moves on to compare the second broad model of Eastern creativity where parallels can be drawn with creation as *poiesis*. In this model, creativity involves a sense of personal fulfillment, it less about innovative material products and more about a connection to the elemental realm in an attempt to express an ultimate reality. Through a process of meditation, the creator accesses experience. According to this model, an individual's experience is a

combination of time and history, which are part of a cyclical natural order. The component of innovation in its Western context is absent from this process; reality is not temporally punctuated by stages such as preparation, praxis and verification. It is a passive engagement with the temporal cycle involving bringing the inner essence of the past as experience in the natural world into daily life.

On the face it, it might seem that both models of creativity revolve around the act of observing reality as complex. However, the ways in which each example connects with reality can be seen in contradistinction to one another. For the preservation of basic human needs it is necessary for the Western model to associate with reality as stability. This is done through a procedure of disintegrating reality as a continuum and establishing it as past, present and future. This brings about a tendency, as William James put, to live forwards and understand backwards due to the inability to properly capture the present. The reality of the present is confused in this rationalist doctrine of creativity; it is abstracted for the purpose of representation. However, in doing this the developmental reality of things becoming is obscured.

The second model, on the other hand, does not attempt to mechanise reality in order to make it represent an instance. Instead reality is illuminated in its natural state. While this theory of creativity seems to correspond more accurately to a reflection of dynamic reality it is difficult to see how this can be utilised in the law. Can a theory of creation that does not produce work be called a theory of creation at all? The remainder of this part of the paper will seek to clarify this theory of reality and crystallise its value when applied in conjunction with a theory of creativity, through deeper analysis of its proponents such as Alfred North Whitehead and Martin Heidegger.

Creativity, the becoming of reality and truth

By drawing all the analysis of the above discussion together, the overall aspiration of the final two subsections of this chapter is to show that creativity is a process of perpetual continuity. Creative capacity is inherent to humans as individuals and thus, as long as humanity continues to socially exist, in a reality that ought to be perceived as developmental, creativity can endure as a self-concealing experience in the temporal aporia between the concepts of past and present.

Heidegger, truth and reality

Abstracting the present and the significance accorded to the creation of objects is analogous to the pure phenomenological philosophical tradition. The starting point that the Cartesian tradition of pure phenomenology adopts is that of subjects relating to objects. As a result, questions relating to how humans as subjects, have knowledge of and conscious experience with, such objects arise. The focus in this instance is on what Heidegger might call the un-ready to hand, the essential element relating to the directedness of the mind toward objects through a theory of intentionality. Evidence of this philosophical outlook in the Western model of creativity can be found in its

rational tendency to logically bracket the intentional content of the mind and declare it to be equivalent to a description of reality. This shows that the departure point of modern creativity is from the comprehension of reality in order to know that particular states of affairs exist. This desire to rationally understand reality brings about a preoccupation with the ability to problem-solve, alluded to in the description of the model above. Attempting to further rationalise the problems that emerge, by relating predicates that are seen with properties to laws, can be seen as the Western model adopting present at hand reasoning. Therefore, the motivational drives of practical creation can be seen as seeking to know that (to acknowledge the existence of a problem) in order to know why (to have the ability bring a state of change about).

In contrast to this, Heidegger's theory, which does away with the traditional hegemony of ontic and metaphysical thinking in the West, is concerned with knowing how and the ready to hand. In contrast to the Cartesian tradition and pure phenomenology this theory requires a relinquishing of 'I' based thinking and an acceptance of one's position as part of Earth. The relinquishing of subjective thinking corresponds to the meditative manner of engagement in Eastern creativity, delving beyond that which is inferred, into a cerebral nothingness. For both Heidegger and Lubart's Eastern creator, it is in this inner clearing that lies beyond all existential questions, where the thing-ness of things in their essential, authentic and natural form is momentarily glimpsed. For Heidegger, this meditative process of becoming one with the situation is Dasein.

Tracing origin in a seemingly cyclical reality is what lies at the core of both meditative approaches to creation. In *The Origin of the Work of Art*, Heidegger suggests that the principle of understanding the World lies in a theory of understanding truth. Artistic interpretation requires insight into the way in which truth is creatively set into the work; this is a truthful drive that has potential to supplement legal interpretation. It is an endeavor that involves opening up the World- the fluctuating reality that all beings are submerged into and conditioned by- that usually goes unnoticed and provides the framework of the present at hand through language. Descending beyond the World and its punctuated history rests the preexistent Earth as the root of all Worlds; it is the sheltering horizon beyond all horizons that allows a World to unfold. Through this type of imaginative yet subliminal engagement the Earth can be temporarily glimpsed, this is of central importance to the concepts of truth and reality in this philosophy.

An analogy can be used to clarify this unorthodox proposal and to present a depiction of the absorptive nature of this activity. The mountain in the background of Hokusai's painting, *Fisherman Standing on a Rocky Premonitory at Kajikazwa*, is set into the white atmosphere between the blueness of sea and sky. All that is visible is the outline of the very peak of the mountain. The lines that make up this outline stop abruptly and vanish in the white sky, a great distance from where the foot of the mountain would be. The mountain appears to rest in this nothingness, beyond logical conception. Engaging in a creative process that seeks to find origin and truth causes the Earth to rise up in a similar way to this mountain, present yet simultaneously

concealed, seemingly tangible yet retreating into the white nothingness of the atmosphere.

Due to this truthful drive, seeking to access this ahistorical point seems an activity of salient similarity to poietic creation. However, Heidegger's writings depict a vivid kind of poiesis that goes beyond that discussed above, it is a method that fully yields to the inexpressibility of things that will remain indefinable. Like the mountain reality is and there is nothing more that can be said, hence, a state of acceptance is reached. In reaching the origin there is no generation of new possibilities but truth as alethēthia in its purest form. What is illuminated is that which is closest, in the sense of Earth allowing mankind to be, yet furthest away in that it retains its nature as indescribable and unalterable.

Therefore, it seems that the understanding of poiesis considered at the beginning of this part, the Eastern methods of creativity and the writings of Heidegger could be adopted and used to challenge what has become the hegemonic perception of reality as a malleable environment. Instead, a process of internal enlightenment can be engaged with on an individual level understanding the temporal nature of a World and the eternal Earth that envelopes it. The motivation behind creation becomes a process of understanding reality as it is and what can be learnt from it. It does not begin by seeking to bracket with the aim of manipulation but focuses on fundamental truths. Reality is seen to be in perpetual cycle, the very essence of its Being represents this by continuously revealing and concealing; this is the becoming reality of reality.

Hence, reality is beyond complete human control and comprehension. Lessening such an anthropocentric attitude can lead to more responsible creativity in the law and sustainable development through thinking of reality beyond its instrumental value. The philosophy regarding the correlation of humanity and the natural world is highlighted in the Deep Ecology Movement where the ecosystem as part of reality is considered beyond advantageous minerals. Conserving this essential link with the truth of the Earth can also lead to greater humility and respect between fellow humans in addition to the environment. This can occur through unveiling the antecedent truth of the interconnectedness of reality, a process brought about by sustainable creativity. This feature of this kind of thinking can be useful in the legal sphere; not only can the theory can be applied to the macrocosm of reality in general; it can also be used to understand the development of relationships between individuals- a facet that is of value to the thesis of this essay which will be discussed in relation to social plurality

Whitehead, reality and creative potential

Despite the usefulness of the theory discussed above for illuminating a more complex picture of reality it is difficult to see how individuals as part of this

reality can be identified. Mankind does seem to have transgressed somewhat from the primordial world to the second world of culture and because of this certain questions come to mind. Where is the place of individual identity in the vastness of Earth? Can human existence mean anything more than simply being part of a vast web of interactions and how can praxis feature in this Heraclitean flux? Alfred North Whitehead and his philosophy of organic reality and creativity can be used in conjunction with the constituent areas this paper has examined so far, to provide a more balanced theory of creativity that citizens and legal actors can engage with.

For Whitehead, reality consists of a series of many individual entities that are akin to moments of experience. The shape of each entity is normatively influenced by other entities. Through a process of concrescence it forms its own, individual identity, which in turn influences the shape of other entities. This is the doctrine of the creative advance, whereby the antecedent many entities that make up the disjunctive universe are synthesised in one moment experience. This new entity, in turn, becomes part of the disjunctive universe: the many become one and are increased by one. Therefore, in this theory of reality, creativity can be seen as the categorical ultimate; the universal of universals that exists as a process that brings about novel entities. Whitehead's philosophy of organism summons up notions of the developmental, becoming reality seen in the Eastern model of creativity. However, like the philosophy behind praxis, Whitehead is also concerned with the potential for action and novelty. The fundamental link between the flux of reality and innovative creation is clarified; this link is creativity. Creativity is the reason for the developmental nature of reality.

Concrescence is a process of growing together to form a unified object. This occurs after the tensions between the two poles that uphold this process of becoming are resolved. The physical pole is the summoning up of past experience in each new moment of creation. The mental pole is the element of subjectivity on behalf of the individual that allows the experience to take a novel shape. Reality is a continuum where innovation and tradition are of equal importance. This is a parallel of the interconnectedness of reality as experience in the Eastern model of creativity. The past is unveiled as the core that sustains and becomes revived in a novel way in order to fit the present in the same way that Heidegger maintains a work of art must preserve its truthful relevance to people in order to continue to exist as a work. However, reality is not cyclical but constantly developing, made up of entities that never retain their identity but are shaped by others. It comprises of an expanding mass of interconnected new entities that create and relate to one another. Hence, creativity occupies the temporal aporia between past and present; it ensures coherence and the unity of reality.

It can be seen that both *poiesis* and *praxis* are employed in equal measure to ensure coherence; *praxis* is rendered normatively acute through an entity adopting a cognitively open attitude toward a kinetic reality. There exists a kind of disjunctive coherence in this theory of reality, whereby each entity is distinct and exists in a universe of other distinct entities; they are united in their individuality. Applying these principles it can be seen that individual identity can have a place in a fluctuating reality, and this, as we shall see later

in the essay, can provide citizens in a modern society with a sense of empowerment. Whitehead can be interpreted as putting forward that there is an equal correlation between reality and individuals; this is a temporal relationship where both reality and individuals develop in symbiosis. Hence individuals, like the reality around them, are becoming entities.

The place of creativity as a first principle that advances this organic philosophy means that not only must every being hold creative potential, but also every being must actually create. An individual cannot but form her own individual experience in the process of synthesising the reality of the world that surrounds her, as Hartshorne has said, due to experience in process philosophy, to be is to create. However, it is not an individualistic process of subjects relating to predicates; creativity does not exist in a vacuum, it has a distinctly social character that is receptive to the creative experience of other entities in the world. From the starting point of viewing creation as experience, all creative acts are seen as innovative; individuals cannot create 'zero'. However, Hartshorne has also said that when, in process philosophy, praise is accorded for 'creative' acts these acts are said to be important or extensive whereas the slighter creations of others can seem more trivial. Therefore, while strength is derived from the interconnectedness of individual creation, there might exist a possibility for self-reification. This is where the unification of both types of creativity can occur to ensure social integrity.

If the two theories are applied together, a process of unveiling truth can be seen as innovative. This is because it is partly subjective and therefore distinct, due to the mental pole of concrescence. In addition to this, unveiling the truth of plurality can have the effect of justly constraining novel creations before they enter the developing reality. The comments of Jacques Derrida, during an interview with the saxophonist Ornette Coleman, famed for his improvisation, provides an analogy that illustrates the operation of this theory:

What we often understand by improvisation is the creation of something new, yet something that doesn't exclude the pre-written framework that makes it possible.

All of this shows that a blended version of creativity can exist in the open space between being passive and being active, it is a way of originally responding to one's environment without inflicting violence upon it. Reality is part cyclical, due to the importance of the past and truth but also part developmental, due the individuality of the entities. It can therefore be seen that amalgamating certain features of all of these ideas can result in a theory of reality and creativity that can be applied to an interrelated, plural and developmental modern society.

The following part of this article is intended to set this theory of a creative, developmental reality against models of constitutionalism. It is argued that the structures of traditional constitutional models are outmoded as they are influenced by the perception of reality as static. Another of this essay's intentions is to show that perceiving reality as static can bring about unjust, or even violent ends. What is needed is a developmental constitutional outlook

brought about through a balanced creative approach by citizens in addition to legal actors.

Creativity, multiplicity and the law

Increasing diversity and problems with constitutional theory

Developments in technology and communication have increased interaction with an extensive variety of cultures for ordinary citizens of the Western world. As the mass media has developed in line with this technological evolution, the ways of living associated with cultures are exposed, documented and processed on a global scale. In addition to this, states have made their territorial boundaries more permeable through the enactment of treaties that set up supranational institutions that actively encourage trade and migration.¹⁷ This has had the effect of increased global interaction. Thus, social plurality is understood as a fact of life for a citizen in the modern world.

This chapter will assess whether constitutional theory has the capacity to truly acknowledge the challenges of an increasingly pluralistic culture in the light of these social changes. It is put forward that constitutional theory might be seen as too narrow. This is due to its tendency to operate within the structure of the nation state, defined by fixed territorial boundaries. The origins of this model of constitutional theory will be traced back in order to show that it is essentially violent and misrepresents reality by pressing it inside universal terminology. Therefore, it can be seen that the social consequences that occur due to specific interactions in a dynamic, global reality are omitted from modern constitutionalism.¹⁸

The genealogy of constitutional theory

This section is intended to show that if the sources of constitutional theory are traced, as a concept, it can be seen to be violent. Modern models of constitutional theory are founded upon classical designs of sovereignty and democracy. These designs are based around the existence of a governing association and a society of subjects within fixed territorial boundaries.¹⁹ In the light of what this essay has already said regarding reality, it is clearly visible that the two foundational elements of classical constitutionalism are abstractions that are intended to endure as perpetually applicable to reality; reality is perceived as stable.²⁰ As this essay has already noted, political engagement no longer occurs on an individual level and the ideas of sovereignty and democracy work towards maintaining this state of affairs. It is

¹⁷ The Treaty on the Functioning of the European Union < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF> > accessed 29 February 2012.

¹⁸ William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009 CUP) p. 17.

¹⁹ Mark Laffey and Jutta Weldes, 'Representing the International: Sovereignty after Modernity' in Paul A. Passavant and Jodi Dean (eds.) *Empire's New Clothes* (Routledge, 2004).

²⁰ James MacLean, n. 20, p 83.

worth considering how these notions of sovereignty and democracy purport to endure, how they misrepresent reality and extent to which they are violent.

In order to consider these questions the philosophy of Jacques Derrida and his theory of deconstruction can be consulted. Derridean deconstruction in a political context is a process that involves tracing back a concept to its original sources for the purpose of reconstructing the concept in a modern context in order to see whether it is just or not.²¹

According to Derrida the respective essences of sovereignty and democracy are diametrically opposed to one another. Yet paradoxically, both concepts are also dependent upon one another in order to endure. ²² Sovereignty involves the exercise of power, it is the legitimate right to declare, as Carl Schmitt states, the exception to the rule or the ability to act contrary to the law.²³ The emphasis here lies on the right to act in this way. A purely sovereign entity does not have to answer to questions of legitimacy, only the sovereign entity alone can legitimately act in this way; power is undivided. It is therefore clear that after a process of deconstruction one can find in its essential state a sovereign has the potential to inflict extreme violence. This extreme or “worst” form of violence as Derrida calls it, occurs when a person finds his individuality to be completely appropriated or eliminated.²⁴ Society appears to have developed beyond pure sovereignty and consequently, democracy is necessary to maintain a sovereign’s ability to declare exceptional circumstances in modern society.

Democracy demands that power be divided and made legitimate through giving reasons for its exercise.²⁵ The writings of Max Weber are useful with respect clarifying how political institutions maintain their legitimacy over time. Weber examines the transitions in ‘ideal types’ of society based upon mechanistic, traditional interrelationships from what he calls the *Gemeinschaft* to the more dynamic *Gesellschaft* society. ²⁶ The legitimate authority of the law in the former is derived from habitual obedience whereas the latter is based on a doctrine of rationality where the law assumes the form of a clear and coherent body of rules that are applicable at all levels, known as the rule of law.²⁷ In the light of this, parallels can be drawn between the traditional model of authority and the exercise of pure sovereign power that is made legitimate by tradition, a sovereign derives its authority from the fact that things have never been otherwise. Similarities between the concern for

²¹ Jacques Derrida, ‘The Force of Law: The Mystical Foundation of Authority’ in *Deconstruction and the Possibility of Justice*, Drucilla Cornell, Michael Rosenfeld and David Gray Carlson (eds) (Routledge 1992).

²² Jacques Derrida, ‘The Reason of The Strongest’ in *Rogues; Two Essays on Reason* Palscale-Anne Brault and Michael Nass (trs.) (Stanford 2005).

²³ Carl Schmitt, *Political Theology* (MIT 1985), Chapter. 1.

²⁴ Jacques Derrida, ‘Faith and Knowledge: The Two Sources of “Religion” at the Limits of Reason Alone’ in *Acts of Religion* Gil Andijar (ed.) (Routledge 2002).

²⁵ Derrida, *The Force of Law*.

²⁶ Max Weber in *Economy and Society Volume I*, Guenther Roth and Claus Wittich (eds.) (1978 University of California Press).

²⁷ Roger Cotterell, ‘Legality and Political Legitimacy in the Sociology of Max Weber’ in *Law’s Community: Legal Theory in Sociological Perspective* (Clarendon 1995).

universalisation in the Gesellschaft and the doctrine of democracy are also visible. It seems that democracy is necessary in order to maintain the legitimacy of the sovereign rule of political institutions as societies develop.

However, Derrida points out, that there exists a contradiction in the exercise of power by a democratic institution. The exercise of power, even in a democratic institution requires the use of force in the form of a decision.²⁸ The ability to use force derives its legitimacy from traditional, sovereign sources. This is evidenced in the parliamentary process of the United Kingdom, where every law that is passed derives its authority from sovereign sources.²⁹ One can notice, looking at its format, that each statute refers to the sovereign authority of the monarch in its enacting formula, thus, the term parliamentary sovereignty can be broken down to show that it is an ability based on the democratic legitimacy of parliament and the authority of sovereign sources. It therefore appears, as Derrida states, that democracy is equally dependent upon sovereignty for its preservation. As deconstruction has shown that the essence of sovereignty is violent it therefore seems that violence is irreducibly part of the democratic process of enacting laws. The term Gewalt spoken of by Walter Benjamin in his Critique of Violence seems most appropriate here. The essence of law is power, authority and legitimate domination.³⁰

In the context of rapid social developments there is a tendency for law to respond in the immediate, analogous to the way in which an individual's aspiration connects with reality in praxis. Sovereign authority is referred to in order to respond in temporal proximity to the perceived inconsistency. This immediacy means that there exists a potential for reactionary policies to be created. Without taking the time to contemplate the true nature of reality, the impact of action is not considered. As a result, these policies can bring about harsh and unforeseen consequences of the worst kind.³¹

In the light of this, the next section can now consider the effects that can be discerned from the way in which this foundational theory manifests itself in a modern context. What the next section is intended to show is that a degree of injustice is inevitable due to the essential violence of constitutional theory.

Applying the foundations of contemporary constitutional theory

Violence, language and plurality

Constitutional language will be the focus of this subsection. A modern constitution becomes a living instrument in the real world through language; it is the way in which citizens comprehend fundamental rights and freedoms.³² Hence, as it is the medium in which legitimacy is contended and understood, language is essential to the continuance of law. If Arendt is

²⁸ Derrida, *The Force of Law*.

²⁹ Colin Turpin and Adam Tomkins, *British Government and the Constitution* (CUP 2011), Ch. 2

³⁰ Walter Benjamin, *Critique of Violence*, Marcus P. Bullock (ed.) (CUP 1996).

³¹ Louis E. Wolsher, *Law's Task: The Tragic Circle of Law, Justice and Human Suffering* (Ashgate 2008) p. 32.

³² John Searle, *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969).

followed, the human condition of plurality is two-fold in its configuration, balanced by equality and distinction. It has been previously considered that a modern constitution attempts to frame an environment for the former requirement of equality; it must use language in order to do this. Language is also evidence of distinction in the condition of plurality. It is one of the basic ways in which individuals express their identity, without distinction there would be no need for language.³³ Language is therefore the means through which plurality must be represented in modern constitutions.

Following analysis of particular socio-legal and political works it is intended to show that the juridified language of modern constitutions is inconsistent with the complexity of the language of the diverse hidden constitutional languages that exist in the multitude.³⁴ The narrowness of the central terms of modern constitutional theory not only obscures these languages from politics but violently forces speakers to disregard them when they seek to affirm their identities when disputes arise. The origins of this juridical language can be traced in order to show that it has occurred as a result of the founding principles of law endeavoring to endure.

The introduction of necessity into the constitutional sphere has resulted in the language of modern politics being guided by economic, administrative and managerial directives.³⁵ The success of the political economy is determined by utility and state enrichment, this economic *raison d'état* provides the state with the ability to intervene in all areas of social life; it is able to influence the forces of material production as well as the forces of cultural, subjective production.³⁶ As Jürgen Habermas puts it, this can also be viewed as the state being part of the broad system that comprises of mechanisms of abstraction and rationalisation colonising the area of social solidarity and community known as the lifeworld.³⁷ Law is the medium through which this colonisation occurs, ensuring monetary and managerial directives that are based on the authority of economic and utilitarian principles. At the same time law becomes increasingly institutionalised and operationally closed to the public through a process of juridification. The process of juridification occurs when conceptual sources of a non-legal character, such as those in the lifeworld, are translated into legal terms.³⁸

An example of the violence of juridification can be seen when individual citizens cross the boundary between the public and private spheres, when legal disputes are brought into the courtroom. Creating the impression that unforeseen situations come to be understood as contemplated, as we have already seen, is the rationale behind the tendency of the law to abstract reality in order for it to apply to universal rules. This process results in the discourse

³³ Arendt, *The Human Condition*, Chapter 1.

³⁴ James Tully, *Strange Multiplicity Constitutionalism in an Age of Diversity* (CUP 1995) pp. 99-101.

³⁵ Arendt, *The Human Condition*, pp. 37-38.

³⁶ Michel Foucault, *The Birth of Bio-Politics: Lectures at the College De France 1978-1979*, Michel Senellart, Arnold I. Davidson, Alessandro Fontana, Francois Ewald (eds.), Graham Burchell (tr.) (Palgrave Macmillan 2009) p. 16.

³⁷ Bo Carlsson, 'Jürgen Habermas and the Sociology of Law' in *An Introduction to Law and Social Theory*, Reza Banakar and Max Travers (eds.) (Hart 2002).

³⁸ Jürgen Habermas, 'Paradigms of Law' (1996) 17 *Cardozo Law Review* 771.

becoming institutionalised. The law is presented in legal terms yet paradoxically it is given legitimacy by forcefully making a citizen accept the legal answer in his or her own terms. The ratio decidendi is laid out in such a way as to say that those subjected to the decision would have reached an identical decision in an ideal discourse, free from domination. It is presupposed that an individual would have employed the same jurisprudence, based on the needs of the collective.³⁹ However, this is not the reality but a jurisprudential monologue that is masked as a dialogue between the citizen and the judiciary, enforcing the legal language of the state.

Applying this in a constitutional context it can be seen that the identities of marginal cultural groups are subsumed and altered under a universal constitutional language.⁴⁰ When individuals in these groups seek to engage in a language of self-governance that is contrary to the universal, their activities are aligned to the overriding constitutional standard, through the process of juridification. The language that these cultural groups see as an original part of their identity is appropriated or distorted by the state. The state externally imposes norms as if these norms have been determined internally and denies and conceals conflict. This points to the type of violence emphasized by Derrida as a 'worst kind'.⁴¹ Therefore, linguistic minorities find themselves excluded from adequate participation in political institutions.

At this point it seems that modern constitutionalism is unable to shake off its violent underpinnings. This violent core permeates through to the language used when issues regarding plurality emerge. Its tendency speak a language of general terminology is a process that is similar to the tendency to abstract reality in the creative process of praxis. The truth of an individual's identity is not the primary concern. Instead, the focus is on manipulating a language in order to fit the requirement of necessity. As a result, the requirement of distinction is subordinate to the requirement of equality. However, this requirement of equality must be accepted in universal, juridified terms rather than in the language of the particular, individual citizen.

Thus, having a constitution based on the schemes of utility and equality, with a single representative language, does not reflect the increasingly pluralistic make up of a modern society. However, as James Tully has said, despite seeking to impose a single cultural practice a constitution can never overcome or transcend the cultural dimension of politics, it is an irreducible facet. Culture is always part of political participation, whether individuals are following or going against rules. Claims of injustice and the desire to self-govern in native languages will continue to occur.⁴² Applying Whitehead, culture is part of an individual's innate potential to create, residing in both the framework that normatively refines and in the representation of something new.

³⁹ John Rawls, *A Theory of Justice* (OUP 1971) p. 27.

⁴⁰ Tully, *Strange Multiplicity*, pp. 4-20.

⁴¹ Derrida, *The Reason of the Strongest*.

⁴² Tully, *Strange Multiplicity* pp. 4-6.

Arranging a comprehensive constitutional language against irreducible forms of life is an issue that political theorists who have fused the linguistic theory of Ludwig Wittgenstein with political philosophy have addressed. The later theory of the philosopher can be used to point out the negative aspects of a general constitutional theory. There are also aspects of Wittgensteinian theory that can be assembled more positively in order to show the justice that can be achieved by attempting to open up a discursive constitutional philosophy.

Wittgenstein, plurality and political theory

Some of the deepest structural elements of Western constitutional theory are rooted in a theory of language that Wittgenstein would find very questionable.⁴³ Particularly, the internal starting point of political theory, derived from the subject-predicate relationship in the Cartesian dialectic. As a result of this, politics comprehends the social activities in society as external to it and aspires to reach an Archimedean perspective and lay down a general theory. However, according to Wittgenstein, using a general theory distorts the reality and cannot transcend the human condition of plurality. A general theory overlooks the fact that language is extendable, a word can have many, perhaps indefinite uses depending on the context in which it is used.⁴⁴ Neutral or universal goals cannot be set underneath language otherwise words lose their meaning and reality is distorted.⁴⁵

General theories tend to result in reducing the meanings of activities; a neutral outlook intended to apply to all situations, results in a view of nothing. According to Wittgenstein it is a mistake to look for the one thing that acts or words mean, he prefers to think of the purpose of philosophy as a reporting instrument. Wittgenstein uses the metaphor of language as tools to describe apparatuses that are applied within a context. Attempting to describe the significance that these tools hold to participants in the context of their natural environment, rather than capture their essence, means that they can be taken seriously, seen and understood from the perspective of participants in the language game.⁴⁶ In the context of politics, it is not a failure to fall short of establishing a single language or leading culture, representative strength is derived from the crisscrossing distinct cultural familial features.

Through viewing language as a natural, social creation it can become instrumental in illustrating the essential duality of equality and distinction in a pluralistic society. Language is inside the individual as well as outside him, he is a product of the language of his community in the same way the language he produces is his own.⁴⁷ Politics can therefore emerge incrementally by understanding this balanced perspective accepting reality as it really is, focusing on the particular instead of the universal.

⁴³ John W. Danford, *Wittgenstein and Political Philosophy: A Reexamination of the Foundations of Social Science* (University of Chicago Press 1978).

⁴⁴ Ludwig Wittgenstein, *Philosophical Investigations* G.E.N. Anscombe (tr.) (first published 1953, Blackwell 1986) para. 10.

⁴⁵ Danford, p. 126.

⁴⁶ Wittgenstein, *Investigations*, para. 7.

⁴⁷ Hanna Fenichel Pitkin, *Wittgenstein and Justice: On the Importance of Ludwig Wittgenstein for Social and Political Thought* (University of California Press 1972) pp. 155-156.

To change the way our institutions function, making them more accepting of forms of life, Wittgenstein would argue that we cannot change them in isolation, through philosophising about them. Philosophy is useful in order to expose matters of fact, however, the resolution ought to be to bring about change.⁴⁸ This encourages an atmosphere in which citizens can employ the species of creative engagement introduced in Part I of this essay. As it seems that constitutional institutions are irreducibly violent, it is suggested that citizens should access their irreducible capacity to create, to politically reengage and bring about changes.

Creativity and political engagement

The final chapter of the discussion is concerned with returning to the theories of creativity and applying them in a constitutional setting. The key constitutional problems that have been brought into the foreground during this essay have been the decline in individual political participation and the violence current constitutional theory has the potential to inflict. The metaphysical and logocentric traditions of the West, with their tendency to operate in abstract and universal terms epitomize this violence. Due to the nature of constitutional theory it is advanced in the section below that the movement for amendment should not take place at a general level but in the plural reality itself. Creativity is the ideal discursive tool for citizens to utilize in order to overcome domination and reengage in political affairs.⁴⁹

Creatively uncovering the past

Unearthing the historical truth of individual political engagement can occur through the poietic process of meditative creativity. In this instance, a citizen should disassociate themselves from the norms and values that have been made to seem perpetual under constitutional theory.⁵⁰ A descent to the basic self is required; this is the plane of pre-political thought where the mind is at its most open, where individualistic impulses can be abandoned. Engaging with the genealogy of politics in this manner means that the essence that sustained Athenian citizenship can be revisited and authentically awakened in the context of modernity. The core substances that sustained the political theory are comprehended as the requirements of equality and distinction.⁵¹ Therefore, it seems that genealogical tools for restoring political involvement are ready to hand, passing through the subconscious. Uncovering these tools through passive creation unearths the receptive political attitude.

⁴⁸ Fennichel Pitkin, *Wittgenstein and Justice* p. 340.

⁴⁹ Gary Wickham, 'Foucault and Law' in *An Introduction of Law and Social Theory*, Reza Banakar and Max Travers (eds.) (Hart 2002).

⁵⁰ Hwa Yol Yuang, 'Heidegger's Way of Sinitic Thinking' in *Heidegger and Asian Thought*, Graham Parkes (ed.) (University of Hawaii Press).

⁵¹ Arendt, *The Human Condition*, Chapter 1.

The value of history is brought to light in this creative process. Praxis as a form of creation tends to focus on “progress” attempting to keep step with developing reality, manipulating and constructing novel entities. In the modern world, this progress is evidenced through the creation of new technology and social structures that have the effect of destroying forms of tradition or cultural homes. As Heidegger said during his *Ansprache zum Heimatabend* address, boredom emerges as a veil over homesickness that hastens the march toward progress in a changing reality.⁵² Nishitani elucidates that the impelling drive toward a cultural home or *Heimat* is evidenced due to the fact that boredom must occupy this abyss between the *Heimat* and the novel or *Un-heimat*.⁵³ Returning to the past ensures that things created are sustainable and non-violent. The core that sustains a culture can be authentically recovered in the modern age if the requirements of equality and distinction are adhered to. In order to submit to these requirements of plurality the *alethēthia* of humans, as part of Earth must be uncovered, thus acquiescing to the circularity of reality. It is the Earth that is the primary creator, rather than humans. Human mortality is underscored in its juxtaposition against the permanence of the Earth. Therefore, a modest, less anthropocentric gesture can be creatively offered and a more open-minded attitude toward fellow citizens adopted.

Viewing reality as cyclical is the feature of most importance to creatively uncovering and using the past. The condition that forms of life continue to exist within the cycle as experiences means *poiesis* can be employed in order to bring them into being, providing they unfold justly.⁵⁴ According to the Dworkin, interpretation of justice can be seen as interpretation of an entity distinct from the individual. This is done in order to give that entity the best possible interpretation it can receive regarding the intentions of its author.⁵⁵ However, justice is not an entity in the sense that the act of its creation can be attributed to an individual artist. The concept in fact, emerges from the plurality of cultural identity. In this sense, justice is a reflective art form that society creates together. Justice is recovered from the polis as *dikē*, a creation that can arise amongst beings, rather the juridified, justice as correctness that has a tendency to arise from the legal models.⁵⁶

This process of reflection will enable citizens to see the injustices of contemporary constitutional theory. Deconstructing its genealogy leads to exposing its violent and contradictory foundations regarding the dependent relationship between sovereignty and democracy. In addition to this, the truth of the juridified language that forcefully converts external norms into those of the individual can be made visible. In the *Human Condition* Arendt points out that a particular type of political participation has been lost in modern times. The process of *poiesis* can be present in two steps towards rekindling this type

⁵² Keiji Nishitani, ‘Reflections on Two Addresses by Martin Heidegger’ in *Heidegger and Asian Thought*, Graham Parkes (ed.) (University of Hawaii Press 1990).

⁵³ *Ibid.* pp. 148-150.

⁵⁴ Krzysztof Ziarek, ‘Poietic Justice’ in *Law and Art: Justice, Ethics and Aesthetics* Oren Ben-Dor (ed.) (Routledge 2012).

⁵⁵ Ronald Dworkin, *Law’s Empire* (Hart 1998), p. 73.

⁵⁶ Steven J. Heyman, ‘Aristotle on Political Justice’ (1992) 77 *Iowa Law Review* 851.

of political involvement that Arendt laments the loss of, in a culturally diverse world. Poiesis can reveal the loss of freedom in the form of potentiality that has occurred as a result of the rise of necessity.⁵⁷ In addition to this, poiesis can frame the second process of active creation by providing citizens with a sense of awareness of the plural reality, through thinking in terms of worlds and cultures instead of objects.

Balanced creativity and political engagement

Combining poiesis, with a cyclical perception of reality, and praxis as part of philosophy of process can result in a style of just political engagement. Creativity, like culture, can be seen as an irreducible process that a single constitutional language is incapable of modifying. Citizens can derive a sense of empowerment from this perspective. The mental pole of concrescence can restrict this sense of empowerment in order to prevent novel creations manifesting dogmatically. This is due to the universe being comprehended as philosophically plural from the point of departure, prior to social engagement. This equips citizens with a more receptive and less reactionary way of thinking and acting that becomes more useful as individuals continue to migrate throughout the world.⁵⁸

Reality derives its coherence from the innumerable presence of multiple entities and their languages. A juridified language can be overcome through the re-appropriation of institutions of justice as human creations, justice as correctness becomes justice as dikē. The outlook of subjects relating to predicates is avoided under Whitehead's view of reality and this instills a sense of harmony in terms of commonality through individuality. There is no single sacred principle or a need for constitutional traditions to be referred to, human traditions are far more important and should always be understood in their own terms before doctrines of authority and legitimacy are referred to.⁵⁹ Following this, political change would not be brought about in isolation with reference to abstract sources but incrementally through the direct experiences of citizens.

The strength of this theory of creativity rests in being cyclically open to past and the imprint experiences have made on others. In addition to this, reality being perceived as simultaneously developmental in that it is made up of new experiences means as a result of all of this, political engagement becomes adaptive to social changes and avoids untruthful politics that seek to stabilise reality.

Conclusion

⁵⁷ Giorgio Agamben, 'On Potentiality' in *Potentialities: Collected Essays in Philosophy* Daniel Heller-Roazen (tr.) (Stanford 1999).

⁵⁸ A.H. Johnson, 'Whitehead and the Making of Tomorrow' (1945) 5(3) *Philosophical and Phenomenological Research* 398.

⁵⁹ Roger Cotterell 'Durkheim on Legal Development and Social Solidarity' (1977) 4 *British Journal of Law & Society* 266.

It should be acknowledged that remedying the violence of constitutional theory is not something that can occur as quickly as the social transformations that have occurred in society in late modernity. However, the first step in a journey toward a more just constitutional arrangement could be brought about if creativity in the public sphere were of a more poietic disposition in its attitude towards reality. Institutions inquisitorially seeking truth, in order to let be, is an action that should be encouraged by citizens as possibilities arise with respect to the reawakening of their active political engagement.

In exposing the political institutions as violent, this essay has opened up a horizon for incremental amendment of constitutionalism. However, this article has been skeptical of whether change ought to take place at this institutional level. This is due to the tendency to make fluctuating reality stable and abstract for the purposes of material gain, fulfilling the requirements of necessity and maintaining the classical constitutional structure. This has been evidenced in the process of juridification that distorts and often completely appropriates the identity of individuals seeking uphold their hidden constitutional values. This is appropriation of the worst kind as language is the basis of plurality as distinction. Hence, change enacted at a completely institutional level seems unlikely to obtain just results; can institutional change be brought about by institutions that seems rooted in injustice and violence?

Creativity is necessary to learn and speak the language of this potential constitutional dialogue and overcome such violence. This type of creativity is both cognitively open to its environment in addition to compassionate reflection towards a past that embodies a form of potential freedom. A combination of the Eastern model with a balance between creatively unveiling truth and authentically creating novel entities, without inflicting violence upon others, is the solution that is offered in the thesis of this paper. Language runs through this process of creation, creators must listen in the language of others and speak in their own terms as a response.

The framework necessary to the discourse between citizens is a theory of reality that fits the creative balance. An analogy that can be used to describe how this process unfolds is to compare it to a 'spinning top' that is being spun by an axis whilst balancing on its point. The motion of the top is at once cyclical and directional. In comparison, the theory of reality in this essay is cyclical in that it is in perpetual motion and self-referential, looking to past sources and bringing them to life. In addition, developmental reality moves in constantly new directions, similar to the movement of the top. Within this framework creativity is the force that allows the top to spin, bringing new ideas into the cycle and exercising a directional energy. Admittedly, this theory, like the spinning top is capable swaying from its upright, harmonious position, as various cultures vying for a position in society attempt to have their languages heard in the political arena. However, continuing to access the inherent human capacity to create will work to uphold a harmonious **society**.

The role of enterprise risk within vicarious liability: courageous or unprincipled judicial reasoning?

Sive Ozer

Sometimes speculation can lead to ignorance and this dissertation attempts to challenge the uncritically accepted assumptions about risk creation within the law of vicarious liability. The most recent case law in this field is examined and an inconsistent application of the doctrine is identified. This analysis demonstrates the over-extension of vicarious liability and the confidence placed upon the ‘fairness’ of the ‘enterprise risk’ reasoning to warrant such a move.

It is argued that the judiciary, despite placing an unprecedented weight upon the ‘enterprise risk’ reasoning, has failed to explore the theoretical weight that is attached to risk creation. The willingness to connect the innocent plaintiff with a defendant of means is understandable. However, if the courts are willing to expand a doctrine that imposes liability on a blameless individual, they must do so through engaging in a more sophisticated reasoning.

Introduction

‘A magical blueprint’¹

Vicarious liability is a legal responsibility imposed on an employer, who may himself be blameless, for a tort committed by his employee in the ‘course of his employment’.² The courts are left with a troublesome task – the choice is whether to impose the burden of damage on an *innocent* employer as opposed to leaving them lie with the *innocent* claimant.³ This difficulty arises from the probable ‘impecuniosity’⁴ of the actual tortfeasor. It is possible to state that the recent developments in the law of vicarious liability provide a ‘magical blueprint’ for promoting plaintiffs’ recovery,⁵ by targeting the ‘deep-pockets’ of the employer. However, this was not always the case. If we widen the lens, it is possible to see that this doctrine has been evolving comfortably to suit the social and economic developments for centuries; ‘it has its roots in medieval law and was refined in the Victorian era’.⁶

¹ John G. Fleming, *An Introduction to the Law of Torts* (2nd edn, Clarendon Press 1986) 14.

² *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215 [14].

³ *Jacobi v Griffiths* [1999] 174 DLR 71 [45].

⁴ Claire McIvor, ‘The use and abuse of the doctrine of vicarious liability’ (2006) 35 CLWR 268, 274.

⁵ John G. Fleming, *An Introduction to the Law of Torts* (2nd edn, Clarendon Press 1986) 14.

⁶ David R. Wingfield, ‘Perish Vicarious Liability?’ in Jason W. Neyers, Erika Chamberlain and Stephen G.A. Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing 2007) 394.

In the early medieval times the master was held responsible for all his servant's wrongs.⁷ It was the prevailing economic growth in the Victorian era that fostered the development of a new law of torts based firmly on the general principle of 'fault'.⁸ The axiom 'no liability without fault'⁹ operated as a hidden subsidy to industry.¹⁰ By allowing industry to operate without excessive burdens, and expecting its occasional casualties to shoulder the loss themselves, as their own contribution to the general welfare,¹¹ the law facilitated what was then viewed as 'human progress'.¹²

However, these 'individualistic notions'¹³ did not survive the aspirations of the mid-twentieth-century man. The emergence of the Welfare State meant 'ever-mounting reliance on collective action' and 'increasing measure of social welfare for the benefit of society's casualties'.¹⁴ George Priest recognised that 'modern tort law generates complicated legal and economic issues that would have appeared bizarre to a lawyer dealing with defective products in the 1950s whose practice was one of warranty interpretation and routine negligence'.¹⁵ These developments are of interest to the present enquiry as the changes in the social policy are reflected directly in the law governing vicarious liability.

Of late, the law of vicarious liability has been subject to vigorous appraisal by the courts.¹⁶ There has been an increased judicial willingness to intervene in favour of innocent claimants. Indeed, Mr Justice MacDuff's judgment, in the recent decision of *JGE v The English Province of Our Lady of Charity*,¹⁷ epitomised this trend. He went as far as stating that vicarious liability is 'a doctrine designed for the sake of the claimant'.¹⁸ Considering this, it is perhaps unsurprising that this case paved the way for a remarkable extension of the doctrine.

*JGE v The English Province of Our Lady of Charity*¹⁹

JGE has been attracting considerable attention as the High Court gave the 'go ahead' to extending vicarious liability to non-employment relationships. This preliminary decision stated that the diocesan bishop should be held

⁷ John G. Fleming, *The Law of Torts* (9th edn, LBC Information Services 1998) 409.

⁸ Carol Harlow, *Understanding Tort Law* (3rd edn, Thomson Reuters (Professional) UK Limited 2005) 11.

⁹ John G. Fleming, *An Introduction to the Law of Torts* (2nd edn, Clarendon Press 1986) 5.

¹⁰ Carol Harlow, *Understanding Tort Law* (3rd edn, Thomson Reuters (Professional) UK Limited) 12.

¹¹ John G. Fleming, *An Introduction to the Law of Torts* (2nd edn, Clarendon Press 1986) 4.

¹² *Ibid.* 5.

¹³ David R. Wingfield, 'Perish Vicarious Liability?' in Jason W. Neyers, Erika Chamberlain and Stephen G.A. Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing 2007) 397.

¹⁴ John G. Fleming, *An Introduction to the Law of Torts* (2nd edn, Clarendon Press 1986) 17.

¹⁵ George L. Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law' (1985) 14 LS 461, 462.

¹⁶ Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 508.

¹⁷ [2011] EWHC 2871, [2012] 1 All ER 723.

¹⁸ *Ibid.* [19].

¹⁹ *JGE* (n17).

vicariously liable for the sexual misconduct of the priest of his diocese, despite the absence of an employment relationship or a relationship akin to employment.²⁰ The diocese, 'to fight the last ditch',²¹ had tried to argue otherwise. Douglas Brodie has recognised that 'the desire to protect third parties has led to decisions in favour of the existence of an employment relationship which would probably not have been made in a different context'.²² However, as Mr Justice MacDuff acknowledged, the issue in *JGE* is not one 'which has previously been decided by the courts of England and Wales'.²³

There are two limbs to vicarious liability: a contract of employment and a tortious act arising within the scope of employment.²⁴ In fact, up until *JGE*, it was commonly assumed that vicarious liability raised three *separate* questions: 'First of all, why does this rule exist? Secondly, when can we say that someone is another's employee? Thirdly, when can we say that an employee who has committed a tort did so in the course of his employment?'²⁵ It is the last two stages that are of concern here, as the reasoning employed in *JGE* proposes a 'synthesis'²⁶ of the two.

In order to find the Roman Catholic diocese liable for the negligent acts of a priest it appointed, Mr Justice MacDuff held that 'the two stages of the test are not to be determined in isolation'.²⁷ He acknowledged that the 'relationship' in the present case differed from employment in a number of ways, however, went on to state that despite the absence of an employment relationship, there was a 'close connection'²⁸ within the meaning of both limbs of the test. What is important is that 'the necessary connection between the employer-created or enhanced risk and the wrong complained of is established'.²⁹

This judgment is significant because, for the first time, the court has found liability despite acknowledging the absence of a formal employment-type contract. The employer-employee relationship had long been regarded by academics as the 'precedent condition for liability'.³⁰ However, the nature of the relationship between the bishop and the priest was held to be such that liability could attach. It can be said that the catalyst for this outcome has been the 'wholly understandable desire to facilitate recovery of damages by victims of child abuse'.³¹ If the outcome had been different, and the defence provided by the Church accepted, 'then effectively the Catholic Church would cease to have any liability whatsoever by abuse committed by paedophile priests'.³²

²⁰ *Ibid.* [43].

²¹ Richard Scorer, 'In the confessional' (2011) 161 NLJ 1618, 1619.

²² Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 503.

²³ *JGE* (n17) [31].

²⁴ *Ibid.* [6].

²⁵ Nicholas McBride and Roderick Bagshaw, *Tort Law* (3rd edn, Pearson Education Limited 2008) 625.

²⁶ *JGE* (n17) [9].

²⁷ *Ibid.* [40].

²⁸ *Ibid.* [34].

²⁹ *Ibid.*

³⁰ Robert Weekes, 'Vicarious liability for violent employees' (2004) 64 CLJ 53, 56.

³¹ Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 508.

³² Richard Scorer, 'In the confessional' (2011) 161 NLJ 1618, 1619.

Having said that, it would be ‘simple-minded’ not to recognise that the claimants in this case were protected at the cost of extending vicarious liability; the ruling opens up the possibility of arguing that vicarious liability should apply to other non-employment relationships in the future.

At this juncture, it is important to refer to the case of *Woodland v Swimming Teachers’ Association*.³³ This is another preliminary decision, heard three weeks before *JGE*, which reveals a much more cautious approach towards vicarious liability. In this case, the question was whether an education authority could be found vicariously liable for brain injuries suffered by a young girl during school swimming lessons; the swimming pool was not run by the school and the swimming teacher and the lifeguard were employees of an independent contractor. Longstaff J’s ‘well-argued judgment’³⁴ states the following: ‘there is less scope of societal expectations of assumptions of responsibility the further removed, an actor is, or the greater his independence or separation from, the undertaking’.³⁵ Therefore, the court felt that in the absence of an employer-employee relationship the policy considerations did not militate for an extension of vicarious liability.³⁶

This raises questions as to whether *JGE* was context specific and the fact that the issue at stake was sexual abuse, and not a more ‘normal’ tort, played a role in the outcome of the case. In fact, the Bishop of Portsmouth has criticised the ruling arguing that ‘a bishop should not be found automatically liable for the actions of a priest simply by virtue of the fact that he or one of his predecessors appointed the priest. The diocese is aware of no other organisation which can be held liable for the actions of its office holders in this way’.³⁷ It is evident that such claims are based on a misunderstanding of vicarious liability. However, what is clear from *JGE* is that, despite the outcome in *Woodland*, the court found liability in the absence of an employer-employee relationship and held the Church liable for having created a risk, which materialised.³⁸

So, what has warranted this expansion?

If one looks closely at the judgment, it is possible to observe an ‘enterprise risk’ reasoning which has formed the core of many recent decisions: ‘the idea that the person who introduces a risk incurs a duty to those who may be injured’.³⁹ This concept was born in cases⁴⁰ that set out to establish whether

³³ [2011] EWHC 2631, [2012] ELR 76.

³⁴ Helen Grimber, ‘Education authority not vicariously liable for independent contractor’ (2011) Post Mag. 34, 34.

³⁵ *Woodland* (n33) [51].

³⁶ Helen Grimber, ‘Education authority not vicariously liable for independent contractor’ (2011) Post Mag. 34, 34.

³⁷ Riazat Butt, ‘Catholic bishop criticises ruling on church liability for actions of priests’ *The Guardian* (15 November 2011) <<http://www.guardian.co.uk/world/2011/nov/15/catholic-bishop-liability-church-priests>> accessed 7 March 2012.

³⁸ It is important to note that both *JGE* and *Woodland* are High Court decisions. Therefore, they are not binding on future courts.

³⁹ *Bazley v Curry* [1999] 2 SCR 534 [30].

an action arose within ‘the course of employment’ and did not concern the employment relationship itself. However, Mr Justice MacDuff proposed that ‘there is obvious overlapping’⁴¹ and the concept of ‘enterprise risk’ is ‘relevant to the whole of the test, not just to the second stage’.⁴²

This approach was previously called for by academics. In 2007, David Wingfield invited the courts to have the ‘courage of their convictions and just ask: what risks are inherent in this enterprise and are there any reasons why the enterprise and those who use its services should not bear them?’⁴³ However, he also recognised that this would be a ‘bold step’ which shows ‘grater willingness to rely on strict liability to ensure compensation for victims’.⁴⁴

The judge in *JGE* appears to have surrendered to such demands. The following reasoning can be identified: ‘whether justice or utility demands that the person whose activity introduced into society the risk that materialised into the harm ought, *for that reason alone*, to be liable for the damage caused by that harm?’⁴⁵ It was acknowledged that Father Baldwin was ‘directed into the community’ and ‘given free rein to act as a representative of the Church’.⁴⁶ This resulted in the diocese creating a risk of harm to others, ‘viz the risk that he could abuse or misuse his powers for his own purposes’.⁴⁷ It was the empowerment of the priest that increased the risk of sexual assault, attracting the possibility of liability.

Although the diocese has been given permission to appeal to the Court of Appeal, this judgment awards an unprecedented status to the concept of ‘enterprise risk’. It is now more obvious than ever that this concept plays a paramount role in assisting the expansion of vicarious liability, and moreover, it should be viewed as the driving force behind it.

This dissertation will steadily build upon the argument that the concept of ‘enterprise risk’, which has been used by the judiciary to expand vicarious liability, is illegitimate, as it has been readily associated with the idea of fairness. The next chapter will demonstrate the ‘wild’ nature of this ‘enterprise risk’ reasoning, whereas the third and final chapter will concentrate purely on risk theory.

Risk – ‘A wild horse’

JGE demonstrates the recent expansion within the law of vicarious liability. However, even before this judgment, Claire McIvor insisted that ‘the courts appear to have lost sight of the fact that, as a form of no-fault liability, the

⁴⁰ *Ibid.*

⁴¹ *JGE* (n17) [40].

⁴² *Ibid.* [37].

⁴³ David R. Wingfield, ‘Perish Vicarious Liability?’ in Jason W. Neyers, Erika Chamberlain and Stephen G.A. Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing 2007) 417.

⁴⁴ *Ibid.* 423.

⁴⁵ *Ibid.* 418 [emphasis added].

⁴⁶ *JGE* (n 17) [35].

⁴⁷ Richard Scorer, ‘In the confessional’ (2011) 161 *NLJ* 1618, 1619.

doctrine of vicarious liability occupies a highly exceptional position within English tort law'.⁴⁸ McIvor opposes the increased judicial willingness to intervene in favour of innocent claimants, as it has been 'founded upon weak or inappropriate policy considerations'.⁴⁹ Similarly, Fleming has argued more generally that tort law 'is irrevocably committed to the provision of a large and probably increasing measure of social welfare for the benefit of society's casualties'.⁵⁰ It is submitted that this expansion is the result of the growing acceptance of 'enterprise risk' reasoning,⁵¹ which has been employed by the judiciary to provide the claimants with some form of redress. However, the 'wild' nature of the notion of 'risk creation' raises serious concerns. The focus of this chapter will be litigation relating to vicarious liability which has been bedevilled by arguments about the extent of institutional liability for individual misconduct.

Enterprise risk - A new chapter for vicarious liability

As stated previously, for vicarious liability to attach, a tort must be committed by an employee in the 'course of his employment'. Prior to the decisions that gave 'enterprise risk' its status today, one would use the Salmond test to determine whether an employee's tort was committed within the course of his employment. Under this test, a wrongful act was considered to be in the course of employment if it was either 'a wrongful act authorised by the master, or a wrongful and unauthorised mode of doing an act authorised by the master'.⁵² Wingfield gives this test a practical interpretation and states that the test focuses upon the 'master's voluntary assumption of such liability as expressed in his contract with his servant'.⁵³ Essentially, it looks to the bargain between employer and employed and focuses on what the employee was hired or authorized to do.⁵⁴

The likes of F.D.Rose spoke out against the Salmond test and argued that 'there has been a too ready acceptance of, too rigid adherence to and too restrictive an interpretation of the traditional test of course of employment and this has obscured the central issues of whether an employer should be found vicariously liable'.⁵⁵ This was rightly so as it soon became apparent that this approach had the danger of leaving the victim to bear the losses of the *intentional* tortious acts committed by the employee as such acts could be 'portrayed as the very antithesis of what the employee was employed to do and, therefore, unconnected with his employment'.⁵⁶ Although the courts occasionally held some form of *intentional* wrongdoing as an authorized mode

⁴⁸ Claire McIvor, 'The use and abuse of the doctrine of vicarious liability' (2006) 35 CLWR 268, 268.

⁴⁹ *Ibid.* 278.

⁵⁰ John G. Fleming, *An Introduction to the Law of Torts* (2nd edn, Clarendon Press 1986) 17.

⁵¹ Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press 2010) 193, 238.

⁵² J.W.Salmond, *Salmond & Heuston on the Law of Torts* (21st edn, Sweet and Maxwell 1996) 443.

⁵³ David R. Wingfield, 'Perish Vicarious Liability?' in Jason W. Neyers, Erika Chamberlain and Stephen G.A.Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing 2007) 394.

⁵⁴ Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 494.

⁵⁵ F.D.Rose, 'Liability for an employee's assaults' (1977) 40 MLR 420, 421.

⁵⁶ Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 494.

of doing an unauthorized act, this was achieved through the use of a ‘verbal sleight of hand’.⁵⁷

This issue was addressed ‘head on’ in the decisions of the Supreme Court of Canada in *Bazley v Curry*⁵⁸ and *Jacobi v Griffiths*⁵⁹. The court acknowledged that ‘sometimes...agents may exceed the bounds of their authority or even defy express intentions’,⁶⁰ and in order to encompass such actions within vicarious liability, they adopted the ‘enterprise risk’ reasoning. In *Bazley*, McLachlin J stated as follows: ‘where the employee’s conduct is so closely tied to the risk that the employer’s enterprise has placed in the community, the employer may justly be held vicariously liable for the employee’s wrong’,⁶¹ as ‘intentional torts arising from situations of friction are like accidents in that they stem from a risk attendant in carrying out the employer’s aims’.⁶² Under the Salmond test, the scope of liability is circumscribed by the employment relationship, whereas under the ‘enterprise risk’ theory, the scope of potential liability goes beyond the employment relationship; it is determined by ‘the measure of risks that may fairly be regarded as typical of the enterprise in question’.⁶³

Bazley concerned a non-profit organisation which operated residential care facilities for emotionally troubled children. The employees were encouraged to act as a substitute parent. Unfortunately, the foundation unknowingly hired a paedophile who sexually abused the claimant. In light of *S.T. v North Yorkshire County Council*⁶⁴ – a Court of Appeal decision, it was certain that sexual misconduct was ‘not an unauthorized mode of performing an authorized act; it was an *independent act*’.⁶⁵ However, McLachlin J insisted that this approach ‘did not confront the underlying policy of vicarious liability’⁶⁶ and set out to modify the existing law through an ‘articulation of the key policy concerns’.⁶⁷

McLachlin J argues that one of the fundamental policy concerns at the heart of vicarious liability is the ‘provision of a just and practical remedy for the harm’.⁶⁸ She justifies the imposition of liability by associating fairness with the ‘idea that the person who introduces a risk incurs a duty to those who may be injured’.⁶⁹ In *Bazley*, the employer’s enterprise formed and fostered the risk through creating a special environment that nurtured and brought to fruition Curry’s sexual abuse.⁷⁰ Therefore, in McLachlin J’s view, it is right that the

⁵⁷ P.S. Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths: London, 1967) 172.

⁵⁸ *Bazley* (n39).

⁵⁹ *Jacobi* (n3).

⁶⁰ Robert Weekes, ‘Vicarious liability for violent employees’ (2004) 64 CLJ 53, 55.

⁶¹ *Bazley* (n 39) [22].

⁶² *Ibid.* [19].

⁶³ John G. Fleming, *The Law of Torts* (9th edn, LBC Information Services 1998) 422.

⁶⁴ [1999] IRLR 98.

⁶⁵ *Bazley* (n39) [23] [emphasis added].

⁶⁶ *Ibid.* [23].

⁶⁷ Douglas Brodie, ‘Enterprise liability: justifying vicarious liability’ (2007) 27(3) OJLS 493, 494.

⁶⁸ *Bazley* (n39) [29].

⁶⁹ *Ibid.* [30].

⁷⁰ *Ibid.* [58].

employer, as the person who creates the risk, bears the loss when the risk ripens into harm.⁷¹

It is true that such a formulation is likely to provide practical means of compensation through targeting the ‘deep-pockets’ of the employer and realising that it is the employer who is often in the best position to spread the losses through mechanisms such as insurance.⁷² However, the ‘fairness’ of this proposition must not be readily accepted. The concept of fair compensation is premised upon a basic risk theory that takes no account of the realities of the situations that are in play.⁷³ This argument will be addressed fully in the next chapter. What is important here is to appreciate the weight that is placed upon ‘risk creation’ in finding vicarious liability.

It is evident that McLachlin J was ‘determined to provide the claimant with some form of redress’.⁷⁴ However, she made sure that she set clear limits: vicarious liability must be ‘closely and materially related to a risk introduced or enhanced by the employer’, as to impose liability on an employer, for a wrong that is *coincidentally* linked to the activity of the employer, ‘does not respond to the common sense notions of fairness’.⁷⁵

This necessary ‘limit’ was made more apparent in the companion decision of *Jacobi*, which fell ‘on the other side of the line’.⁷⁶ Here, the court refused to impose liability on a non-profit organization that provided behavioural guidance for children, for the sexual assaults undertaken by one of its employees. Binnie J stated that ‘the “enterprise risk” rationale holds the employer vicariously responsible because, however innocently, it introduced the seeds of the potential problem into the community, or aggravated the risks that were already there, but only if its enterprise *materially* increased the risk of the harm that happened’.⁷⁷ In this case, ‘Griffiths had no job-created authority to insinuate himself into the intimate lives of these children’,⁷⁸ and as a result, ‘the relevant nexus’⁷⁹ between the risk created by the enterprise and the harm that materialised was not present, thereby preventing the imposition of vicarious liability. It was argued that ‘an employer who encourages an employee to create no more than a positive rapport with children is not at the same end of the spectrum as the employer in *Bazley*’.⁸⁰ This ‘close connection’ requirement limits the ability of a court to ‘freely’ reach into an employer’s ‘deep pocket simply because it is there’⁸¹ and is therefore welcomed.

⁷¹ *Ibid.* [31].

⁷² *Bazley* (n39) [30]-[21].

⁷³ Claire McIvor, ‘The use and abuse of the doctrine of vicarious liability’ (2006) 35 CLWR 268, 271.

⁷⁴ *Ibid.* 270.

⁷⁵ *Bazley* (n39) [36].

⁷⁶ *Jacobi* (n3) [29].

⁷⁷ *Jacobi* (n3) [67] [emphasis added].

⁷⁸ *Ibid.* [43].

⁷⁹ *Ibid.* [81].

⁸⁰ *Ibid.* [41].

⁸¹ *Ibid.* [71].

The 'enterprise risk' theory was 'imported'⁸² by the House of Lords in *Lister v Hesley Hall*.⁸³ This was a case concerning the abuse of children by a warden of a boarding school. Lord Millet, in finding the school vicariously liable, held that 'if the employer's objectives cannot be achieved without a *serious* risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable'.⁸⁴ Essentially, his Lordship identified factors inherent in the nature of employment that facilitated the assaults on the children, so as to decide whether the tort was committed within the course of employment.⁸⁵

It must be stated that Lord Millet is the only judge who openly adopts the 'enterprise risk' reasoning. Lord Steyn takes a broader approach and welcomes the Canadian decisions by stating that 'whenever such problems are considered in future in the common law world these judgments will be the starting point'.⁸⁶ This 'supposed' ambiguity has been criticised by Paula Giliker who argues that 'the House of Lords was prepared to change the law relating to vicarious liability radically without considering its theoretical basis'.⁸⁷ However, despite the inconsistencies in the level of weight awarded to 'enterprise risk' reasoning between the Law Lords, it is submitted that it would be impossible to be 'assisted by the luminous and illuminating judgments of the Canadian Supreme Court'⁸⁸ and not adopt this reasoning. The 'enterprise risk' theory formed the basis of both Supreme Court decisions and as Brodie claims '*Lister* is utterly consistent with the ultimate justification for the imposition of vicarious liability being the creation of enterprise risk'.⁸⁹

It is admitted that 'vicarious liability finds its rationale today in a combination of policy factors'.⁹⁰ These include: enterprise risk, loss distribution and deterrence. As Atiyah argued, 'in a complex modern society the justification for a particular principle may frequently have to be sought in many considerations. None of them taken by itself may be a sufficient reason for the principle, but the combined effect of all of them may be overwhelming'.⁹¹ Having said that, Longmore L.J. questions the new developments in this field:

'Is it that the law should impose liability on someone who can pay rather than someone who cannot? Or is it to encourage employers to be even more vigilant than they would be pursuant to a duty of care? Or is it just a weapon of distributive justice?'⁹²

⁸² Paula Giliker, 'Rough Justice in an Unjust World' (2003) 65 MLR 267, 279.

⁸³ *Lister* (n2).

⁸⁴ *Ibid.* [65] [emphasis added].

⁸⁵ Po Jen Yap, 'Enlisting close connections: a matter of course for vicarious liability?' (2008) 28 LS 197, 201.

⁸⁶ *Lister* (n2) [27].

⁸⁷ Paula Giliker, 'Rough Justice in an Unjust World' (2003) 65 MLR 267, 274.

⁸⁸ *Lister* (n2) [27].

⁸⁹ Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 496.

⁹⁰ *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2006] 3 WLR 125 [9].

⁹¹ P.S. Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) 15.

⁹² *Maga v Archbishop of Birmingham and another* [2010] EWCA Civ 256, [2010] 1 WLR 1441 [81].

With respect to Longmore L.J., it is obtuse not to recognise the trend that has emerged in the recent decisions. In fact, a close scrutiny of the judgment in *Bazley* reveals that ‘not only were the principal policy concerns fully articulated and appraised but, crucially, they were also ranked’.⁹³ McLachlin J did not only state that ‘it is right and just that the person who creates a risk bears the loss when the risk ripens into harm’ but also insisted that ‘the fairness of this proposition is capable of standing alone’.⁹⁴ Therefore, it can be said that the most substantial of these policy considerations is enterprise liability and that ‘in determining the extent of the law of vicarious liability, recourse to enterprise risk becomes all important’.⁹⁵

What should be deduced from this ‘new chapter’ is that enterprise risk possesses the advantage of providing both ‘a justification for liability and a basis for future decision-making’.⁹⁶ Although the Privy Council has stated that risk creation ‘does not constitute the criterion for application of the rule defining the ambit of vicarious liability’,⁹⁷ it is submitted that the ‘enterprise risk’ reasoning adopted by the courts has a great resemblance to a fully functioning test. That is: the injury inflicted by the servant must involve a risk sufficiently inherent in or characteristic of the employer’s business that it is just to make him bear the loss.⁹⁸

‘Sheer amorphousness of the new replacement test’⁹⁹

The judgments referred to above see the existence of ‘risk’ as ‘a decisive reason for imposing liability’.¹⁰⁰ Lord Steyn claimed that, after adopting this reasoning the Anglo-Welsh law will ‘no longer struggle with the concept of vicarious liability for intentional wrongdoing’.¹⁰¹ This was correct, in the sense that the outcome certainly met the demands of modern society by providing an increased ‘measure of social welfare for the benefit of society’s casualties’.¹⁰² However, this was not achieved without its problems.

The issue as to how far vicarious liability will ultimately extend has been left open to debate.¹⁰³ Indeed in *Lister*, Lord Millet indicated that the circumstances in which an employer may be vicariously liable for his employee’s intentional misconduct are not closed.¹⁰⁴ In a similar vein, Lord Clyde encouraged a broad approach ‘in considering the scope of employment’.¹⁰⁵ It is possible to see that later decisions, which will be discussed below, have picked up on such ambiguous comments to warrant the extension of liability.

⁹³ Douglas Brodie, ‘Enterprise liability: justifying vicarious liability’ (2007) 27(3) OJLS 493, 494.

⁹⁴ *Bazley* (n39) [31].

⁹⁵ Douglas Brodie, ‘Enterprise liability: justifying vicarious liability’ (2007) 27(3) OJLS 493, 508.

⁹⁶ Paula Giliker, ‘Rough Justice in an Unjust World’ (2003) 65 MLR 267, 277.

⁹⁷ *Brown v Robinson* [2004] UKPC 56 [11].

⁹⁸ Winfield & Jolowicz, *Tort* (W.V.H Rogers ed, 18th edn, Sweet & Maxwell 2010) 958.

⁹⁹ Claire McIvor, ‘The use and abuse of the doctrine of vicarious liability’ (2006) 35 CLWR 268.

¹⁰⁰ Robert Weekes, ‘Vicarious liability for violent employees’ (2004) 64 CLJ 53, 55.

¹⁰¹ *Lister* (n2) [20].

¹⁰² John G. Fleming, *An Introduction to the Law of Torts* (2nd edn, Clarendon Press 1986) 17.

¹⁰³ Alan Barron, ‘Vicarious liability for employees and agents’ (2004) 15 SLT 91, 95.

¹⁰⁴ *Lister* (n2) [83].

¹⁰⁵ *Ibid.* [42].

'Not-so-special' risk

To determine whether an employee's acts are committed in the course of his or her employment, we must establish whether the employee's torts were so closely connected with his or her employment that it would be fair and just to hold the employers vicariously liable.¹⁰⁶ *Bazley* suggests that, in order to satisfy the equitable basis of vicarious liability, there must be an 'intense focus'¹⁰⁷ on the risks that are *inherent* in the enterprise and the torts that are committed by the employee.¹⁰⁸ This appears similar to what Lord Millet said in *Lister* about risk creation being at the root of vicarious liability.¹⁰⁹

Despite this, the likes of McBride and Bagshaw have argued that the test in *Lister* is 'so vague and open-ended that it is now very hard to tell when exactly an employee will be held to have committed a tort in the course of his employment'.¹¹⁰ This argument is credible, as there are at least two different formulations of the 'close connection' test in *Lister*.

Lord Steyn stated that 'the question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable'.¹¹¹ On the other hand, Lord Hobhouse focused on the idea of assumption of responsibility - 'where the employer has assumed a relationship to the plaintiff'.¹¹² This disagreement was recognised in the case that followed *Lister*, where Lord Nicholls observed that *Lister* 'affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any wrong resulting from the wrongful act, should fall on the employer rather than the third party who was wronged'.¹¹³

This missed opportunity proved to be vital from the outset as a clear description was not attached to the 'close connection test'. Arguably, the Law Lords in *Lister* disregarded the primary responsibility that they owe the public at large, which is to ensure that the law is stated in clear and certain terms.¹¹⁴ Consequently, it is perhaps unsurprising to see that subsequent decisions have struggled to establish the relevant connection and have imposed liability haphazardly, in the absence of a 'special risk of harm', that was rigorously demanded by the Supreme Court of Canada.¹¹⁵

¹⁰⁶ *Ibid.* [28].

¹⁰⁷ *Bazley* (n39) [17].

¹⁰⁸ *Ibid.* [41].

¹⁰⁹ *Lister* (n2) [79].

¹¹⁰ Nicholas McBride and Roderick Bagshaw, *Tort Law* (3rd edn, Pearson Education Limited 2008) 667.

¹¹¹ *Lister* (n2) [28].

¹¹² *Ibid.* [54].

¹¹³ *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 [25]-[26].

¹¹⁴ Nicholas McBride and Roderick Bagshaw, *Tort Law* (3rd edn, Pearson Education Limited 2008) 667.

¹¹⁵ *Bazley* (n39) [46].

This can most obviously be seen in the Court of Appeal's judgement in *Majrowski v Guy's and St Thomas's NHS Trust*¹¹⁶ where a claim was brought against an employer for a breach of a statutory duty. Auld LJ stated that 'in the view of the court, to render harassment in breach of the Act a reasonably incidental risk of the undertaking and/or employment, it may consider it just and reasonable in the circumstances to hold the employer vicariously liable'.¹¹⁷ The House of Lords subsequently upheld the decision by a rather different route; an argument based on the wording of the statute was employed.¹¹⁸

The Court of Appeal's judgment indicates that it will suffice to show that the employee's wrongdoing represented a risk that was 'reasonably incidental' to the nature of employment.¹¹⁹ This concept only ever featured in a highly 'context-specific dicta'¹²⁰ in the judgment of Lord Millet in *Dubai Aluminium Co Ltd v Salaam*¹²¹ and it is certainly not the 'material enhancement of risk'¹²² requirement that featured in *Bazley* and adopted by the House of Lords in *Lister*.

Po Jen Yap¹²³ gives the example of 'an employer who allows his senior employees to have the use of company cars', to demonstrate the dangers attached to such formulation. He states that under the 'reasonably incidental risk approach' the employer would be 'vicariously liable for any injuries caused by the employees (deliberate or negligent) on the road since this is a risk the employer creates when such policy is introduced'.¹²⁴ Accordingly, he goes on to argue that 'the risk introduced by the employer must be inherent, inevitable or inextricably linked to the enterprise'¹²⁵ to avoid the law expanding in the wrong direction. Perhaps, the utmost extension of vicarious liability can be seen in the most recent Court of Appeal decision.

*Weddall v Barchester Healthcare Ltd; Wallbank v Wallbank Fox Designs Ltd*¹²⁶

The Court of Appeal recently heard two combined cases and considered the concept of vicarious liability in circumstances of an attack on an employee by another employee, where the attack was a violent response to a lawful instruction. The issue was whether the tortfeasor was acting in the course of his employment. It is important to note that these appeals are more 'distant'¹²⁷ from other cases concerning liability for violent employees, where the use of

¹¹⁶ *Majrowski v Guy's and St Thomas' NHS Trust* [2005] EWCA Civ 251, [2005] QB 848.

¹¹⁷ *Ibid.* [59] [emphasis added].

¹¹⁸ Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 498.

¹¹⁹ Claire McIvor, 'The use and abuse of the doctrine of vicarious liability' (2006) 35 CLWR 268, 275.

¹²⁰ *Ibid.*

¹²¹ *Dubai* (n 113).

¹²² *Bazley* (n39) [40].

¹²³ Po Jen Yap, 'Enlisting close connections: a matter of course for vicarious liability?' (2008) 28 LS 197.

¹²⁴ *Ibid.* 206.

¹²⁵ *Ibid.*

¹²⁶ [2012] EWCA Civ 25.

¹²⁷ Alex Glassbrook, '“You're only supposed to blow the bloody doors off!” – employers' vicarious liability for the torts of violent employees.' (2005) 3 JPI Law 240, 245.

force was either authorised¹²⁸ or the risk of violence was inherent¹²⁹ in the nature of employment.

In *Weddall*, Pill LJ ‘had no difficulty in concluding’¹³⁰ that the violence that accrued as a result of a routine request for a night shift cover, was an independent venture of the employee’s own; ‘the instruction, or request as in fact it was, was no more than a pretext for an act of violence unconnected with work as a health assistant’.¹³¹ The fact that the employee, was not on duty at the time and ‘attacked Weddall twenty minutes after receiving the request’,¹³² was crucial to this finding. This decision could be viewed as ‘reassuring’ as the court seems to be maintaining ‘a tight rein’¹³³ on vicarious liability. However, this conclusion must be dismissed in light of *Wallbank*.

In *Wallbank*, the court was persuaded that the employer should bear vicarious liability for the spontaneous force by which the employee reacted to the instructions given to him. Moore-Bick LJ stated that Mr Brown reacted to instructions almost immediately and ‘to my mind the tort flowed directly from the fact that Mr Brown was given instructions by a fellow employee in the course of his employment’.¹³⁴ It is evident that the particular facts of each case led to two different outcomes. However, the expansion that has resulted from finding vicarious liability in *Wallbank* is of crucial importance to the present discussion.

As acknowledged by the court, ‘the step taken in *Lister* was to make employers vicariously liable for conduct which arose from carrying out duties improperly’.¹³⁵ However, in *Lister* it was also stated that the employer should be found liable ‘only if the risk is one which experience shows is *inherent* in the nature of the business’.¹³⁶ In *Wallbank*, the tortfeasor was employed as a powder coater when the misconduct took place. It was accepted by Pill LJ that ‘it is difficult to establish the link with employment in this case’.¹³⁷ Nevertheless, he went on to state that ‘reactions to instructions, normally by way of carrying them out, is part of an employment, whether as a powder coater or in any other capacity’.¹³⁸

It is true that a broad view of the nature of employment is encouraged. Indeed, this was called for in *Lister*: ‘the matter must be looked at broadly, not dissecting the servant's task into its component activities—such as driving, loading, sheeting and the like—by asking: what was the job on which he was

¹²⁸ *Brown* (n 97).

¹²⁹ *Mattis v Pollock* [2003] EWCA Civ 887, [2003] 1 WLR 2158.

¹³⁰ *Weddall; Wallbank* (n126) [44].

¹³¹ *Ibid* [45].

¹³² *Ibid* [44].

¹³³ Steven Conway, ‘Court of Appeal keeps reins on vicarious liability in assault at work cases’ (*law, less ordinary: legal opinions from brownejacobson*) <<http://www.law-less-ordinary.co.uk/wordpress/2012/02/07/court-of-appeal-keeps-reins-on-vicarious-liability-in-assault-at-work-cases-2/>> .

¹³⁴ *Weddall; Wallbank* (n126) [67].

¹³⁵ *Ibid*. [35].

¹³⁶ *Lister* (n2) [65] [emphasis added].

¹³⁷ *Weddall; Wallbank* (n126) [51].

¹³⁸ *Ibid*. [52].

engaged for his employer?’¹³⁹ However, it is submitted that the approach taken in *Wallbank* is so broad that it threatens to distort one of the fundamental requirements of vicarious liability. This argument can be supported with reference to hypothetical examples adopted by both judges and academics.

In *Bazley*, McLachlin J stated that ‘if a man assaults his wife’s lover (who coincidentally happens to be a co-worker) in the employees’ lounge at work, few would argue that the employer should be held responsible’.¹⁴⁰ A similar point is also made by Peter Cane: ‘an engineering company would not be vicariously liable where, without more, an employee sexually assaulted another employee on the employer’s premises; carrying on an engineering business does not (as far as we know) materially increase the risk of assault on the employer’s premises’.¹⁴¹ In the context of the present case, it is difficult to see how employment as a powder coater can be said to increase the risk of assault in any shape or form.

The groundbreaking nature of this decision becomes more apparent when viewed in the light of another Court of Appeal decision - *Mattis v Pollock*.¹⁴² In that case, a bouncer was employed ‘to keep order and discipline at the nightclub’¹⁴³ and the employer actively welcomed the bouncer’s aggressive attitude to his customers. Central to finding the employer vicariously liable for the battery committed by his employee was that where an employee is expected to use violence while carrying out his duties, the likelihood of establishing that an act of violence fell within the broad scope of his employment is greater than it would be if he were not.¹⁴⁴ In stark contrast to this case, the court in *Wallbank* found the following submission sufficient: ‘the risk of friction between employees is a risk created by the employer and, if it leads to violence, the employer should bear the risk’.¹⁴⁵ This case takes us into a new territory as the risk of violence bubbles beneath the surface of many employment relationships, regardless of whether those jobs envisage the use of force at all.¹⁴⁶

In 1997, Rose complained that ‘in many cases of assault, the line is very closely drawn and the employee can suddenly find himself outside the course of his employment, committing an independent act’.¹⁴⁷ However, he also indicated that ‘it is not denied that if an employee commits an assault purely for personal reasons which are wholly unconnected with his employment, that there is no reason to hold his master liable merely because it was committed at his work’.¹⁴⁸ Therefore, this recent expansion was not anticipated even by

¹³⁹ *Lister* (n2) [77].

¹⁴⁰ *Bazley* (n39) [35].

¹⁴¹ Peter Cane, ‘Vicarious Liability for Sexual Abuse’ (2000) 116 LQR 21, 24.

¹⁴² *Mattis* (n129).

¹⁴³ *Ibid.* [30].

¹⁴⁴ *Ibid.* [25].

¹⁴⁵ *Weddall; Wallbank* (n 126) [19].

¹⁴⁶ Alex Glassbrook, ‘“You’re only supposed to blow the bloody doors off!” – employers’ vicarious liability for the torts of violent employees.’ (2005) 3 JPI Law 240, 246.

¹⁴⁷ F.D.Rose, ‘Liability for an employee’s assaults’ (1977) 40 MLR 420, 424.

¹⁴⁸ *Ibid.*

Rose who was in favour of a 'greater readiness to hold the employer liable for assaults arising out of circumstances connected with his servant's employment'.¹⁴⁹

There may be some risks which are inevitably brought about by the very existence of an enterprise.¹⁵⁰ However, the apparent readiness to impose liability because generally 'a violent reaction to an instruction is an act in the course of employment',¹⁵¹ provides further insight into judicial decision-making. As Chrisoulla Pawlowska suggests, courts sometimes take an early view of a case and reason backwards.¹⁵² In fact, in *Wallbank*, Pill LJ recognised that the step taken is one 'beyond what emerges from the facts of the cases cited' but 'a step that should be taken on the facts of this case'.¹⁵³ Aikens LJ also readily admitted to 'making a value judgment'.¹⁵⁴

Therefore, rather than embarking on the difficult task of identifying the risks that are created by the enterprise,¹⁵⁵ the judges simply decide cases by reference to the broad notions of 'justice and fairness'. There is an implicit recognition that workplace insurance provides a practical solution for a claimant who may have suffered serious harm at the hand of an employee.¹⁵⁶ This can be seen in Aiken LJ's judgment where he states that 'in practice often the person whom the law holds vicariously liable is better able to bear the financial consequences precisely because he is the employer and, often, because the person or entity that is held vicariously liable has liability insurance, whereas the actual tortfeasor may not have the means adequately to compensate the victim'.¹⁵⁷

Such judgments have led Jenny Steele to conclude that 'the practice of insurance, including compulsory insurance cover in many crucial cases, challenges the monopoly of the law in respect of accidents and threatens the juridical image of the event'.¹⁵⁸ Juridical notion was that 'accidents were the product of individual will' and liability was the result of 'ill-will'.¹⁵⁹ This surfacing reliance on insurance as a justification for liability is, to a degree, understandable. The role of insurance, which is not the subject of this dissertation, is remarkable as 'without insurance, accident law would be relatively insignificant, because damages would be paid on few occasions'.¹⁶⁰

Furthermore, it is possible to identify a bigger problem: the uncertainty about how we assess whether risks are 'material', 'incidental' or 'merely

¹⁴⁹ *Ibid.* 432 – 433.

¹⁵⁰ Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 501.

¹⁵¹ *Weddall; Wallbank* (n126) [20].

¹⁵² Chrisoulla Pawlowska, 'A connection too far' (2009) 153 SJ 8, 11.

¹⁵³ *Weddall; Wallbank* (n126) [55].

¹⁵⁴ *Ibid.* [68].

¹⁵⁵ Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 501.

¹⁵⁶ Mike Griffiths, 'Vicarious Liability Revisited' (2003) 153 NLJ 721, 721.

¹⁵⁷ *Weddall; Wallbank* (n126) [63].

¹⁵⁸ Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002) 36.

¹⁵⁹ *Ibid.* 55.

¹⁶⁰ *Ibid.* 36.

coincidental'.¹⁶¹ As authorities repeatedly emphasise, the 'test is a matter of applying the facts of the case and applying the law to those facts'.¹⁶² Therefore, empirical evidence plays a significant role in this context. This issue has been discussed by Brodie, who noted that 'the identification of enterprise risks has, so far, been regarded very much a value judgment; it is a matter of what 'experience shows'. The extent to which this experience is empirically grounded is not clear'.¹⁶³ This raises concerns about the equitable basis of vicarious liability; in the absence of empirical evidence, the courts are in danger of including all manner of unwarranted assumptions in their judgments.¹⁶⁴ However, it is also important to appreciate that any attempt at discovering empirical evidence is likely to prove highly problematic as identification of risks, which an enterprise can be said to have created, present significant difficulties.

Risk and status¹⁶⁵

A new direction has been given to the Canadian risk approach through cases that establish vicarious liability on the basis of 'job-created power'.¹⁶⁶ It is submitted that this advancement fails to consider the warnings about 'enterprise risk' reasoning contained in *Bazley*¹⁶⁷ as the authority awarded to the tortfeasor, in itself, merely provides an *opportunity* to commit a tort.

The decision in *Maga v Archbishop of Birmingham and another*¹⁶⁸ concerned a claim brought against a Roman Catholic archdiocese for damages for sexual abuse by a priest in the archdiocese. Before proceeding on to a detailed analysis of this case, it is beneficial to refer to Binnie J's judgment in *Jacobi*, where he approvingly quotes a decision from 1986: 'it would defy every notion of logic and fairness to say that sexual activity between a priest and a parishioner is characteristic of the Archbishop of the Roman Catholic Church'.¹⁶⁹ Despite this, the Court of Appeal in *Maga*, the first reported English authority to deal directly with this matter,¹⁷⁰ held that 'a number of factors taken together established a sufficiently close connection between the priest's employment as a priest at the Church and the abuse which he had inflicted on the claimant to render it fair and just to impose vicarious liability for the abuse on the archdiocese as the priest's employer'.¹⁷¹ This contrasting position clearly demonstrates the extension of vicarious liability. In fact, in *O'Keefe v Hickey*,¹⁷² Hardiman J opined that the judges are 'so greatly influenced by the need to find a basis to pay compensation for sexual abuse

¹⁶¹ Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press 2010) 194.

¹⁶² *Weddall; Wallbank* (n126) [15].

¹⁶³ Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 498.

¹⁶⁴ *Ibid.*

¹⁶⁵ Phillip Morgan, 'Distorting Vicarious Liability' (2011) 74(6) MLR 932, 938.

¹⁶⁶ *Jacobi* (n3) [64].

¹⁶⁷ Phillip Morgan, 'Distorting Vicarious Liability' (2011) 74(6) MLR 932, 946.

¹⁶⁸ *Maga* (n92).

¹⁶⁹ *Jacobi* (n3) [54].

¹⁷⁰ Phillip Morgan, 'Distorting Vicarious Liability' (2011) 74(6) MLR 932, 933.

¹⁷¹ *Maga* (n91) 1442.

¹⁷² [2008] IESC 72.

that they depart from anything resembling a coherent legal principle grounding vicarious liability'.¹⁷³

It is submitted that a new 'status-based risk' approach emerged from *Maga* as Lord Neuberger indicated that it was the *opportunity* to spend time alone with the claimant, which arose from Father Clonan's role as a priest,¹⁷⁴ that the court found sufficient for the imposition of vicarious liability. In permitting liability to attach in these circumstances, the court has allowed for a significantly lower threshold to prevail. In fact, Lord Neuberger himself acknowledged this when he stated that 'the claimant's case is at least weaker than...that of the successful claimant in *Lister's* case'.¹⁷⁵

What is interesting is that the court recognised that it 'should not be too ready to impose vicarious liability on the defendant. It is, after all, a type of liability for a tort which involves no fault on the part of the defendant, and for that reason alone its application should be reasonably circumscribed'.¹⁷⁶ However, a close examination of the judgment reveals that it focused purely on the risk that was introduced into the society by the Church and in the words of Phillip Morgan; this opened a 'disturbing new chapter for vicarious liability'.¹⁷⁷

In the Court of Appeal, Lord Neuberger criticised the decision of the trial judge not to impose vicarious liability as follows: 'the judge appears to have erred in principle by focusing on the actual motives of Father Clonan, and placing too much emphasis on the acts of abuse themselves'.¹⁷⁸ It was not the risk that was characteristic of employment that triggered liability but the risk that was introduced by the enterprise itself. What this means is that, upon a liberal interpretation, the wrong committed by the employee no longer needs to be a consequence of the job nature or what the tortfeasor was employed to do; the finding of ancillary risk accompanying the activities of the enterprise is sufficient to impose liability. As Morgan states, this reasoning 'comes dangerously close to introducing employer's strict liability for all torts committed'¹⁷⁹ whose job-conferred status increases the risk of any misconduct and provides an *opportunity* for the tortfeasor to engage in a negligent act.

This is reminiscent of a 'but for' reasoning which was carefully rejected by the Supreme Court of Canada. In *Bazley*, McLachlin J stated that 'when the opportunity is nothing more than a but-for predicate, it provides no anchor for vicarious liability'.¹⁸⁰ Similarly, in *Jacobi*, Binnie J argued that a 'mere opportunity' to commit a tort, in the common 'but-for' understanding of the phrase, does not suffice to impose no-fault liability'.¹⁸¹ He further went on to illustrate that 'the creation of opportunity without job-created power over the

¹⁷³ *Ibid.*

¹⁷⁴ *Maga* (n92) [50].

¹⁷⁵ *Ibid.* [44].

¹⁷⁶ *Ibid.* [52].

¹⁷⁷ Phillip Morgan, 'Distorting Vicarious Liability' (2011) 74(6) MLR 932,935.

¹⁷⁸ *Maga* (n92) [43].

¹⁷⁹ Phillip Morgan, 'Distorting Vicarious Liability' (2011) 74(6) MLR 932.

¹⁸⁰ *Bazley* (n39) [40].

¹⁸¹ *Jacobi* (n3) [45].

victim or other link between the employment and the tort will seldom constitute the ‘strong-connection’ required to attract vicarious liability’.¹⁸²

In *Maga* the claimant was a non-Catholic, and therefore, as Morgan states the ‘job-created power over the victim’ was ‘different from the case of a priest’s abuse of his alter server or a member of the congregation’.¹⁸³ It can be argued that this indicates a lack of importance awarded to empirical evidence. However, the important point to be made here is that status of a priest may vary with the victim and a ‘holding out of status cannot *materially* increase risk unless it impacts upon the victim or facilitates the tort’.¹⁸⁴

This inference is worrying. The status-based reasoning has the potential to apply more broadly in a secular context.¹⁸⁵ For example, it can extend to instances where a manager of a company, who could potentially hold an immense status from the perspective of a junior employee, chooses to engage in sexual misconduct towards her outside working hours; he would be taking advantage of the *opportunity* that resulted from his job-conferred status. It is apparent that status-based risk reasoning covers instances outside working hours, however, how far this would extend is certainly open to debate. Despite Justices in *Maga* indicating that this approach should be kept within very narrow confines,¹⁸⁶ it is very difficult to see ‘where the courts will draw the line’.¹⁸⁷

Having said that, a recent case may suggest some ‘brakes’ on the developments in this area. *EL v The Children’s Society*,¹⁸⁸ albeit only a High Court decision, acknowledges that vicarious liability must be kept within ‘clear limits’.¹⁸⁹ This case concerned the ‘physical and mental abuse’¹⁹⁰ that took place in a national children’s charity which provided residential care for children. The court stated that the charity could not be held vicariously liable for abuse committed by the son of its employees. Importantly, it was emphasised that the evidence did not ‘begin to satisfy the fact sensitive test’¹⁹¹ for vicarious liability.

Concluding remarks

The courts of England and Wales have fully embraced the ‘enterprise risk’ reasoning which was initially adopted by the Supreme Court of Canada. However, the recent decisions indicate that the focus is no longer on the ‘close-connection’ between the risks that are created by the enterprise and the harm caused, but the creation of a risk itself has become sufficient to attach liability. Therefore, as this reasoning has been used extensively to extend the

¹⁸² *Ibid.* [45].

¹⁸³ Phillip Morgan, ‘Distorting Vicarious Liability’ (2011) 74(6) MLR 932, 937.

¹⁸⁴ *Ibid.* 941 [emphasis added].

¹⁸⁵ *Ibid.* 946.

¹⁸⁶ *Ibid.*

¹⁸⁷ Paula Giliker, ‘Rough Justice in an Unjust World’ (2003) 65 MLR 267, 277.

¹⁸⁸ [2012] EWHC 365.

¹⁸⁹ *Ibid.* [22].

¹⁹⁰ *Ibid.* [10].

¹⁹¹ *EL* (n188) [56].

doctrine of vicarious liability so far beyond its traditional limits, it can be portrayed as 'a wild horse'.

Furthermore, the extension of vicarious liability is justified by reference to risk creation as it is believed that 'the appeal to equity is only convincing where the scope of the enterprise's liability is actually determined by reference to the risks it has created'.¹⁹² It was stated by Atiyah as early as 1967 that 'in the typical case of vicarious liability the master plays a considerable part in *creating* the circumstances in which the tort is committed'.¹⁹³ Similarly, Paula Case observed that the traditional view that vicarious liability did not depend on 'employer's fault but on his role' is 'mutating into a perception that damages are paid because the employer has some moral connection with the claimant'.¹⁹⁴ More recently, Morgan gave this idea further impetus by suggesting that 'risk introduction is a causal idea'.¹⁹⁵ This is interesting because there are instances other than vicarious liability in tort law that allow for the imposition of liability with no causal requirement. For example: personal liability and joint and several concurrent tortfeasors.¹⁹⁶

The fact that the equitable basis of vicarious liability is founded upon the *creation* of risk and the doctrine is justified in causal terms, when there are other perfectly permissible instances where liability is imposed without the requirement of causation, point towards the underlying concerns practitioners have towards the unfair outcomes of vicarious liability. In fact, when one uncovers the uncritically accepted assumptions about 'risk creation', it is possible to rebut the supposition that 'the fairness is present, given that the employer puts the *risk* into the community'.¹⁹⁷

Are risk-takers decision-makers?

There is little doubt that the imposition of vicarious liability is connected with the risks that are introduced into society by the enterprise. It can be said that the smaller the amount of risk required, the bigger its ambit becomes. The decision reached by the Court of Appeal in *Wallbank*¹⁹⁸ suggests that the risk that is present does not need to be *material* or *incidental*, but that the mere existence of 'a risk' is sufficient to justify the imposition of vicarious liability. Therefore, the notion of 'risk' is given an unprecedented value which might not be immediately obvious. However, perhaps the most alarming chapter in this episode is that this stance has been justified as 'entirely rational'¹⁹⁹

¹⁹² Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 501.

¹⁹³ P.S. Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) 13 [emphasis added].

¹⁹⁴ Paula Case, 'Developments in vicarious liability: shifting sands and slippery slopes' (2006) 22 PN 161, 165.

¹⁹⁵ Phillip Morgan, 'Distorting Vicarious Liability' (2011) 74(6) MLR 932, 934.

¹⁹⁶ P.S. Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) 13.

¹⁹⁷ *Bazley* (n39) [31] [emphasis added].

¹⁹⁸ *Weddall*; *Wallbank* (n125).

¹⁹⁹ Douglas Brodie, 'Enterprise liability: justifying vicarious liability' (2007) 27(3) OJLS 493, 498.

without realising a need for an ‘overt discussion of what is meant by the word ‘risk’;’²⁰⁰ the judiciary readily assume that risk-takers are decision-makers.

The courts have accepted that generally, fairness allows recovery from an employer when the employer introduced the risk which resulted in the harm complained of. However, fairness has been assessed solely from the perspective of the victim and in terms of the victim’s need for a remedy, when arguably it relates more to the position of the defendant and the question of whether there are good reasons in the circumstances for making him take responsibility for harm that he has not personally caused.²⁰¹ Despite this, academics have also agreed that ‘equity dictates that the enterprise, which stands to profit from the running of those risks, should be obliged to compensate in the event of harm materialising’.²⁰² By adopting this reasoning, the courts have been able take advantage of the ‘wild’ nature of risk creation to expand vicarious liability to situations which were previously thought to be outside the scope of the doctrine.

It is submitted that judges adopt an ‘enterprise risk’ reasoning in order to bypass the problem posed by the imposition of vicarious liability; namely that ‘common sense is opposed to making one man pay for another man’s fault’.²⁰³ Ideas about risk creation have been utilised and a specialised use of risk terminology has been developed which draws deeply on a theoretical heritage concerned with rational action and decision-making.²⁰⁴ This introduces a façade of moral responsibility. As Steele argues, ‘risk has frequently been not so much a concern as a *tool* for legal theory’.²⁰⁵ It is evident that, in decisions concerning vicarious liability, risk is ‘seized upon as an explanatory device, without necessarily being subjected to close attention in its own right’.²⁰⁶

Despite failing to embark upon any discussion of what is meant by ‘risk creation’, it seems that judges find ‘risk in the decision-making sense deeply attractive’.²⁰⁷ They approach the idea of risk-taking as an essential aspect of human action and thus responsibility.²⁰⁸ Steele supports this observation and states that legal theorists ‘employ ideas related to risk and decision-making in order to determine answers to some of its core questions about responsibility, equality and justice’.²⁰⁹ However, she also rightly argues that this position fails to drill into the core elements of risk. It merely makes ‘a link between individual autonomy and preference on the one hand, and objective or universal standards for responsibility on the other’ and to these issues it attaches ‘the vocabulary of risk’.²¹⁰ Conversely, Steele herself, by exploring the theoretical influences on risk, plays down the role of free will in risk taking.

²⁰⁰ Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002) 56.

²⁰¹ Claire McIvor, ‘The use and abuse of the doctrine of vicarious liability’ (2006) 35 CLWR 268, 271.

²⁰² Douglas Brodie, ‘Enterprise liability: justifying vicarious liability’ (2007) 27(3) OJLS 493, 495.

²⁰³ Oliver Wendell Holmes, ‘Agency’ (1891) 5 Harv L. Rev 1, 14.

²⁰⁴ Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002) 9.

²⁰⁵ *Ibid.* 4.

²⁰⁶ *Ibid.* 56.

²⁰⁷ *Ibid.* 29.

²⁰⁸ *Ibid.* 8.

²⁰⁹ *Ibid.* 11-12.

²¹⁰ *Ibid.*

This idea will be explored below. For now, it is important to appreciate the problems associated with the position adopted by judges in cases concerning vicarious liability.

Risk in the decision-making sense emphasises agency and choice;²¹¹ it concentrates its attention on the individual decision-maker. It can rightly be argued that the arrival of the concept of risk has marked a real stride forward in terms of freedom.²¹² It freed society from the idea that we lived our lives by 'fate'. Anthony Giddens depicts this change through criticising Ulrich Beck's study of the 'risk society'.²¹³ He states that the "risk society" might suggest a world which has become more hazardous'.²¹⁴ However, this is 'not necessarily so'.²¹⁵ The Middle Ages were no less hazardous than the modern 'risk society' but there was 'no notion of risk in any traditional culture'.²¹⁶ Dangers that were experienced were a given; 'either they came from God, or they came simply from a world which one takes for granted'.²¹⁷ The notion of risk allows for a society where individuals have a degree of control over their actions.²¹⁸ This is relevant because, it is this very advancement that has enabled the judges today to view risk in the decision-making sense and attach responsibility on this basis.

These changes in the structure of society coincided with the development of 'social physics', which directly opposes any claims of indeterminacy related to tradition, but instead it focuses its attention on regulation and predictability. This theory introduces the 'impersonal, statistical, and often proudly counter-intuitive sense of risk'.²¹⁹ At first glance, such attention on 'predictability' might seem to distance itself from associating risk with decision-making by emphasising the role of probabilities. However, this is a misconception. More accurately, 'social physics' emphasises the way that techniques of prediction can allow individuals to 'exercise their freedom as active agents'.²²⁰ By having accurate information about what consequences would be, if the risk in question were to materialise, risk-takers can make informed decisions. Furthermore, as Steele recognises, by using techniques of pure statistical observations, the individual can exercise value judgements; for example, relating to 'dominance, maximin, or the avoidance of catastrophe'.²²¹ By supporting such a view, one would be accepting that 'risk-takers' are 'decision-makers'. This would mean that the way the courts impose liability on those who 'choose' to introduce risks into society is fair, as they are making an 'informed' decision and thereby should be held responsible for whatever the outcome may be.

²¹¹ *Ibid.* 55.

²¹² *Ibid.* 30.

²¹³ Ulrich Beck, *Risk Society: Towards a New Modernity* (Mark Ritter tr, SAGE Publications Ltd 1992).

²¹⁴ Anthony Giddens, 'Risk and Responsibility' (1999) 62 MLR 1, 3.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002) 30.

²¹⁹ *Ibid.* 18.

²²⁰ *Ibid.*

²²¹ *Ibid.* 20.

This analysis indirectly assumes that ‘risk is always someone’s fault’.²²² This is why it seems ‘just’ to impose liability on an individual who decides to take risks. However, as Steele argues, ‘having clear or rational grounds for a decision is not the same as being able to determine events’.²²³ She rightly believes that ‘we cannot determine the future’²²⁴ as ‘luck will always intervene, and a complex question about the relationship between informed decision, and unintended consequences, is opened up’.²²⁵

The role of ‘luck’ has been extensively studied by Nagel²²⁶ who came to a different conclusion to Steele’s: he favoured the imposition of liability despite the lack of ‘control’ on the part of the ‘decision-maker’. He argues that ‘where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck’.²²⁷ Nagel admits that ‘prior to reflection, it is intuitively plausible that people cannot be morally assessed for what is not their fault, or for what is due to factors beyond their control’.²²⁸ But the reality of the situation is that, what we do does not necessarily depend on what is under our control. In fact, ‘ultimately, nothing or almost nothing about what a person does seems to be under our control’.²²⁹ Although this evaluation fits almost perfectly with the nature of vicarious liability, for Nagel, it also applies to instances where there is a supposition of fault.

Nagel states the following: ‘factors beyond the agent’s control, like a coughing fit, can interfere with his decisions as surely as they can with the part of a bullet from his gun’.²³⁰ He argues that although it may seem irrational that we are morally at the mercy of fate, ‘we judge people for what they actually do or fail to do, not just for what they would have done if the circumstances had been different’ as ‘our moral attitudes would be unrecognizable without it’.²³¹

Having said that, ‘the effect of concentrating on the influence of what is not under our control is to make this responsible self seem to disappear, swallowed up by the order of more events’.²³² Especially in the instance of vicarious liability, where the lack of control is at the far end of the spectrum as an employer can even be held liable for an employee’s *independent* actions. Surely, this can be viewed as the ‘kind of lack of control that really undermines certain moral judgment’?²³³ Nagel is ready to dismiss such a conclusion as it

²²² John Gardner, ‘General Editor’s Preface’ in Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002).

²²³ *Ibid.* 18.

²²⁴ *Ibid.* 29.

²²⁵ *Ibid.* 18.

²²⁶ Thomas Nagel, ‘Moral Luck’ in Thomas Nagel, *Mortal Questions* (Cambridge University Press 1979).

²²⁷ *Ibid.* 26.

²²⁸ *Ibid.* 25.

²²⁹ *Ibid.* 26.

²³⁰ Thomas Nagel, ‘Moral Luck’ in Thomas Nagel, *Mortal Questions* (Cambridge University Press 1979) 32.

²³¹ *Ibid.* 34.

²³² *Ibid.* 36.

²³³ *Ibid.* 26.

could trigger a situation where ‘eventually nothing remains which can be ascribed to the responsible self. And we are left with nothing but a portion of the larger sequence of events, which can be deplored or celebrated. But not blamed or praised’.²³⁴

To allow for the imposition of vicarious liability on this basis would indicate that the mechanism for providing what is required comes first, whereas the demands for justice and fairness ‘limps in a poor second’.²³⁵ Stephen Perry has rightly argued that ‘if the issue is taken to be the fairness of adopting one social arrangement over another, it is not enough to argue that a particular system is fair *tout court*. It is necessary that the proposed system is the fairest of various possible arrangements’.²³⁶

Another approach, which favours responsibility over determinism and irresponsibility, is Tony Honore’s ‘outcome responsibility’.²³⁷ Honore’ proposes that a person should be responsible for their conduct and its consequences even when their conduct was perfectly permissible.²³⁸ He embraces the idea that it is acceptable to impose responsibility regardless of ‘fault’, as by taking a risk one is gambling on its non-materialisation, and it is fair that if one loses the gamble, one pays.²³⁹ So, ‘vicarious liability is justified by the principle of taking the rough with the smooth’.²⁴⁰ This approach is deemed to be fair ‘since agents of normal capacity will win more than they lose on the basis of this principle’.²⁴¹ Honore’ says that the system ‘must work so as to entitle each person to potential benefits that are likely on the whole to outweigh the deterrents to which it subjects him’.²⁴²

This formulation does not fully ‘hold up’ in the context of vicarious liability. It is established that vicarious liability does not only apply to profit-making organisations but is also relevant to charitable enterprises. This position was fully entrenched in the case of *Bazley*²⁴³ where McLachlin J stated that ‘while charitable enterprises may not employ people to advance their economic interests, other factors, make it fair that they should bear the burden of providing a just and practical remedy for wrongs perpetrated by their employees’.²⁴⁴ Despite acknowledging that non-profit organisations perform

²³⁴ *Ibid.* 37.

²³⁵ Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002) 110.

²³⁶ Stephen R. Perry, ‘Honore’ on responsibility for outcomes’ in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays in honour of Tony Honore’ on his 80th Birthday* (Hart Publishing 2001) 67.

²³⁷ Tony Honore’, *Responsibility and Fault* (Hart Publishing 2002).

²³⁸ Peter Cane, ‘Responsibility and Fault: A relational functional approach to responsibility’ in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays in honour of Tony Honore’ on his 80th Birthday* (Hart Publishing 2001) 100.

²³⁹ Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002) Preface.

²⁴⁰ Peter Cane, ‘Responsibility and Fault: A relational functional approach to responsibility’ in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays in honour of Tony Honore’ on his 80th Birthday* (Hart Publishing 2001) 85.

²⁴¹ Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002) 94.

²⁴² Tony Honore’, *Responsibility and Fault* (Hart Publishing 2002) 26.

²⁴³ *Bazley* (n39).

²⁴⁴ *Ibid.* [30].

‘needed services on behalf of the general public’,²⁴⁵ the Canadian Supreme Court indicated that the issue should be viewed from the perspective of ‘the innocent child who was the victim of the abuse’: ‘it is fair that as between him and the institution that enhanced the risk, the institution should bear legal responsibility’.²⁴⁶ It is difficult to envisage a circumstance where a non-profit organisation can gain from its ‘gamble’. Consequently, the ‘fairness’ of Honore’s outcome responsibility, in the instance of vicarious liability, can be questioned.

In fact, Honore directly refers to vicarious liability in the midst of his analysis; however, his explanation for its relationship with ‘outcome responsibility’ is somewhat paradoxical. Initially he states that vicarious liability is ‘exceptional’²⁴⁷ as the action is brought ‘against an employer for the act of an employee who, in working for him, has harmed the plaintiff’.²⁴⁸ However, Honore later accepts that ‘responsibility is not confined, either in the law or morals to responsibility for one’s own conduct or for one’s fault or for situations in which one has chosen to be responsible’.²⁴⁹ He goes on to say ‘that we should think of ourselves as responsible agents, as taking on responsibility for other people’;²⁵⁰ ‘an employer, can, for example, be vicariously liable for the act of an employee’.²⁵¹

It is evident that vicarious liability baffles Honore. Nevertheless, he sees risk-taking as a form of ‘gambling in which we mostly win but sometimes lose’ and this ‘helps to explain and in part to justify not merely outcome responsibility but strict liability’.²⁵² Perhaps it is true that an agent can ‘fairly’ be held liable for outcomes that he contributed to as what is done depends on more than the agent’s state of mind or intention.²⁵³ However, the moral issue with this approach is that ‘it amounts to holding one responsible for contributions of fate as well as for their own – provided that they have made some contribution to begin with’.²⁵⁴ In the instance of vicarious liability this contribution is the introduction of risk into the society.

What is obvious from the analyses of Nagel, Honore and Steele is that ‘risk’ cannot rightly be portrayed as a decision-making device. The interference of ‘luck’ and circumstances that are beyond our control certainly work to undermine such a conclusion. However, although this suggests that the element of ‘risk’ reduces the role of humans as decision-makers in the face of the unknown,²⁵⁵ the likes of Nagel and Honore still believe that it is ‘fair’ to

²⁴⁵ *Ibid.* [48].

²⁴⁶ *Ibid.* [50].

²⁴⁷ Tony Honore, *Responsibility and Fault* (Hart Publishing 2002) 81.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.* 127.

²⁵⁰ *Ibid.* 127.

²⁵¹ *Ibid.* 126.

²⁵² *Ibid.* 27.

²⁵³ Thomas Nagel, ‘Moral Luck’ in Thomas Nagel, *Mortal Questions* (Cambridge University Press 1979) 31.

²⁵⁴ *Ibid.* 31.

²⁵⁵ Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002) 3.

attach responsibility for outcomes. They favour responsibility over determinism and irresponsibility.²⁵⁶

It is submitted that there is nothing 'fair' or morally fundamental about this. Oliver Wendall Holmes criticises this approach as follows:

'Everyman, it is said, has an absolute right to his person, and so forth, free from detriment at the hands of his neighbours. In the cases put, the plaintiff has done nothing; the defendant on the other hand, has chosen to act. As between the two the party whose voluntary conduct has caused the damage should suffer, rather than one who has had no share in producing it'.²⁵⁷

As Steele has argued, what is inescapable as the basis for general judgments of responsibility need not be the basis for our approach to allocating or distributing losses, if there is a fairer way of doing it. Indeed, there might be a good moral reason for designing an alternative system for dealing with losses.²⁵⁸

Conclusion

Simply put, 'in recent years there have been some bizarre cases; alas, all with grave consequences'.²⁵⁹ The courts have adopted the 'enterprise risk' reasoning to justify expanding vicarious liability beyond its traditional limits. The 'wild' nature of this new test incorporates the objectives of social convenience, rough justice and the responsibilities of the employer;²⁶⁰ it provides a 'magical blueprint' for promoting plaintiff's recovery.

In light of the above analysis it can rightly be said that, in the context of vicarious liability, the will to compensate an innocent claimant has overridden any concern for a 'fair' outcome. The 'enterprise risk' reasoning has been employed haphazardly, without any consideration for the notion of risk which carries 'a lot of theoretical weight'.²⁶¹ 'Risk' can in no way 'be treated as a shorthand for easy solutions to problems of responsibility'²⁶² and it is certainly not a straightforward concept that merely enables decision-making.

²⁵⁶ *Ibid.* 100.

²⁵⁷ Oliver Wendall Holmes, *The Common Law* (Little Brown & Co 1881) 84.

²⁵⁸ Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002) 100.

²⁵⁹ Simon Allen, 'Violent employees and vicarious liability' (*The Law Society Gazette* 16 February 2012) <<http://www.lawgazette.co.uk/in-practice/violent-employees-and-vicarious-liability>> accessed 7 March 2012.

²⁶⁰ David Greenwood, 'Vicarious Liability – The Future' (*Jordans Solicitors: Child Abuse Lawyers* 1 July 2011) <<http://www.childabusesolicitor.com/2011/07/vicarious-liability-the-future/>> accessed 7 March 2012.

²⁶¹ Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2002) 3.

²⁶² *Ibid.* 207.

It is essential for the courts to re-consider the 'tool' that they have used to expand vicarious liability so far. When one scrutinizes and drills deeper into the concept of 'enterprise risk', its fairness, which has been associated with its ability to enable decision-making, raises serious doubts. 'The exponential growth of risks' and 'the impossibility of escaping from them'²⁶³ unsurprisingly leads to a wish to attach responsibility to those who are in a better position to compensate. However, this simple formulation should not lay a foundation for legal responsibility. This dissertation does not suggest that 'an injury arising from an inevitable accident, or, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer',²⁶⁴ nor does it support the 'strongly voiced alternative trend which asked to found vicarious liability on the exclusive basis of the master's personal fault (in selecting or supervising the servant)'.²⁶⁵ However, it certainly argues that, if a court has a desire to impose liability, it must do so 'fairly' through embarking upon a more sophisticated reasoning than what we have seen in cases concerning vicarious liability.

Legal liability should not be imposed straightforwardly in cases where popular ascriptions of responsibility can be detected. Fairness requires that there must be a 'soul searching analysis'²⁶⁶ to justify the imposition of liability. Therefore, in deciding whether someone is responsible for some deed we need to consider both fairness to that person and fairness to others.²⁶⁷ It is true that there are instances where legal responsibility is appropriate even though blame is not.²⁶⁸ However, as we have seen, the account of responsibility in cases concerning vicarious liability has at best been haphazard and far from principled.

²⁶³ Ulrich Beck, *Risk Society: Towards a New Modernity* (Mark Ritter tr, SAGE Publications Ltd 1992) 36.

²⁶⁴ Oliver Wendall Holmes, *The Common Law* (Little Brown & Co 1881) 95.

²⁶⁵ Izhak Englard, *The philosophy of tort law* (Aldershot 1993) 51.

²⁶⁶ David J. Ibbetson, *A historical introduction to the law of obligations* (Oxford University Press 1999) 181.

²⁶⁷ Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press 1999) 16.

²⁶⁸ *Ibid.* 4.