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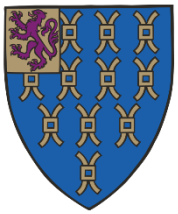

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Foreword

1. It is with great pleasure that I introduce the sixth edition of the *Lincoln's Inn Student Law Journal,* a publication that continues to provide a platform for the exceptional talent and intellectual rigour of our student members. This year's edition features seventeen articles with a diverse range of subject matter that reflects the breadth and depth of legal knowledge within Lincoln's Inn. Each contribution is underpinned by hard work and a commitment to advancing legal thought and practice.
2. This edition is particularly significant as it marks the inaugural inclusion of The Lord Millett Equity Essay Prize, a distinguished award made possible by the generous legacy of the late Lord Millett, who served as Treasurer of the Inn in 2004.
3. The Lord Millett Equity Essay Prize was established in agreement with Lord Millett's family to honour his lifelong commitment to the study and practice of equity. The Lincoln's Inn community is most grateful to his family for this prize, which will ensure that Lord Millett's dedication to equity continues to inspire future generations of lawyers and aspiring lawyers.
4. This year's winning equity essay, authored by Oliver Clement, exemplifies the in-depth exploration of the legal doctrine of proprietary estoppel, with a particular focus on how courts handle these cases and the implications of their decisions. It is a fitting tribute to Lord Millett's legacy and a valuable addition to the field.
5. I am also pleased to highlight the winner of this year's Lincoln's Inn Legal Essay Prize, Mostafa Taimur Raihan. Raihan's paper explores the growing impact of Artificial Intelligence on legal practice, highlighting the specific challenges it presents to the legal profession. Raihan's piece exhibits an impressive mastery of legal research and argument, embodying the high standards upheld by this journal.
6. As you explore the essays within this edition, I hope you are inspired to follow up some of the references, apply some of the concepts to your work, and submit your own contribution in the future.

Edward Cousins, Editor

30th August 2024

Contents

What are the challenges of using artificial intelligence in litigation and dispute resolution and how do they relate to the general debate on artificial intelligence in law?

Mostafa Taimur Raihan

Introduction

As with many other fields, Artificial Intelligence (AI) offers a great deal in legal practice. AI-driven processes have already revolutionised everyday practice.[1] Case databases with finely tuned search protocols have largely replaced physical law libraries filled with beleaguered paralegals,[2] protracted manual negotiation processes are now facilitated by complex financial models,[3] and smaller scale disputes such as those under consumer law can now be settled through chatbot-based processes.[4]

At the same time, history indicates that the misapplication of technology can be extremely harmful, especially if the impact of that technology is not fully known.[5] A review of the challenges of applying AI in the legal sphere is then highly mandated, so as to better capitalise on its benefits and to mitigate potential harms. It is this mandate that this essay will take up, concentrating on three issues of AI-use within litigation and dispute resolution and linking them back to broader issues of AI in law.

Three specific issues have been identified. First, the issue of identifying litigant values will be considered in the context of human-machine translation. Second, issues of transparency of process will be evaluated. Third, the prospect of technological elitism will be analysed. Nonetheless, it should arguably be remembered that the challenges and benefits of AI within the law will ultimately be determined by the impact of AI.[6] Thus if it is shown that AI in general constitutes a risk (as is sometimes proposed) than any discussion of harm in the context of the law becomes moot.

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[1] R Susskind, D Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (OUP. 2015) 87.

[2] E Salmeron-Manzano, 'Legaltech and Lawtech: Global Perspectives, Challenges, and Opportunities' (2021) 10(2) *Laws* 24-33, 24.

[3] R Susskind, D Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (OUP. 2015) 182.

[4] CEPEJ, 'European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment' (CEPEJ, 2018) 17. Available at: https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c.

[5] T Hagendorff, 'The Ethics of AI Ethics: An Evaluation of Guidelines' (2020) 30 *Minds and Machines* 99-120, 100.

[6] J Goodman, *Robots in Law: How Artificial Intelligence is Transforming Legal Services* (Kluwer, 2016) 8.

Litigant Objectives and Human-Machine Translation

The objectives that a litigant can bring to the table are extremely varied.[7] Although financial restitution is often the goal, quantifying damages for even relatively straightforward claims is itself a complex business, and this is before phenomena like counterclaims are considered. Applications for injunctions add another level of complexity, given the huge range of forms that they might take. Yet another form of complexity arises in the context of alternative dispute resolution (ADR) processes, given that such proceedings need not abide by conventional legal standards, and can essentially take whatever form the parties agree on. All this forms a substantial stumbling block to the implementation of AI in litigation and dispute resolution processes.

Before an AI process can work towards an objective, it must first have a sufficient 'understanding' of that objective.[8] This is certainly possible where the objective exists in terms that are amenable to computing processes. By merit of their nature, computers are highly adept at mathematical manipulation, and therefore if the objective is simply to maximise financial gain, then an AI led process can be highly useful. Thus, information on asset value, inflation and market risk might be combined to help negotiate an appropriate settlement offer.[9] Nonetheless, issues quickly emerge when the abstract values typical to humans are involved. Even plain numerical information is often more complicated than it might first appear. For instance, a corporate subsidiary might be valued according to conventional financial models, but this will not account for other added value.[10] Perhaps the subsidiary is a pet project of the CEO, or perhaps it allows the business to retain employee talent that might be useful later. Financial value is itself an imperfect concept: an AI dispute resolution process might happily describe an 'optimal' settlement during multi-party litigation which involves an annuity, but this is of little worth to a claimant with limited time to live. Similarly, it bears highlighting that the 'true' objectives of parties are often beyond financial gain, even if that is the only remedy available. Litigation against the medical profession, for instance, is often motivated less by a desire for compensation (despite this being the main and usually only remedy available) but instead on a desire for acknowledgement and apology.[11]

Matters become even more complicated outside of disputes which do not involve straightforward calculations. Family law, for example, will often involve extremely abstract concepts, which might even be beyond the awareness of the parties themselves. A divorcing couple might consider justice, happiness, peace or even revenge as their primary objectives[12] –

[7] C Adam et al. (Eds.) *Taking the EU to Court* (Palgrave Macmillan, 2019) 155.
[8] S Russel, *Human-Compatible Artificial Intelligence and the Problem of Control* (OUP, 2019) 4.
[9] D Kumar, GW Taylor, A Wong, 'Opening the Black Box of Financial AI with CLEAR-Trade: A Class-Enhanced Attentive Response Approach for Explaining and Visualizing Deep Learning-Driven Stock Market Prediction' (2017) *arXiv* 1709.01574 [Online] Available at: https://arxiv.org/abs/1709.01574]
[10] AJ Ali, 'Corporations: beyond the sense of infallibility' (2010) 20(4) *IJCN* [Online] Available at: https://www.emerald.com/insight/content/doi/10.1108/ijcoma.2010.34820daa.001/full/html]
[11] E Jackson, *Medical Law: Text, Cases and Materials* (OUP, 2019) 168.
[12] G Hall, 'What do divorcing couples want from a legal service?' (Prettys, 2022) Available at: https://prettys.co.uk/articles/what-do-divorcing-couples-want-from-legal-service

none of which can, at present be readily quantified into computing terms. A fact that also bears highlighting is the fact that at times, abstract values are hardcoded into the law and therefore cannot be ignored or evaded. For example, child welfare remains the paramount consideration of any dispute resolution process, as per the Children Act 1989.[13] At the same time, the concept of 'welfare' would be alien to any AI: it might be able to describe which parent is in the optimal position to care for a child, but not what would, in reality, be best or preferred by the child themselves.

This gives rise to an overarching issue: before an AI might truly take on a role the wider law, it will first be necessary to translate the values that human parties have into a form which can be understood by computers.[14] This is not an impossibility - few things are - but neither is it a certain probability. Natural language processing would certainly be one solution to the translation problem, but this appears to be a distant prospect at present.[15] Translation might instead occur on the human side, but this would likely be crude, especially at early stages. For example, an AI model designed to aid with family law cases might be able to 'understand' a child's wishes regarding a care order should the child be asked to rate their parents on a scale of 1-10. Of course, it would then fall to programmer to pre-determine how those values would interact with other relevant information (like parental assets, health and more). Such an example also demonstrates a further issue with human-machine translation: the burden often falls onto humans to 'speak' computer rather than the other way around, regardless of whether this is ultimately harmful:[16] the child is placed into a situation of distilling a complex relationship with a parent into a value between 1-10, simply because the computer demands it.

It might even be asserted that translation is impossible, given that some abstract concepts cannot even be readily explained by one human to another. For instance, the concept of justice clearly has a role at the heart of most legal systems, and yet thousands of years of jurisprudence have not rendered a full or complete description of the concept. To then suppose that a universally applicable description which can be understood outside of humanity is an achievable goal is perhaps overly optimistic, especially in the short term.[17]
This then indicates that a substantial challenge exists. Outside of the starkest financial dispute, litigation and dispute resolution involve abstract values which at present are simply beyond any AI. This links into a broader problem with AI and the law: the law relies on patently human concepts and values and ideals, and computers neither rely on these values and nor can they understand them.

[13] Children Act 1989, c.41.
[14] E Jones et al. *Digital Lawyering* (Routledge, 2022) 103.
[15] G Choudhury, 'Natural Language Processing' (2003) 37 *ARIST* 51-89, 76.
[16] M Gavriushenkoa, O Kaikovaa, V Terziyana, 'Bridging human and machine learning for the needs of collective intelligence development' (2020) 42 *Procedia* 302-306, 302.
[17] B Custers, E Fosch-Villaronga, *Law and Artificial Intelligence* (TMC Asser, 2022) 515.

Although a problem on its own, this also links into the challenge discussed in the next section: that AI-supported dispute resolution is likely to be highly normative due to the limitations of technology.

AI Supported Litigation and Transparency of Process

Further problems emerge when the notion of AI supported litigation and dispute resolution is considered. Outside of some extremely advanced AI which might recreate ostensibly human processes like creative thought, it is likely that the AIs used to support the litigation process will take very specific approaches to problem solving.[18] As argued above, it is unlikely that AIs will act with abstract concepts or values in mind. Instead, it is likely that they will be incentive driven – that their goal will simply be to maximise the return rendered to its clients (and thus its creators and licensees).

At first glance, this is not particularly problematic, given that human litigators might act similarly. However, this phenomenon may well be more detrimental in an AI context. For instance, it will sometimes be the case that precedent will emerge which leads to a reassessment of a current legal principle, indicating that the precedent should apply in its place, or else that the law has been misinterpreted. An AI which 'discovers' that there exists some precedent which undermines the arguments it has been making has no incentive to bring such information to outside attention: it makes far more money misapplying the law and is therefore far more effective keeping this information hidden. This might be contrasted with a human litigator. Whilst there is certainly an incentive to not disclose the newly discovered precedent, it remains a possibility. Academically minded practitioners may prioritise the advancement of collective knowledge over renumeration or might simply refuse to make disingenuous arguments out of a sense of honesty (again, an abstract concept which is neither of use nor interest to an AI). It might even be the case that some professional body demands integrity from its members and expects them to act accordingly, and again, AIs cannot be professionally sanctioned and even if there were, they would not care. Although it might be argued that this phenomenon might be protected against by dictating that AIs must act with certain values in mind, it is arguably doubtful that this could occur with any real certainty. Problems quicky arise given the translation problem outlined above, and even if this might be overcome, it is difficult to see how an AI might balance competing abstract values against one another.[19] It is notable that although humans undertake this process automatically in their day to day lives, that it is extremely difficult to quantify or codify how this process occurs. Values like 'honesty', 'community' and 'family' might all come to the mind of someone dealing with a problem, but these do not interact directly with one another, and a model which adequately balances just three values would be highly complex, let alone dozens or hundreds.

[18] A Verghese, NH Shah, RA Harrington, 'What This Computer Needs Is a Physician: Humanism and Artificial Intelligence' (2017) 319(1) *JAMA* 19-20, 19.

[19] CEPEJ, 'European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment' (CEPEJ, 2018) 8. Available at: https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c

Further, issues with transparency quickly emerge. If current models of technological development continue to apply, it is more than likely that legal AIs will be the purview of private companies and proprietary intellectual property (IP). Indeed, rudimentary AI technology showcases this: dispute resolution and negotiation AIs have arisen within commercial organisations. This creates a problem of transparency, accountability, and oversight.[20] Should there be some problem with an AI which gives rise to injustice, there is little incentive for a private company to highlight it. Detecting such issues will be difficult given that AI creators will likely wish to protect and exploit their IP rights and will therefore eschew open-source practices. Indeed, even if the full code of an AI is made available, it is not a given that problems will be easily detectable. It bears highlighting that at present, even simple coding is still likely to suffer from bugs, unintended consequences, and hacking vulnerabilities. To then suppose that this will not be an issue with the extremely complicated processes of advanced AI is then arguably foolhardy.

It is arguably simple to see how this problem might arise across the law in general: if problems with AI litigators or dispute resolution assistants can be highlighted, then so too can problems with the prospect of an AI judiciary or similar. Indeed, the more centralised the technology, the larger the risk. In the context of litigators, it is perhaps likely that AI will be a matter of some competition – that problems inherent to any single AI process will be lessened due to a diversity of approaches because numerous competing AIs will be available. In contrast, it is arguably likely that a single AI service would be used for matters like judicial assistance or similar processes, thereby concentrating the risk.[21]

An issue is therefore apparent. AIs have little use for human values, and are not incentivised accordingly, and this might have untoward effects. Whilst checks and balances might be used to prevent this, there is no indication that a transparent model will be employed by those developing AI technology, and even then, no promise that the full impact of complex AIs will be apparent even to knowledgeable observers. Although alarming on its own, such problems can be predicted across the whole of the law, wherever complex AI systems are employed.

Access to the Courts and Technological Elitism

Finally, it can be asserted that the use of AI processes will ultimately have a negative impact on access to litigation and dispute resolution.

As it stands, access to the courts is an ongoing and worsening problem. Individuals with means can freely enforce their legal rights and obligations in court because legal advice and counsel

[20] CEPEJ, 'European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment' (CEPEJ, 2018) 11. Available at: https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c

[21]

remains affordable, and the associated costs tend to be vindicated by the value of the assets at stake.[22] This is not the case for many, who will find themselves with theoretical but not practical access to remedy. Similarly, although dispute resolution can take on many forms, it is far more accessible to those with money. More formal processes like commercial arbitration certainly come at a cost which will be more affordable to larger entities, and even mediation and conciliation processes will be beyond the means of many.

At first glance, AI offers a potential solution to this problem.[23] An advanced mediation AI does not require a salary, can work constantly without breaks or vacations, and is free from the bounds of geography. This would indicate that access might be heightened by reducing the inherent costs of litigation and dispute resolution. This is perhaps an overly optimistic prediction, however. To the contrary, AI development appears to largely be the purview of private organisations who have a direct incentive to maximise the cost of licensing their product and no real incentive to ensure equal access to technology. Indeed, productivity in the legal sector has been hugely augmented in recent decades with the implementation of even rudimentary technology, and yet at the same time, this has not resulted in any associated uptick in access to the law. It is then arguably foolhardy to suggest that an AI-led revolution in legal access is forthcoming.[24]

Instead, it can be asserted that a rift will begin to emerge between those with access to the best AI technology and those without. Litigation and dispute resolution are both overtly adversarial processes, especially in the context of the UK courts. Even ostensibly cooperative processes like mediation may well give rise to negotiations which are ultimately zero sum in nature, and thus will take on an adversarial form. This then incentivises the implementation of the best possible AI technology available. This may well give rise to untoward consequences. At present, the quality of legal services which are available are limited by human capacity. Even the best lawyer has a limit on how much they might know, how much research they might undertake, and how many hours they can work. No such limits exist in an AI context. In contrast, advanced AIs might quickly outstrip their peers in terms of processing power and ability, creating a disparity far beyond that which is currently seen between parties using litigators of differing abilities and resources.[25] This would then give rise to a situation of inequality: those who can access the most advanced AIs (or any AI legal service at all) will enjoy the law at its most effective and those who cannot will find themselves disadvantaged. Indeed, it is already well-documented that those without means find themselves self-representing as litigants-in-person, and find

[22] M Fouzder, 'Wealth becoming key to justice, say 87% of lawyers' (Law Gazette, 21 November 2014) Available at: https://www.lawgazette.co.uk/law/wealth-becoming-key-to-justice-say-87-of-lawyers/5045251.article
[23] J Zelezkinow, 'Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts?' (2017) 8 *International Journal for Court Administration* 30-45, 30.
[24] R Ramilo, M Embi, 'Critical analysis of key determinants and barriers to digital innovation adoption among architectural organizations' (2014) 3 *Frontiers of Architectural Research* 431-451, 432.
[25] M Traddeo, L Floridi, 'Regulate Artificial Intelligence To Avert Cyber Arms Race' (2018) 556 *Nature* 296-298, 297.

themselves poorly placed to navigate the law, especially when across from a qualified lawyer.[26] It is then simple to imagine how a litigant-in-person would fare in the face of an AI-led litigation service – extremely poorly.

This pattern will arguably repeat itself within the wider legal sphere as human-led processes become dominated by AIs: those firms and organisations who are able to implement the most advanced system will find themselves using and applying the law with relative ease, in contrast to their peers who will be left behind.[27] This is arguably already the case to a certain extent: practitioners with access to advanced legal databases (and their advanced search algorithms) enjoy ready access to precedent, far beyond anyone without such access. Indeed, given the almost unbounded potential of AI technology, it is difficult to assert that this inequality will not develop wherever it is implemented: within litigation and dispute resolution, within the law, and within the wider world. It is therefore indicated that issues will begin to emerge as AI services are supplied to the highest bidder. The adversarial nature of claims incentivises an AI 'arms race' between parties, and the privatised nature of AI development ensures that technology will be limited to those who can pay. This is likely to be part of an overarching pattern within the law.

Conclusion

To conclude, it is evident that the implementation of AI in litigation and dispute resolution contexts will give rise to certain challenges. First, issues of human-machine translation must be overcome, so that litigant objectives can be centralised rather than side-lined. Second, care must be taken that AI technology is fully understood in a transparent manner. Without doing so, uninvited consequences become a risk. Third, care must be taken that AI does not worsen the law's current 'pay-to-win' model as technology is developed. Whilst these problems can certainly be predicted in the context of litigation and dispute resolution, it can be extrapolated that issues within the wider law may well develop. Therefore, although AI development is still at an early stage, the risks of obsessive implementation are becoming apparent. Whilst disheartening, it is only with an awareness of these risks that the full benefits of AI might be enjoyed. In the present, care must be taken to ensure that efficiency of process is not prioritised above the provision of clear and effective justice – that although imperfect, an inefficient but just system is preferable to the alternative.

[26] J Eekelaar, 'Litigants in person – the struggle for justice' (2015) 37 *JSWFL* 463-466, 463.
[27] J Goodman, *Robots in Law: How Artificial Intelligence is Transforming Legal Services* (Kluwer, 2016) 129.

'Just get a contract?'—The nature of the courts' inquiry in proprietary estoppel cases, and its remedial consequences.

Oliver Clement

Each day, in one's interactions with others, one invariably makes a series of promises as to future conduct or intention. A task facing the law is, and has always been, how to distinguish adequately between those promises which should be binding, and those on which one should be free to renege. One answer which the law provides is contract: where there is a promise given for consideration, with intent to create legal relations, that promise will bind the promisor. In proprietary estoppel, the law volunteers another answer: where there is a promise made in relation to land, which is relied upon by the promisee, and as a consequence of that reliance the promisee suffers detriment, an equity will arise in favour of the promisee, requiring satisfaction.[1] Given the concern of both doctrines with the enforceability of promises, and the conceptual overlap on the facts of many cases, it is not surprising that there have been suggestions that conflict exists between the two, and that the courts should do away proprietary estoppel altogether, dealing with the cases in contractual terms alone.[2] Part I of this essay will deal with this proposition, concluding that the backward-looking nature of the inquiry involved in establishing an estoppel demonstrates that the doctrines are, in fact, wholly different and therefore capable of coexistence. Part II will consider the implications of this conclusion, and argue that this feature of proprietary estoppel has significant remedial implications—the court should ordinarily be concerned with addressing the detriment of the promisee.

Part I—The Compatibility of Contract and Proprietary Estoppel

Incompatibility rests fundamentally on the idea that the operation of one thing undermines the proper operation of the other. Given proprietary estoppel is an equitable remedy, it would undermine contract if it served to alter the outcome the common law provided without further justification. Given there are cases, which will be discussed below, in which proprietary estoppel will give different answers to contract, the compatibility of the two will turn on the reason for the intervention of equity; the justification cannot be contractual in substance, but must establish estoppel as a separate doctrine. Equity cannot give a different answer in contract than contract gives at common law.

There are two principal situations in which the application of proprietary estoppel may be said to undermine contract: (i) in cases where no contract is present on account of a lack of consideration for the promise; and (ii) in cases where there is bargain between the parties which

[1] *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776.

[2] P Atiyah, 'When Is an Enforceable Agreement Not a Contract? Answer: When It Is an Equity' (1976) 92 LQR 174 ('Atiyah').

is rendered unenforceable by the application of formality rules. Though the potential for conflict exists, it will be demonstrated that proprietary estoppel properly conceptualised does not undermine contract in either of these cases.

Consideration and Proprietary Estoppel

Mr Crabb[3] had enjoyed access to his land in Pagham by two access points. Access point 'A' was available on account of an easement. Access point 'B' was informal in nature; the land was owned by Arun District Council, and a meeting between Mr Crabb and the Council left him assured that he was permitted to use it. The council erected gates at both access points three years after Mr Crabb had purchased the property. He subsequently sold half of the land, and retained the half which was accessible only by access point B; he went as far as padlocking the inside of the gate at point B. It is not difficult to imagine his surprise when the council replaced that gate with a fence, and demanded payment for the re-opening of the access point. Mr Crabb's land was left unreachable.

On a first encounter with such a set of facts, it seems surprising that the case did not fall to be analysed in contractual terms.[4] Atiyah certainly thought so, writing in the Law Quarterly Review that the rigidity of the contractual doctrine of consideration was what prevented the Court of Appeal from rooting their analysis in contract, instead choosing the more flexible (and 'new') estoppel to resolve the dispute.[5] Rather than turn to estoppel, Atiyah said, the issue should have been tackled head on; if the judges believe that contract is too rigid, the problem should be addressed in contract.[6] The problem with this analysis is evidenced, however, by the pithy statement made by Sir John Pennycuick VC at first instance:

> '… it would be plainly impossible so to argue [for the existence of a contract] in the absence of either writing or consideration'[7]

Evidently, the trial judge was certain that there was no contract in these circumstances.[8] Taking Atiyah's concerns seriously, it does appear strange that on facts where no contract can be said to arise, the court is willing to take a promise and enforce it, with the detriment to the promisee acting in lieu of any required payment.

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[3] *Crabb v Arun DC* [1976] Ch. 179 (CA).

[4] Especially given that in argument Peter Millett QC (as he then was) made clear that *'[the plaintiff] does not expect to obtain an easement for nothing*'; Ibid at 181.

[5] Atiyah (n 2).

[6] Atiyah (n 2).

[7] *Crabb* (n 3); P Millet, 'Crabb v Arun District Council—A Riposte' (1976) 92 LQR 342 ('Millett').

[8] As indeed was Scarman LJ in the Court of Appeal: '*…no question of legally enforceable contract*'; *Crabb* (n 3) 193.

Formality Rules

The second category of facts which may give rise to allegations of incompatibility are those cases where an otherwise contractual bargain is rendered unenforceable by the application of formality rules.[9] When acting as counsel in *Stone v Withipole*,[10] Edward Coke argued that all effectual considerations should be either beneficial to the promisor, or to the detriment of the promisee. In circumstances where there is a promise, and detriment to the promisee, it seems odd to turn to proprietary estoppel rather than contract. If, on account of some formality rule, a contract is rendered unenforceable, that should be the end of the matter. In *Jennings v Rice,*[11] Walker LJ discussed such cases and noted that the parties have, in essence, valued the expectation and detriment as commensurate.[12] In these cases there is a promise made, with detriment to the promisee, and the positive result of that bargain can be enforced by the courts as the proper way to satisfy the arising equity. It is hard to see how this is not performing the same role as contract, whilst simply circumventing any policy-based formality rules.

Differing Aims

There is an obvious reason for the apparent difficulty in resolving the apparent similarity of the two doctrines. As Lord Sales has noted extra-judicially, the answer is that these are simply proxies for resolving underlying moral questions.[13] It may seem as though the key moral question here is when a person should be bound to a promise, but that need not be so. The proper question is when should the law intervene, and for what reasons?

A promise made in particular circumstances may be one reason for the law to intervene. One reason may be because the parties have seriously agreed to order their lives in a particular way, and in doing so have met particular external requirements which ensure the law takes notice. This is contract. It is prospective; the parties are bound *ab initio*. As Peter Millet QC pointed out in his riposte to Atyiah, no matter the subsequent conduct of contracting parties, they will be entitled precisely to that for which they bargained.[14]

Properly conceptualised, a claim in proprietary estoppel is importantly different. In *Walton v Walton*,[15] Hoffmann LJ asserted that:

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[9] Ordinarily either the Law of Property (Miscellaneous Provisions) Act 1989, s 2; or the formalities for testamentary dispositions found in the Wills Act 1837.

[10] (1589) YLS Ms. G. R29.6, fo. 81 (Q.B.); J Baker, *Baker and Milsom Sources of English Legal History: Private Law to 1750* (OUP, 2nd edn, 2010) 533.

[11] *Jennings v Rice* [2002] EWCA 159; [2003] 1 P&CR 8 at [45].

[12] This reasoning was explained and accepted in Lord Briggs' leading judgment in *Guest v Guest* [2022] UKSC 27; [2022] 3 WLR 911 at [77].

[13] P Sales, 'Proprietary Estoppel: Great Expectations and Detrimental Reliance' (Modern Studies in Property Law Conference, Oxford, March 2022) at [53]

[14] Millett (n 7) 346.

[15] *Walton v Walton* (CA, 14 April 1994).

> '[equitable estoppel] looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept.'

His Lordship is correct to say that the inquiry is backwards-facing in nature but, it is respectfully submitted, wrong to say that it necessarily looks backwards from the moment of due performance, or that the necessary question is whether it is unconscionable for the promise not to be kept, the latter being the point Part II will come to address. The same sentiment is perhaps put more cleanly by Lord Sales' comment that:

> '[T]he promise-detriment remedy is backward-looking in nature and does not impose obligations at the time of the relevant promise.'

Proprietary estoppel is fundamentally concerned with the unconscionability of the situation at the time of trial.[16] The question is what has happened since the promise, and whether the promisor should have to account for it. This is different from contract; the inquiry is different, as are the consequences. It is notable, for example, that the claimant will receive nothing unless he seeks redress in the courts, and even then is faced with a discretionary remedy.[17]

The conflicts which seemed so apparent above seem to fade away in the face of this. In *Crabb*, there was no contract. It was the behaviour of the claimant subsequent to the promise which meant equity came to his aid. The same is true for bargain cases. Formality rules apply to contracts, but in the absence of any such contract, and providing the rules for establishing an estoppel are clear and different, formality rules provide no barrier. The question of whether the expectation is the best award in these cases is considered below, but it does not necessarily undermine the operation of contract. Indeed, it is notable that where a bargain existed which in the view of the courts should have been formalised in contract, there was no estoppel established; *'he ran a commercial risk'*.[18]

Part II—Remedial Implications

Establishing that the two doctrines are compatible is to solve only half of the problem. The nature of proprietary estoppel as focused on the events subsequent to a promise has important remedial implications. The ultimate question with which the courts have struggled in developing the estoppel doctrine is the wrong the remedy is seeking to rectify. In *Guest v Guest*,[19] Lord Briggs made perhaps the clearest attempt to elucidate this wrong:

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[16] A fact recognised by counsel for the defence in *Crabb*, who noted that *'proprietary estoppel looks at the present not to the future'*; *Crabb* (n 3) 182.

[17] See B McFarlane, 'Equitable Estoppel as a Cause of Action: Neither One Thing Nor One Other' in Contracts in Commercial Law; Milett (n 7) 346.

[18] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752 at [91] per Lord Walker.

[19] *Guest* (n 12).

> 'The wrong is the **repudiation** [of the promise] and the harm is the non-fulfilment of the promise thereafter.'[20]

Authoring the dissent Lord Leggatt provides a different answer:

> '[The law regards as unconscionable] A's failure to accept responsibility for the consequences of B's reasonable reliance on the promise and for ensuring that B does not suffer detriment as a result of such reliance.'[21]

In Lord Briggs' view,[22] the harm is the non-fulfilment of the promise, i.e. that the promisee is deprived of his expectation. The result is to render the detriment-rooted view as untenable; detrimental reliance is what renders the repudiation wrongful, and it cannot *also* be the harm which must be remedied. The requirements for establishing the equity (i.e. promise and detrimental reliance), are separate from measuring the harm. It is true, as Lord Leggatt acknowledges,[23] that the reasoning cannot be as simple as 'detriment is required to establish the equity, so if the detriment is removed, the equity is satisfied', as the same is true in respect of the promise.[24]

A detriment based remedy is, however, a better approach, on account of the above inquiry into the compatibility of contract and proprietary estoppel. It is only by understanding the nature of the court's inquiry that the proper choice can be made. It must be remembered that proprietary estoppel looks backwards, from the present to the promise. To award expectation, however, is to look backwards at the promise, and then make that promise operate forwards; it is to fictionalise prospective effect. Further, detriment is different from the promise in an important way: it is an effect. If A promises B an interest in land and in reasonable reliance B benefits, although not by receiving any land, no equity would arise at all, yet B may well feel the same sense of disappointment at his being deprived of that particular land. It is, ultimately, the promisee's conduct which determines whether an equity will, in fact, arise following the initial promise. That conduct is the focus of a backwards looking inquiry; the court is searching for the promisee having been negatively affected on account of the promise. It is no surprise that Gray chose to equate detriment with 'unconscionable disadvantage' when writing his textbook.[25] It is these effects, therefore, at which the court should direct its remedial sights.

Often, as in *Guest*, the claimant would have had nothing at the time of trial but for the dispute; the promise was not yet due to be performed. At this point it is crucial to acknowledge the

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[20] *Guest* (n 12) at [70].
[21] *Guest* (n 12) at [191].
[22] As put even more starkly in Lord Briggs' comments in *Guest* (n 12) at [11] that *'the harm consists of the soul-destroying, gut-wrenching realisation of being deprived…'*.
[23] *Guest* (n 12) at [195].
[24] A Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295.
[25] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 1228.

often disparate but vaguely understood caveats to promises of the kind made in family-type proprietary estoppel cases which could render the truly intended performance far different. These promises, and the circumstances in which they would have been performed, may be vastly different from those at the time the court is operating. What the court must do is look at why the equity has arisen. It is true that there must be a promise combined with detrimental reliance, but the making of the promise, as Lord Briggs notes,[26] is not itself a wrong. That the promisee suffered some kind of loss as a result of this promise, is not in fact better off as a result, and the promisor is refusing to make good that loss, is a far more compelling narrative for what amounts to unconscionability. Compounding this is the court's inability to look forward with a clear vision; counterfactuals as to future potential conduct are for contract, with its prospective effect.

It is, therefore, Lord Leggatt's conception of the unconscionability which should be preferred. Lord Briggs contends that this is to retrospectively transform the making of the promise into a wrong.[27] This, however, is to misunderstand what it is that is unconscionable. The inquiry, as established, looks at the present circumstances, and backwards. What is unconscionable is not the making of the promise, but leaving circumstances as they are; it is the promisor's *inaction*. The making of the promise may have been well intentioned, but it would *now* be wrong for the promisor to do nothing, on account of the detriment suffered by the promisee. It is sufficient that the circumstances are such that if the promisor did *not now act*, that would constitute a wrong. In these circumstances, it is entirely appropriate for equity to intervene to resolve an unconscionable state of affairs, and to force the promisor to account for the reasons which point to that unconscionability.

If the promisor acted of his own accord to either keep to his promise or account for the promisor's detriment, there would be no equity to satisfy. Given the promisor is not acting of his own volition, the court should hold him only to the less onerous of these. The unconscionability is rooted in his not accounting for the effects of his promise, and so it is that which he must be compelled to do. That he *could* also satisfy the equity by keeping to his promise does not change the nature of that unconscionability from effects based to expectation-based; the court always looks backwards.

Conclusion

Once it is established that contract and proprietary estoppel can operate together if the backwards-looking nature of proprietary estoppel is firmly understood, the question arises as to whether this has any broader consequences for the operation of the doctrine. Though it is unlikely to be reconsidered for some time, the majority in *Guest* took a wrong turn. Enforcing

[26] It should be noted that the majority's clear statement that the making of the promise may be in absolute good faith rather undermines the aggressively penal response to which awarding expectation amounts; *Guest* (n 12) at [9] per Lord Briggs: *'the equitable 'wrong' is not the making of the promise in the first place.'*.

[27] *Guest* (n 12) at [70].

expectation, particularly in 'clean break' cases like *Guest* has the effect of retrospectively upgrading otherwise unenforceable promises into promises akin to contract, with prospective effect. Rather, the court should be looking backwards, focused on the effect of that promise on the promisee, which is the determinative factor in rendering some promises legally notable where others are not. It is those consequences, extant at the time of the inquiry, which lie at the heart of the wrong in proprietary estoppel cases

Conscience and Unconscionability: Towards a Coherent Knowledge Requirement in English Unconscionable Bargains

Alexandra Breckenridge

I: Introduction

English law is committed to the principle that courts do not save parties from bad bargains. Expressed in Lord Nottingham's maxim that "*Chancery mends no man's bargain*", this rule establishes that a contract will not be set aside in equity merely because a party expresses regret after it has been struck.[1] Underpinning this principle is a theory that contracting parties are best-placed to judge and protect their own interests.[2] This model of parties' bargaining autonomy provides a good "starting-point" for the law of contract.[3] Yet, when viewed as an infallible principle in favour of contract enforcement, it ignores the reality that unfair bargains are secured at the expense of people with little bargaining power or skill. English law acknowledges this difficulty and provides relief from contract enforcement when one party proves the existence of a vitiating factor, i.e., a "recognised invalidating circumstance".[4]

This essay concentrates on one such invalidating circumstance: the doctrine of *unconscionable bargains*. When contract law's underlying assumptions about party autonomy lose persuasiveness, courts have deployed the vitiating factor of *unconscionability* to provide relief from unfair bargains entered by vulnerable parties. This essay analyses the modern operation of this vitiating factor. It aims to provide clarity on an important equitable doctrine whose contemporary requirements are contested and poorly understood in this jurisdiction.[5]

Three distinct requirements for a bargain to be deemed unconscionable emerge from English case law: **(I)** the bargain must be oppressive to the complainant; **(II)** the complainant must have suffered from a serious bargaining impairment; **(III)** the enforcing party must *knowingly* have taken advantage of these circumstances.[6] This essay's primary focus is the third doctrinal element: this is the *knowledge requirement*, used by English courts to assess the culpability of parties on the advantageous end of an unconscionable bargain.[7]

The need to clarify the nature of this element is plain. The knowledge requirement presently confounds English scholars: commentators widely disagree on whether the stronger party must,

[1] *Maynard v. Moseley* [1676], 3 Swans. 651 at 655.
[2] Atiyah, "The Liberal Theory of Contract," *Essays on Contract*, (Oxford University Press, 1990).
[3] Ibid., 148.
[4] *Credit Lyonnais v Burch* [1997] 1 All E.R. 144, 153, citing *Brusewitz v Brown* [1922] 42 NZLR 1106.
[5] Capper, "The Unconscionable Bargain in the Common Law World," *LQR* 126 (2010): 403.
[6] *Chitty on Contracts, 34th Edition*, [10-164], (Sweet & Maxwell, 2022).
[7] *Jones v Morgan* [2001] EWCA Civ 995, [35].

subjectively, have understood and exploited the complainant's vulnerability in order to be culpable[8] or whether the enforcing party's knowledge should be assessed *objectively*, with reference to what the reasonable person would have understood in his position.[9] Responding to this "*subjective versus objective dispute*"[10], this essay shows that English cases support an ***objective*** assessment of enforcers' knowledge, in which *constructive knowledge* of the complainant's bargaining impairment may, in narrow circumstances, uphold a finding of unconscionability.[11] The court's basic enquiry "is not whether the conscience of the party who has obtained the benefit of the transaction is affected *in fact*; the enquiry is whether, in the view of the court, it *ought* to be".[12]

II: The Knowledge Requirement Re-examined

Introducing the Knowledge Requirement

Three doctrinal requirements for the vitiating factor of unconscionability can be discerned from modern case law: (***I***) the bargain must be oppressive to the complainant; (***II***) the complainant must have suffered from a serious bargaining impairment; (***III***) the enforcing party must have acted unconscionably by *knowingly* having taken advantage of these circumstances.[13] This tripartite definition is based on the restatement of the principles in *Fry v Lane* by Peter Millett QC (then sitting as a deputy High Court judge) in *Alec Lobb v Total Oil*[14], which has been endorsed in prominent, recent cases as accurately establishing the modern limitations on the English doctrine.[15]

Under ***Element III***, it must be shown that enforcers had knowledge of ***Elements I*** and ***II***.[16] English judges have not always made this doctrinal "knowledge requirement" explicit, but they have invariably noted the absence of sufficient knowledge in rejecting a finding of unconscionability.[17] The precise nature of the doctrinal knowledge requirement has, however, vexed English commentators and courts in recent years.[18] Commentators are at cross-purposes on whether enforcers must, *subjectively*, have understood and exploited complainants' circumstances, or whether it is sufficient that they ought, *objectively*, to have understood their advantage over complainants. This scholarly debate has amplified the appearance of imprecision in English unconscionability cases, at the expense of the doctrine's modern development.

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[8] Beale, "Undue Influence and Unconscionability", *Defences in Contract* (Hart, 2017), 107–8.
[9] Bamforth, "Unconscionability as a Vitiating Factor," *LMCLQ*, 1995, 548-549.
[10] Ibid., 550.
[11] Virgo, 'Whose Conscience? Unconscionability in the Common Law of Obligations', *Divergences in Private Law*, (Hart, 2016), 304.
[12] *Jones v Morgan* [2001] EWCA Civ 995, Chadwick LJ at [35] (emphasis added).
[13] *Chitty on Contracts, 34th Edition*, [10-164].
[14] *Alec Lobb (Garages) v Total Oil Great Britain Ltd* [1983] 1 WLR 87 (Ch) 94–95.
[15] *Pakistan International Airline v Times Travel* [2021] UKSC 40, [24].
[16] Chen-Wishart and Williams. 'Affirmative Duties in Vitiated Consent Transactions'. In *Misleading Silence*. Hart, 2020, 156.
[17] Bamforth, 555; *Hart v O'Connor* [1985] UKPC 1, 1028.
[18] Bamforth, 548.

In recent years, a consensus in favour of the ***subjective*** approach has gained traction among authors of English contract law textbooks. Its proponents argue that the defendant's knowledge should be assessed by the courts with reference to his subjective perceptions at the time of the contract's formation. Beale, for example, argues that relief should not be available even if "the weakness would have been spotted by the reasonable person without further enquiry".[19] Similarly, Davies supports an entirely subjective knowledge requirement, under which "the defendant must actually realise that their conduct is reprehensible".[20] Notably, Davies endorses this subjective test as having "the advantage of restricting the scope of the doctrine", by limiting courts' capacity to intervene on the basis of "the substance of the parties' bargain".[21]

By contrast, in favour of ***objectivity***, scholars like Bamforth and Virgo suggest that English authorities provide support for an external assessment of defendants' knowledge.[22] The "objective conscience of the defendant" is, Virgo suggests, assessed with reference to what the defendant *should* have known, rather than by examining his subjective state of mind.[23] For Virgo, the unconscionable bargain thus falls squarely within his category of equitable doctrines that *objectively* interpret the idea of conscience, alongside breach of confidence and dishonest assistance.[24]

This divergence of scholarly opinions has undermined the modern relevance of this venerable jurisdiction. Indeed, scholars who endorse the subjective approach have done so while arguing that unconscionability should only be pleaded as a "last resort" in contractual disputes.[25] This contemporary emasculation of the English doctrine is regrettable, in that it undermines this jurisdiction's capacity to respond to the modern proliferation of unfair transactions "entered into in changing circumstances."[26]

Despite the contemporary emergence of scholarly support for a subjective knowledge requirement, this essay shows that English courts continue to approach the question of enforcers' knowledge externally. A careful examination of recent case law provides an answer to Bamforth's "*subjective versus objective dispute*".[27] Indeed, Part 1 of this Section shows that modern English authorities demonstrate judicial support for the application of an *objective* test to assess the stronger party's culpability.[28]

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[19] Beale, 108.
[20] Davies, Paul S. *JC Smith's The Law of Contract*, 288–96. (Oxford, 2021).
[21] Ibid., 291.
[22] Virgo (2016), 304.
[23] Ibid., 302; 304.
[24] Ibid., 302.
[25] Davies, 292.
[26] Ibid., Nourse LJ at 151.
[27] Bamforth, 550.
[28] *Jones v Morgan* [2001] EWCA Civ 995, [35] (emphasis added).

Given the vagueness of modern judicial explanations of this knowledge test, however, it is unsurprising that there remain differences of scholarly opinion about whether the stronger party's knowledge should be subjectively held or objectively assessed. Covert judicial tools are never reliable.[29] Addressing this problem of judicial ambivalence, Part 2 provides an account of how the courts apply the objective knowledge requirement in practice. I show, by examining recent case law, that English courts, in practice, require that the *reasonable person* in the enforcer's position would not have had to make further enquiries to understand the transaction as *unconscionable*.

Throughout modern case law, the English court's approach remains consistently objective: the individual defendant's perceptions of his conduct are irrelevant to the test for culpability. Instead, the question is whether, in the view of the court, the defendant's conscience *ought* to have been affected in the circumstances.[30]

1. The Doctrinal Case for Objectivity

As this essay will now show, a close reading of modern decisions demonstrates that the defendant's *subjectively held* views play no role in the English court's assessment of culpability. We should, I suggest, take English courts at their word when they assert that the court's enquiry is *not* whether the defendant's conscience was affected *in fact,* but rather whether, "in the view of the court, it ought to have been."[31]

The catalyst for the recent English line of cases cited by scholars in support of a subjective approach to culpability is the 1978 first-instance decision of Browne-Wilkinson J, as he then was, in *Multiservice Bookbinding v Marden*.[32] This case concerned stipulations in a mortgage transaction which, when the Swiss Franc strengthened, increased the annual interest rate to more than 16%. No cases in the *Fry v Lane* line were cited by the High Court, and the decision was primarily concerned with a separate, *sui generis* ground of relief (based on unreasonable collateral advantages in lending agreements).[33] Yet Browne-Wilkinson J's decision has become influential because of his assertion that it is a requirement of the doctrine of unconscionability that one of the parties must have "imposed the term in a morally reprehensible manner, that is to say, in a way which affects his conscience".[34] This dictum was picked up by Peter Millett QC in *Alec Lobb*, and again by the Privy Council in *Boustany v Pigott.*[35] Since its inclusion in Lord Templeman's judgment in *Boustany*, Browne-Wilkinson J's dictum has been cited by commentators as an authority for the claim that defendants must have been "deliberately

[29] Llewellyn, K. *Harvard Law Review* 52, no. 4 (1939): 700–705.
[30] *Jones v Morgan* [2001], EWCA Civ 995, [35].
[31] *Jones v Morgan* [2001] EWCA Civ 995, Chadwick LJ at [35].
[32] [1978] 2 All ER 489.
[33] Capper, 'The Unconscionable Bargain in the Common Law World', 404.
[34] [1978] 2 All ER 489, 502.
[35] [1995] 69 P. & C.R. 298, 303.

exploitative" in order for a bargain to be deemed unconscionable.[36] Indeed, Beale relies on the Privy Council's submissions in *Boustany* to argue that relief is unavailable "even if the [complainant's] weakness would have been spotted by the reasonable person".[37] Browne-Wilkinson J's first-instance decision has, therefore, had an outsized effect on scholarly interpretations of unconscionability's knowledge requirement.

Reliance on Browne-Wilkinson J's decision to support a subjective test does not, however, hold up to doctrinal scrutiny. Even in *Multiservice Bookbinding* itself, the court suggested that an objective approach could be used to determine a defendant's culpability. Browne-Wilkinson J emphasised that where there is "an unusual or unreasonable stipulation… it may well be that in the absence of any explanation, the court will assume that unfair advantage has been taken."[38] This objective approach to the test for culpability was echoed in the Privy Council's decision in *Hart v O'Connor*.[39] Lord Brightman emphasised that defendants could be held responsible either for "the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances".[40] Under this approach, if the circumstances of a transaction are judged, objectively, to be unconscionable, a defendant need not have *deliberately* exploited the complainant's weakness for relief to be available.

Multiservice Bookbinding does not, therefore, represent a departure from the objective approach taken in prominent unconscionability cases in the mid-twentieth century.[41] Indeed, Browne-Wilkinson J's decision is consistent with what Lord Brightman described as "the traditional view in English law" that it is sufficient for claimants to show that a defendant "ought to have appreciated" a bargain's unconscionability.[42]

Cases following *Multiservice Bookbinding* display similarly constrained judicial support for the objective approach, despite scholarly assertions to the contrary. *Hart v O'Connor,* for example, is often cited by scholars as a decision in which relief was denied because the defendant lacked subjective knowledge.[43] A close reading of *Hart* reveals, however, that Lord Brightman approached the issue of knowledge externally. The Board held that the defendant "had no means of knowing" that the vendor was of unsound mind, rather than denying relief because he did not, *in fact,* understand the vendor's disadvantage.[44] Similarly, the Privy Council's 1995 decision in *Boustany v Piggott* is commonly cited as a resounding triumph for subjectivity.[45] Yet, *Boustany* does not unambiguously endorse a subjective knowledge test. Relief was granted on the basis

[36] Agnew, 495.
[37] Beale, 108.
[38] [1978] 2 All ER 489, 502.
[39] [1985] UKPC 1, 1024.
[40] Ibid., 1024.
[41] E.g. *Cresswell v Potter* [1978] 1 WLR, 259.
[42] Ibid., 1014.
[43] E.g., Enonchong, 301.
[44] [1985] UKPC 1, 1028.
[45] Beale, 108.

that Mrs Boustany had "full knowledge" that her conduct was unconscionable, but, tellingly, Lord Templeman failed to elaborate on the test used to arrive at this conclusion.[46] Additionally, in defining what it meant by "unconscientious advantage", the Board cited a passage from an Australian High Court decision which endorses an objective knowledge requirement.[47] These instances of judicial ambiguity demonstrate the difficulties involved in arriving at a clear doctrinal definition. Late twentieth-century decisions do not, however, support scholars' categorical assertions that English law assesses defendants' knowledge subjectively.

English courts have persisted in a conservative approach to unconscionable bargains in the twenty-first century; yet there remains judicial support for an objective knowledge test. In *Jones v Morgan*, for example, although Chadwick LJ cited with approval Browne-Wilkinson J's *Multiservice Bookbinding* dictum, the Court of Appeal endorsed an objective knowledge requirement. In assessing the enforcer's culpability, Lord Justice Chadwick emphasised that the test is "not whether the conscience of the party who has obtained the benefit of the transaction is affected in fact; the enquiry is whether, in the view of the court, it ought to be".[48]

Similarly, while denying relief under this doctrinal element, the Court of Appeal expressed support in *Portman v Dusangh*[49] for an external assessment of enforcers' culpability. It is important to examine this case carefully, given that Beale cites *Dusangh* as having "clearly decided the point" in favour of a subjective approach.[50] Mr Dusangh submitted that his mortgage transaction should be set aside in light of the building society's knowledge that he was an elderly man of limited means, who might die before the expiry of its 25-year term. In assessing this claim, the Court of Appeal endorsed Millett LJ's approach to unconscionability in *Credit Lyonnais v Burch*[51], holding that in both undue influence cases and unconscionable bargains the conscience of the stronger party must be "affected by notice, actual or constructive, of the impropriety by which [the bargain] was obtained."[52] Courts may, on this view, grant relief on the basis of constructive knowledge of the complainant's bargaining impairment.[53]

The Court of Appeal held, however, that the building society did not have constructive knowledge of Dusangh's vulnerability. Because the transaction was capable of reasonable explanation based on parental affection, the building society was not, in Lord Justice Ward's view, "put upon further inquiry" of Dusangh's circumstances.[54] The Court of Appeal's denial of

[46] [1995] 69 P. & C.R. 298 (PC) 303, 304.
[47] Ibid., 303; See *Commercial Bank of Australia v Amadio* (1983) 46 ALR 402, 413.
[48] [2001] EWCA Civ 995, [35].
[49] [2000] 2 All ER (Comm) 221 (CA).
[50] Beale, 108.
[51] [1997] 1 All E.R. 144
[52] [2000] 2 All ER 221, 8.
[53] Ibid., 16: the "*same*" legal definition of constructive notice for undue influence "*applies to notice of any equity arising from unconscionable behaviour…*"
[54] Ibid., 16.

relief on this basis demonstrates, contrary to Beale's assertion, that constructive knowledge may *indeed* support a finding of unconscionability. *Dusangh* thus provides a key, recent example of continued support by the English courts for an objectively assessed knowledge requirement.

2. The Objective Test in Practice

Modern authorities, in supporting an objective knowledge test, have not provided guidance on its practical application. This judicial ambiguity helps to explain the serious divergence of scholarly views on the nature of the doctrinal knowledge requirement. Contemporary commentators, in support of a subjective approach, rely on *Multiservice Bookbinding* and *Boustany* to suggest that enforcers must have had actual knowledge of the complainant's circumstances.[55] Other commentators rely directly on *Fry v Lane*, treating the factors identified by Kay J (and modernised in *Creswell v Potter* and *Alec Lobb*) as capable of raising a rebuttable presumption that a bargain has been unconscientiously procured.[56]

A careful examination of recent authorities, however, allows these ostensibly divergent approaches to be understood coherently. I argue that the English court's test requires, *at minimum*, that the reasonable person in the enforcer's position would not have had to make further inquiries to understand the transaction as unconscionable. Constructive notice of ***Element II*** will only suffice, therefore, in rare cases in which the transaction's terms (***Element I***) are "self-evidently" oppressive.[57] The most prominent modern definition of this objective test draws from an imprecise source, the Court of Appeal's decision in *Jones v Morgan*, which fails to identify the role of *constructive notice* in the court's assessment of defendants' knowledge.[58] This definition can, I argue, be supplemented by a clearer authority in the form of Millet LJ's analysis of unconscionability in *Credit Lyonnais v Burch*.[59] These cases, when examined together, provide a coherent approach.

The *Jones v Morgan* definition of the knowledge requirement takes the form of Chadwick LJ's assertion that the Court's enquiry is whether the defendant's conscience *ought* to have been affected by the circumstances of the bargain, rather than whether his conscience has been affected *in fact*.[60] Lord Justice Chadwick's test has been criticised persuasively for failing to address whether constructive knowledge of the complainant's circumstances suffices in *all* circumstances, or whether the court, in applying its objective test, simply ignores the defendant's subjectively held views in assessing his culpability.[61]

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[55] Beale, 108.
[56] Virgo, 304.
[57] *Snell's Equity, 34th ed,* (2020), [8–045].
[58] Devenney, 'A Pack of Unruly Dogs: Unconscionable Bargains, Lawful Act (Economic) Duress and Clogs on the Equity of Redemption.', *JBL.*, 2002, 539–53.
[59] [1997] 1 All E.R. 144.
[60] [2001] EWCA Civ 995, [35].
[61] Devenney, 539–40.

To arrive at a coherent understanding of this doctrinal requirement, English courts should, instead, turn to the detailed exposition of unconscionability provided by Lord Justice Millett in *Credit Lyonnais v Burch*.[62] *Burch* was decided as an undue influence case, since unconscionability was not pleaded by Ms. Burch at first instance. Yet, both Lord Justices Millett and Nourse made clear that Ms. Burch had a direct right against the bank to set aside her transaction as an unconscionable bargain.[63] Additionally, Chen-Wishart has argued that the Court of Appeal's decision is best understood as a straightforward application of the "ancient jurisdiction to relieve against unconscionable transactions".[64] As mentioned above, Millett LJ's approach to unconscionability was reaffirmed in *Portman v Dusangh*. *Burch* can, thus, be relied upon to clarify the modern nature of English law's objective knowledge test.

The facts of *Burch* demonstrate the importance, in Lord Justice Nourse's words, of a doctrine of unconscionability that is "capable of adaptation to different transactions entered into in changing circumstances".[65] Ms. Burch, a junior employee, risked her home, personal liability, and bankruptcy in providing an unlimited guarantee for a temporary increase in the overdraft facility available to her employer. Her case, to use the traditional phrasing, shocked the conscience of the court.[66] In assessing whether Ms. Burch had a direct right against the bank to set aside the transaction, Lord Justice Millett closely compared unconscionability with the doctrine of undue influence, arguing that in both vitiating factors the defendant's notice of the complainant's circumstances may be either actual or constructive. The court may, Millett LJ argued, infer the presence of impropriety from "the terms of the transaction itself" in evaluating the availability of relief under both undue influence and unconscionability.[67] Millett LJ quoted with approval from the 1922 decision in *Brusewitz v Brown*, suggesting that constructive notice is insufficient for relief when a bargain's unfairness is limited to "inadequate consideration", but that the court may "in a proper case" infer the presence of unconscionable conduct from contract terms alone.[68]

The Court of Appeal concluded that Ms Burch's case was an example of a bargain so unfair that constructive notice would indeed suffice to give rise to a direct right against the bank to set aside the transaction. Her suretyship, under which she risked all for virtually no benefit, was a bargain that no competent solicitor could defend.[69] The *reasonable bank,* in Millett LJ's view, would have understood that Ms. Burch's transaction was unconscionable without the need for further investigation.[70]

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[62] [1997] 1 All E.R. 144
[63] Ibid., 151, 153.
[64] Chen-Wishart, 'The O'Brien Principle and Substantive Unfairness', 60.
[65] [1997] 1 All E.R. 144, 151.
[66] Ibid., 152.
[67] Ibid., 153.
[68] Ibid., 153; and note [1922] 42 NZLR 1106 at 1110.
[69] Ibid., 157.
[70] Ibid., 152: "*The transaction gives rise to grave suspicion. It cries aloud for an explanation…*""

Millet LJ's dicta suggest that constructive notice of the complainant's vulnerability will not be sufficient for a finding of unconscionability when a bargain's substantive unfairness is "not very excessive".[71] Where a bargain's unfairness (***Element I***) is limited to, for example, inadequate consideration, English courts demand that the complainant's bargaining impairment (***Element II***) would have been apparent in the enforcer's position *without* the need for further inquiry. Yet where the terms of a transaction, like Ms. Burch's, are so unfair as to raise a presumption of unconscionability, *constructive notice* of ***Element II*** may suffice.[72]

III: Conclusion

Recent judicial ambiguity on the nature of English law's knowledge requirement has undermined unconscionability's doctrinal clarity.[73] Yet a careful reading of English authorities demonstrates that this vitiating factor's modern requirements are capable of being defined clearly and applied fairly. Recent Court of Appeal decisions reveal a coherent approach to the application of the objective knowledge test. Examining *Burch* alongside *Jones v Morgan* and *Dusangh*, it becomes clear that English courts demand, at minimum, that the bargain's unconscionability would have been apparent to the reasonable person in the enforcer's position. In limited situations – when a transaction's terms are so unfair as to raise a presumption of unconscionability – *constructive knowledge* of the complainant's bargaining impairment may fulfil this test.

By applying this measured, objective test, in which relief based on constructive knowledge is limited to exceptionally unfair bargains, English courts have avoided unconscionability transforming into a "general power" to set aside bargains.[74] The narrow circumstances in which constructive knowledge suffices for relief reflect a legitimate concern in English law, expressed by Lord Hoffmann in *Union Eagle v Golden Achievement*, that unconscionability should not become an "undefined discretion" used by courts to refuse the enforcement of contracts.[75]

Nevertheless, this essay's analysis of modern case law demonstrates clear judicial support for the use of a flexible, *objective* test to assess the stronger party's mental state. The English unconscionable bargain thus remains capable of "adaptation to different transactions entered into in changing circumstances".[76]

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[71] Enonchong, 310.
[72] Chen-Wishart and Williams, 155.
[73] Bamforth, 548.
[74] Ibid., 555.
[75] [1997] AC 514 (UKPC) at 519.
[76] *Burch* [1997] 1 All E.R. 144, 151.

Diligence for Victory: Case note on *R (on the application of Day) (Appellant) v Shropshire Council (Respondent)* [2023] UKSC 8

Natalia Catechis

On 1 March 2023 the Supreme Court held unanimously that a 'mistaken' grant of planning permission by Shropshire Council was to be quashed.[1]

The issue was summarised by Lady Rose in the Supreme Court:

> *The question raised by this appeal is what happens to the public's rights to use the land when the local authority disposes of land which is subject to a statutory trust but where it fails to comply with the consultation requirements laid down by section 123(2A) and (2B).*[2]

Background

Legal Framework

The Public Health Act ('PHA') 1875 and the OSA 1906 enable local authorities to acquire and provide pleasure grounds and open spaces, respectively.[3] Where a local authority exercises such powers under either Act, the land becomes subject to a statutory trust: the local authority holds the land for the purpose of enjoyment by the public.[4]

The LGA 1972 imposes procedural requirements on local authorities seeking to dispose of land subject to such a statutory trust. Under section 123(2A), the local authority must provide notice of its intention to dispose of the land by advertising that intention in the local area for two consecutive weeks. The local authority must also consider any objections to the intended disposal. Where the local authority has completed these steps and disposed of the land, section 123(2B) provides that the land will be free from the statutory trust.

Purchasers of land subject to statutory trust are protected by the 1972 Act. Under section 128(2)(a), the disposal will not be invalid on the basis of non-compliance by the local authority with any requirements of advertisement or consideration of objections. Further, section 128(2)(b) relieves the purchaser of any need to inquire into the compliance by the local authority with any such requirements.

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[1] *R (on the application of Day) (Appellant) v Shropshire Council (Respondent)* [2023] UKSC 8 [115]
[2] ibid [4]
[3] Public Health Act (PHA) 1875, s 164; Open Spaces Act (OSA) 1906, ss 9 and 10
[4] OSA 1906, s 10; *R (Friends of Finsbury Park) v Haringey London Borough Council* [2017] EWCA Civ 1831 [16]

Where an application for planning permission is made to a local authority, it must have regard to the factors listed at section 70(2) of the Town and Country Planning Act ('TCPA') 1990 in making its decision. One such factor is 'any other material considerations' (section 70(2)(c)).

Facts

The land in the present case forms part of the Greenfields Recreation Ground in Shrewsbury, the county town of Shropshire. It was purchased in 1926 by the municipal corporation of Shrewsbury, after a petition by local residents for a safe area where local children could play. Part of the land provided allotments during the Dig for Victory campaign in 1942, before it was used as a tree nursery until around 2000. Since then, the land has been accessible to, and accessed by, the public.

In 2010 Shrewsbury Town Council acquired the land. It sold the land to CSE, a private development company, in 2017. Prior to the sale Shrewsbury Town Council did not ascertain whether the land was subject to a statutory trust. As a result, it did not comply with the advertising or consideration of objections requirements at section 123(2A) LGA 1972.

The following year, Shropshire Council granted planning permission to CSE for a residential development. This grant was opposed by a number of local residents, including the Appellant, Dr Day. Having researched its history, Dr Day believed the land was subject to a statutory trust under either the PHA 1875 or the OSA 1906. He brought judicial review proceedings to challenge the grant of planning permission.

Legal Proceedings

<u>The Planning Court</u>

It was undisputed that Shrewsbury Town Council did not comply with the advertising and consideration of objections requirements at section 123(2A) LGA 1972.

Dr Day asserted that Shropshire Council failed to 'ask itself the right questions to establish the Site's history and status' and to 'take account of material considerations, including the existence of the statutory trust'.[5]

Lang J cited *R (CPRE Kent) v Dover District Council* [2017] UKSC 79: 'a local planning authority is under a legal duty to ask itself the right questions, acquaint itself with the relevant information, and consider it'.[6] Shropshire Council had recognised that the land was 'potentially' subject to a statutory trust for the benefit of the public before opining that it was

[5] *R (on the application of Day) v Shropshire Council* [2019] EWHC 3539 (Admin) [36]
[6] ibid [49]

not.[7] Lang J was unpersuaded by the suggestion that an expectation of further investigation was not reasonable. Shropshire Council had not taken reasonable steps to ascertain the land's history and legal status.

Dr Day submitted that the statutory trust was a material factor within the meaning of section 70(2)(c) TCPA 1990 to which Shropshire Council ought to, but did not, have regard in deciding whether to grant planning permission. Lang J cited the Court of Appeal's definition in *R (Kides) v South Cambridgeshire District Council* [2003] P & CR 19: 'a consideration is 'material' … if it is relevant to the question whether the application should be granted or refused'.[8] Whether the land in the present case was subject to a trust for the purpose of enjoyment by the public was, Lang J resolved, 'plainly a material consideration in deciding whether to grant planning permission'.[9] The oversight by Shropshire Council was a failure to have regard to a material consideration.

While he accepted that the sale to CSE was valid, Dr Day submitted that, under section 123(2B) LGA 1972, the land 'remained subject to the statutory trust and could not be developed'.[10] Shropshire Council asserted that the land 'had never been held under a statutory trust for local residents pursuant to the OSA 1906 and/or the PHA 1875'.[11] It contended that, 'even if such a statutory trust once existed, it ceased to have effect once [Shrewsbury] Town Council sold the Site to [CSE]'.[12] Lang J did not decide whether the statutory trust was extinguished on the sale to CSE; read with section 128(2) LGA 1972, any subsisting public rights could not be enforced against CSE, whether the trust survived the sale or not.[13] Lang J emphasised that to position CSE as the new trustee of the land would be 'against its wishes and prevent [CSE] from pursuing the purpose for which it purchased the [land], namely, to develop it for housing'.[14]

The Court of Appeal

When the case reached the Court of Appeal, four matters were agreed: the land was subject to a statutory trust for the purpose of public recreation in the hands of Shrewsbury Town Council; CSE was not put on notice of the possibility of such a trust; Shrewsbury Town Council had acted unlawfully by its non-compliance with section 123(2A) LGA 1971; and, despite these matters, the sale of the land to CSE was valid.[15]

[7] ibid [53]
[8] ibid [51]
[9] ibid [52]
[10] ibid [37]
[11] ibid [38]
[12] ibid [38]
[13] ibid [116]
[14] ibid [113]
[15] *R (on the application of Day) v Shropshire Council* [2020] EWCA Civ 1751 [9]

Dr Day submitted that the statutory trust had survived the sale to CSE; and, therefore, Shropshire Council erred in not having regard to it as a material consideration.

Dr Day reiterated that, without compliance with section 123(2A), the trust could not have been freed under section 123(2B). Shropshire Council asserted that, as section 10 OSA 1906 imposes trust obligations on local authorities, those obligations cease to exist where the land is in the hands of a third party, particularly read with section 128(2)(a). The Court of Appeal accepted neither argument. As section 128(2)(b) is 'a classic formula for setting at nought any argument based on constructive notice',[16] the Court of Appeal concluded that section 128(2)(b) allows land sold without compliance with section 123(2A) to be free from a statutory trust unless the buyer had 'actual knowledge that the requirements have not been met'.[17] As CSE had no such knowledge, the statutory trust was extinguished on the sale of the land.

The Court of Appeal held that, as the statutory trust over the land was extinguished upon the sale of the land to CSE, Shropshire Council did not err in not having regard to the trust as a material consideration.[18]

The appeal was dismissed by Lord Justice Richards, Lord Justice Hickinbottom and Lady Justice Andrews.[19]

The Supreme Court

The judgment of the Supreme Court was delivered by Lady Rose, with whom Lord Reed, Lord Kitchin, Lord Hamblen and Lord Stephens agreed.

There were two primary issues before the Supreme Court: whether land held by a local authority on a statutory trust for public recreation continues to be subject to that trust upon the sale of that land; and whether the existence of a statutory trust and public recreation rights are material considerations within the meaning of section 70(2)(c) TCPA 1990.

Whether land held by a local authority on a statutory trust for public recreation continues to be subject to that trust upon the sale of that land

The Supreme Court described the 'principal question' as whether the Court of Appeal was correct to hold that land subject to a statutory trust can be freed from that trust despite non-compliance with section 123(2A) unless the buyer had 'actual knowledge' of the existence of the trust.[20]

[16] ibid [45]
[17] ibid [45]
[18] ibid [69]
[19] ibid [73]
[20] *R (on the application of Day) (Appellant) v Shropshire Council (Respondent)* [2023] UKSC 8 [31]

Their Lordships and Ladyship found that 'the simple transfer of the land subject to the statutory trust into private ownership is not sufficient to extinguish the trusts'.[21] If that were the case, sections 123(2B) and section 128(2)(b) LGA 1972 would effectively be redundant: 'the restrictions and conditions that have always attached to the sale of statutory trust land would be very easily circumvented'.[22] Further, the Supreme Court accepted a parallel with public rights in village and town greens and over public highways, in that those rights are not extinguished upon the transfer of control of the land to a private company: 'there seems … no reason to suppose that the public's rights under the statutory trusts should be so much more precarious than these other public rights'.[23]

The historical development of law governing the powers of local authorities over land demonstrates a consistent presence of 'special conditions or restrictions', and 'statutory trust land has generally been treated as different from other land, so that wide powers applicable to disposals of all land held are not regarded as overriding the public's rights to enjoy recreation land'.[24] Therefore, the Supreme Court held that 'section 128(2) properly construed does not operate to extinguish the rights enjoyed by the public' under the PHA 1875 or the OSA 1906: 'those rights are only extinguished if the local authority complies with the bespoke procedure set out in section 123(2A) and (2B)'.[25] Unlike the courts before it, the Supreme Court held that the trust survived the sale of the land to CSE and, therefore, the public rights under it continued.

Whether the existence of a statutory trust and public recreation rights are material considerations within the meaning of section 70(2)(c) TCPA 1990

It followed the Supreme Court's findings on the first issue that 'the continued existence of the statutory trust binding the land would clearly have been an important consideration for Shropshire Council when considering CSE's planning application'.[26]

Conclusion

The appeal was allowed and the grant of planning permission was to be quashed. The Supreme Court acknowledged the resulting 'messy situation' from the point of view of CSE, who purchased the land to develop it.[27] However, it firmly concluded, 'that is a consequence of [Shrewsbury Town Council]'s acknowledged failure to do the investigatory work that Dr Day

[21] ibid [57]
[22] ibid [57]
[23] ibid [58]
[24] ibid [92]
[25] ibid [91]
[26] ibid [114]
[27] ibid [116]

did to establish the status of the land and hence the absence of any opportunity for Dr Day … to object to the sale of the land before it was completed'.[28]

Significance

Public Authorities

The Supreme Court judgment offers guidance to local authorities on dealing with, and disposing of, land enjoyed by the public.

First and foremost, local authorities must not underestimate the vitality of due diligence prior to the sale of land. The Supreme Court encouraged local authorities to 'take stock of how they acquired and now hold the pleasure grounds, public walks and open spaces that they make available to the public to enjoy'.[29] A public interest report issued to Shrewsbury Town Council noted that it ought to record steps taken; a research trail could assist a local authority to assert that steps taken were sufficient for the principle in the aforementioned *Dover District Council*. The report urged it to 'put robust procedures in place to ensure that an oversight such as [the one in the present case] is not permitted to recur'.[30] As the report recommended to Shrewsbury Town Council, local authorities 'should consider whether [they have] the legal power to proceed with any future disposals and … formally document the powers on which it has relied when making any such decisions'.[31]

Second, local authorities can 'take stock' of the historical and legal context of such land through effective record management; such findings provide a strong foundation to inform future decisions. This would reflect the apparent assumption by legislators, as observed by the Supreme Court, 'that local authorities keep records as to the basis on which, and the purposes for which, they hold the different parcels of land in their possession'.[32]

Finally, if in doubt, a local authority can protect the buyer of land enjoyed by the public through compliance with the advertising and consideration of objections requirements at section 123(2A) LGA 1972. As the Supreme Court highlighted, these requirements 'are not of themselves onerous; where the local authority knows the status of the land in its control there should be no difficulty in complying with the requirements'.[33] Although these steps may delay the sale process, it is no doubt preferable to a predicament such as the one in the present case.

[28] ibid [116]
[29] ibid [118]
[30] ibid [117]
[31] ibid [117]
[32] ibid [117]
[33] ibid [111]

Purchasers

Like public authorities, purchasers should be duly diligent prior to purchasing land from a local authority. The doctrine of caveat emptor, or 'buyer beware', places an onus on the purchaser to make inquiries before buying land. The present case emphasises the centrality of this principle when purchasing land from a local authority. This is particularly fitting where the land is an open space, as there is no definitive register of such spaces. The nature of such a transaction differs from private purchases of land: the seller may be under duties to the public concerning the land and its use. To ensure the land is freed from those duties and public rights, a buyer would do well to document the steps to ascertain the status of the land and any knowledge of compliance with section 123 by the local authority. Buyers cannot rely on public authorities' due diligence and compliance with section 123, or lack thereof.

The Supreme Court emphasised that a public trust 'is not a trust which has the same incidents of a private trust'.[34] It rejected the suggestion that a statutory trust could be 'overreached under, pursuant to, or at least by analogy with' section 2(1) Law of Property Act ('LPA') 1925. If this were possible, CSE could have purchased the land 'as a purchaser in good faith for valuable consideration' such that the trust property became the proceeds of the sale of the land, and CSE held the land free from the trust.[35] The Supreme Court said that 'whether it is ever appropriate to fill a gap in these statutes by importing concepts from private trust law seems … doubtful'.[36] It concluded that 'it is clear that the generally applicable provision in section 128(2)(b) can not override … statutory trusts'.[37] Therefore, 'a purchaser would be wrong to think that buying land which appears to be an open space from a local authority is bound to be trouble-free because of section 128(2)'.[38]

Public

The Supreme Court concluded:

> *The elaborate provisions of section 123 were clearly designed to secure that members of the public should have ample opportunity to learn what was proposed and the right to contend that the statutory trust land should not be sold. It cannot be right to construe section 128(2)(b) as meaning that Parliament provided a few sections later in the same Act for the extinguishment of the trust without any notice to the public and without any member of the public having the right to object as the automatic result of a sale by the local authority.*[39]

The present case affirms the strength of public rights over land held for the purpose of public enjoyment. The interpretation of section 128 as insufficient to allow circumvention of section

[34] ibid [50]
[35] ibid [51]
[36] ibid [52]
[37] ibid [103]
[38] ibid [104]
[39] ibid [110]

123, combined with the rejection of any parallel with section 2 LPA 1925, demonstrates the protection afforded to a parcel of land, and the rights of local residents, by a statutory trust for public enjoyment. As Dr Day observed, 'This clarification of the planning law applying to the sale and development of public land is a warning to local authorities and a victory for community groups across the country'.[40]

[40] Landmark Chambers, 'Appeal allowed by the Supreme Court in R (Day) v Shropshire' (*Landmark Chambers*, 1 March 2023) <www.landmarkchambers.co.uk/news-and-cases/appeal-allowed-by-the-supreme-court-in-r-day-v-shropshire> accessed 26 March 2024

Whether the law of mortgages is adequately protecting the rights of the mortgagor.

Haashim Duffaydar

The simple idea of a mortgage is that it is a security for a loan. The reasons for which mortgages are taken out have changed over the years. However, the law of mortgages (LOM) has obstinately retained concepts which operate 'in sharp contrast to the ever-changing world of finance.'[1] This paper reveals that despite the intervention of equity and Parliament in the LOM, it has ultimately failed to adequately protect the rights of the mortgagor (borrower). Although allowing the mortgagor an unfettered right to redeem in a few cases, the LOM seeks predominantly to protect the security of the mortgagee (lender). Parliamentary reform should thus be considered.

The equitable right to redeem and the 'no clogs or fetters' rule

The equity of redemption refers to a mortgagor's right to pay off the debt and take back the property free of the mortgage burden 'in the condition in which he parted with it'.[2] Even after the date of contractual redemption, there is an equitable right to redeem provided that all sums owing are paid. The courts will protect this right to the extent that they may render as void particular terms within the mortgage contract. Terms in the mortgage that prevent the equity of redemption are referred to as 'clogs and fetters.' Equity's insistence that there be no 'clogs and fetters' on the mortgagor's equitable right to redeem has accordingly operated in various ways.

Where a clause attempts to remove the right to redeem in its entirety such that, in effect, the mortgage is irredeemable, the term will be void.[3] Equally, a clause which restricts the mortgagor or the time for redemption will be struck out.[4] Clauses which attempt to postpone the right to redeem are also likely to be void in circumstances where the result is to render redemption meaningless or illusory.[5] As per Lord MacNaghten, 'equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption.'[6] Nevertheless, a postponement will be valid where it has been freely agreed, negotiated between the parties and is not unconscionable. The test for assessing unconscionability, is to ask whether the term was 'imposed in a morally reprehensible manner'

[1] Lisa Whitehouse, 'Longitudinal Analysis of the Mortgage Repossession Process 1995–2010: Stability, Regulation and Reform' in S Bright (eds), *Modern Studies in Property Law* (Hart Publishing 2011) 151.

[2] *Noakes v Rice* [1902] AC 24 (HL) 33 (Lord Davey).

[3] *Jones v Morgan* [2001] EWCA Civ 995, [2001] 6 WLUK 609.

[4] *Re Sir Thomas Spencer Wells* [1933] Ch 29 (CA).

[5] *Fairclough v Swan Brewery* [1912] AC 565 (PC).

[6] ibid 570.

affecting the mortgagee's conscience.[7] It will be difficult to argue that the terms were oppressive or unconscionable if the mortgagor received independent legal advice prior to the mortgage agreement.[8] In *Knightsbridge Estates Trust*, the court held that a contractual postponement of the equitable right to redeem was valid.[9] The borrower was not allowed to repay earlier due to the commercial context, the equal bargaining power of the parties, and their access to legal advice at the time of the agreement.[10] The lack of an absolute rule by equity in the LOM lead to courts being reluctant to encroach on a parties' freedom to contract. Subsequently, lenders seek to further limit the right of the mortgagor to early redemption by applying contractual 'redemption charges.' Provided they have been fully explained to the mortgagor prior to the grant of the mortgage, these will be valid.

In conflict with the above is a stipulation that the mortgagee has a right to purchase the mortgaged property once the term of the mortgage ends. In *Samuel Jarrah*, the House of Lords reluctantly held an option to purchase was void.[11] What was seen as a 'perfectly fair bargain' was void as it was linked to the mortgage itself.[12] Lord Macnaghten regarded this rule as being 'founded on sentiment rather than principle.'[13] Contemporarily, Sir Frederick Pollock unenthusiastically described the doctrine of clogging as an 'anachronism' which 'might with advantage be jettisoned'.[14] There seems to be judicial unease with this branch of equitable intervention. However, where the option to purchase is contained in a separate agreement, the doctrine may not apply.[15] Still, identifying the true substance and reality of an agreement may not always be an easy task. This was reflected in *Jones*, where an option to purchase was found as part of the same transaction.[16] Lord Philips made his feelings clear in that 'the doctrine of a clog on the equity of redemption is… an appendix to our law which no longer serves a useful purpose and would be better excised."[17] The doctrine has troubled an otherwise unobjectionable commercial contract. Thompson goes on to say that the rule 'was devised to deal with completely different socio-economic circumstances.'[18] Whilst it has adequately protected the rights of the mortgagor during the nineteenth and early twentieth century, it now fails to meet the changing conditions of modern life. The result is an upset on commercial contracts.

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[7] *Multiservice Bookbinding v Marden* [1979] Ch 84 (ChD).

[8] *Jones* (n 3).

[9] *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441 (HC).

[10] ibid.

[11] *Samuel v Jarrah Timber* [1904] AC 323 (HL).

[12] ibid 325 (Lord Halsbury LC).

[13] ibid 326.

[14] Frederick Pollock, 'English Law Reporting' (1903) 19 LQR 359.

[15] *Reeve v Lisle* [1902] AC 461 (HL).

[16] *Jones* (n 3).

[17] ibid [86].

[18] MP Thompson, 'Do We Really Need Clogs?' [2001] Conv 502, 515.

The rule against terms operating in restraint of trade seeks to achieve a balance between the freedom of contract and the wider public benefit of ensuring that trade is not hampered. 'Solus ties' or 'collateral advantages' are ancillary benefits under the mortgage agreement whereby the mortgagor has an obligation to provide favourable treatment towards a mortgagee's interest.[19] In *Kreglinger*, the House of Lords emphasized that freedom of contract and equality of bargaining position between the parties would be relevant factors in determining whether a collateral advantage in a mortgage can continue after it has been redeemed.[20] The rule against clogs will only apply if the collateral advantage is genuinely 'collateral' to the mortgage. In contrast to the early case of *Jennings*, it was affirmed that 'a man shall not have interest for his money on a mortgage, and a collateral advantage besides for the loan of it.'[21] This principal seems to have been long lost and so puts in question the present usefulness of the doctrine in protecting the rights of the mortgagor.

The doctrine that there should be no clog on the equity of redemption seems to have outlived its usefulness. The Law Commission shared an agreeable view in that there 'is some uncertainty over precisely which terms are not likely to be regarded as falling foul of the principle, and that, because it evolved over the nineteenth and early twentieth centuries in a very different commercial environment, the detailed rules are not always appropriate to modern conditions.'[22] Watt would go even further to argue that the time has come to abandon the equity of redemption altogether.[23] The form of a mortgage was completely different to what it is now, and the courts 'have failed to acknowledge that land subject to a registered charge is not 'redeemed' as was land conveyed under the classic form of mortgage.'[24] However, without equity's jurisdiction in the LOM, the rights of the mortgagor would not be adequately protected. Thompson's call for parliamentary reform should thus be preferred.[25] This would be in accordance with the Law Commission's recommendation of replacing the principle of 'clogs and fetters' with a 'single new statutory jurisdiction' applicable to all mortgages.[26] The court would have a discretion to alter any term in a mortgage contract that would result in the mortgagee enjoying rights 'substantially greater than or different from those necessary to make the property available as security' or that would otherwise be unconscionable.[27] Not only would this place renewed emphasis on the fundamental principle of equity in the LOM, but also provide adequate protection to the rights of the mortgagor.

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[19] *Noakes* (n 2).

[20] *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 (HL).

[21] *Jennings v Ward* [1705] 2 Vern 520 (CA).

[22] Law Commission, *Transfer of land- Land mortgages* (Law Com No 204, 1991) para 8.2.

[23] Gary Watt, 'The Lie of the Land: Mortgage Law as Legal Fiction' in JW Harris (eds), *Property Problems: From Genes to Pension Funds* (Kluwer 1997).

[24] ibid.

[25] Thompson (n 18) 515.

[26] Law Commission (n 22) 8.4.

[27] ibid.

Possession and sale

The mortgagor has the power to claim possession of the mortgaged property provided that no claim to possession has been made by the mortgagee.[28] Equally as important, is a right of the mortgagor to sell their property even when it is not desired by the mortgagee.[29] Consequently, this right can be asserted in cases of negative equity.[30] This is of high significance, particularly if the mortgagor fears spiralling debt which they will be unable to pay. The courts seem to recognize that the principle of ownership in the modern LOM is with the mortgagor. What the lender essentially has, is a security. The unfettered discretion enjoyed by the court to order sale under this provision might be seen as undermining the value of the mortgagee's security or the freedom of the parties to contract.[31] However, the contrary can be said in relation to the mortgagee's right of possession.

The right to possess the mortgaged property is one of the key powers of the mortgagee; this is normally with a view of sale. In *Quennell*, Lord Denning remarked how equity has an intervening role to play in restricting the exercise of an otherwise broad legal power vested in the mortgagee.[32] The only legitimate reason for exercising the mortgagee's right of possession, is to protect or realise the security for the debt.[33] Hence, in the event of default, the mortgagee also has a power of sale.[34] Additionally, the courts have asserted a right of the mortgagor to obtain relief in the form of a postponement or adjournment of possession proceedings.[35] This right has been substantially extended by section 36 of the Administration of Justice Act 1970 (AJA 1970) where it appears that the mortgagor will, within a reasonable period, be able to pay sums due under the mortgage.[36] Yet, this only applies where the property consists of or includes a dwelling house.[37] Even if the mortgage agreement stated that in the event of default, the totality of the debt was due,[38] the mortgagor would not be expected to pay the capital sum owed.[39] It would seem that Parliament wants to make sure people can retain their homes, thereby adequately protecting the rights of the mortgagor. Moreover, given the remaining term of the mortgage should be the starting point, several relevant considerations were set out to assist courts in deciding what is a 'reasonable period' to allow for repayment.[40] The courts would

[28] Law of Property Act 1925 (LPA 1925) s 98.

[29] LPA 1925, s 91.

[30] *Palk and Another v Mortgage Services Funding Plc* [1993] Ch 330 (CA).

[31] *National Westminster Bank Plc v Hunter* [2011] EWHC 3170, [2011] 11 WLUK 662.

[32] *Quennell v Maltby and Another* [1979] 1 WLR 318 (QBD) 323.

[33] ibid.

[34] LPA 1925, s 101.

[35] *Birmingham Citizens Permanent Building Society v Caunt and Another* [1962] Ch 883 (ChD).

[36] Administration of Justice Act 1970 (AJA 1970) s 36.

[37] ibid.

[38] *Halifax Building Society v Clark and Another* [1973] Ch 307 (ChD).

[39] Administration of Justice Act 1973, s 8.

[40] *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 WLR 343 (CA).

investigate a range of factors regarding the personal and financial circumstances of the mortgagor to see if repayment is likely.[41]

However, Whitehouse argues that the common law principle is rarely followed in practice.[42] She notes that 'district judges do not have or are unwilling to exercise the power to intervene in the contractual relationship between the mortgagor and mortgagee.'[43] The courts struggle to budget beyond the next few years. Consequently, orders for possession are made based upon a budgeting exercise that is not compliant with the common law and so they fail to adequately protect the rights of the mortgagor who are placed in an imbalanced bargaining position. Furthermore, the mortgagee has the ultimate right to go into possession of the property without a court order.[44] The LOM recognises the right to possess 'before the ink is dry on the mortgage'.[45] The court will thus be incapable of exercising its powers under section 36 of the AJA 1970.[46] It would seem that that the question as to when and how to seek possession rests ultimately with the mortgagee. They can exercise discretion in the 'strong sense' compared to district judges, who just have section 36 of the AJA 1970 at their disposal,[47] in the 'weak sense'.[48] The LOM has therefore failed to effectively control the behaviour of some mortgagees leading, on occasion, to the inconsistent and inequitable treatment of mortgagors.

Whitehouse rightly notes, that in order 'to enhance due process and to ensure consistent and equitable treatment for mortgagors, a more prescriptive and systematic approach is required.'[49] She refers to the Home Owner and Debtor Protection (Scotland) Act 2010.[50] There are legal and cost consequences for lenders who fail to follow a pre-action protocol in respect to moving in and taking possession of the property. The law in Scotland is requiring lenders to act in a more responsible and careful manner vis-a-vis a mortgagor who is in default by making possession conditional on the award of an order from the court. The UK Parliament should therefore seek to pull upon these applications towards improving borrower representation in actions for possession.

Conclusion

This paper has shown that it is through the preservation of obsolete principals and high powers vested into the mortgagee, that the LOM is unsuccessful in adequately protecting the rights of

[41] ibid.

[42] Whitehouse (n 1).

[43] ibid 164.

[44] *Ropaigealach v Barclays Bank Plc* [2000] QB 263 (CA).

[45] *Four Maids Ltd v Dudley Marshall Properties Ltd* [1957] Ch 317 (ChD) 320.

[46] AJA 1970, s 36.

[47] ibid.

[48] Ronald Dworkin, *Taking Rights Seriously* (first published 1977, Duckworth 1991) 31.

[49] Whitehouse (n 1) 169.

[50] Home Owner and Debtor Protection Act 2010 (asp 6).

the mortgagor. It, therefore, needs to be reformed to make it accord with the economic realities of the twenty-first century.

'The law of negligence-To be or not to be-that is the question'

Xenia Kalatha

Introduction

The law of negligence provides a 'private law forum for the airing of grievances…and the redress of wrongs'.[1] It serves as a 'regulatory technique'[2] for the conduct of individuals, companies and public bodies. Its regulatory function, however, in the context of individuals is undermined. When justice is served between the tortfeasor and the injured party, negligence regulates behaviour by deeming the conduct unreasonable whilst also deterring the subsequent commission of torts. This argument will be analysed by mainly criticising Stevens' interpretation of the law.[3] In the context of companies, the law of negligence is undermined by the introduction of regulations or 'external norms'[4] by other regulatory bodies. In terms of public bodies, negligence's regulatory competence appears to be undermined by the Human Rights Act 1998 (HRA 1998).[5] Nevertheless, it is the court itself that undermines negligence's regulatory competence and enables its further subordination by the HRA 1998.[6] Nonetheless, negligence still serves an important function and the world would be a far more dangerous place without it. If the law of negligence was abolished, Parliament would have to remedy the vacuum and Parliament is not structurally equipped to assess and constrain danger. Dangerousness is interpreted by adopting Epstein's wider definition to include both the degree and probability of harm.[7] This is because the analysis will only be constrained to negligence and a restriction of the assessment only to 'potential of harm'[8] will not encompass negligence's causation requirement.

Individuals

Negligence's regulatory competence is underestimated when it comes to the effect it has on individual behaviour. The court, in acknowledging 'residual suffering'[9] and reasserting the 'right to remedy',[10] recognises antisocial behaviour and encourages greater care by deeming conduct unreasonable.[11] By imposing liability, occasions are provided to judges 'to regulate

[1] Douglas A Kysar, 'The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism' (2018) 9 European Journal of Risk Regulation 48,49
[2] Peter Cane, 'Tort Law as Regulation' (2002) 31 Common Law World Review 305,310
[3] Robert Stevens, *Torts and Rights* (OUP 2007) 320-323
[4] Maria Lee, 'The Sources and Challenges of Norm Generation in Tort Law' (2018) 9 European Journal of Risk Regulation 34,43
[5] Human Rights Act 1998(HRA 1998)
[6] Human Rights Act 1998(HRA 1998)
[7] Robert C Epstein, 'A Theory of Strict Liability' (1973) 2 Journal of Legal Studies 151,185
[8] ibid 185.
[9] Kysar(n 1) 50.
[10] ibid 54.
[11] John CP Goldberg, 'Twentieth Century Tort Theory' (2002) 91 Georgetown Law Journal 513,527

behaviour on a forward-looking basis"[12] and to set a 'discrete set of policy objectives'.[13] These policy objectives establish the bounds of personal responsibility[14] but simultaneously regulate behaviour by deterring wrongdoing.[15] By knowing that there is a possibility of liability, individuals seek to exercise greater care because, as recognised by Cane, 'tort liability is, from the defendant's perspective, a burden'.[16]

Stevens argues that deterrence is limited because the shield of insurance does not enable the defendant to directly account for the wrongdoing.[17] Regardless of the justice served between the parties, the defendant by not directly paying does not account for the wrongdoing. Stevens however fails to distinguish between individuals and companies. Consequently, he operates under the assumption that individuals are insured for all negligent conduct and do not personally account for any wrongdoing.[18] Stevens also argues that that deterrence is limited since liability arises because of 'a brief moment of inattention'[19] and it is beyond the competence of human nature to control and deter via the law of negligence.[20] A generic assertion is made that all torts are accidental and incapable of being prevented because of human nature.[21] This assertion underestimates the law of negligence. Although driving accidents may occur, for example, because of a moment of inattention,[22] they can also occur because of driving at a high speed.[23] Thus, some aspects of human behaviour can be controlled and deterred by knowing the potential exposure to liability. This is particularly important because negligence regulates individual behaviour[24] that rests between innocence and criminal liability.[25] Hence, since individual behaviour can be regulated, greater care is encouraged to avoid the burden of individual responsibility.[26]

Companies

Contrary to individuals, negligence in the context of companies is undermined because of regulations introduced by Parliaments that appear to set the expected standards. However, as Lee established, there is no hierarchy between other forms of regulations and the common

[12] ibid 524.
[13] ibid 525.
[14] Cane(n 2) 403.
[15] Gary T Schwartz, 'Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice' (1997) 75 Texas Law Review 1801,1803
[16] Cane(n 2) 404.
[17] Stevens(n 3) 322.
[18] James Fleming, 'Accident Liability Reconsidered: The impact of Liability insurance' (1948) 57 Yale Law Journal 549,564
[19] Stevens(n 3) 322.
[20] ibid 322.
[21] Epstein(n 6) 180.
[22] *Nettleship v Weston* [1971] 2 QB 691 (CA)
[23] *Phethean-Hubble v Coles* [2012] EWCA Civ 349
[24] Cane(n 2) 305.
[25] Kysar(n 1) 56.
[26] ibid 58.

law.[27] In assessing what is reasonable, the court balances fault and regulatory standards to establish the expected standard.[28] The Asbestos litigation[29] is an example where the court went beyond the 'notoriously inadequate'[30] standards and introduced a higher level of regulation. In Jeromson[31] the 'prudent employer' [32] would have taken greater precautions and therefore the employers were found liable even before the discovery of mesothelioma.[33] Thus, negligence should not be undermined, because in balancing what is to be reasonably expected, the court is not restricted by external norms.

In the context of product liability where the strictness under the Consumer Protection Act 1987 (CPA 1987)[34] provides greater protection to consumers than negligence, the role of negligence can arguably be correctly undermined. Strictness incentivises manufacturers to take a higher level of precautions, skills and knowledge.[35] In addition, it enables consumers to go down the chain of production and sue trademark companies or importers[36] encouraging more care throughout the production process.[37] Nonetheless, the dichotomy between the strictness of the CPA 1987 and the negligence standard is more elusive.[38] In Abouzaid v Mothercare[39], the court was adamant in clarifying that reasonableness is irrelevant when assessing what the public is entitled to expect.[40] By setting the standard at what the 'public at large'[41] is entitled to expect, the court disguised an underlying negligence standard of what the reasonable person is entitled to expect.[42] Therefore, we undermine negligence if we regard it as being completely displaced by the CPA 1987. Moreover, in a post-Brexit era, where there is a possibility of the CPA 1987 being repealed, it is essential to consider negligence liability separately so that the common law does not remain stagnant.[43] Thus, even in the context of the CPA 1987, negligence should not be undermined since it provides a continuing underlying layer of protection. This layer however, unlike the CPA 1987, is not confined to consumer protection for defective products. The law of negligence regulates company standards throughout the industry by balancing external norms with fault, under the guise of reasonableness. By incorporating

[27] Maria Lee, 'Safety, Regulation and Tort: Fault in Context' (2011) 74 Modern Law Review 555,572
[28] ibid 559.
[29] Lee(n 4) 47.
[30] ibid 38.
[31] *Jeromson v Shell Tankers UK Ltd* [2001] EWCA Civ 101
[32] Lee(n 4) 41.
[33] ibid 41.
[34] Consumer Protection Act 1987(CPA 1987)
[35] Cees van Dam, *European Tort Law* (2nd edn, OUP 2013) 302.
[36] CPA 1987, s2(2)(b)(c)
[37] Christopher Newdick, 'The future of negligence in product liability' (1987) 103 Law Quarterly Review 288,291
[38] van Dam(n 34) 306.
[39] *Abouzaid v Mothercare (UK) Ltd* [2000] All ER (D) 2436 (CA)
[40] ibid [44].
[41] ibid [13].
[42] van Dam(n 34) 306.
[43] *Abouzaid*(n 38) 50.

regulations, but while not being bound by potentially lower standards, negligence gains 'epistemic legitimacy'[44] which should not be undermined.

Public authorities

The position of negligence in regulating public authorities has been infiltrated by the HRA 1998. Nevertheless, even if the HRA 1998 challenges the law of negligence, the courts themselves undermine negligence's regulatory competence by the use of policy considerations as an excuse to liability. In Robinson v Chief Constable of West Yorkshire Police[45] and per du Bois,[46] public authorities are subjected to the same principles as individuals. Negligent provision of services should amount to liability where there is an assumption of responsibility.[47] However, the courts undermine the regulatory competence of negligence by using flimsy excuses of no duty of care where the deceased had dialled the police service who affirmatively responded to her request.[48] Although negligence 'safeguards people against injustices that may be inflicted by anyone',[49] the court itself undermines its regulatory competence, as by not imposing liability, public bodies are not encouraged to take more reasonable care. Consequently, the HRA 1998 appears to regulate public bodies to a greater extent because as seen in D v Commissioner of Police of the Metropolis[50] where a negligence claim fails, a claim under the HRA 1998 can succeed.[51] It appears as though, the HRA 1998 'creates new rights'[52] with different and broader objectives than negligence.[53] In not enabling negligence to expand by lifting the veil of policy and by enabling HRA 1998 claims to successfully diverge,[54] 'separate spheres of operation'[55] are created. Therefore, the introduction of the HRA 1998 heightens the undermining negligence but it is primarily the courts that undermine the regulatory competence of tort law.

A dangerous world without the law of negligence

Although weaker in the context of public authorities, negligence does not cease to be a 'risk regulation mechanism'.[56] The world would be far more dangerous without the law of negligence, because the court does not only assess the potential of risk which is inherent in all activities.[57] The court also regulates the degree of risk by examining the factual matrix of cases.

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[44] Lee(n 4) 44.
[45] *Robinson v* Chief Constable of *West Yorkshire Police* [2018] UKSC 4 [64]
[46] Francois du Bois, 'Human Rights and the Tort Liability of Public Authorities' (2011) 124 Law Quarterly Review 588,592
[47] ibid 592.
[48] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 [5]-[15]
[49] du Bois(n 45) 594.
[50] D v Commissioner of Police of the Metropolis [2018] UKSC 11
[51] ibid 136.
[52] Jenny Steele, 'Damages in tort and under the Human Rights Act: remedial or functional separation?' (2008) 67 Cambridge Law Journal 606,611
[53] *R v Secretary of State for the Home Department, ex p Greenfield* [2005] UKHL 14 [19]
[54] *D v Commissioner of the Police of the Metropolis*(n 49) 67-69.
[55] du Bois(n 45) 589.
[56] Kysar(n 1) 50.
[57] Epstein(n 6) 185.

Since negligence consists of 'doing something which a prudent and reasonable man would not do',[58] the 'malleability of [such] open ended, rhetorically fact based'[59] assessment permits risk calculation which responds accordingly to different contexts. Where in Bolton v Stone[60] the risk was so small that the reasonable man would not have taken further precautions to ensure safety,[61] the court, when it comes to drivers, requires 'excellent knowledge and abilities'.[62] The potential and degree of harm on a daily basis involved in driving, as opposed to getting hit by a cricket ball outside the Cricket Ground,[63] is so inherent that the court constructs the 'perfect person'.[64] The absence of such malleability in assessment of the factual matrix would render the world far more dangerous, because instead of relying on the flexible 'conventional bar for standard setting'[65] of the reasonable person, Parliament would have to respond to the vacuum and set the standard.

Parliament however will respond inadequately to the vacuum of the law of negligence since, when legislating, Parliament seeks to ensure that burdens and benefits are allocated appropriately in society.[66] As a matter of policy it does not seek to impose an undue burden. Negligence is, therefore, essential in regulating the dangers individuals are exposed to, because Parliament will be constrained by policy considerations. It can be argued that the CPA 1987 establishes a high standard of protection.[67] Parliament prioritized consumer safety far more than the manufacturer's interests and thus Parliament would adequately respond to a negligence vacuum. However, the CPA 1987 is not an accurate reflection of the legislature's policy. It was introduced because Parliament was bound to incorporate Directive 85/374/EEC[68] in domestic law.[69] Hence, the reduction of danger should not be attributed to Parliament. Prior to the CPA 1987, the legislature did not take the initiative to introduce strict liability to shield consumers from defective products. Greater exposure to danger was permitted because the 'optimum'[70], a balance between burdens and benefits, was preferred rather than a greater degree of danger reduction. Thus, Parliament would not adequately respond to the absence of negligence.

[58] *Blyth v Birmingham Waterworks* [1856] 11 Ex Ch 781,784-156 ER 1047,1049
[59] Lee(n 4) 49.
[60] *Bolton v Stone* [1951] 1 All ER 1078 (HL)
[61] ibid 867.
[62] van Dam(n 34) 304.
[63] *Bolton*(n 59) 851.
[64] van Dam(n 34) 304.
[65] Lee(n 4) 37.
[66] Lee(n 26) 559.
[67] *Abouzaid*(n 38).
[68] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] *OJ L 210/29*
[69] Lee(n 26) 575.
[70] ibid 577.

It can be argued that judges are 'inappropriate decision makers'.[71] Judges are inferior[72] to Parliament which represents an 'expression of collective values'.[73] These values are a reflection of what society perceives as dangerous. Even in the absence of negligence, Parliament would more appropriately guard individuals by preventing the world from becoming far more dangerous. Although this may be accurate due to the democratic nature of Parliament as argued by Lee,[74] the unwillingness of Parliament to hold the reins and substitute the common law is an indication of how dangerous the world would be without the law of negligence. This is evident by the Law Reform (Contributory Negligence) Act 1945[75] where a 'continuation of the law of tort'[76] is assumed. Parliament does not define 'fault'[77] because it is a nuanced concept with multiple perplexities.[78] The task of balancing the claimant's carelessness in relation to risk of harm[79] is left to the courts since it is the 'case law that provides the basic legal framework onto which statutes have to be fitted'.[80] Regardless of the democratic nature of Parliament, the legislature recognises the peculiarities of the law and entrusts the task on the judiciary. Therefore, the absence of negligence would render the world far more dangerous since Parliament wisely reposes the task on the judiciary.

It should be recognised that the peculiarities of negligence make the world considerably less dangerous where there is a duty of care between the parties. The absence of the law of negligence will not alter the level of dangerousness an individual is exposed to in terms of third-party intervention. This is because a third party will neither be encouraged nor discouraged to intervene by the state of the law. Lay people are unaware of the legal rules. Their choice not to intervene and reduce the danger an individual is exposed to depends on their moral sense rather than the state of the law.[81] Contrary to this, the 'good Samaritan'[82] intervenes because of his 'benevolence and charity'[83] so that a person who is already at risk will not be subjected to an even greater degree of risk of harm. Like a third party however, the presence or absence of negligence will not have an effect on the Samaritan's actions because he is driven by his morals rather than the law. The absence of negligence will neither increase the dangerousness an individual is exposed to due to negligence by a third party nor will it decrease the dangerousness by encouraging intervention of help. Nevertheless, it should be noted that when the Samaritan intervenes, the possibility of liability under tort law when he 'dials the phone or

[71] Kysar(n 1) 52.
[72] Cane(n 2) 313.
[73] Lee(n 26) 580.
[74] ibid 580.
[75] Law Reform (Contributory Negligence) Act 1945(LR(CN)A 1945)
[76] Andrew Burrows, 'The Relationship Between Common Law and Statute in the Law of Obligations' (2012) 128 Law Quarterly Review 232,234
[77] LR(CN)A 1945, s1(1)
[78] Burrows(n 75) 243.
[79] *Froom and Others v Butcher* [1976] QB 286 (CA) 292
[80] Burrows(n 75) 233.
[81] Epstein(n 6) 195.
[82] ibid 191.
[83] ibid 197.

moves the plaintiff'[84] may encourage more prudence and care so that the injured party in not left worse off.[85]

Conclusion

To conclude, negligence and its regulatory competence are underestimated. In 'embodying the principle of individual responsibility',[86] negligence regulates individuals by serving justice between the parties.[87] In addition, the possibility of liability encourages greater care since human behaviour, in certain circumstances, can be deterred.[88] Negligence is also underestimated in terms of its regulatory effect on companies. Although the CPA 1987 appears to displace the importance of negligence, its application does have an underlying consideration of negligence. Furthermore, negligence has proven, particularly in the Asbestos litigation,[89] to have a higher standard than regulations. Therefore, negligence should not be underestimated or regarded as inferior to regulations.[90] In the context of public bodies however, it is the court that undermines negligence and enables the HRA 1998 to undermine its importance. In other words, by excusing liability under the negligence standard, claims are directed under the HRA 1998 enabling the undermining of tort law. Nevertheless, the law of negligence still serves a very important function in preventing the world from becoming a far more dangerous place. The absence of negligence would shift the burden on Parliament which is ill-equipped to deal with the complex factual matrixes negligence addresses. Parliament is also constrained by policy considerations and hence when legislating a balance between burdens and benefits[91] would be sought, compromising the reduction of risk, rendering the world more dangerous. Although in the context of third-party intervention the absence of the law of negligence may not have a significant impact, negligence's presence is paramount because it provides a flexible and malleable approach to justice.

[84] ibid 194.
[85] ibid 204.
[86] Ernest J Weinrib, 'A Step forward in Factual Causation' (1975) 38 The Modern Law Review 518,518
[87] Cane(n 2) 305.
[88] Cane(n 2) 305.
[89] Lee(n 4) 47.
[90] Lee(n 26) 572.
[91] Lee(n 4) 35.

To what extent did *Pennington* effectively grant the courts licence to qualify at will the longstanding principle of equity that it will not perfect an imperfect gift?

Digna Kandrataviciute

Maitland's *Lectures on Equity* (1932) explained the rationale behind the longstanding rule that equity will not perfect an imperfect gift on the basis that there is a difference between a desire to give and a desire to create a trust over property or to absolutely part ownership with property by way of gift. Thus, equity requires gifts and trusts to be perfect before it can justify imposing their onerous obligations. Along with other formalities, they should be perfected through complete compliance with all formalities to vest title in the trustee or donor (*Milroy v Lord*).[1] This is the process of constitution and it can be done through two main routes: declaration of self as trustee or through transfer of legal or equitable title.

This essay will examine the exceptions in the case law that exist to the rule in *Milroy*.[2] First, it will examine the case law prior to *Pennington v Waine* to evaluate whether 'equity will not perfect an imperfect gift' is actually a longstanding principle, whether the early case law created reasoned exceptions to the rule and whether the courts had already granted themselves a licence 'at will' to qualify the rule, prior to *Pennington*.[3] Then, the effect of *Pennington* will be evaluated, with reference to the recent decision in *Khan v Mahmood*.[4]

Re Rose and 'all that was necessary'

The first and possible exception is the rule in *Re Rose,* where equity will perfect a transfer by imposing a constructive trust when the transferor has done everything necessary and in their power to transfer title.[5] In *Re Rose,* the transferor had completed all documentation necessary to transfer shares and delivered it to the company to which the shares related. However, the transfer was not complete because the directors of the company did not register the transfer until June, but the donor had died in April. For the purpose of estate duty, the issue was whether the transfer was completed in March, when the donor delivered the shares.

Evershed MR relied on the key passage from *Milroy v Lord*: 'the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property' (per Turner LJ).[6] Evershed MR argued

[1] (1862) 4 De GF & J 264
[2] Ibid
[3] [2002] EWCA Civ 227
[4] [2021] EWHC 597
[5] [1952] Ch 499
[6] Ibid, at 511

that where the documents were 'proper' to transfer title, unlike in *Milroy*, the transfer can be held complete in equity (*Re Rose*). Meanwhile, LJ Jenkins placed more emphasis on the fact that the documents were fully executed and delivered to the company. Either way, both judgements could be reconciled with *Milroy*, and so *Re Rose* created at best a 'gloss' affirming that the transfer will be complete at equity where the settlor has done all that was necessary.

Despite its successful application in many cases, which indicates that the '*Re Rose* gloss' sets down clear principles (e.g. *Mascall v Mascall*[7]; *Brown v Sun Alliance*[8]), there is a possible inconsistency when compared to *Re Fry*.[9] Here, the donor had completed all documentation to apply for consent from the Home Office to transfer shares but was held not to have done all that was necessary when the transfer was not authorised. *Re Fry* is particularly objectionable when it is noted that in *Re Rose* it may have been held that the settlor had not done all that was necessary because registration of the transfer was a matter of discretion for the directors of the company, much like the consent of the Home Office. Nevertheless, the inconsistency can be solved. *Re Fry* is explicable because the Defence Regulations prevented the passing of equitable title without the consent of the Treasury, Parliamentary statute prevailed over equitable doctrine, or either way, *Re Fry* is anomalous (Luxton [2012]).[10]

Thus, *Re Rose* created a line of case law which qualified the longstanding principle that equity will not perfect an imperfect gift, but it did not amount to an exception because it was consistent with the statement of principle as per Turner LJ in *Milroy*.[11] Generally, it created a reasoned qualification that cannot be described as an exercise of the court's independent will: the court will examine the actions and deeds of the transferor and conclude whether they have done all that was necessary for that property to be transferred.

***Strong v Bird* and an alternative capacity**

The second line of case law can be identified in *Strong v Bird*.[12] The courts will perfect an imperfect gift where it was promised to a donee but the donee received title to it in an alternative capacity, provided that an intention to give continues (*ibid; King v Dubrey*).[13] For example, a gift of release from debt could be perfected when the deceased appointed the donee as her executor under a will (*Strong v Bird*). By contrast, where the deceased had promised property to her daughter by will but later drew up a cheque for £33,000 instead, the change of intention (from gift of house to money) meant that *Bird* did not apply (*Re Gonin*).[14]

[7] [1984] 6 WLUK 97
[8] *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [2001] Ch. 733
[9] [1946] Ch 312
[10] P Luxton, 'In Search of Perfection: The Re Rose Rule Rationale' [2012] Con 70
[11] (1862) 4 De GF & J 264, at 1189
[12] (1874) LR 18 Eq 315
[13] [2015] EWCA Civ 581
[14] [1979] Ch 16

Strong v Bird is arguably closer to an exception to the rule in *Milroy* because the donors will not have done all that was necessary according to the nature of the property to transfer title. Donees are appointed, instead, in an alternative capacity. Nevertheless, the exception cannot be described as a licence to qualify 'at will' because there are clear requirements: formalities for the alternative capacity must be fulfilled and there must be clear and continuous intention (*Strong v Bird*[15]; *Re Gonin*).[16]

The case law from *Bird* is also subject to inconsistency, but this occurs over a narrower technicality of law: whether it is sufficient for a donee to acquire title in an alternative capacity as administrator, rather than executor. (The latter is appointed by the donor, the former is appointed by operation of law.) In *Re James*, the rule was applied where the donee was appointed as administrator.[17] In *Re Gonin*, Walton J criticised *James* because the satisfaction of 'alternative capacity' occurs by chance of operation of law, not by the clear intention of the donor.[18] Virgo argues that the key rationale of *Bird* is that the alternative capacity in itself is sufficient to perfect the title, but this subverts the rationale behind the maxim 'equity will not perfect an imperfect gift'.[19] It must be remembered that gifts are an absolute parting of ownership to property, and an intention to 'gift', not just to 'give' is vital if we are to justify exceptions to the general principle (ibid). By limiting the rule in *Strong v Bird* to executors, a justifiable exception is achieved.

The deathbed doctrine

The doctrine of donatio mortis causa (DMC) can be understood as an exception to the rule that equity will not perfect an imperfect gift. As a result of its recent clarification in *King v Dubrey*, its qualification is principled and it is not a licence for decisions made 'at will' (Cumber).[20] DMC will perfect an imperfect gift where the donor made it in contemplation of an imminent death for a specific purpose, the gift was only conditional upon death and the property or essential indicia of title to the property were given to the donee (*King v Dubrey*).[21] The first requirement is important because it significantly limits the scope of the exception. In *Sen v Headley* a donor who handed the donee keys to a box containing title deeds clearly contemplated an imminent death of a specific purpose because he did so whilst lying in his deathbed.[22] In contrast, the deceased who presented title deeds to a house and stated 'this will be yours when I go' but was not suffering from any illness and died a couple months later, could not be held to have made the promise in mind of an 'imminent death for a specific purpose' (*King v Dubrey*).[23]

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[15] n. 10
[16] n. 12
[17] [1935] Ch 449
[18] [1979] Ch 16, at 34-35
[19] G Virgo, 'The Principles of Equity and Trusts', (4th edn, Oxford University Press 2020) 153
[20] H Cumber, 'Donationes mortis causa; a doctrine on its deathbed?' Conv. 2016, 1, 56-61
[21] [2015] EWCA Civ 581
[22] [1991] Ch. 425
[23] [2015] EWCA Civ 581

The second requirement justifies the exception because it upholds a testamentary intention only if death occurs. This means that those who are vulnerable at times of serious illness are afforded leigh way to change their mind if they recover. For this reason, the Law Commission concluded that the doctrine might continue to serve a purpose by softening the hard edges of the formalities relating to wills (*Making a Will* (Law Com CP 231, 2017)). Therefore, the doctrine of DMC is a qualification of the principle that equity will not perfect an imperfect gift, but it is a limited one and it is guided by principled requirements that have been clarified as a result of the Court of Appeal in *King v Dubrey*.[24]

Thus, the case law prior to *Pennington v Waine* has provided for various routes of qualification or exception to the general principle against perfecting imperfect gifts, but has set down applicable requirements each time that prevent decisions solely by 'acts of will'.

***Pennington v Waine* 'unconscionability'**

However, it is submitted that *Pennington v Waine* created a qualification which is closer to an exercise of unfettered will, rather than principled reasoning, when it held that a gift can be perfected in equity where it would be unconscionable for the donor to deny the gift.[25] Unconscionability is an unprincipled extension of the '*Re Rose* gloss' because it shifts the focus away from the actions and deeds of a donor and onto his conscience (Evans [2022]).[26] The former can be ascertained with relative clarity from the facts, i.e. were all proper and apt documents completed and delivered (?) (*Re Rose*). The latter is a matter of subjective interpretation, with no set list of relevant factors on which decisions can be rationalised.[27] They are left to the will of the court.

***Pennington* challenged**

Some limitation to *Pennington* seemed possible in *Curtis v Pulbrook* when Briggs J reinterpreted *Pennington* as 'an example of sufficient detrimental reliance (DR) by the donee'.[28] Luxton welcomed what he perceived as an additional ingredient to 'unconscionability' because the established case law on DR could be applied to provide consistency to decisions.[29] However, it is highly questionable whether DR was actually present in *Pennington*: simply agreeing to become director does not detriment anything but your hopes, and such an interpretation of 'detriment' is surely too whimsical to base a claim upon. Further, the requirement of DR to unconscionability seems to have been dispelled since *Khan v Mahmood*; Smith J held that DR is

[24] (Cumber) n.17
[25] [2002] EWCA Civ 227
[26] S Evans, 'Unconscionability: Pennington resurrected, but confusion remains: Khan v Mahmood' Conv.2022, 2, 238-247
[27] n.22, per LJ Arden
[28] [2011] EWHC 167
[29] P Luxton, 'In Search of Perfection: The Re Rose Rule Rationale' [2012] Con 70

not 'the perimeter of unconscionability' but 'only one of the relevant considerations'.[30] This does not go much further than LJ Arden's list of 'relevant facts' specific to the facts of *Pennington*.[31]

Clearly there are qualifications and exceptions to the general principle against imperfect gifts, most of which provide principled requirements for the qualification to apply (other than *Pennington*). However, there is no single, consistent policy consideration behind them.[32] Thus, Luxton argues there is no issue as to why there are exceptions (*Re Rose* and DMC are justified exceptions) to the general rule, but why equity will perfect an imperfect gift remains a separate issue.[33]

Nevertheless, Luxton suggests that the rationale for *Re Rose* is that the gift is perfected because there has been a valid assignment of equitable title.[34] This is sufficient because equity is only concerned with who has the 'better title', not title that is good against the whole world; it provides certainty from the outset for proprietary rights because once the settlor has done all that is necessary for them to do, they can rely on an equitable assignment being completed, and the principal is consonant with what lay donors expect the law to be.[35] Similar reasoning was deployed by Smith J in *Khan*[36] and Clarke J in *Pennington*, both of whom concluded that there has been a valid constitution of trust because enough was done to complete an equitable assignment of title.[37]

However, finding that enough has been done for an equitable assignment to answer the issue of whether there has been a valid constitution is a circular question.[38] It does not tell us *when* this occurs and 'when' matters for real clients, clients who need certainty in some aspect of their case before they can gamble on pursuing litigation (Evans).[39] The absence of a consistent and single rationale to underpin all the exceptions and qualifications examined in this essay risks undermining access to civil justice (ibid). Though, arguably, DMC and the rule in *Strong v Bird* can be satisfied by the single rationale of testamentary intention, coupled with some degree of formalities followed. Thus, the lack of clarity is confined to *Re Rose* and the case law from *Pennington*.

In conclusion, it has been argued that there was a body of case law which qualified or exempted the general principle against imperfect gifts but did so by establishing clear rationales for their

[30] [2021] EWHC 597 (Ch)
[31] n.24
[32] ibid
[33] P Luxton, 'In Search of Perfection: The Re Rose Rule Rationale' [2012] Con 70
[34] ibid
[35] ibid
[36] n.27
[37] n.22, per LJ Clarke
[38] n.24
[39] S Evans, 'Unconscionability: Pennington resurrected, but confusion remains: Khan v Mahmood' Conv.2022, 2, 238-247

own exception, prior to *Pennington* (*Re Rose; Strong v Bird; King v Dubrey*). However, *Pennington* introduced an unprincipled exception of 'unconscionability' which provides a 'licence at will' to courts (*Pennington; Khan v Mahmood*).[40]

[40] n.27

The Limits of Analogies: Knowing Receipt after Byers v Saudi National Bank

Adnan Khaliq

The question the Supreme Court[1] had to answer in *Byers v Saudi National Bank*[2] was a relatively simple one: did a claim in knowing receipt require a claimant to prove a continuing equitable interest in the property transferred to the defendant in breach of trust?[3] The Supreme Court answered in the affirmative and unanimously dismissed the appeal. Despite this, the Court was unable to agree why it had come to this conclusion. In fact, its lengthy decision contains three separate judgments: two judgments from Lord Briggs and Lord Burrows and a third from the "majority"[4] identifying "reasons common"[5] between the two judgments. The Supreme Court's decision to answer the question in the affirmative has generally been welcomed by academics[6] and much of the subsequent discussion has focused on *which* judgment provides the best route to that answer.[7]

The present analysis challenges this warm reception and argues the Supreme Court erred as a matter of principle. The court should have answered the question in the negative and allowed the appeal: there is no reason in principle a *personal*[8] claim in knowing receipt requires a claimant to prove a continuing equitable interest in the property transferred. The reasoning of the Supreme Court (in all three of its judgments) is deeply regrettable and risks creating a fraudster's charter.

The remainder of this analysis is structured as follows: section A sets out the essential elements of a claim in knowing receipt. Section B then sets out the basic facts in *Byers* and critically analyses the reasoning of the UKSC. In doing so, it identifies two "errors common" to both of their Lordships' judgments and considers some of the decision's troubling implications. Section C contains the concluding remarks.

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[1] "UKSC".

[2] [2023] UKSC 51.

[3] Space precludes consideration of the level of knowledge required for a claim in knowing receipt and whether this depends on whether it is a proprietary or personal claim and/or if the claim is made in a domestic or commercial context. See [33]-[35] and [40].

[4] Lord Hodge (with whom Lord Leggatt and Lord Stephens agreed) at [1]-[9].

[5] Byers, supra note 1, [9].

[6] Anita Purewal, "Proprietary interests and knowing receipt: Byers v Saudi National Bank [2023] UKSC 51" [2024] Trusts & Trustees, 2024, 30.

[7] Space precludes consideration of the key difference between the two approaches. Lord Hodge succinctly summarises the differences between the two substantive judgments at [8] of his judgment.

[8] Clearly a proprietary claim in knowing receipt would require a continuing equitable interest.

A. Knowing Receipt: An Outline

Hoffmann LJ identified the essential elements of a knowing receipt claim in *El Ajou v Dollar Land Holdings Ltd*[9]:

> [...] the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.[10]

As Lord Briggs recognised at [10] of his judgment:

> [...] the claim usually arises where a trustee ("T") transfers trust property beneficially owned by the claimant ("C") to the defendant ("D") in breach of trust, and D learns about that breach before disposing of the property by transfer to a third party or by dissipation or destruction of it. In such a case although, after disposal, dissipation or destruction of the property by D, C can no longer pursue a proprietary claim that D transfer the property to C, (or if appropriate back to T or to a new trustee), D incurs a personal liability to account or pay compensation to C as if D were a trustee of the property. From the moment when D learns of the breach of trust, D comes under a personal obligation to restore the trust property to its equitable owner, and to act as its custodian in the meantime.

B. The Judgment

i. The Facts

The claimants were Saad Investments Company Ltd (SICL) and its liquidators. Mr Al-Sanea held shares in five Saudi Arabian companies ("the Disputed Securities") on trust for SICL under various trusts. In September 2009, Mr Al-Sanea transferred the Disputed Securities to a Saudi Arabian financial institution, the Samba Financial Group (Samba) to discharge his own personal debts to Samba.[11] He did so in breach of trust. At the time of Samba's receipt of the Disputed Securities it knew that Mr Al-Sanea was holding the Disputed Securities on trust for SICL.[12]

Unsurprisingly, SICL brought a personal claim of knowing receipt against Samba for the value of the shares: the transfer to Samba was in breach of trust which it knew at the time of receipt. However, the transfer was governed by Saudi Arabian law which does not recognise the distinction between legal and equitable ownership. As a result, SICL's equitable interest was extinguished upon the transfer and Samba was registered as the shares' sole owner.

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[9] [1994] 2 All ER 685.

[10] Ibid., at 700g.

[11] Samba's assets and liabilities were transferred to the Saudi National Bank in April 2021 so they became the defendants.

[12] Byers, supra note 1, [10].

It was against this backdrop the court was asked to consider "whether an equitable claim in knowing receipt depends (among other things) upon C retaining an equitable proprietary interest in the property transferred to D at the time when it reached D's hands before D either transferred, dissipated or destroyed the property."[13] The key question was the effect of SICL's proprietary interest being overridden by Saudi Arabian law.

ii. "Errors Common" to Both Judgments

Their Lordships agreed a claim in knowing receipt could not succeed once the claimant's proprietary equitable interest in the property in question had been extinguished or overridden.[14] This section focuses on two issues with the Court's reasoning.[15] Before considering these, it is necessary to outline the basic principles of equity Lord Briggs summarised at [18]-[28] of his judgment.

The first is that an equitable interest is "(statute or foreign law apart) good against all the world except a bona fide purchaser for value of the legal estate without notice of that interest"[16]. This person is referred to as equity's darling. The next basic principle concerned the ways in which an equitable interest in specific property "may cease to affect that property without any consent or other action by the equitable owner."[17] For present purposes, it is only relevant to consider two circumstances: (i) a sale to equity's darling even if this was a breach of trust and (ii) overriding by operation of law. Situation (ii) applies if "the mode of disposition of the legal title is such that, under the law applicable either to the property or to the transaction, the transferee takes free of it, even if the property is transferred in breach of trust."[18] This may occur in a purely English law context or it may, as in the present case, be the consequence of the applicable foreign law.

The Court rightly identified that a sale to equity's darling precludes any later claim against the defendant in knowing receipt. Crucially however, "an equitable interest in specific property is unaffected by the transfer of the property in breach of trust to [...] a purchaser for value if the purchaser has notice of the equitable interest"[19]. That was the situation in the present case and so equity's darling was irrelevant to the present analysis.

Instead, the present case required the court to consider situation (ii) i.e. the effect of overriding by operation of (foreign) law. As Lord Briggs identified at paragraph 28:

[13] Byers, supra note 1, [10].
[14] With one important exception: see discussion under the "Error 2" Heading.
[15] Space precludes extensive consideration of whether a personal claim in knowing receipt exists should necessarily be consistent with whether there is a proprietary claim. C.f. Byers, supra note 1, [6].
[16] Byers, supra note 1, [18].
[17] Byers, supra note 1, [19].
[18] Byers, supra note 1, [21].
[19] Byers, supra note 1, [18].

> The question is, where the law applicable either to the property or to its transfer gives the defendant a clean title to it, and one which is good against any proprietary claim, can the aggrieved beneficiary still say, before or after the defendant has disposed of it for his own benefit: "you must return it to me, account to me or pay me equitable compensation for its loss".

Error 1: The Analogy with Equity's Darling

In reaching its conclusion, the Court repeatedly drew an analogy with situation (i). As Lord Briggs said at [36], "the obvious question which arises, if a claim in knowing receipt is closed off as the result of [...] its being overridden by a transfer to equity's darling, is why should the opposite result follow if the claimant's equitable interest is overridden by a transfer which, under its proper law, is also designed to give the recipient a clean title?"[20]

With respect, this is misconceived. Although both involve an "overriding" of the equitable interest, this does not mean both need to be treated in the same way.[21] As Lord Briggs identified earlier on in his judgment, "[t]he whole purpose and effect of the doctrine of equity's darling is to confer full beneficial ownership of the property upon the bona fide purchaser of the legal title for value without notice of an adverse equitable interest."[22] This simply does not arise in situation (ii). The Court was being asked a different question so it was wrong to set out the position in respect of situation (i) and then presume situation (ii) should be treated in the same way. Instead, the Court should have considered the essential elements set out in *El Ajou v Dollar Land Holdings Ltd* and *then* considered the effect of the foreign law extinguishing the title upon transfer. In other words, if one proceeded on the basis this was a domestic transfer the essential elements would be met. Having established that, the Court should have then considered the effect of the equitable interest being extinguished under Saudi Arabian law.[23] The Court may, for example, still have come to the same conclusion based on comity[24] but this would have at least been a more principled basis to reach the same outcome.

Adopting the above framework of analysis would have ensured the Court paid greater attention to the argument that overriding by foreign law would result in a money launderer's charter. The Court's answer to this is not entirely satisfactory: the mere fact there might be a

[20] This is particularly true of Lord Briggs' judgment: see for example [38] and [61]. Indeed, the phrase "equity's darling" appears 29 times.

[21] Equally there is no reason overriding by domestic law should be treated in the same way as where the interest is said to be overridden by foreign law.

[22] Byers, supra note 1, [26].

[23] See [66]-[69]. Having drawn the analogy with Equity's darling, Lord Briggs did eventually analyse it through this framework but he thought it failed at the second hurdle. Hoffmann LJ (as he then was) used the word "tracing" which Lord Briggs held meant the claimant required a continuing equitable beneficial interest in the assets at the time of their receipt by the defendant. The Court erred in treating Hoffmann LJ's dicta as if it were a statute. The Court was entitled to, and should have, approached the question as one of principle.

[24] Although comity is an elastic concept. See e.g. *Unicredit Bank GmbH v Ruschemalliance LLC* [2024] EWCA Civ 64. Lord Burrows makes a passing reference to comity at [173].

parallel remedy based on dishonest assistance[25] and/or the criminal law[26] is not a reason why knowing receipt should not be available. Equally, this conclusion assumes their Lordships were correct in thinking that although knowing receipt is called a form of ancillary liability it is not ancillary to the liability of the trustee.[27] In a *personal* claim, it is difficult to see why it is not ancillary to the wrongdoing. This is a convenient juncture to consider the second issue with the Court's reasoning.

Error 2: Rejecting the Role of Unconscionability

In dismissing the appeal, the Court rejected many of the appellants' arguments about the role of unconscionability in the present context.[28] This is surprising for two reasons: (i) it is arguably in tension with previous authority and (ii) it is inconsistent with their own analysis.

i. Previous Judicial Recognition

In *Williams v Central Bank of Nigeria*[29] Lord Sumption JSC said:

> The essence of a liability to account on the footing of knowing receipt is that the defendant has accepted trust assets knowing that they were transferred to him in breach of trust and that he had no right to receive them. **His possession is therefore at all times wrongful** and adverse to the rights of both the true trustees and the beneficiaries. No trust has been reposed in him. He does not have the powers or duties of a trustee, for example with regard to investment or management. **His sole obligation of any practical significance is to restore the assets immediately. [...]** There may also, in some circumstances, be a proprietary claim [...].[30]

This makes it clear unconscionability is at the heart of the doctrine. It is respectfully submitted the Court should have had the concept at the forefront of its mind when conducting its analysis.[31] In answer to the submissions about unconscionability, Lord Briggs countered at paragraph 37 "[b]ut equity nonetheless achieves that purpose by the laying down of well-understood principles (rather than hard rules) which have, over time, enabled purely equitable personal rights to harden into property rights, in the form of equitable interests, extending to full beneficial ownership." This is certainly true, but unconscionability is not mutually exclusive with the development of well-understood principles. Indeed, unconscionability is at the heart

[25] Byers, supra note 1, [41].
[26] Byers, supra note 1, [73].
[27] Although they disagreed at what the claim was ancillary to: see Byers, supra note 1, [8].
[28] [36]. The appellants argued that liability in knowing receipt is not about, or based on, matters of equitable title at all, but rather about equity's historic role as "the enforcer of the obligations of conscience."
[29] [2014] UKSC 10.
[30] Byers, supra note 1, [31]. Indeed, this passage seems to support the view the Court was wrong to hold it would be logically inconsistent for the law to allow the personal claim in knowing receipt to survive where the proprietary claim has been defeated by the lack of a continuing proprietary equitable interest.
[31] Indeed, it is a little surprising this passage does not appear in the judgment. However, it is cited in the High Court's judgment: *Byers & Ors v Samba Financial Group* [2021] EWHC 60 at [45].

of anti-suit injunctions and yet the case law has still developed a body of well-understood principles. The Court could, and should, have done the same in the present case.

ii. The Inconsistent Exception

Lord Burrows and Briggs both agreed that the general position is that once the earlier equitable interest is overridden it is overridden "once and for all"[32]. However, although Lord Briggs thought this was because any "supposed suspensory effect of a transfer to equity's darling is contrary to basic equitable principle"[33] both of their Lordships agreed there was an exception to this position. As Lord Burrows explains:

> [...] where the defaulting trustee reacquires the property from a third party bona fide purchaser of the legal title for value without notice. But in that situation, the ordinary liability of a trustee, both to proprietary and personal claims, is revived and the defaulting trustee is rightly being denied the ability to shelter behind another's bona fide purchase. The defaulting trustee assumed the obligations of a trustee in relation to the asset and the trustee should not be released from those obligations by its own breach of trust. The trustee would otherwise be taking advantage of its own wrong. If therefore the trustee re-acquires the asset, the trustee cannot deny, by relying on the intermediate transfer to a third party having cleared the title, that it is holding the asset on trust for the beneficiary.[34]

With respect, the only conceptual basis this can be justified is by the doctrine of unconscionability. In effect, both of their Lordships thought a trustee should not benefit from their own wrongdoing. Why is the same not true of a party which seeks to escape liability on the basis there was an overriding of the equitable interest under a foreign law, simply because the foreign law does not recognise the distinction between legal and equitable title? In other words, if unconscionability can be used to justify this exception to the general rule, why cannot it be used to justify an exception in the present circumstances? Seen in this light, the argument that the Supreme Court's decision risks creating a fraudster's charter becomes all the more significant.

C. Conclusion

Over twenty-five years ago, Lord Millett wrote a seminal article called "Equity's Place in the Law of Commerce".[35] In characteristic fashion, he presciently recognised the risks with applying equitable principles in the commercial sphere. Indeed, the article started a debate between equity and commercial lawyers about the role of equity in commercial law: the former were concerned about preserving the unique nature of equity whilst the latter were concerned about the uncertainty equitable principles might bring into English commercial law. Properly

[32] Byers, supra note 1, [26].
[33] Ibid.
[34] Byers, supra note 1, [170]. See [24] for a similar view from Lord Briggs.
[35] Sir Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214.

analysed, the decision in *Byers* should leave both camps unhappy. It underplays the role of unconscionability in knowing receipt whilst also paying insufficient attention to the international nature of commerce. Fraudsters, on the other hand, have reason to celebrate.

Children (Scotland) Act 2020 and child participation in Scots family law proceedings. "Won't somebody please think of the children?!"

Thomas Lam

Introduction

It appears that the Children (Scotland) Act 2020[1] does simply that. This review of the 2020 Act and child participation in Scots family law proceedings will (i) outline the aims and effect of the Act; (ii) identify key changes relating to the participation of children in legal proceedings and explain why those changes are being introduced; (iii) indicate whether or not the implementation of the Act is likely to strengthen child participation rights and enhance the voice of the child in family law proceedings and justify why. Your reviewer will conclude that the 2020 Act's implementation will likely strengthen child participation rights and enhance the child's voice. This conclusion will be reached by discussing and analysing primary and secondary materials, particularly in the context of the newly inserted child participation provisions *viz* s11ZB(1)(a), s11ZB(3) and s11F of the Children (Scotland) Act 1995, and by evaluating arguments for and against this submission.

Aims and Effect

'History will judge us by the difference we make in the everyday lives of children.'[2]

The key aims of the legislation are to ensure that the child's views are heard and that the child's best interests are at the centre of any contact and residence case or Children's Hearings, in order to guarantee optimum compliance with the United Nations Committee on the Rights of the Child in these family law proceedings,[3] in particular with Article 3 (consideration of the

[1] This is the first measure the Scottish government is undertaking to create further children's rights based legislation. The second is to fully incorporate the United Nations Convention on the Rights of the Child into Scots Law. However, see *Reference by the Attorney General and Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42. Here, the Supreme Court ruled that ss6, 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) would be outwith the legislative competence of Holyrood, primarily for the ways in which their provisions "modify" the right (contained in s28(7) of the Scotland Act 1998) of the UK Parliament to legislate in devolved areas. For a more in depth discussion see Chris McCorkindale, 'The UNCRC and European Charter of Local Self-Government Bill References: Once (and twice) more unto the breach?' (2021) Centre on Constitutional Change <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/uncrc-and-european-charter-local-self-government-bill-references-once-and-twice> accessed 10/01/24.

[2] Nelson Mandela, 'Address by Nelson Mandela at Luncheon hosted by UN General Secretary Kofi Annan, New York - United States, 9 May 2002' (*Speeches by Nelson Rolihlahla Mandela* [South African Government]) <http://www.mandela.gov.za/mandela_speeches/2002/020509_kofi.htm> accessed 10/01/24.

[3] Explanatory Notes to the Children (Scotland) Act 2020, para 3.

child's best interests) and Article 12 (child's right to be heard). In addition, the 2020 Act will ensure that domestic abuse victims[4] and children are protected appropriately during the family court process, and introduce regulations for child welfare reporters, curators *ad litem* and contact centres.[5]

Seminal Changes

'Even if people are still very young, they shouldn't be prevented from saying what they think.'[6]

As noted above, there are three important sections directly relevant to child participation in family law proceedings which have been inserted into the 1995 Act.

Firstly, s1(4) of the 2020 Act inserts the new s11ZB(1)(a). This specifies that in deciding whether or not to make a s11(1) order and what order (if any) to make, the court must give the child concerned an opportunity to express the child's views in the manner that the child prefers, or in a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference. Under the new legislation, children can now appear in person for the court to obtain their views though beforehand they normally would have merely completed a F9 form, obtained a court ordered report prepared by Child Welfare Reporters, spoke directly in private to sheriffs or be represented by a solicitor.[7] Justification of the change arises from the need to adhere to UNCRC Art 12 and in particular their advice that effective participation must be: transparent and informative; voluntary; respectful; relevant to children and young people; child-friendly; inclusive; supported by training; safe and sensitive to risk; and accountable.[8]

Secondly, unlike s11(10) of the 1995 Act which stated that a child 12 years of age or more shall be presumed to be of sufficient age and maturity to form a view, s1(4) of the 2020 Act inserts the new s11ZB(3) which provides that the child is to be presumed capable of forming a view unless the contrary is shown. The reason for this is to comply generally with UNCRC Art 12 and more specifically its comment that Article 12 imposes no age limit on the right of the child to express her or [their] views, and discourages States parties from introducing age limits either in law or in practice.[9] Moreover, the provision was introduced to clarify the law because *Shields*

[4] For a further discussion see Fiona Morrison, E. Kay M. Tisdall and Jane E. M. Callaghan, 'Manipulation and Domestic Abuse in Contested Contact - Threats to Children's Participation Rights' (2020) 58(2) Family Court Review; see also Tisdall, Morrison & Judy Warburton, 'Challenging undue influence? Rethinking children's participation in contested child contact' (2021) 43(1) Journal of Social Welfare and Family Law.
[5] (n 3) para 5.
[6] Storm Jameson, *The Diary of Anne Frank* (Pan Books 1954) 140.
[7] Scottish Government, *Review of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy* (Scottish Government 2018) 12.
[8] *General Comment No.12 (2009): The Right of the Child to be Heard*, 20 July 2009, CRC/C/GC/12, para 134 <https://digitallibrary.un.org/record/671444?ln=en> accessed 10/01/24.
[9] ibid para 21.

v Shields[10] demonstrated that courts already do take into account the views of children younger than 12 when making orders.[11]

Thirdly, s20 of the 2020 Act inserts s11F which creates a new obligation on the court to explain decisions to children in a way that the child can understand in regard to s11(1) orders. The rationale behind this stems from the objective to comply with UNCRC Art 12 and its suggestion that children ought to receive feedback to inform the child of the outcome of the process and explain how her or his views were considered.[12] Importantly, it stresses that the feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously.[13]

Result

'But Jesus said, Suffer little children, and forbid them not, to come unto me: for such is the kingdom of heaven.'[14]

It can be submitted that the 2020 Act will likely strengthen child participation rights and enhance the voice of the child in regard to each of the aforementioned provisions.

Firstly, your commentator argues that s11ZB(1)(a) will strengthen child participation rights and enhance the voice of the child. Mainly because, the court must now give the child a more accessible opportunity to express his or her views and as mentioned previously there were no such mechanisms before. Kirsteen Mackay even notes that under the 1995 legislation only 1% of children spoke to sheriffs in abuse cases,[15] confirming that few children were given an adequate opportunity to express their views directly in court. From this, it can be submitted that s11ZB(1)(a) will prevent this from continuing and so will likely strengthen child participation rights and enhance the voice of the child, by imposing an absolute duty on the courts to allow the child to express their views.

Nevertheless, Gillian Black questions the implications of the provision on the welfare of the child principle, arguing that as the duty to seek the views of the child is now absolute being no longer connected to the best interests principle, it is uncertain what will occur under these new statutory provisions if this duty on the court clashes with the welfare principle.[16] She explains that it is not clear whether the welfare principle will still be regarded as the court's primary

[10] 2002 SC 246.
[11] Albeit the Inner House indicated that the nine-year-old child had 'growing maturity' to express a view, mainly because the litigation about him had been ongoing for over two years.
[12] (n 8) para 45.
[13] ibid.
[14] Matthew 19:14.
[15] 'The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse' (SCCYP, 2013) 5.
[16] 'Seeking the Views of Children: Judicial and Statutory Developments' (2021) EdinLR(25) 342, 346.

duty,[17] in light of the fact that the explicit principle of the paramountcy of the child's welfare in s11(7)(a) has been repealed. Nonetheless, your current commentator counter-argues that this is not necessarily a negative result. Because under s11(7)(a) the court's paramount consideration was the child's welfare, though as E. Kay M. Tisdall purports, children's views were not considered useful if they did not assist with that outcome.[18] Your commentator concurs with this perspective. Since in *P v M*,[19] the court did give less weight to the child's views since the child was emotional and anxious, deeming it unhelpful. However, as S. Bailey, J. Thoburn and J. Timms demonstrate, parental separation and subsequent changes are distressing to many children.[20] And as courts are often making decisions on issues that are highly plausible to be distressing to children, s11ZB(1)(a) is needed to create an obligation on the courts to listen to children's views. Since, N. Bala, R. Birnbaum and F. Cyr found that most children do want to contribute their views and have them considered in the decision making,[21] this section will help to achieve this. Notably, your commentator is convinced of Bala, Birnbaum and Cyr's study since these cases directly revolve around the child and so it is sensible to infer that the child would want to participate.[22] Given this evidence, it can be affirmed that s11ZB(1)(a) will likely strengthen child participation rights and enhance the voice of the child, particularly in the context of parental separation cases.

Moreover, your author contends that s11ZB(3) will strengthen child participation rights and enhance the voice of the child because it opens up participation rights to children under 12 due to the fact that biological age is evidently not the sole determining factor of capacity to express a view. For example, Gerison Lansdown identified that other factors including personal experiences, environment and levels of support provided have affected capacity to express a view also.[23] Your author endorses her point, especially since Lady Hale in *Re D (A Child) (Abduction)*[24] ruled that children often have a point of view which is quite distinct from that of the person looking after them and that children are quite capable of being moral actors in their own right. Indeed, the previous age presumption in the 1995 Act was condemned by Tisdall and F. Morrison for 'sidelining' the views of children below 12.[25] Therefore, it can be asserted that s11ZB(3) will likely strengthen child participation and enhance the voice of the child since it will not limit the capacity to express a voice solely to biological age.

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[17] ibid.
[18] 'Subjects with agency? Children's participation in family law proceedings' (2016) 38(4) Journal of Social Welfare and Family Law 362, 373.
[19] 2012 GWD 26-549.
[20] 'Your shout too! Children's views of the arrangements made and services provided when courts adjudicate in private law disputes' (2007) 33(2) Journal of Social Welfare and Family Law.
[21] 'Judicial Interviews in Canada's Family Courts: Growing acceptance but still controversial' in T. Gal and B. Faedi Duramy (eds), *International Perspectives and Empirical Findings on Child Participation* (OUP 2015).
[22] See also Nicole Kratky and Michela Schröder-Abé, 'A court file analysis of child protection cases: What do children say?' (2020) 25(1) Child & Family Social Work.
[23] *The Evolving capacities of the child* (UNICEF/Save the Children, Innocenti Insight, 2005) s 2.
[24] [2007] 1 FLR 242.
[25] 'Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experience' in Freeman M (ed), *Law and Childhood Studies* (OUP 2012).

However, some of the judiciary have reasoned that children below the age of 12 are too young and so it might be implied that this provision will unlikely make a difference in child participation rights if young children are unable to adequately express themselves. An example of this can be found in *LRK v AG*.[26] Here, the Sheriff Appeal Court concluded that a child under three years would not have the capacity to form a view providing that they do not have the sufficient maturity. Nevertheless, your author submits that this case must be distinguished. Since the court in *Stewart v Stewart*[27] held that children as young as the age of three and four can have the sufficient age and maturity within decisions about parental rights and responsibilities. Similar to the UN Committee on the Rights of the Child,[28] your author is of the belief that any child, no matter what age, can still express their voice in some shape or form. This submission becomes more convincing when viewed alongside Marie Bradwell's finding that even if young children cannot form the actual verbal words, they can still communicate through nuances in body language and facial expression.[29] Accordingly, it can be maintained that s11ZB(3) will likely strengthen child participation rights and enhance the voice of the child, as it will allow children under 12 years of age to participate and have a voice in proceedings.

Finally, your writer acknowledges that s11F appears to strengthen child participation rights and enhance the voice of the child as it puts an obligation on the court to communicate its decision to the child itself. This perspective is somewhat logical. Because under s11F(2) courts will be entrusted to ensure that the decision is explained to the child concerned in a way that the child can comprehend. Ergo, it could be inferred that s11F seems to strengthen child participation rights and enhance the voice of the child.

Notwithstanding, your writer concedes that there is a provision in this section which will have the effect of undermining and reducing child participation rights and the child's voice respectively. Specifically, subsection (3)(b) of 11F which precludes the court from ensuring that the decision is explained to the child if satisfied that it is not in their best interests. Your writer avows that it will be difficult for the court to concretely determine how a decision is not in a child's best interests given the evident fact that children themselves are the principal actors in the cases and any decision will likely affect their lives. This point is reflected by Lesley-Anne Barnes Macfarlane who believes that a child should still be given some suitably worded explanation about the decision even if the child may be unwell, or particularly upset by the circumstances surrounding their family breakdown or sensitive details about the parents' relationship may have influenced the court's decision.[30] Your writer supports this idea since children, who have experience of particular medical conditions, can have highly informed views

[26] 2021 SAC (Civ) 1.
[27] 2007 CSIH 20.
[28] (n 9) provides that even very young children can use a range of communication methods to demonstrate understanding, choices and preferences.
[29] 'Voice, views and the UNCRC Articles 12 and 13' (2019) 17(4) Journal of Early Childhood Research 423, 427.
[30] 'Out of the Mouths of Babes' (2021) 66(4) Journal of the Law Society of Scotland 22, 23.

on their treatment and its short and long term implications for their best interests according to P. Alderson's research.[31] While concerning children's medical consent, it is your writer's submission that if children are capable enough to have informed views on the short and long term implications for their best interests on medical matters, then they themselves at least ought to be told by the court how his or her views were considered in the decision making of family law cases.[32] Ergo, your writer submits that the subsection should be amended to provide that all decisions should be explained to the child, unless of course they cannot understand the explanation or cannot be found. Otherwise, this section in particular will neither strengthen child participation rights nor enhance the child's voice.

Conclusion

Overall, this critical review has (i) explored the aims and effect of the 2020 Act; (ii) assessed the key changes and their rationale; (iii) evaluated why the Act will likely strengthen child participation rights and enhance the voice of the child in family law proceedings. Concerning this final point, your reviewer is satisfied that s11ZB(1)(a) will achieve this effect due to the criticisms of the previous position by Mackay and Tisdall, and the fact that most children desire to contribute their views per Bala, Birnbaum and Cyr. Likewise, your reviewer is persuaded that s11ZB(3) will achieve the effect of strengthening child participation rights and enhancing the child's voice due to the arguments of Lansdown, Hale, Tisdall, Morrison and Bradwell. Nevertheless, your reviewer is not persuaded that s11F will make it likely that child participation rights and the child's voice will be strengthened and enhanced respectively. This is because, throughout this review, there has been a clash on whether the children's welfare or the children's views should take precedence. If child participation rights and the child's voice are to be strengthened and enhanced, then in some situations the welfare principle will have to take a "backseat." Given the argument that children should still be given some explanation and are quite capable of providing informed views on what is best for their own interests per Barnes Macfarlane and Alderson respectively in the context of s11F. Nonetheless, your reviewer concludes that while the 2020 Act may not be the perfect "gold standard" for child participation rights in Scots family law proceedings, it is still likely to advance them. The 2020 Act has indeed made Scotland's dream of becoming 'the best place in the world to grow up'[33] slightly brighter.

[31] *Children's Consent to Surgery* (Buckingham OUP 1993).

[32] Especially since, as noted previously, the case revolves around them so any decision will likely affect their lives.

[33] Scottish Government, 'Improving Children's Rights' (*Scottish Government Announcement*, 22 May 2019) <https://www.gov.scot/news/improving-childrens-rights/> accessed 10/01/24.

Guest v Guest: The Resolution of a "Lively Controversy"

Samuel Lane

On 19 October 2022, the Supreme Court handed down judgment in *Guest v Guest*.[1] The appeal focused on how the court should grant relief in cases of proprietary estoppel, a subject which had inspired, in Lewison LJ's words, "a lively controversy".[2] On the one hand, some commentators had taken the view that the court should aim "to give effect to the claimant's expectation unless it would be disproportionate to do so". On the other hand, others considered that judges should aim simply to compensate claimants for the detriment that they had suffered.[3] In *Guest*, the majority – in a judgment given by Lord Briggs, with which Lady Arden and Lady Rose agreed – decidedly rejected the latter view, concluding that it did not form "any part of the law of England".[4] Holding that the "true purpose" of proprietary estoppel is to prevent "the unconscionability constituted by the promisor resiling from his promise", they decided that "in many cases… the fulfilment of the promise is likely to be the starting point" when granting relief. Nevertheless, they emphasised the "flexible and pragmatic nature" of judges' discretion, and acknowledged that "considerations of practicality, justice between the parties, and fairness to third parties may call for a reduced or different award".[5]

Lord Briggs' approach was sharply criticised by Lord Leggatt, who wrote a trenchant dissenting judgment, with which Lord Stephens agreed. Although the minority departed from the majority's reasoning on several grounds, two major points of criticism stand out. First, Lord Leggatt held that, as a matter of principle, "the aim of the remedy is to prevent… [the claimant] from suffering detriment as a result of his reliance on the promises made to him". This "detriment-based" approach meant that, in circumstances where the promise has not yet fallen due to be performed, the award would often take the form of monetary "compensation for… [the claimant's] reliance loss".[6] Secondly, the minority criticised the majority's approach for the amount of discretion which it afforded to judges. Lord Leggatt did not, of course, deny that "the court has a flexible discretion to fashion a remedy which does justice in the circumstances of the particular case".[7] However, he suggested that "to give judges no clearer mandate than to do what they think just or necessary to avoid unconscionability is a recipe for inconsistent and arbitrary decision-making". Indeed, he endorsed academic criticism that this lack of clear

[1] [2022] UKSC 27, [2022] 3 WLR 911.
[2] *Davies v Davies* [2016] EWCA Civ 463, [2016] P&CR 10 [39].
[3] ibid. [39].
[4] *Guest* (n1) [71].
[5] ibid. [79], [94].
[6] ibid. [259]-[261], [276].
[7] ibid. [261].

guidance made it more difficult for parties to predict the outcome of estoppel claims, and thus harder for them "to reach a sensible compromise".[8] With respect to Lords Leggatt and Stephens, this essay argues that Lord Briggs' judgment should be preferred, and that their criticisms of the majority's approach are misconceived.

The Detriment-Based Approach

The argument that courts should, as a matter of principle, take a "detriment-based" approach to granting relief suffers from three major difficulties. First, it runs contrary to much English precedent. As the majority stressed, courts have tended "to prioritise an expectation-based approach to remedy" since the nineteenth century,[9] including in such well-known cases as *Ramsden v Dyson*,[10] *Inwards v Baker*,[11] and *Taylor Fashions v Liverpool Victoria*.[12] In contrast, there is limited support in the authorities for the minority's "detriment-based" approach. The clearest prior judicial – as opposed to academic – endorsement of such an approach was Lewison LJ's observation in *Davies v Davies* that "logically, there is much to be said" for the view that judges should aim "to ensure that the claimant's reliance interest is protected, so that she is compensated for such detriment as she has suffered". However, Lewison LJ was careful to acknowledge that the court was not required to decide the point on the appeal,[13] and consequently "no more than toyed with… the notion that the aim of the remedy is detriment-based".[14]

In this light, it is perhaps unsurprising that the minority extensively relied on, in Lord Leggatt's words, "the seminal Australian cases of *Grundt* and *Verwayen*".[15] It is true that these cases give some support to a "detriment-based" approach; in *Grundt*, for example, Dixon J remarked that estoppel's "basal purpose" was to "avoid or prevent a detriment to the party asserting the estoppel".[16] Yet the value of these authorities as precedents is limited. Not only was neither case concerned with proprietary estoppel, but the relevance of their dicta to English law had already been doubted; in *Jennings v Rice*, Aldous LJ remarked that "the Australian authorities which appear to lean towards the view that the award should compensate for the detriment… do not reflect the law of this country".[17] What is more, Australian courts themselves appear to have resiled from this "detriment-based" approach. In *Sidhu v Van Dyke*, for instance, the High Court held that "the relief which is necessary" in proprietary estoppel cases "is usually that which reflects the value of the promise".[18] As Lord Briggs poetically put it, "thus did the seed of a

[8] ibid. [171]-[172].
[9] ibid. [40].
[10] (1866) LR 1 HL 129 (HL) 170.
[11] [1965] 2 QB 29 (CA) 37.
[12] [1982] QB 133 (Ch) 144.
[13] *Davies* (n2) [39].
[14] *Guest* (n1) [69].
[15] ibid. [231].
[16] (1937) 59 CLR 641, 674.
[17] [2002] EWCA Civ 159, [2003] 1 P&CR 8 [30].
[18] [2014] HCA 19 [85].

detriment-based aim of the remedy in proprietary estoppel… fall on hard Australian ground and wither away".[19]

The second major difficulty with a "detriment-based" approach is that detriment is often exceptionally difficult to quantify. This was emphasised by the majority, who remarked that detriment is not "something which can necessarily or even usually be valued", and conceded by Lord Leggatt, who observed that detriment may "include [the] loss of educational or career opportunities… which it is intrinsically difficult, and in one sense impossible, to value".[20] How can one adequately value a claimant subjecting themselves to a "difficult working relationship",[21] reluctantly moving from Sheffield to Cornwall,[22] or dedicating their "whole life" to a farming operation?[23]

Although the minority emphasised that "it is important not to overstate the difficulty" of quantifying detriment, because "courts routinely place a monetary value on lost earning opportunities and on non-pecuniary harm", this rather misses the point.[24] For instance, in personal injury cases, where the claimant has lost an arm, a leg, or a career as a professional athlete, the court does not have the power to restore them to that arm, leg, or career. Consequently, as Lord Leggatt acknowledged, judges are obliged to award them a sum of money, as "the best that a court can do by way of compensation", even though "no sum of money is comparable to physical or psychiatric injury".[25] Yet these constraints simply do not apply in proprietary estoppel cases, where the court usually does have the power to order the defendant to transfer the promised property to the claimant. Moreover, inviting the court to calculate a claimant's detriment is likely to be a costly exercise for the parties,[26] since it can involve complex expert evidence.[27] It is thus small wonder that the exercise has been frowned upon by courts; in *Jennings v Rice*, Walker LJ remarked that "it would rarely if ever be appropriate to go into detailed inquiries as to hours and hourly rates where the claim was based on proprietary estoppel".[28]

The third substantial problem with focusing on a claimant's detriment is that it could lead to unfair outcomes. This is particularly the case if courts focus on a claimant's "lost earnings", with Lord Leggatt's proposed award of £610,000 in *Guest* simply consisting of "lost earnings" and

[19] *Guest* (n1) [60].
[20] ibid. [9], [198].
[21] *Davies* (n2) [53].
[22] *Bradbury v Taylor* [2012] EWCA Civ 1208 [27].
[23] *Thompson v Thompson* EWHC 1388 (Ch) [157].
[24] *Guest* (n1) [199].
[25] ibid. [199].
[26] Elizabeth Houghton, '*Guest v Guest*: Clarity at last for Proprietary Estoppel?' <https://www.wilberforce.co.uk/article/guest-v-guest-clarity-at-last-for-proprietary-estoppel/> accessed 1 March 2024.
[27] *Habberfield v Habberfield* [2018] EWHC 317 (Ch), [2019] 1 FLR 121 [238].
[28] *Jennings* (n17) [54].

interest thereon.[29] Let us take the hypothetical example of a fifty-five-year-old man, who – one month into his retirement from a well-paid job – leaves his home and travels across the country to care for his seventy-five-year-old mother after she suffers from a fall, on the promise that she bequeaths him her house. He leaves his own friends and life behind, and duly cares for his mother for fifteen years, before she ultimately reneges on her promise. If one focuses on "lost earnings", the man's award would presumably be negligible, since he had already retired. But had his mother fallen and he left just two months earlier – while he was still working, and before he had handed in his notice – his award might have been vastly greater, even if he had only cared for his mother for one, two, or three years, rather than fifteen. This discrepancy is plainly unjust.

Indeed, the minority's approach might have led to claimants receiving small awards in real cases, rather than just hypothetical ones. Many claims arise in agricultural contexts, where wages are notoriously low, and where claimants might still have earned relatively little, even if they had worked on a different farm. For instance, in *Habberfield v Habberfield*, Birss J held that the claimant had earned about £264,000 (or £8,800 p.a.) on her family farm for working 60-70-hour weeks between 1983 and 2013, but might have only earned £527,000 (or £15,810 p.a.) elsewhere, so that her "quantifiable… reliance loss" was just £220,000 (taking into account £44,000 that she had received from an insurance policy). As he proceeded to hold, a figure of £220,000 would have been scant compensation for the claimant committing herself "to the farm for three decades instead of going elsewhere and building a different life" in reliance on promises that she would inherit property worth up to £2.5 million.[30]

As such, there are fundamental problems with the "detriment-based" approach espoused by the minority. Not only might it lead to inequitable outcomes, but it would also represent a wholesale departure from the approach taken in most recent authorities, in both England and Australia. Indeed, it would also run into major practical obstacles, by encouraging the parties to incur considerable costs, and by obliging judges to perform a task which they are reluctant to undertake, with imperfect and artificial results.

Discretion, Unpredictability, and Settlement

The minority's suggestion that Lord Briggs' approach allows trial judges too much discretion, which leads to unpredictability and precludes settlement, also suffers from three principal problems.[31] First, it appears to rest on the premise that many more cases would settle if judges were afforded a little less discretion. Yet this seems somewhat unrealistic. As the majority acknowledged, proprietary estoppel cases often involve "such bitterness that settlement is always going to be difficult", as well as "fundamental disputes of primary fact", which are

[29] *Guest* (n1), Appendix [21]-[22], [30].
[30] *Habberfield* (n27) [225], [238]-[246].
[31] *Guest* (n1) [171]-[172].

"themselves likely to be the greatest enemy of any predictability of outcome".[32] Moreover, even if the breadth of judicial discretion was the main reason for unpredictability, it does not follow that this would necessarily prevent parties from reaching settlements. As Lord Briggs observed, unpredictability is not always "a bar to settlement, because the increased risks of a trial for both sides can be a spur to settlement before the litigation becomes a battle purely about costs"[33].

The second difficulty with Lord Leggatt's criticism is that it appears to pay insufficient regard to how the majority have clarified proprietary estoppel. Through firmly rejecting the view that "the true aim of the remedy is to compensate for detriment", the majority has left the law rather clearer than it was beforehand.[34] Some practitioners have voiced optimism that this will leave them "better able to advise clients as to the likely outcome of their claims".[35] Furthermore, through emphasising that "the true purpose" of the remedy is to put right "the unconscionability… in the promisor's repudiation of his promise",[36] the majority appear to have fixed "the aim which the court is seeking to achieve" in exercising its discretion, rather than leaving it "to the choice of the judge in the individual case".[37] This is, according to Lord Leggatt – drawing on the work of Professor Simon Gardner – the first and most important of the three conditions which need to be satisfied if the exercise of judicial discretion is to be consistent with the rule of law.[38]

The third problem with the minority's arguments is that, even if there is a residual lack of clarity, and even if that does deter settlements, it is hard to see how this would be mitigated by shifting to a "detriment-based" approach. While a claimant's expectations are usually ascertainable (even if disputed on the facts), their detriment is – as noted above – often impossible to value. A "detriment-based" approach is thus likely to be even more uncertain and unpredictable than one which foregrounds a claimant's expectations. Indeed, as Elizabeth Atkinson has suggested, it seems doubtful whether Lord Leggatt's "process for determining the remedy would be less discretionary than Lord Briggs' method in practice".[39] Since the minority recognised that the court could prevent a claimant from suffering detriment by compelling the defendant "to perform the promise", as well as by compensating their "reliance loss", judges would still have a broad remedial discretion, even on their approach.[40]

[32] ibid. [82].
[33] ibid. [82].
[34] ibid. [68].
[35] Elizabeth Atkinson, 'Proprietary Estoppel: the Supreme Court gives Guidance on Remedies' [2023] PCB 12, 22.
[36] *Guest* (n01) [13].
[37] ibid. [164].
[38] ibid. [164]. The other two conditions – that "giving judges a discretion must be necessary" and that judicial decisions must be "susceptible to audit" – were uncontroversial in *Guest*.
[39] Atkinson (n35), 22.
[40] *Guest* (n1) [256].

Accordingly, Lord Leggatt's view that the majority afforded judges too much discretion, with the consequence that cases are hard to predict and fail to settle, is also unconvincing. This argument overlooks how Lord Briggs' judgment has clarified several key issues, as well as how the minority's favoured approach would likely be no more certain, and involve no less discretion, than that of the majority. Moreover, it is also, in part, based on flawed foundations, since it seems that many proprietary estoppel cases are unlikely to settle, irrespective of the approach adopted by the courts to granting relief.

The Majority's Approach

While the minority's criticisms appear misplaced, there is much to commend the majority's judgment. First, as noted above, it is consistent with generations of case law. Secondly, Lord Briggs' insistence that proprietary estoppel aims to "put right the unconscionability inherent in the [promisor's] repudiation of the promise" ensures that his approach is consistent with the developing law of estoppel more generally.[41] This is perhaps summed up most eloquently in Lewison LJ's remark that "the animating principle of all kinds of estoppel is the prevention of the unconscionable repudiation of promises".[42] Thirdly, Lord Briggs' recognition that "the prevention of unconscionable conduct lies at the heart of the doctrine" also means that his judgment reflects,[43] as Walker LJ put it, a "fundamental principle" of equity more broadly, namely that it is "concerned to prevent unconscionable conduct".[44] Finally, the majority's approach reaches a sensible compromise between two vital, and occasionally conflicting, priorities: the need to give the law a degree of clarity and coherence, and the need for judges "to frame an appropriate remedy to do justice in the infinitely variable exigencies of real life".[45] On the one hand, it spells out the aim of the remedy, the customary starting point, and the correct approach for courts to adopt, but on the other hand, it allows judges to award something less than the claimant's expectations should the situation demand.

In this light, it is hardly surprising that the majority's judgment has been widely welcomed. Although some academic commentators have described the decision as a "missed opportunity" to redraw the law of estoppel more radically,[46] it has been praised by others, such as Professor Graham Virgo, who hailed how it "has gone a long way to ensure that proprietary estoppel is more transparent".[47] Furthermore, Lord Briggs' judgment has been heralded by some practitioners, such as Charlotte John, who described the decision as "a welcome one" for settling "the hotly debated issue of the correct approach to remedying a proprietary estoppel-

[41] ibid. [10].
[42] *Morton v Morton* [2023] EWCA Civ 700, [2024] Ch 41 [44].
[43] *Guest* (n1) [48].
[44] *Gillett v Holt* [2001] Ch 210 (CA) 225.
[45] ibid. [62].
[46] Kirsty Potts, 'An Unwelcome Guest? Exploring the Spare Room of Proprietary Estoppel' [2023] Conv 78, 82, 91.
[47] Graham Virgo, *The Principles of Equity and Trusts* (5th edn, Oxford University Press, 2023), 349.

based claim".[48] Indeed, and perhaps most importantly, judges appear to have derived assistance from the majority's analysis. Thus, in *Hughes v Pritchard*, HHJ Keyser KC referred to "helpful passages" from Lord Briggs' judgment,[49] and, in *Dixon v Crown Estate Commissioners*, HHJ Hodge KC stated that his judgment "contains much useful learning on the subject of proprietary estoppel".[50]

Conclusion

As such, the decision of the majority in *Guest* should be applauded. Not only do the criticisms of it offered by Lord Leggatt seem to miss the mark, but it is also consistent with previous proprietary estoppel cases, the law of estoppel more widely, and fundamental equitable principles. Equally, Lord Briggs' approach successfully balances the need for the law to be as cogent as possible with the courts' need to respond to real-life situations. Although the task left to judges when granting relief will not always be straightforward, neither are human lives, human relationships, or the contexts in which proprietary estoppel claims arise. While some of us might desire the law to be neater, clearer, and simpler, the majority's approach should be commended for allowing judges to devise remedies that are appropriate to the world as it is, which is rarely neat, clear, and simple.

[48] Charlotte John, 'An Unwelcome Guest and a "Lively Controversy" – *Guest v Guest* on the Essential Aim of Proprietary Estoppel' [2023] FRJ 6.
[49] [2023] EWHC 1382 (Ch) [14].
[50] [2022] EWHC 3256 (Ch) [44].

Online Safety Act and Intimate Image-Based Abuse: A Step Forward for Justice, But A Victim-Centred Approach is Needed

Emma Lindsey

Introduction

In January of this year, digitally altered — or otherwise known as 'deepfake' — pornographic images of Taylor Swift widely circulated X, a platform formerly called Twitter. Certain images received almost fifty million views within 24 hours before X finally removed them. The unfortunate incident launched the issue of intimate image-based abuse and online misogyny, a subject that has received significant media and political attention in recent years, into the spotlight once more. The massive circulation of 'deepfake' pornographic images of Taylor Swift, an American singer with international acclaim, happened just as the Online Safety Act began to take effect in the United Kingdom. Consistent with its name, the statute aims to make the Internet a safer place.[1] The law contains a wide range of measures, including duties on internet platforms about having processes and systems to control harmful content on their websites.

This essay will focus specifically on the amendments criminalising intimate image-based abuse. This abuse refers to the sharing or the threat of sharing intimate images without the consent of the person in those images. Research demonstrates intimate image-based abuse disproportionately impacts women and girls, while also experiencing greater stigma and 'slut shaming'.[2] This type of abuse is often called 'revenge porn', but this paper will not use this term as it implies that the victim acted in a way to cause the abuse, assigning blame on the victim rather than the perpetrator.[3]

In June 2023, before the act became law, legislators announced plans to introduce image-based abuse amendments into the bill. The amendments sought to bridge gaps in previous legislation on the matter, specifically taking into account the Law Commission's 2022 report, which outlined a need for such improvements. While a step forward in covering the loopholes that allowed predators to slip through the patchwork of previous legislation, this essay will examine how the Online Safety Act ('OSA') lacks a victim-centred approach.

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[1] The Online Safety Act 2023.

[2] Jessica Ringrose and Kaitlyn Regehr and Betsy Milne, 'Understanding and Combatting Youth Experiences of Image-Based Sexual Harassment and Abuse' (2021) Department of Education, Practice and Society, UCL Institute of Education, 13.

[3] Cyber Civil Rights Initiative, 'Frequently Asked Questions' (CyberCivilRights.org, 2023), <https://cybercivilrights.org/faqs/#terminology> accessed 17 March 2024.

Improvements: The Law Commission's Report

Briefly, I will discuss the improvements the act made, which stem from the issues outlined in the Law Commission's report. Firstly, it is important to note that each previous statute covered a certain type of abuse, including voyeurism[4] and disclosing or threatening to disclose private sexual photographs with intent to cause distress.[5] The recording of an image of genitals and buttocks underneath clothing otherwise known as 'upskirting' was also covered.[6] However, despite these laws, many perpetrators fell through the cracks due to loopholes found in this mismatch of legislation.[7]

The OSA aims to provide a more all-encompassing approach to the issue, eliminating many gaps outlined in the 2022 report. One notable improvement entails the widening of images covered. The OSA criminalises the sharing of intimate images involving a person's exposed genitals (meaning full or partial exposure of genitals, buttocks, or breasts), a person in an act of urination, defecation, or carrying out an act of personal care in association with urination or defecation.[8] The act inserts provisions into the Sexual Offences Act 2003, such as making 'downblousing' or taking nonconsensual images of breasts criminal, where it had not been previously.[9] This includes images of digitally altered material, such as the 'deepfakes' in Taylor Swift's case, which prior legislation did not cover.

Further, the OSA eliminates the motive loophole. Previously, although motivations such as receiving sexual gratification and causing distress are covered, other motivations like sharing the images for a laugh or to coerce an individual were not covered. The OSA introduces a base offence of sharing or threatening to share an intimate photograph or film with no proof of intent needed.[10] More serious offences entail doing so with the intention to cause the victim humiliation, alarm, or distress as well as receive sexual gratification.[11]

Finally, with previous legislation, only victims of voyeurism and 'upskirting' were eligible for automatic anonymity.[12] However, as a result of the OSA, new offences were inserted into the Sexual Offences Act 2003, entitling victims of the offences outlined above to automatic lifelong anonymity.[13] The new offences, like voyeurism and 'upskirting' covered in the 2003 act, now also receive automatic anonymity under the Sexual Offences (Amendment) Act 1992.[14] The impacts of anonymity will be further considered below. Overall, the OSA clearly marks a significant

[4] The Sexual Offences Act 2003 (SOA 2003) s 67.
[5] The Criminal Justice and Courts Act 2015, s 33.
[6] SOA 2003, s 67(a).
[7] Law Commission *Intimate image abuse: a final report* (Law com 407, 2022) para 1.10.
[8] SOA 2003, s 66(d)(5).
[9] ibid.
[10] OSA 2003, s 66(b)(1)
[11] OSA 2003, s 66(b)(2), s 66(b)(3)
[12] Law Commission (n 7) para 13.12.
[13] OSA 2003, pt 3 s 16, pt 3 s 17.
[14] Sexual Offences (Amendment) Act 1992, ss 1(1) and 2.

improvement to image-based abuse legislation. More abusive acts are criminalised. Hence, the act constitutes an enormous improvement through its widening of access to victims in pursuing justice.

A Victim-Centred Approach Needed

Still, receiving a criminal conviction against their perpetrators, is only one factor to supporting victims. Legislators should take care to support their mental well-being and emotional needs as well. Briefly, a victim-centric approach prioritises victims' rights, expressed needs, choices, dignity, safety, and well-being.[15] This approach places importance on listening and preventing re-traumatization.[16] The aim is to return as much control to victims as possible and establish compassionate and non-judgemental delivery of services to victims of abuse. In essence, stakeholders centre the needs of victims as much as possible. Unsurprisingly, one key step in ensuring a victim-centred piece of legislation entails listening to victims. My analysis of a victim-centred approach is based in the insights of feminist standpoint epistemology,[17] which views victims as experts of their abuse. Likewise, legislators should adopt this approach when developing law. There is substantial research on the subject of image-based abuse that champions the voices of the abused.[18]

Lifelong Anonymity

Notably, the OSA did make a few major improvements from a victim-centred perspective, specifically in implementing the automatic lifelong anonymity for victims. This demand was a major win for survivors. Research on image-based abuse well documents victims' demand for anonymity.[19] Particularly, there are intense psychological effects of the justice system depriving them of anonymity, meaning the victim's name can be published on the internet, on social media, and in newspapers.

As per the three-year research project of Rackley and others, one victim said that strangers knowing her identity and the nature of the abuse was worse than the intimate image-based abuse itself.[20] The study interviewed 75 victims and 43 stakeholders across the UK, Australia, and New Zealand. Secondly, victims identified the absence of anonymity as a barrier to notifying police. In the same research article, another victim with the pseudonym Lucy said she would not report again, knowing there was no anonymity. She reflected on her past choice to

[15] United Nations 'Victims Rights First' (un.org) < https://www.un.org/en/victims-rights-first> accessed 17 March 2024.
[16] ibid.
[17] Erika Rackley and others (2021) 'Seeking Justice and Redress for Victim-Survivors of Image-Based Sexual Abuse' 29 Feminist Legal Studies.
[18] North Yorkshire Police, Fire & Crime Commissioner 'Suffering in silence: image-based sexual abuse report 2018' (NYP 2018); Clare McGlynn and others (2020) '"It's torture for the soul": The harms of image-based sexual abuse' 30 Social and Legal Studies; Rackley and others 'Seeking Justice and Redress' (n 17).
[19] North Yorkshire Police, Fire & Crime Commissioner 'Suffering in silence' (n 18) 2, 9; Clare McGlynn and others 'It's torture for the soul' (n 18).
[20] Rackley and others 'Seeking Justice and Redress' (n 17).

report to the police: 'Even if you could guarantee me that the police would be very sympathetic and take it seriously and investigate, I still wouldn't do it because there's no anonymity.'[21] Still, while there are improvements like anonymity, a victim-centred approach is noticeably absent from the legislation in two key areas: training of justice system agents and the support of shame free education programs.

Training in the Justice System

Among victims, there is a distrust of workers in the justice system with many feeling unheard and blamed. As part of the aforementioned research project conducted by Rackley and others, a victim pseudonymously named Heather described her experience in reporting her abuse. A law enforcement officer told her 'well I guess you've learnt your lesson.'[22] Other victims in the same study recount feeling shamed after interacting with law enforcement, demonstrating a need for better training among agents in the justice system. Likewise, a survey-based study of 783 police officers and law enforcement staff in England and Wales revealed that the police have a limited understanding of intimate image-based abuse laws and are not confident in investigating cases and in responding to victims.[23] The majority of survey participants reported that they had 'some knowledge of revenge pornography but with significant gaps (39.5%) and 95 percent of police officers had received no training on the relevant legislation.[24] This survey was conducted in 2017 prior to the OSA being implemented, but the findings remain relevant. A more recent 2023 study highlighted the need for increased training among police officers, specifically for frontline officers and call centre staff for larger Metropolitan forces, who are more likely to be undertrained in the area due to the size and workload of the force.[25] Overall, stakeholders and some police officers, recommended training focused on better understanding the effects of intimate image-based abuse.[26] More cognizance of its invasive life effects helps create officers who are empathetic and understand the need for victims to be listened to, even if they are limited in pursuing court action. Meeting victims with compassion can be instrumental to recovery. Currently, there is no provision in the legislation that provides for this increased training for law enforcement officers and call centre employees.

Entrenched Shame through Criminalisation as Children

Furthermore, victim voice focused research shows a need for changing the shame-filled narrative, which begins for many in their formative school years.[27] Victims report feeling 'degraded', 'ashamed, 'disgusted' with themselves, and 'stupid', which demonstrates the burden

[21] ibid.
[22] Rackley and others 'Seeking Justice and Redress' (n 17).
[23] Emma Bond and Katie Tyrrell, 'Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales' (2018) 36 Journal of Interpersonal Violence.
[24] ibid.
[25] Antoinette Raffaela Huber, 'Image-based sexual abuse: Legislative and policing responses' (2023) Criminology & Criminal Justice.
[26] ibid.
[27] Andy Phippen and Emma Bond, 'Why do legislators keep failing victims in online harms?' (2024) International Review of Law, Computers & Technology 10-18.

of gendered social expectations and 'sexual scripts'.[28] A need to change the social culture surrounding intimate image-based abuse is clear. A first step towards this challenge can be made through amending laws that criminalise children and promote victim blaming. Under the Protection of Children Act 1978,[29] a child victim of intimate image-based abuse could face criminal charges for sending a nude photo of themselves, which is later non-consensually shared to others. The 1978 law fails to recognise the nuances of consensual youth-produced sexual images and 'sexting' (the sharing of sexual images or messages by mobile phone).[30] The OSA has no provision for changing the law. However, amending legislation could make an immeasurable impact to both child victims in their pursuit of justice as well as future adult victims, who internalise this victim blaming discourse.

Correspondingly, a change in the law would bring on a wave of culture change, where young girls no longer hear in school assemblies a blame ridden framework surrounding intimate image-based abuse. More specifically, new law would trigger a revision of government guidelines and a different approach to how schools discuss 'sexting' and online abuse. The existing 2019 guidelines from the Department of Education provides that pupils should be taught 'not to provide material to others that they would not want shared further.'[31] This language centres the blame on the child for distributing the image, asking them to change their behaviour rather than the perpetrator. The guidelines continue: pupils should be made aware that sharing and viewing intimate images of a child is a criminal offense, even those created by the child themselves. The government recommendations reflect the unfortunate current state of the law. As seen in the wording in the guidelines for educators, the framework for approaching the topic of image-based abuse is steeped in shame, victim blaming, and criminalisation. Phippen and Bond argue that due to this early on shame-filled discourse, self-blame is entrenched into victims throughout their lives.[32] As a consequence, adult victims commonly express that the abuse is their fault as they should not have sent the images.[33] The OSA made no attempt to shift the narrative, leaving the current law — which criminalises children for their abuse — in effect.

Digital Citizenship and Online Abuse Education Programmes

A large gap in the OSA is its failure to make provisions to support educational programmes on the issues of digital citizenship and online abuse. Briefly, digital citizenship competency refers to the 'knowledge, values, attitudes, and skills that all citizens require to exercise and defend

[28] Clare McGlynn and others 'It's torture for the soul' (n 18).
[29] The Protection of Children Act 1978, s 1.
[30] Jessica Ringrose and Kaitlyn Regehr and Betsy Milne 'Understanding and Combatting Youth Experiences' (n 2) 16.
[31] Department for Education, 'Relationships Education, Relationships and Sex Education (RSE) and Health Education' (2019) 28.
[32] Andy Phippen and Emma Bond, 'Why do legislators keep failing?' (n 27) 10-11.
[33] ibid 11.

their democratic rights and responsibilities in cyberspace.[34] Rackley and others' qualitative interviews with victims highlights the necessity for enhanced education on the impacts of digital image-based abuse to drive cultural change.[35] One victim emphasized, '[The perpetrators are] sharing it because they think it's a cool thing to do and not realise the effect that it actually has on the person, and I think if they were more aware … even if it was just one of them that changed their view'.[36]

GLITCH, a charity that works to end online abuse, called for the inclusion of better educational programmes as part of its written evidence submitted to Parliament before the Online Safety Bill became law.[37] GLITCH's representatives stated there is an urgent need for financial investment from government and tech companies in digital education and research programmes on online abuse.[38] GLITCH pointed to the e-Safety Commission in Australia as a model, which is the world's first government agency committed to online safety, including image-based abuse.[39] Along with producing research, the e-Safety Commission directs schools to teach online safety through their detailed educational workshops, videos, and activities.[40] In stark contrast to the existing 2019 English guidelines, these Australian teaching resources on intimate image-based abuse do not teach children a prohibitive approach to sending nude photos amongst each other, rather they emphasise that the abuse is no fault of the victims. The programme also teaches key skills in digital literacy as well as individual rights and responsibilities online to avoid causing harm to others. In this fashion, the blame is shifted back to the perpetrator. Such initiatives have the potential to counteract the victim-shaming discourse perpetuated by the current law and educational guidelines.

There is no funding provision in the OSA to provide for empowering educational programmes or an e-Safety Commission akin to Australia's. Alongside GLITCH, researchers at University College London, University of Kent, and more call for improved small group digital sex education workshops, and a divergence from the 2019 guidelines to a more victim-oriented approach.[41]

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[34] Council of Europe, 'Digital Citizenship Education' (coe.int, 2024) < https://www.coe.int/en/web/digital-citizenship-education/target-groups> accessed 26 March 2024.
[35] McGlynn and others, 'Shattering Lives and Myths: A Report on Image-Based Sexual Abuse' (Australian Research Council 2019) 15.
[36] ibid.
[37] Glitch, 'Written evidence from Glitch' (OSB0097) <https://committees.parliament.uk/writtenevidence/39245/pdf/> date accessed 26 March 2024.
[38] ibid 6.
[39] ibid 11.
[40] eSafety Commissioner, 'eSafety Education' (esafety.gov.au) <https://www.esafety.gov.au/educators> accessed 26 March 2024.
[41] GLITCH, 'Royal Assent of the Online Safety Act: What's next?' (glitchcharity.co.uk 2023) < https://glitchcharity.co.uk/royal-assent-of-the-online-safety-act-whats-next/> accessed 17 March 2024; Jessica Ringrose and Kaitlyn Regehr and Betsy Milne 'Understanding and Combatting Youth Experiences' (n 2) 59, 62-63.

Conclusion

Intimate image-based abuse has been subject to significant research and public discussion in recent years. This type of abuse is incredibly important to protect against, specifically due to the enduring emotional and distressing impact on victims. Due to the long-lasting nature of the internet and the difficulty in removing images, survivors describe the impact as invasive into every aspect of their life, seemingly endless, and damaging to their physical autonomy.[42] The Online Safety Act shows a step forward through implementing the changes outlined in the Law Commissions Report and eliminating legal loop holes that impeded justice.

But receiving justice is only one piece of the puzzle for a victim's larger journey. There is a clear imperative for further legislation more attuned to a victim-centred approach that prioritises their mental health and wellbeing with a focus on listening and avoiding traumatisation. The extending of automatic anonymity under the OSA does mark a progressive step forward. However, other necessary victim focused measures like improved training for justice system workers are wanting. This step is especially crucial as law enforcement officers and call centre employees are on the frontlines hearing victims' stories. In addition, victims generally report feeling shame and blamed for the abuse, signalling a need to shift the larger societal thinking and culture surrounding the issue. Changing the law to decriminalise child victims is essential. Such action would force a deviation from the victim blaming and prohibitive discourse currently taught to children and internalised into adulthood. Similarly, Parliament should provide for funding shame-free education programmes, taking inspiration from Australia's e-Safety Commission. In essence, there remains a pressing need for ongoing legislation action to better support victims interacting with the justice system as well as efforts to shift harmful social perspectives on image-based abuse.

[42] McGlynn and others 'It's torture for the soul' (n 18).

The definition of Genocide in the 1948 Convention on the Prevention and Punishment of Genocide is too narrow: requiring reform.

Emilia Lyons

Introduction

At the end of World War II, the extent and breadth of atrocities committed by the Nazi's was uncovered and discussion began as to the appropriate punishment for these crimes. Winston Churchill described the massacres as a 'crime without name'. In 1944, Raphael Lemkin went on to call this genocide – an international crime which was a threat to international peace. Lemkin stated: "Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group"[1]. These events led to the establishment of the Nuremberg Tribunals in 1945 and jurisdiction was given to the three categories of crime: 'crimes against peace', 'war crimes' and 'crimes against humanity'.

The act of Genocide was first recognised as a crime under international law in 1946, by the United Nations ('UN') General assembly[2]. In its resolution, the General Assembly affirmed that genocide is a crime under international law for which individuals are punishable, characterising genocide as "a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings"[3]. With this crime definition, the UN Economic and Social Council undertook to cement the General Assembly's concept of genocide and invited the drafting of a treaty on the crime of genocide from the UN Secretary-General. Genocide was later codified as an independent crime under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('the Genocide Convention'). As of January 2018, the convention has been ratified by 149 states. Despite its creation, acts of genocide still allegedly took place, including the Cambodian Civil War, which transpired between 1967-1975. However, it was not until a few decades after the brutality of the Khmer Rouge regime for genocide to be first recognised as having occurred. During the conflict in Bosnia in the 1990s, there were instances of ethnic cleansing, rape and killings. In 2001, the International Criminal Tribunal for the Former Yugoslavia ('ICTY')[4] dealt with these war crimes and ultimately indicted 161 individuals. Additionally, the International Criminal Tribunal for Rwanda ('ICTR') was established and was the first ever international tribunal to

[1] Lemkin. R, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (Columbia University Press 1945, 2 nd edn) p.117.

[2] Office on Genocide Prevention and the Responsibility to Protect, 'Definitions: Genocide' The United Nations available at: < https://www.un.org/en/genocideprevention/genocide.shtml >.

[3] General Assembly Resolution 96 A/RES/96 (1946) UN, Part 2, Resolutions, p. 188.

[4] Kosovo v Milošević (Slobodan) [2001] Case no IT-99-37-PT (Official Case No) ICL 337 (ICTY 2001).

deliver verdicts in relation to genocide, and the first to interpret the definition of genocide set forth in the 1948 Geneva Convention.

What is genocide?

Article II[5] states that 'genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. It then goes on to list said acts from a-e. These are the four groups that if subject to persecution – it will be considered genocide occurred. The Rome statute also covers genocide within article 6[6].

Although the definition of genocide is defined in treaty law, in Article II of the 1948 Genocide Convention[7], the International Court of Justice ('ICJ') has repeatedly stated that the convention embodies principles that are part of customary international law. Regardless of whether or not a State has ratified the Genocide Convention, it is bound by it (as are all other states) due to the mere fact that genocide is a crime prohibited under international law. 'The ICJ has also stated that the prohibition of genocide is a peremptory norm of international law (or jus cogens) and consequently, no derogation from it is allowed'[8]. The 1948 definition binds states not subject to treaty law purely on the basis that it is recognised in customary international law (as states have generally accepted the principle). This is evident as the act has been ratified by various countries. This can be seen in case law such as the ICTY and also the ICTR. Many states have also criminalised genocide in their domestic law; other states have yet to do so.

When has genocide been committed?

Under Article II, the crime of genocide will be considered committed if two distinct elements are simultaneously present – intent and conduct. Firstly, the special intent to destroy in whole or in part a national, ethnic, racial or religious group as such; secondly, the commission of any of the prohibited acts against any member of the protected group.

Genocide distinguishes itself against other international crimes due to its defining characteristics including special intention; the mens rea of special intent, also referred to as dolus specialis, is to destroy a specific group of people – based on nationality, ethnicity, race or religion. It is important to note that genocide is not limited to the killing of a certain group but also includes any act that aims to destroy the group. Article 6 (a-e) of the Rome statute[9], like Article II of the Convention, lists the acts which are considered to destroy the group and

[5] The Convention on the Prevention and Punishment of the Crime of Genocide [1948], Article II.
[6] The Convention on the Prevention and Punishment of the Crime of Genocide [1948], Article II.
[7] The Convention on the Prevention and Punishment of the Crime of Genocide [1948], Article II.
[8] Office on Genocide Prevention and the Responsibility to Protect, 'Definitions: Genocide' The United Nations available at: < https://www.un.org/en/genocideprevention/genocide.shtml >.
[9] Rome Statute of the International Criminal Court [2011], Article 6 (a-e).

these include 'causing serious bodily or mental harm', 'imposing measures intended to prevent births within the group' and 'forcibly transferring children of the group to another group'[10].

The contrast between the historical and contemporary interpretation of genocide

Although these definitions and examples of genocide are provided, the term genocide is frequently abused and used incorrectly. As it is a rather emotive term, we should not name things genocide unless they strictly meet the criteria under the convention. It is important to recognise the gross misuses of the term in order to preserve the integrity of the criminal proscription. Historically, the definitions for international crimes (including war crimes, crimes against humanity, genocide and aggression) came from the International Court of Justice. In the contemporary aspect, as modern language has changed, how we use the term genocide has changed and it is not as exclusive as it once was.

Why is the genocide convention considered to be narrow?

The convention excludes various groups including political groups and social class. Political groups were included in earlier drafts of the document but were omitted in the final text. The narrowness of the definition provided in the genocide convention has faced great criticism for this reason alone. This has resulted in recurrent suggestions in the years following the establishment of the convention to extend it to encompass political, social, economic and other groups. The narrow classification of the victim groups was as a direct result of political compromise. This definition allows governments to exploit these loopholes. In 1959, the scholar Pieter Drost proposed a new legal definition "the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such".

However, the definition of genocide within the convention is deliberately narrow – intention to destroy may be difficult to prove in practice. The limitation on the groups protected came about at the insistence of the Soviet Union which did not wish to include political, social or economic status. Moreover, at the time the genocide convention was adopted in 1948, its drafters did not include an extensive list of criteria but rather 'national minorities' – an already well recognised concept within international law at the time. When the convention was initially drafted, it was suitable at present time and place so to speak. This was because it reflected international concern regarding the actions carried out by Germany during the second World War. This convention was written more than seventy years ago and was incredibly relevant.

When the convention was formed, cultural genocide was intentionally excluded. Despite the definition remaining unchanged, this has not prevented judicial interpretation to develop; it has broadened significantly. The commission creating the convention also exhibited a subject approach regarding the identification of the protected group. Recent judicial decisions made have enforced that there is no requirement of a state plan or policy. Despite treaty law not

[10] *Ibid.*

recognising cultural genocide, there is a definite tendency to expand the notion to what is colloquially called 'ethnic cleansing'.

The Genocide Convention establishes in Article I[11] that the crime of genocide may take place in the context of an armed conflict, international or non-international, but also in the context of a peaceful situation. One area where genocide is not considered narrow is with respect to the sense of time; the act does not need to be committed during wartime. Although it is much less common, genocide can in fact be committed during peacetime.

Is there a requirement for genocide to be on a large scale?

The necessity of a scale is an area that is not covered within the convention. Despite being discussed at great lengths, this area requires greater clarification. In theory, genocide could involve the harm towards/killing of a handful of people or can consist of a singular act. It is important to note here that although it can be a singular act, this is not the same as the target of destruction being a member of a group as an individual, the target must be the group and if it is a singular act, it must be due to an individual's affiliation within said group. This is because victims of genocide are deliberately targeted because of their real or perceived membership of one of the four groups protected under the Convention. In present day, there are still numerous examples where genocide can be seen including: i) Christians and Muslims in the Central African Republic, ii) Christians and Yazidis in Iraq and Syria, iii) Darfuris in Sudan and the Nuer and other ethnic groups in South Sudan. Ethnic cleansing and genocide are still very prominent globally with the head of the UN's Humanitarian office (Stephen O'Brien) remarking that the two international crimes have been on the rise, specifically in the Central African Republic where there is "a very deep ethnic-cleansing approach"[12].

Debatably excluding other vulnerable and targeted groups such as economic and social classes, women, political and cultural groups will have undermined the adjudication of the crime of genocide. This is for the mere fact that those groups are victims to targeted attacks as a direct result of their membership within a specific group so they should be afforded the same rights and protection as other groups in society. Over the last century, there has been greater respect and rights given to these groups, i.e. women's rights have seen considerable development including the UN adopting the Convention on the Elimination of All Forms of Discrimination against Women in 1979[13] but the major breakthrough occurred in 1993 during the World Conference on Human Rights in Vienna, where 'women's rights were finally recognised as human rights - not less, not separate'[14]. Surely with the change in social norms, the legislation

[11] The Convention on the Prevention and Punishment of the Crime of Genocide [1948], Article I.
[12] Kranz. M, '5 Genocides that are Still Going on Today' Business Insider (2017) available at: < https://www.businessinsider.com/genocides-still-going-on-today-bosnia-2017-11?r=US&IR=T >.
[13] The Convention on the Elimination of All Forms of Discrimination against Women [1979].
[14] Haan. F, 'A Brief Survey of Women's Rights' The United Nations available at: < https://www.un.org/en/chronicle/article/brief-survey-womens-rights >.

needs to be updated to protect groups against international crimes to give them the same consideration and the violent acts be categorised as genocide.

Ad Hoc Tribunals and how the law of genocide was applied

International law including the genocide convention was created to deter individuals from committing the crimes at the outset. Additionally, it was to prevent conflict and to maintain international peace and security. For this reason, the ad hoc tribunals took place to act as a precedent to be relied upon in the future to establish international criminal justice. The purpose of the ad hoc tribunals was to deal with the core international crimes, namely genocide, war crimes and crimes against humanity. The Nuremberg trials after World War II marked the start of ad hoc tribunals. Nuremberg defines crimes against humanity, offering genocide as an example. Further to this, in response to the violence in the former Yugoslavia, the Security Council created the ICTY in 1993[15] via Resolution 827[16]. The ICTY conducted 111 trials - this acted as a precedent for decisions to follow on international crimes. A year later, the Security Council acted again, in response to the genocide in Rwanda throughout 1994, to create the ICTR[17]. It has a pioneering role in establishing a credible international criminal justice system. It was also the first international tribunal to define rape in international law and to afford the recognition of rape as a means of perpetrating genocide. This was due to rape causing not only physical destruction, but mental destruction. This once again highlights that the definition is not too narrow as it considers both the mental and physical element.

Ever since special courts were also set up to prosecute those who commit both domestic and international crimes. Examples of mixed tribunals can be seen in recent case law including: Kosovo[18], Sierra Leone[19], Bosnia Herzegovina[20] and most recently Lebanon[21]. The ICTR played a critical role with the establishment of a credible international criminal justice system. Moreover, the ICTR also produced a substantial amount of jurisprudence regarding genocide, crimes against humanity and war crimes. The first ever verdicts from an international tribunal, concerning genocide, were provided by the ICTR. It was also the first tribunal to interpret the definition of genocide set forth in the 1948 Geneva Convention – the ICTR truly played a

[15] Tolbert. D, 'International Criminal Law: Past and Future Anniversary Contributions - International Criminal Law' (2009) 30 Int'l L. 1281.
[16] The United Nations Security Council Resolution 827 S/RES/827 [1993].
[17] Ford. S, 'The Impact of the Ad Hoc Tribunals on the International Criminal Court' (2019) Cambridge University Press.
[18] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p.403.
[19] Prosecutor v Charles Ghankay Taylor [2012] SCSL-03-1-T, Special Court for Sierra Leone.
[20] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Reports, p.43.
[21] R (on the application of MM (Lebanon)) (Appellant) v Secretary of State for the Home Department (Respondent) [2017] UKSC 10.

pioneering role. These ad hoc tribunals could try individuals accused of any of these core international crimes, demonstrating that international justice was possible[22].

The work of both tribunals have highlighted that international investigation and international prosecution of those responsible for grave violations of international humanitarian law are possible and credible. Although they demonstrated the viability of international criminal justice, the ICTR and ICTY also demonstrated the limitations of the Security Council's ad hoc approach[23]. Also, creating these tribunals in response to grave atrocities committed is not a sustainable solution. The cost of the ad hoc tribunals was immense and took up a substantial amount of the UN's budget[24] - "by 2004 the United Nations ad hoc tribunals consumed more than $250 million per year, which is about 15% of the UN's general budget."[25] Additionally, due to the tribunals being created in response to specific brutalities, the ad hocs were limited in their jurisdiction[26] - they can only prosecute crimes investigated within the tribunals. Essentially, if a new atrocity occurred which did not have any precedence, as it was not covered within the previous trials, a new ad hoc tribunal would have to be established. A more permanent solution was required; this led to the creation of a more lasting measure – the international criminal court[27]. In addition, if the Security Council were relied upon to create additional new tribunals, the permanent members within the Council may utilise their veto powers, preventing the establishment of tribunals that are not in their interest.

A criticism of ad hoc tribunals is that there is, to a certain extent, inconsistency in their accountability of violations to criminal law. As a result, accusations of double standards within the UN have been suggested as ethics are being used as a basis for serving the self-interest of some states. Furthermore, these tribunals are considered problematic as they have exacerbated tension within communities, as opposed to prompting reconciliation.

Due to all these factors mentioned above, the 1948 convention leaves 'ample room for pessimism about the role of the Convention as an instrument for the protection of human rights"[28]. However, if we make alterations to the convention we will fundamentally have

[22] Washburn. J, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) Pace IL Review 11.
[23] Danner. A, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2005) ICC-OTP Guest Lecture Series, The Hague.
[24] Sterio. M & Schar. M, The Legacy of Ad Hoc Tribunals in ICL: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments (CUP, 2019).
[25] Schabas. W, The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone (Cambridge University Press, 2006).
[26] Updated Statute of the International Criminal Tribunal for the former Yugoslavia, Article 1; Statute of the International Criminal Tribunal for Rwanda. Article 1
[27] Washburn. J, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking' (1999) Pace International Law Review 11, 416.
[28] Ratner. S & Ridgeway. D, 'The Genocide Convention after Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity' (1998) American Society of IL 92.

changed it and removed its exclusive properties. Due to the ever-developing nature of the world, it is important to implement this into legislation in order to keep it current.

Conclusion

Although the definition of genocide provided in the 1948 convention excludes a broader sense of 'groups' by directing the act of genocide to be against 'national groups', it cannot be concluded from this that the definition is narrow in nature. With respect to its consideration of destruction, this is not limited to physical annihilation but also covers acts intended to destroy the culture of a group. Evidently, thought is given to actions that may affect the sustainability of the group, including preventing births and extracting children from the group. The convention covers both the mental and physical elements of genocide and the devastation it causes. It resulted in numerous ad hoc trials and the prosecution of the persons that committed genocide – getting justice for its victims. Despite these encompassing aspects that are not merely physical, there is no sufficient protection afforded to some of the key groups in society, for example women – the largest group not being represented. This is the major drawback of the convention as it limits genocide to the four groups listed. Persecution can occur against women for their gender and this should be given international recognition as genocide. Times have changed and women have been given a greater legal standing since the convention was first drafted. This is where the current legislation is lacking and frankly, too narrow.

Although the genocide convention can be considered outdated for this reason, it is important to realise that it proved to be useful at the time of its creation. This was because it reflected the international concern at the time regarding the actions of Germany during the Second World War. But the contemporary views of the world have significantly changed since then as numerous decades have passed since the creation of the convention. This is mainly due to the emergence of mass media, resulting in society being rather more intuitive than it once was. For this reason, it is important to regularly interrogate legislation, including these conventions, to evaluate their relevance to contemporary society. This does not seek to criticise and change legislation, merely for the sake of promoting change, but it is to properly re-evaluate the role of the 1948 Convention within international law at present. It also does not take away from the value the convention has brought, the only way to improve is to learn from what came before and new legislation and amendments would be made to keep it relevant. This would not dilute the term and take away from genocide being the 'ultimate crime' but offer protection to those persecuted. Overall, the convention should act as a reference point, but alterations need to be made to support the vulnerable groups against international atrocities.

Anchored in Choppy Waters: A Critical Evaluation of the Law of Arrest in English Shipping Law.

Harry Maunder

"We should not allow our professional preoccupation with maritime law to shut our eyes to the law which applies on land, nor to think that maritime law is special when it is not".[1]

Introduction

Centuries have passed and still the untrammelled access to arrest, arising as of right, is still the chief distinguishing feature of Admiralty[2] and regarded as a "special advantage incident to the jurisdiction".[3] It is important that such unrestrained access to arrest is not severely hindered, for fear that English shipping law becomes unattractive to forum shoppers wishing to bring claims,[4] owing to its unique nature, to the Admiralty Courts in London. Arrest encapsulates many of the key desires of any claimant; namely, the way in which it secures jurisdiction and perfects security. However, now is the time to ask who pays the price for such unrestricted access to our courts. It will be argued that the scales are tilted unduly in favour of the claimant, leaving the defending shipowner to face the courts' harsh and ultimately unforgiving treatment based on incoherent and outdated rationale.

This paper will focus on the doctrine of wrongful arrest, exposing the uncompensated losses associated with an unfounded arrest that do not fit within the narrow restraints of *The Evangelismos*[5] test. It is contended that the doctrine of wrongful arrest plays a disproportionate role within English shipping law and favours the claimant.[6]

This paper will be split into three parts. First, an acknowledgement of the wider role played by arrest will be outlined, providing historical context relevant to later discussions. Second, this paper will refine its scope and pertain to an evaluation of the wrongful arrest doctrine, highlighting the inherent disproportion that it affords claimants in an arrest claim. Third, this section will focus on pushing the debate forward through suggesting reform and finding a

[1] S. Boyd, 'Shipping Lawyers: Land rats or water rats' (1993) LMCLQ 317, 329
[2] D.J. Cremean, 'Mala Fides or Crassa Negligentia" (1998) LMCLQ 9 at p.10.
[3] *City of Mecca* (1879) 5 P D 28 per Sir Robert Phillimore.
[4] See the comments of Dr Lushington in *The D.H. Peri* (1862) Lush 543.
[5] *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945.
[6] It is interesting to note the civil law position on the wrongful arrest of a vessel which compensates the defendant for losses occasioned with the arrest; see, for example, Art 921 of the German procedural code (ZPO).

'happy medium' that has been called for by great commentators in this area.[7] Proposals for reform are twofold; firstly, the test set out in *The Evangelismos* should be reformed, as in Australia, to encapsulate claims that fall just outside the high threshold of *mala fides* and *crassa negligentia*. This would, contrary to judicial hesitation, provide a legitimate attempt to redress the imbalance within the current law. Secondly, it will be argued that the arresting party should be required to provide the court with a cross-undertaking in damages. This would rightly bring the law in line with freezing injunctions.

Part 1: The Law of Arrest

The law of arrest is subject to international convention; namely, the 1952 Convention[8] and, where applicable, the 1999 Convention.[9] England has ratified the 1952 Convention which allows a claimant, as of right,[10] to bring an in rem claim against property; usually a ship. However, it must be satisfied that: (i) the case falls under one of the heads of jurisdiction of the Admiralty Court;[11] (ii) the claim, after satisfying the heads of jurisdiction, can be brought in rem; (iii) if so, an application can be made to the Admiralty Marshall[12] for an arrest warrant which must be executed synonymous to an in rem claim form.[13] As aforementioned, arrest encapsulates many key desires of the claimant; securing jurisdiction and perfecting security. Both will be explained below.

A. Jurisdiction

Notwithstanding that England is a party to the international convention,[14] it is stipulated that a claimant can bring an in rem claim within the jurisdiction.[15] The 1952 Arrest Convention stipulates that the arrest of ships establishes jurisdiction in the country of arrest. Therefore, if the claim is brought in rem against a ship, then the ship can be arrested, and the Admiralty Court can hear the claim in England, establishing jurisdiction.

B. Security

If, upon the successful arrest, the claimant does not attend court, the claim can still be made.[16] Any potential proceeds of sale arising from the sale of the ship upon a successful claim can be used to satisfy the courts' judgment. With an in rem claim, security can be provided in return for the release of the ship, with such security typically deriving from the shipowners and the

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[7] Bernard Eder, 'Wrongful Arrest of Ships: A Time for Change' (2013) 38 Tul Mar JL 115; Martin Davies, 'Wrongful Arrest of Ships A Time for Change – A reply to Sir Bernard Eder' (2013) 38 Tul Mar LJ 137; Bernard Eder, 'Wrongful Arrest of Ships: Rejoinder by the Honourable Mr. Justice Eder' (2013) 38 Tul LJ 143.

[8] The International Convention for the Unification of Certain Rules Relating to Arrest of Sea-going Ships, 1952.

[9] The International Convention on the Arrest of Ships, 1999.

[10] Since 1986, an arrest warrant is available as of right cf The Varna [1993] 2 Lloyd's Rep 253; see now CPR 61.5.2.

[11] The Senior Courts Act 1981, s20(2).

[12] The Civil Procedure Rules 1998, r 61.5(8).

[13] ibid, r 61.5.5.

[14] Council Regulation (EC) 1215/2021of 12 December 2012 on jurisdiction and the recognition and enforcement

[15] *The Freccia del Nord* [1989] 1 Lloyd's Rep 388 (Adm).

[16] Although, upon the defendant's absence, the claim will still have to be evidenced: CPR r 61.9(3).

Protection and Indemnity Club. Arrest perfects jurisdiction because, differing from an in personam claim allowing a freezing injunction to be obtained, an in rem claim can convert the claimant into a secured creditor.[17]

Part 2: The Wrongful Arrest Doctrine

The defendant can seek damages for the wrongful arrest of their ship. This is only available in two restricted categories: the claimant must have either acted in *mala fides* (bad faith); or with *crassa negligentia* (gross or 'malicious' negligence).[18] Bad faith refers to the claimant not having an honest belief in entitlement to the arrest,[19] with gross negligence meaning that there was such limited basis for the arrest that it is inferred that the claimant could not have had an honest belief to entitlement. A genuine mistake will not amount to gross negligence.[20]

A. *The Evangelismos*

The aforementioned test was established by *The Evangelismos*[21] and *The Strathnaver*.[22] *The Evangelismos* was accused of colliding with a ship and was subsequently arrested. However, in a case of mistaken identity, it was not the offending vessel. Upon an application to claim damages for wrongful arrest, the claim was dismissed owing to a bona fide belief that, as *The Evangelismos* was the offending ship, there was no *mala fides*. On appeal the Privy Council, in particular Rt Hon T Pemberton, stated that:

"Undoubtedly there may be cases in which there is either *mala fides*, or (...) *crassa negligentia* ... the real question in this case ... comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour ... that it rather implies malice ... or that gross negligence which is equivalent to it?".[23]

Chong articulates that the preceding test is clearly an onerous one.[24] The below analysis will pertain to the concept of these requirements being pragmatically limited,[25] resulting in shipowners being deterred from pursuing a claim for wrongful arrest.

In agreeance with Chong, Nossal notes how the aforementioned test results in the claimant being "protected and immunised from the consequences of their actions".[26] Although it must be questioned why, considering that the probable consequence of arrest is financial loss to the

[17] *The Cella* (1888) 13 PD 82 (CA); In *re Aro Co Ltd* [1980] Ch 196 (CA).
[18] *The Evangelismos* (n 5); *The Stathnaver* (1875) 1 App Cas 58 (PC).
[19] Nathan Tamblyn, 'Shipping Law: An Outline' (Amazon, 2 nd edn 2021) pp, 46.
[20] *The Kommunar (No3)* [1997] 1Lloyd's Rep 22 (Adm), 30.
[21] *The Evangelismos* (n 5).
[22] *The Stathnaver* (n 18).
[23] *The Evangelismos* (n 5) at 359-360.
[24] S. Chong 'Charting Our Own Courses: The Australian, New Zealand, and Singapore Journeys in Maritime Law' (2016) 30 ANZ Mar LJ 1, 9.
[25] Eder (n 7) 155,126.
[26] S. Nossal, 'Damages for the Wrongful Arrest of a Vessel' [1996] 1 L.M.C.L.Q. 368.

shipowner, the arresting party is afforded generous protection from the courts. Hill, however, regards such protection as proper: no claimant should fear that making an arrest "exposes himself to unpalatable countersuit for wrongful arrest".[27] Hill's argument is admittedly convincing. The right of arrest should be unqualified, with access to the courts unprohibited. However, where this line of argument fails is when claimants, owing to the narrow rule in *The Evangelismos*, are afforded abundant protection; pragmatically resulting in damages for wrongful arrest being "hardly ever pursued"[28] by the shipowner. Chong and Nossal's analysis is to be preferred; the test derived from *The Evangelismos* allows for too narrow a reading.

B. Critique

The scope of the test is unclear, and it is uncertain whether malice is an active requirement for finding wrongful arrest. The Privy Council in *The Evangelismos* stated that malice need not be proved, merely *crassa negligentia*. However, *The Strathnaver* adapted the requirements to "mala fides or malicious negligence";[29] implying that mere negligence is now insufficient. Nossal notes how the requirement of malice is still unascertainable in subsequent cases.[30] In *The Avon*,[31] Barnett J opined that "something less than malice"[32] may be required. However, although there have been cases where malice was proved,[33] there have been far more instances where malice was not found and damages for wrongful arrest were still awarded.[34]

Therefore, if malice is required, then it is only in "exceedingly rare cases"[35] that the defendant will be successful in a claim for wrongful arrest. Sheppard notes how hard it is for a shipowner to succeed in a claim for damages upon wrongful arrest.[36] Colman J in *The Kommunar* (No3)[37] remarks that the position in English law, where unless there is *mala fides* or *crassa negligentia* the claimant will not have to compensate the shipowner for any loss, bears "very harshly on shipowners".[38] Therefore, this paper will evidence below why the proceeding analysis from Sheppard and Nossal is agreeable and heightens the calls for reform.

Part 3: Reform

The current test used by the courts is unclear and tilts the scales in favour of the claimant. Regarded as confusing,[39] there is force behind calls to "re-examination the narrow rule and its

[27] C. Hill, "England and Wales" in Arrest of Ships (Lloyd's of London Press, London, 1985), 48.
[28] ibid.
[29] *The Stathnaver* (n 18) at [67].
[30] Nossal (n 26) 368, 373.
[31] *The Avon* 27 January 1992; AJ. No 4 of 1992 Unreported (H.K., H.C.).
[32] ibid.
[33] *The Walter D. Wallet* [1893] P. 202; *The Cathcart* [1867] L.R. 1 A & E 314.
[34] The Victor (1860) Lush. 71; *The Eleonore* (1863) Br. & L.; *The Cheshire Witch* (1864) Br. & L; *The Margaret Jane* [1869] L.R. 2 A & E 345.
[35] Nossal (n 26) 368, 373.
[36] Aleka Mandaraka Sheppard, ' Wrongful Arrest of Ships: A Case for Reform' (2013) 19 J.INT'L MAR.L. 41.
[37] *The Kommunar* (n 18).
[38] ibid at 30.
[39] Eder (n 7) 115, 118.

foundations".[40] This paper argues that to redress the imbalance between the parties, a cross-undertaking in damages is required, as the current law "deters deserving shipowners from pursuing wrongful arrest claims".[41]

A. Expanding the Test for Wrongful Arrest

Nossal interprets the test in *The Evangelismos* as consisting of both narrow and broad components. He asserts that damages for wrongful arrest can be awarded when the arrest is done: (i) 'maliciously'; or (ii) 'negligently'; or (iii) 'unwarrantably'.[42] Sheppard refutes such a depiction of the law, asserting that although Nossal's arguments are not unfounded, it is questioned whether, even upon a liberal reading of the test, it would include mere negligence.[43] Sheppard's analysis is to be preferred; the problems with the test cannot be fixed by applying a broad interpretation in the future. Even Nossal notes that "the inadequacies of the law can be rectified by an abandonment of the narrow rule".[44] However, circumventing the narrow approach through a broad interpretation is admittedly unpersuasive: siding with Shepherd's analysis, a complete "re-examination"[45] of the law is required. Therefore, it is argued the law should be changed to reflect the law in Australia.

B. Australia

For over a century, the test established in *The Evangelismos* has prevailed over the Commonwealth; applied in Canada,[46] Hongkong,[47] Singapore[48] and New Zealand.[49] The test is both anachronistic, "one sided and heavily plaintiff-friendly".[50] Aware of these concerns, Australia promulgated legislative provisions[51] in Section 34 of the Admiralty Act 1988.[52] Of great importance is that the provision contains an alternative test to that established in *The Evangelismos*: where a party "unreasonably and without good cause"[53] obtains the arrest of a vessel, they are liable for damages. Chong, with Woodford in full support,[54] argues that this provision strikes an "equitable balance"[55] between the interests of both the shipowner and the claimant. Such analysis from Chong is agreeable: without an analogous adaptation to the

[40] Nossal (n 26) 368, 387.
[41] Sheppard (n 36) 41, 54.
[42] Nossal (n 26) 368, 377-378.
[43] Sheppard (n 36) 41, 44.
[44] Nossal (n 26) 368.
[45] Sheppard (n 36) 41, 44.
[46] *Armada Lines Ltd v Chaleur Fertilizers Ltd* [1997] 2 SCR 617.
[47] *The Maule* [1995] 2 HKC 769.
[48] *The Kiku Pacific* [1999] 2 SLR(R) 91.
[49] *Mobile Oil New Zealand Ltd v The Ship "Rangiora"* [2000] 1 NZLR 49.
[50] S. Chong (n 24) 1, 9; see also e.g Michael Woodford, 'Damages for Wrongful Arrest: Section 34, Admiralty Act 1988' (2005) 19 Australian and New Zealand Maritime Law Journal 115; The Vasiliy Golovin [2008] 4 SLRR 994 at [120].
[51] Sohana Goordeen 'The Test for Wrongful Arrest of Vessels in Search of Harmonisation' (University of Cape Town 2018).
[52] The Admiralty Act 1988, s34.
[53] ibid.
[54] Woodford (n 50).
[55] Chong (n 24) 1,9.

current test in English law, shipowners will continue to face the law's disproportionate response to their interests deriving from the restrictive test established in *The Evangelismos*. Accepting this suggestion would redress the imbalance between the claimant and shipowner; increasing a defendant's ability to claim for wrongful arrest, without disproportionally affecting the claimants right to arrest the vessel.

C. A Cross-Undertaking in Damages

Currently, under English law, there is no requirement for the claimant to provide the court with a cross-undertaking in damages. Teare J in *The Alkyon*[56] confirmed the long-standing practice that the claimant's right to arrest should be as of right. In doing so, Teare J upheld the reasoning of the Court of Appeal in *The Bazias 3 and the Bazias 4*[57] and the dicta of Lord Clarke in *Willers. V. Joyce.*[58] However, Bernard argues that the law should be reformed as to allow for such a cross-undertaking and questions why the law should not be brought in line with the law on freezing injunctions. This would require a claimant to provide compensation so that, if the claim fails, the claimant is liable for the loss sustained by the injunction. The absence of such a requirement is noted by Colman J. in *The Kommunar* as a feature distinguishing admiralty proceedings from freezing injunctions but notes that:

"the absence of a similar facility in Admiralty proceedings … leaves without remedy an innocent defendant shipowner who has suffered loss by an unjustifiable arrest but who is unable to establish malice or crassa negligentia".[59]

Bernard sees no reason why equity, a compelling justification for the requirement of an cross-undertaking in injunctions, should not allow an analogous safeguard regarding the arrest of a vessel.[60] The requirement of a cross-undertaking for an interim injunction has been accepted, at least since the House of Lord decision in *Novello v James*,[61] and now crystallised in statue.[62] Such practice has been described by Lord Wilberforce as "so obviously just, it is almost universal".[63] Therefore, it is put that a cross-undertaking should be analogous regarding the arrest of a vessel.[64] Davies, conversely, warns against the requirement of a cross-undertaking in damages.[65] However, such an objection from Davies is unconvincing.

[56] *Stallion Eight Shipping Co SA v NatWest Markets Ltd* (The MV Alkyon")[2018] EWCA Civ 2760.
[57] *The Bazias 3 and the Bazias 4* [1993] 1 Lloyd's Rep. 101
[58] Willers v. Joyce [2016] 3 WLR 477.
[59] *The Kommunar* (No3) (n 20) at [33]-[34].
[60] Eder (n 7) 115, 132.
[61] *Novello v James* (1854) 5 De G M. & G 876.
[62] CRP PD 25A, para 5.1(1).
[63] Case 85/76 Hoffmann-Law Roche v Commission [1979] ECR 461 at 1146.
[64] Eder (n 7) 143, 144.
[65] Davies (n 7) 137, 138.

Davies argues that a cross-undertaking in damages is a nuclear weapon and that while "few [ships] are actually arrested",[66] the 'high costs' of arrest are only borne by companies that are practically insolvent.[67] He reiterates that security is provided at little or no cost by a letter of undertaking from the ships P&I Club and therefore, sees no reason why a cross-undertaking is required.[68] This argument is unattractive as it disregards the practical application of the law.

Firstly, surely arrest is, in itself, 'nuclear' as it is analogous to a freezing injunction, capable of shutting down a one-ship company that cannot provide adequate security? It is contended, therefore, that arrest is already an equally powerful weapon. Moreover, where a one-ship company, as seen in *The "Alkyon"*,[69] has a loan agreement with the bank, P&I will not extend to a disputed claim under a loan agreement and renders the company immobilised. Clearly, Davies misses the pragmatic difficulties that one-ship companies such as *The "Alkyon"* face when they are unable to put up security.

Consequently, the requirement of a cross-undertaking would improve the law, as it can "balance the claimant's right of arrest with the owner's right to be able to claim damages",[70] something of which the current law, and Davies' argument, clearly omits. The argument that a cross-undertaking would make the right of arrest practically unavailable to smaller claimants (crew members) can be easily addressed. Tsimplis suggests a discretionary provision, allowing for security to be collected under a more lenient test for such claimants.[71] Potentially, making the smaller arresting party provide a cross-undertaking for the costs of obtaining security as opposed to the full amount. Tsimplis' analysis is agreeable and would be a favourable adaptation to Bernard's above analysis. This suggested reform is better than the current law as the requirement of a cross-undertaking in damages upon wrongful arrest would see the law properly balance the interests of both parties.

Such reform would not require legislative approval. The Court of Appeal in *The "Alkyon"* confirmed that it was not bound to refuse an application for a cross-undertaking in damages and that, without any approval from Parliament or the Rules Committee, they were able to depart from the historic reluctance of the Admiralty Court to refuse a cross-undertaking.[72] It is regrettable, therefore, that the Court of Appeal decided not to do so and constitutes a missed opportunity.

[66] ibid 137, 139.
[67] ibid.
[68] ibid.
[69] *The MV Alkyon* (n 56).
[70] Sheppard (n 36) 41, 57.
[71] M. Tsimplis, 'Procedures for Enforcement' in Y. Baatz 'Maritime Law' (Informa Law from Routledge 4 th edn 2017).
[72] Teare J in *The MV Alkyon* [2018] EWCH 2033 (Admlty) at [10].

Conclusion

The preceding analysis has demonstrated how the law of arrest plays a disproportionate role within English shipping law, causing excessive protection of claimants' interests and failing to equally balance such rights with that of the shipowner. The law would benefit from the above reforms which would redress the current imbalance.

The Lawyer as Agent.

Ashley McClain

In *MacPhail*, the appeal case from which the quoted description of "agent" comes, LJC Moncrieff reverses the decision of the Inner House and finds **the principal**, Mr. Scott, completely liable for the goods from **the third party**, MacPhail & Sons. Having made Mr. Scott trustee, Mr. Maclean, the trustor, and **agent,** also granted Mr. Scott a five-year lease on land, which Mr. Maclean initially owned. As manager of the farmland as well, Mr. Maclean ordered and received goods on Mr. Scott's behalf for use on the land. LJC Moncrieff subsequently found that it is Mr. Scott who should be responsible for the sum being sued for: "the orders… which were given by Mr. Maclean…were on behalf of Mr. Scott…the furnishings which were bought by Mr. Maclean were bought on behalf of Mr. Scott."

As "the hand – and nothing but the hand" of Mr. Scott, Mr. Maclean acted, but it was as though Mr. Scott did. The act, although performed by the agent, is the act of the principal.[1] Put another way, "If someone is authorized to make a statement on my behalf, the statement is mine regardless of whether the words come out of my mouth."[2] An agent is a "person [who] can transact on behalf of another… conclude contracts on behalf of their principals… perform other juridical acts on their principals' behalf [such as] transfer property, appeal decisions of courts or tribunals and make or accept payments."[3] A juridical act is any voluntary conduct intended to affect someone's legal position.[4] There are different types of agents as well including general, special, commercial and mercantile. The agent has a duty to follow instructions, of skill and care, keep accounts and a fiduciary duty to his principal.[5] In turn, the principal owes rights to the principal including the agent's entitlement to commission and reimbursement, and for commercial agents, a general duty of good faith.[6] An agent must have authority before binding their principal; this authority can be actual, apparent or retrospective. LJC Moncrieff's conceptualization of agent as representative for the principal, or the vehicle through which the principal acts, is reminiscent of the *alter ego* theory. His statement implies that any act by the agent will bind their principal, however, as will be seen, this is not the case. There are instances when the agent will not be held personally liable for the principal's behaviour, for example. Therefore, the limitations of Moncrieff's statement cannot be overlooked. Indeed, as Macgregor points out, "the evidence suggests that the agent should be treated as an independent actor."[7]

[1] Macgregor, *The Law of Agency in Scotland* (Edinburgh: SULI/W. Green, 2013) para 13.10.
[2] Stevens, "Why do agents 'drop out'?" (2005) L.M.C.L.Q. 101, 103.
[3] MacLeod, "Agency in Ross G Anderson (ed), *Scots Commercial Law* (Edinburgh University Press 2022) 107.
[4] ibid.
[5] (n 1) 157-159.
[6] ibid 162.
[7] (n 1) para 2.05.

A case which demonstrates the truth, but limits of the alter ego theory well is *Salomon v Salomon & Co. Ltd*.[8] A sole trader, Mr. Salomon incorporated a new company and transferred his existing business to the new company. As managing director **(agent)** of the company **(principal)**, Mr. Salomon was able to buy the existing sole trader business and make it a part of the newly incorporated company. Even though Mr. Salomon, as agent, is acting, he has done so on behalf of his principal, the company. Following this reasoning, one might assume that an attempt to sue the agent would mean an attempt to sue the principal. However, as *Miller v Mitchell*[9] first established and *MacPhail* corroborates, where the principal is named and disclosed to the third party, the agent will not incur any personal liability. Therefore, while the court at first instance and Court of Appeal agreed that Mr. Salomon should be held personally liable for the company's debts, the House of Lords established that newly incorporated companies had their own distinct legal personas and the company here was **not** the agent of Mr. Salomon. Accordingly, the company's debts were its own, **not** Mr. Salomon's and creditors could access only those assets held by the company (limited liability), Salomon & Co. Ltd, and not by Mr. Salomon, the individual.

There are straightforward applications of the alter ego theory. In *Donald v Rutherford*[10], the failure of the pursuer's solicitors to serve a writ in time on the defender resulted in his claim against the defender being dismissed by the Court of Session. Lord Dunpark explained that while blame could not be attached to the pursuer for his solicitor's failure to raise the action in time, the defender nor his insurance company could be held liable either. He ascribes this fault solely to the pursuer's solicitors, which, in that case, were his alter ego.[11] Similarly, in *Forsyth*[12], due to an oversight by an assistant with the pursuer's solicitors, an action for reparation against the pursuer's employer was 48-days late and eventually dismissed by the Court of Session as well. Describing the Lords' reasoning in *Donald* as "the correct exposition of the law", LJC Wheatley remarked "that a pursuer in such circumstances has to accept responsibility for the sins of omission or commission of his agent — his solicitor."[13]

However, the alter ego theory is limited in its explanation of the principal-agent relationship. One way these limits are revealed is when determining what kind of relationship has been formed between the agent, principal and third party. In *Lamont Nisbet & Co v Hamilton,*[14] the agents were the managing owners of a ship who instructed the defenders, insurance brokers, to insure the ship for which they were responsible. When the agents went bankrupt, the brokers brought an action against the owners of the ship for payment of the insurance premiums but were unsuccessful. The court held that the brokers were aware of the agents' representative

[8] 1897 A.C. 22.
[9] 1860 22 D. 833.
[10] 1984 S.L.T. 70.
[11] ibid 78.
[12] 1985 S.L.T. 51.
[13] ibid 54.
[14] 1907 S.C. 628.

capacity, relied on the credit of the agents throughout the contract and did not use the Register of Owners to find out the identity of the owners of the ship. For this reason, the agents were "their debtors and sole debtors"[15] and the principal could not be bound by the agent's actions. *Ruddy v Monte Marco*[16] resembles *Lamont* more closely in its outcome but differs as where the identity of the principal was not disclosed, the agent was held personally liable for the pursuer's injuries. *Gibb v Cunningham & Robertson*[17] resembles *Ruddy* closely in its outcome, as the agent's failure, who was a solicitor, to disclose the identity of his client resulted in his liability to implement a contract which he had concluded on his client's behalf. Therefore, in each case, instead of the principal and agent identity merging as LJC Moncrieff might describe, agents are held independently and individually responsible for their principal's behaviour.

In agent relationships, where there is an undisclosed principal, the limits of the alter ego theory can also be seen as the distinction between the principal and agent is not clear to the third party. Therefore, to the third party, the agent is the principal. In such instances, the agent can be held personally liable for a breach of contract by the third party.[18] The alter ego theory can be seen operating but only to an extent; it goes as far as enabling the agent to contractually bind his/her principal. An example can be found in *Bennett v Inveresk Paper Co.*[19] , where the principal, Bennett, was bound by the contract entered for the supply of paper by his agent in London, who was following his instructions.[20] However, when Bennett decided to disclose his identity (as Inveresk was not aware of his existence previously), the court held he had title to sue Inveresk for the damaged paper that arrived in Australia. This contrasts with Bennett's agent suing the third party on his behalf.

The limits of the alter ego theory are revealed. While Moncrieff's statement points more towards a merging of identity between principal and agent, the evidence supports more of a Macgregor understanding of agent as being treated like independent actors.

[15] Ibid 636.
[16] 2008 CSIH 47.
[17] 1925 S.L.T. 608.
[18] Black, *Business Law in Scotland* (2nd edn, 2011) para 9.40.
[19] 1891 18 R. 975.
[20] *Hutton v Bulloch* 1874 L.R. 9 Q.B. 572.

Artificial Intelligence and the Inventive Step: Why the law must be amended to provide for the grant of a patent without a human inventor

Alysen Miller

Introduction

Futurist Ray Kurzweil predicted in 2005 that the singularity – the point at which the capabilities of a computer will surpass those of the human brain – would arrive in 2045. In light of recent advances in the field of Artificial Intelligence (AI), this prediction seems rather quaint. The UK's recent AI Safety Summit – which drew a star-studded cast of global leaders, tech executives, academics and civil society figures and which was held, symbolically, at Bletchley Park in Buckinghamshire – produced an international declaration to address the risks associated with the technology.[1] Nevertheless, it is clear that the current legal framework is ill-equipped to deal with a technology whose applications are expanding entropically. This is nowhere more evident than in the field of intellectual property (IP). A recent test case heard by the Supreme Court (UKSC), *Thaler v Comptroller General of Patents Trade Marks and Designs* (*Thaler*),[2] exposed the limitations of the courts' construction of the Patents Act 1977 (PA) with respect to AI inventors. In the Court of Appeal (CoA), Birss LJ had said that "[j]ust because all inventors are people, this case demonstrates that it does not follow that all inventions have a person who invented them."[3] The effect of this construction, approved by UKSC, is to render AI-designed inventions ineligible for patent protection under PA. In circumstances in which it may be difficult in the future – or, indeed, the present – to determine if an invention was created by a human, an AI, or both, the question is not *if*, but *how* the law must be amended in order to resolve the legal status of AI-designed inventions.

This article examines the courts' construction of PA and the possible legal arrangements that could be implemented in order to bring AI inventors and their inventions within the scope of PA, as well as provide the necessary clarity in this area of law. All statutory references are to PA unless otherwise stated.

Current state of the law on AI inventors

PA does not make specific provision for computer-generated works.[4] A patent may be granted for an AI-assisted invention provided the application satisfies the legal requirements set out in the Act.

[1] The Bletchley Declaration by Countries Attending the AI Safety Summit, 1-2 November 2023.
[2] [2023] UKSC 49.
[3] [2021] EWCA Civ 1374, [79].
[4] Except in so far as it excludes "a program for a computer" from patent protection to the extent that the application "relates to that thing as such." (Section 1(2)(c)).

Section 7(2) sets out the categories of applicants to whom a patent may be granted, namely (a) the inventor (or joint inventors); (b) any person who is the first owner of the "property in" the invention at the time of making the invention; and (c) successors in title to (a) or (b). Section 7(3) defines the inventor as the "actual deviser" of the invention. PA does not make explicit reference to the inventor *qua* person, natural or otherwise. On a literal construction, therefore, there is no reason why an AI could not be an inventor for the purposes of PA provided it had the technological capacity actually to devise. The derivation of the requirement that an inventor be a person for the purposes of Section 7 is therefore interpretative. Furthermore, the exact nature and level of personhood required has been construed inconsistently by the courts. This is exemplified by the judgments in *Thaler*, at first instance before the High Court and subsequently on appeal and finally before UKSC. The courts agreed that personhood was a necessary condition for the grant of a patent, but disagreed on the level and nature of personhood required.

Legal personality as sufficient condition

It is first worth analysing Marcus Smith J's decision in the High Court.[5] The facts are as follows: the applicant, Dr Thaler, filed statements of inventorship in connection with two patent applications stating that the "inventor" was an AI he owned called DABUS. Marcus Smith J, upholding an earlier decision by the Intellectual Property Office, found that the naming of DABUS as the inventor did not meet the requirements of PA, and consequently the application was liable to be deemed withdrawn under Section 13(2). The question of whether an AI could be an inventor hinged on the construction of Section 7. *Per* Marcus Smith J, the language of Section 7 makes clear that the classes of applicants, (a), (b) and (c), to whom a patent may be granted are all persons in the following ways:

(i) Only persons can hold property

An invention, an application for grant of a patent and a patent itself are all property. Therefore all the classes of applications to whom a patent may be granted must be persons.

(ii) The language of the Act as a whole makes it clear that the holder of a patent must be a person

It follows from Section 7(1) ("Any person may make an application for a patent,") that the grant of a patent can only be made to a person, because only a person may make an application for a patent. Furthermore, Classes (b) and (c) explicitly refer to the "person" that is the transferee of the inventor's rights; therefore Class (a), although not explicitly stated, must also be a person since only a person can transfer property to Classes (b) and (c).

Paragraph 34 of Marcus Smith J's judgment is particularly relevant and is worth quoting in full:

[5] *Stephen L Thaler v The Comptroller-General of Patents, Designs and Trade Marks* [2020] EWHC 2412 (Pat).

"It is common ground that DABUS is not a person, whether natural or legal. DABUS is not a legal person because (unlike corporations) it has not had conferred upon it legal personality by operation of law. It is not a natural person because it lacks those attributes that an entity must have in order to be recognised as a person in the absence of specific (statutory) legal intervention."

It follows that, were AIs were to be imbued with legal personality in the same way as corporations, they would be eligible to apply for and receive patents. And yet this does not align with the way in which Section 7 has been by construed by CoA.

The "inventive step" and the requirement for natural personhood

CoA was asked to consider whether PA requires that an inventor be a person. It found unanimously that it does. Birss LJ's leading judgment, endorsed by UKSC, can be summarised as follows: (i) Section 7(1) provides expressly that "any person" may make an application for a patent; (ii) the reference in Section 7(3) to the "actual deviser" of the invention means the natural person who actually devised the invention; and (iii) the rest of the Act is drafted on the footing that the inventor is a person.

It is worth disaggregating these arguments and analysing each on its merits.

(i) "Any person" may make an application for a patent

Birss LJ notes that Section 7(1) provides that "any person" may make an application for a patent, without qualification. Applying a presumption of *expressio unis est exclusio alterius*, the wording of Section 7(1) implies that personhood is both a necessary and a sufficient condition. This supports the view that, were an AI to be imbued with legal personality, it would automatically be eligible to apply for a patent.

(ii) The "actual deviser" of the invention means the natural person who actually devised the invention

The meaning of "inventor" in Section 7(3) was considered by the House of Lords in *Yeda*.[6] *Per* Lord Hoffmann, "it means, as Laddie J said in *University of Southampton's Applications*, the natural person who 'came up with the inventive concept.'"[7] In fact, the word "natural" does not appear in Laddie J's judgment in *University of Southampton's Applications*;[8] while Section 7(3) itself makes no mention of the word "person," let alone "natural person." Lord Hoffmann's argument is that, while there is no express provision that excludes non-natural persons from being inventors,

[6] *Rhone-Poulenc Rorer International Holdings Inc and another v Yeda Research and Development Co Ltd (Comptroller General of Patents, Designs and Trademarks intervening)* [2007] Bus LR 1796.
[7] ibid, [20].
[8] [2005] RPC 220, [234].

once the notion of an "inventive step" is taken into consideration (one of the requirements for a patentable invention set out in Section 1(1)), the narrowing of the term "inventor" to apply only to natural persons becomes inevitable. His reasoning is as follows: "[T]he inventive concept is a relationship of discontinuity between the claimed invention and the prior art. Inventors themselves will often not know exactly where it lies."[9] It is difficult to reconcile this analysis, with its reliance on *a priori* assumptions about the nature of creativity, with contemporary understandings of AI. Birss LJ acknowledges that "[w]hether there has been an inventive step is a question answered by considering how a notional person skilled in the art would behave. The notional person skilled in the art has attributes which no real human being does or could have."[10] In other words, it is an objective legal test. It is noted with some irony how closely this test mirrors the famous Turing Test for artificial intelligence.

Birss LJ goes on to say that "[j]ust because all inventors are people, this case demonstrates that it does not follow that all inventions have a person who invented them."[11] It is respectfully submitted that this statement is incorrect, both linguistically and legally. Applying Lord Hoffmann's construction in *Yeda*, all inventions, by definition, must be invented or devised by *someone* in order to fulfil the requirement of the "inventive step" as set out in Section 1(1)(b). An invention without a "person who invented it" would therefore be ineligible for patent protection – a result that is surely irreconcilable with the purpose of PA and of IP law in general.

(iii) The rest of the Act is drafted on the footing that the inventor is a person

The third limb of Birss LJ's argument broadly endorses the judgment of Marcus Smith J; namely, that the scheme of the Act as a whole presupposes that the inventor is a person: "For example Section 7(2)(c) of the 1977 Act refers to the 'person or persons mentioned in paragraph (a) or (b) and Section 13 of the Act requires an applicant to identify the 'person or persons whom he believes to be the inventor or inventors.'"[12] And yet the principles established in *Yeda* do not support this analysis; in particular the finding that Section 7 contains an "exhaustive code" for determining who is entitled to grant.[13] Even if the Act as a whole assumes that the inventor is a person, in other words, this does not constitute a substantive requirement so as to affect the textual integrity of Section 7(2)(a).

The case of *Thaler* demonstrates that the courts' construction of Section 7 is anachronistic. As UKSC was unanimous as to the identity of an inventor under PA, if patents are to be granted in respect of inventions by AIs in the future, the law will have to be amended. It is therefore proposed that the Government clarifies, with primary legislation, the legal status of AIs by

[9] *Yeda* (nr 7), [20].
[10] *Thaler* (nr 2), [56].
[11] ibid, [79].
[12] ibid, [51].
[13] *Yeda* (nr 7) [29(3)].

conferring upon them legal personality in order to satisfy the requirements of Section 7(1) and that PA itself be amended to make explicit provision for AI inventors in Section 7(3).

Legal personality for AIs

The current definition of a person can be found in the Interpretation Act 1978, which provides that a "person" includes "a body of persons corporate or unincorporated."[14] The seminal case of *Salomon v Salomon & Co Ltd*[15] establishes the basic framework that a company is a separate legal entity, distinct from its members and shareholders. Indeed, it is axiomatic that an AI system could be accommodated within this framework without the need to amend the law at all simply by incorporating it as a company with its owners or operators its members. Thus would it fulfil the precondition for personhood set out in Section 7(1).

Critics of this approach note that while AIs would enjoy all the benefits of legal personality, it is unclear how the corresponding legal obligations could be enforced against them; and further, that such a structure could even be exploited to shield humans from the consequences of an AI's conduct thanks to the doctrine of limited liability. In fact, corporate law has developed a number of mechanisms to hold those running a company to account.[16] It is not difficult to image that the courts might be prepared to adapt these principles in order to hold human owners and operators liable for the conduct of their AIs on public policy grounds.

Another option is to treat AIs as agents. Under this scenario, a purported AI inventor would be deemed to have acted on behalf of a natural person – in other words, as their amanuensis – and its actions attributed to its human principle.[17] Thus would the requirement for the inventor's natural personhood be satisfied. While it is generally accepted that legal personality is a prerequisite for agenthood, the law recognises a number of categories of "limited" agents; in other words, intermediaries who have authority to represent a principal in certain matters but without the ability to change the legal position of that principal in all circumstances. These include company employees (where they are not full agents, for example because they lack the necessary seniority) and estate agents. However, this solution is inelegant. Firstly, it does not do justice to the role of the AI as the actual deviser of the work. Secondly, the reality is that, for the time being at least, AIs are dependent on natural persons to act on their behalf and thus exercise their rights through human agents and not *vice versa*.

The ideal solution would be to create a new, separate legal category of Artificial Personality. The concept of artificial personality is not new; the first reference to an "artificial person" in

[14] Section 5 & Schedule 1.
[15] [1897] A.C. 22.
[16] The relevant cases are *Gilford Motor Co Ltd v Horne* [1933] Ch. 935 and *Jones v Lipman* [1962] 1 W.L.R. 832 (fraud or sham companies) and *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 A.C. 337 and *Petrodel Resources Ltd v Prest* [2013] UKSC 34; [2013] 2 A.C. 415 (veil piercing).
[17] This argument presupposes that there is likely to be no situation, at least for the time being, in which an invention could be created without any human involvement whatsoever: as a minimum, a human is likely to be involved in training an AI.

legal literature appears in Hobbes's Leviathan.[18] In other jurisdictions, the creation of such a category has already been debated. California Superior Court Judge Curtis Karnow has proposed creating a new legal entity, which he describes as an "electronic persona,"[19] while the European Parliament has adopted a proposal on Civil Law Rules of Robotics, in which it recommends that the European Commission "creat[e] a specific legal status for robots *[sic]*... so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons."[20]

Many of the arguments against imbuing AIs with legal personality are essentially some version of the "slippery slope" fallacy.[21] Such fears – that ever-more advanced AIs will aspire to more exalted levels of "personhood" – may be said to be premature. In any case, legal personality is not a continuum with no clear dividing lines, as the concept of corporate personality proves. It would be possible, within the statutory framework, to define Artificial Personality narrowly and with reference only to those rights which are deemed essential for the present purpose.

Amend Section 7(3)

It is necessary to amend Section 7(3) to overcome the precedent of "human" inventors established in *Yeda*. It proposed that Section 7(3) be amended as follows (emphasis on the new language):

"In this Act "inventor" in relation to an invention means *the natural or legal person who actually devised the invention*, and "joint inventor" shall be construed accordingly."

Putting the status of AI inventors on a statutory footing would bring them into line with the spirit of PA, since the Act provides that the right to be granted a patent is *primarily* to be given to the inventor.[22] This would also resolve the ambiguity over the legal status of AI-generated works by ensuring they are eligible for patent protection.

Conclusion

The case of *Thaler* demonstrates that developments in technology have outpaced developments in the law. AI is already widely used to generate new works and invent novel ways of doing things, and it is disproportionate to deny patent protection to otherwise patentable subject matter simply because it lacks a human inventor. Any amendment to the law would need to

[18] "When they are considered as his owne, then is he called a Naturall Person: And when they are considered as representing the words and actions of an other, then is he a Feigned or Artificiall person." (Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985), Chapter 16.)
[19] Karnow, C. E. A, 'The Encrypted Self: Fleshing out the Rights of Electronic Personalities," Journal of Computer and Information Law, XIII, 1 [1994].
[20] European Parliament, *Report with recommendations to the Commission on Civil Law Rules on Robotics* [A8-0005/2017], [59(f)].
[21] Mark Sellman, 'Elon Musk warns: Stop AI or it will 'outsmart and replace us',' *The Times of London* (London, 29th March 2023).
[22] Section 7(2).

strike a balance between the Government's stated aim of encouraging investment and innovation in AI[23] and preserving the role of IP law in promoting human creativity and innovation. While it is possible that the Supreme Court could have found that PA should be interpreted so as to give effect to these aims, in any case failure to put the status of AI inventors on a statutory footing is likely to frustrate the these aims and have a chilling effect on research and investment in the technology in the long run.

[23] Intellectual Property Office, *The IPO Strategy 2018* (2018).

The importance of diversity and empathy in judicial appointments.

Katie Stephens

This article considers diversity of judicial appointments and the role of empathy in judicial decision-making. This article begins by discussing how judges are selected and then examines multiple studies which demonstrate that having judges from different backgrounds is beneficial. It then looks at the current state of the UK judiciary and argues for the continuation of outreach programmes to encourage individuals from all backgrounds to seek careers in law and the judiciary.

There are two basic models of judicial recruitment: bureaucratic, typical in civil law jurisdictions and professional, typical in common law jurisdictions.[1] Bureaucratic judiciaries are selected through examination, and training is primarily by the judiciary, whereas professional judiciaries are appointed following professional legal careers.[2] There are four appointment systems: political institutions, the judiciary, commissions or councils, and elections.

In some countries political institutions appoint judges.[3] In America, at the federal level, judges are recruited through nomination by the President, screening by the Senate Judiciary Committee and approval by the Senate on a majority vote.[4] This decreases the diversity of the judiciary as presidents are likely to nominate from their political party; the American judiciary has become identified with the notion of judicial activism.[5] For example, Trump appointed primarily conservative judges.[6] This is indicative that political institutions do not create politically diverse judiciaries.

Turning to elections, at the state level in America, the direct election of judges varies in electoral methods in states and recruitment methods with the type of state court.[7] In partisan elections, candidates run for judicial office on a political party platform.[8] Critics argue this undermines the judge's image as a neutral umpire.[9] Although the public has a say, through voting, elections lead to judges being heavily politicised and hence largely lacking diversity.

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[1] Guarnieri C and Pederzoli, *Power of judges* (OUP, 2012) 66.
[2] Ibid 67.
[3] Ibid 27.
[4] Ibid 28
[5] Ibid 32.
[6] The Washington Post, 'Trump picked the youngest judges' (16 February 2021) < https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age/> accessed 1 May 2022.
[7] Guarnieri (n1) 32.
[8] Ibid 30.
[9]Ibid 33.

In civil law countries, the largest proportion of judges are recruited directly from universities through a public examination, requiring no legal experience. Candidates are appointed to the bottom of the career ladder and professional training and socialisation take place.[10] In addition to examination, training may be provided by schools, such as in France and Spain.[11] This exam-based model means diversity is not considered.

Higher Councils of the Judiciary select judges. The composition of councils varies according to their role in different countries, but the judiciary are granted representation.[12] Where judges hold the majority of seats and are directly elected, the level of judicial independence is typically higher.[13] This reduces diversity as judges may elect those with similar backgrounds to them.
In England and Wales, judges are appointed by the Judicial Appointments Commission (JAC), composed of 15 members: one lay chair, five lay members and nine judicial/legal members.[14] There is a statutory requirement to increase the diversity of applicants, not appointments.[15] Whilst American nominating commissions usually submit a shortlist of nominees to the executive, the JAC recommends a single candidate to the Lord Chancellor.[16] The research on whether nominating commissions increase diversity is inconclusive. However, Hurwitz and Lanier studied the racial and gender composition of judges of all federal courts in the last resort and intermediate appellate courts in all 50 states, the District of Columbia and federal courts in the US in 1885 and 1999. They found the ability of ethnic minorities and women to attain a place in the judiciary is not solely a function of any single factor. Although success in terms of representation of state appellate court judges was made by women, minorities made a gain of less than 1%. However, Hispanics fared better under this system.[17] Although commissions somewhat increase diversity, this is not the sole factor and minorities do not always benefit.
This article will now discuss two main benefits of a diverse judiciary: fostering public confidence and better judicial decision-making.

First, it is important to foster confidence in the judiciary; the judiciary should reflect the diverse and democratic nature of society. President Clinton openly stated an intention to name a judiciary that 'looks like America'.[18] As Burnett argues, confidence is likely to be higher if it is clear that judges come from all sections of society and are not skewed towards, or against, any particular group.[19] This is bolstered by a UK survey which found one-third of black people

[10]Ibid 34, 44.
[11] Ibid 46.
[12] Ibid 54.
[13] Ibid 51.
[14] Courts and Tribunals Judiciary, 'Judicial Appointments Commission' < https://www.judiciary.uk/related-offices-and-bodies/judicial-appointments-commission/> accessed 2 May 2022.
[15] House of Lords Select Committee on the Constitution, "Judicial Appointments Follow Up Report" (2017), 39.
[16] Cheryl Thomas, Judicial Diversity in the UK and other Jurisdictions (2005) Her Majesty's Commissioners for Judicial Appointments, 36.
[17] Ibid 38.
[18] Thomas (n16) 47.
[19] Lord Burnett of Maldon, "A Changing Judiciary In A Modern Age', Treasurer's Lecture, Middle Temple, (2019)

who had contact with the courts said they were likely to be treated worse than people of other ethnicities.[20] This view was supported by a study by the American Bar Association which revealed there is suspicion of the courts by ethnic minorities due to a lack of diversity throughout the judicial system.[21] This demonstrates people lack faith if they are unrepresented: it is important to have a judiciary which reflects the make-up of society.

Second, a diverse judiciary may lead to improved judicial decision-making. The attitudinal approach examines the extent to which individual judges' beliefs and attitudes affect individual votes. The new intuitionalist model looks at how institutional factors interact with judges' policy preferences, such as formal requirements of the law.[22] Three studies will be discussed to decipher how judges' characteristics and personal backgrounds affect decision-making.

First, Feeley and Rubin analysed prison reform litigation 1965-1990 and interviewed judges.[23] No U.S. court had ever attempted to use its authority to change prison conditions in 1965 but judges issued orders mandating prison reforms in 25 states, in 1975. However, this coincided with the enforcement of the Civil Rights Act and a national commitment to enforcing a particular set of social values hence the timing was right for policymaking.[24] They found that judicial policymaking involves engaging with legal doctrine and expressing the results in terms of legal doctrine, but the doctrine does not explicitly control or constrain.[25]

Second, Goldman studied 2,115 non-unanimous decisions in the US Court of Appeals 1965-1971.[26] After categorising the cases into six themes, he looked for correlations between the judge's decisions and seven personal background factors, including age and prior judicial experience.[27] Goldman found significant correlations between judicial decision-making and party affiliation, age, years on the bench, previous judicial experience, and religion. For example, party divided the judges on most issues, with Democrats tending to be more liberal than Republicans.[28] This demonstrates decision-making is affected by a judge's background, providing support for a representative judiciary.

Third, Glynn and Sen examined the role of empathy and the link between judges with daughters and their approach to gender-based cases (cases involving discrimination or women's rights). The large-scale quantitative analysis looked at 1000 gender-related cases 1996-2002 in

[20] Thomas (n16) 57.
[21] Ibid 9.
[22] Anne Bloom, 'The "Post-Attitudinal Moment": Judicial Policymaking through the Lens of New Institutionalism' (2001) 35(1) Law and Social Review 219.
[23] Ibid 224.
[24] Ibid 225.
[25] Ibid 226.
[26] Sheldon Goldman, 'Voting Behavior on the United States Courts of Appeals Revisited' (1975) 69(2) The American Political Science Review 491, 491.
[27] Ibid 501.
[28] Ibid 505.

the US Court of Appeal, involving 224 judges. The considerations were whether the judge was male or female; whether they had daughters or sons, and how many; whether they were nominated by a republican or democratic president; and lastly, how they voted on gender-related cases.[29] The findings were having at least one daughter corresponded with a 7% increase in the proportion of cases in which a judge voted in a feminist direction. This mostly affected male Republican nominated judges, where having one daughter, rather than a son, was linked to a 16% increase in the proportion of gender-related cases decided in a feminist direction.[30]

The explanation put forward by Glynn and Sen was 'learning': having one daughter caused conservative male judges to learn about, hence have empathy for, women's interests. This was not purely parental instinct because there was no evidence that judges with a daughter voted more liberally in criminal cases, nor more liberally overall.[31] There is further credence to this: there was no significance between a judge being female and having daughters. As female judges have first-hand experience with women's issues, the learning theory is convincing because male judges are introduced to the challenges through daughters. Although the study provides empirical support for the idea personal relationships affect how judges decide cases, it is not entirely conclusive; there may be other personal relationships that may be more influential, including having a homosexual child. Overall, the study indicates empathy has a role in decision-making thus a diverse judiciary is important. However, it is important to note that the panel as a whole was not looked at.

The studies discussed have limitations as they studied each judge independently. This article now considers group decision-making to examine the existence of peer effects, by considering three studies.

First, Epstein and Knight, in their examination of the correspondence between the US Supreme Court Justices in the 1970s and 1980s, discovered in over half of all landmark cases, the justices either changed their mind or joined opinions that did not reflect their personal policy preferences.[32] Furthermore, in two-thirds of landmark cases, at least one justice tried to strike a bargain with the lead opinion writer, and in half of the cases, justices expressed concerns about the view of government institutions or public opinions. Possible explanations for these findings include the desire to gain support for interests in other cases or to please governmental institutions. This demonstrates the collegiate nature of the judiciary. As argued by Ifill, a diverse judiciary fosters impartiality by reducing the possibility that one perspective will dominate adjudication.[33]

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[29] Adam Glynn and Maya Sen, "Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?" (2014) American Journal of Political Science, 42.
[30] Ibid 45.
[31] Ibid 51.
[32] Bloom (n22) 220.
[33] Thomas (n16) 10.

Second, a study by Cameron and Cummings between 1971 and 1999 on the US Court of Appeal found adding a single non-white individual to a three-judge panel increased the probability two white judges would vote in favour of affirmative action by 15%.[34] A possible explanation is the critical race theory: there is a voice of colour that brings a different perspective.[35] Cameron's study demonstrates a racially diverse judiciary encourages judges to consider, and have empathy for, a broader range of perspectives leading to improved opportunities for individuals subject to discrimination.

Third, Sunstein's study examined the decision-making of three judge panels on the Federal Court of Appeal for the District of Columbia Circuit 1970-2002.[36] Sunstein found judges appointed by a president of the same party showed ideological amplification: a republican appointee sitting with two other republican judges is more likely to vote in the stereotypically conservative, compared to if sat with one Democrat and one Republican. For example, all Republican panels voted to invalidate affirmative action 65% of the time, compared to 51% when sat with one Republican and one Democrat.[37] Additionally, when a Republican sat with two Democrats, they were less likely to vote in the stereotypically conservative fashion than if sitting with one Republican and one Democrat. This is ideological dampening: when a judge is confronted with the unanimous views of other judges, they tend to yield and follow the conclusion.[38] This illustrates that judges are susceptible to peer effects hence politically diverse panels are crucial. However, the findings are not conclusive; there are exceptions: abortion and capital punishment.[39] This is likely the result of individuals having strong views on these issues, hence a diverse panel allows for a range of perspectives.

In addition, a divided panel may produce a dissenting judgment which may then catch the attention of the Supreme Court and be reviewed. Sunstein suggests the possibility of dissenting acts as a whistleblower because if the law favours the dissenting view, judges may be influenced to adopt the action most closely in line with the law.[40] This demonstrates diverse panels can move the judgment in the direction the law requires.

This article will now review the current state of the judiciary, focusing on gender, ethnicity, and socio-economic background.

On 1st April 2023, 37% of judges in courts and 52% in tribunals were female.[41] This indicates a gender-diverse judiciary, especially when compared with 2009 when only 29% of judges in

[34] Ibid 59.
[35] Ibid 58.
[36] Sunstein C, *Why societies need dissent* (Harvard University Press, 2005).
[37] Ibid 167.
[38] Ibid 170.
[39] Ibid 183.
[40] Ibid 180-181.
[41] Ministry of Justice (MOJ), 'Diversity of the judicial 2023 Statistics' <
https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2023-statistics/diversity-of-the-judiciary-

courts and 37% in tribunals were women.[42] However, women remain underrepresented in senior roles: there are only 30% of women in the High Court and above. For the Recorder role, requiring 7 years PQE, the proportion of women among applicants was lower than in the eligible pool, and fell further to recommendation.[43]

Furthermore, in 2023, 5% of judges were Asian, 1% were Black, 3% were mixed ethnicity and 1% were from other ethnic minority backgrounds. Ethic minority individuals make up 17% of the working-age population of England and Wales hence this demonstrates a lack of diversity.[44] From April 2014 to April 2017, there was almost no change in the percentage of BAME court and tribunal judges.[45] This may be a result of lower recommendation rates. In 2021, from the eligible pool, recommendation rates for Asian, Black and Other ethnic minorities candidate groups were an estimated 36%, 73% and 44% lower respectively compared to White candidates.[46] However, in 2023, the recommendation rates for ethnic minority individuals were found to be the same as that for white candidates.[47] This demonstrates progress has been made.
Assessing the intersection between gender and ethnicity, in 2023, white men constituted 52% of posts, white women for 37%, ethnic minority men for 5% and ethnic minority women for 5%.[48] At Court of Appeal level, 68% of judges are white men, 30% are white women and 3% are ethnic minority men. There are no ethnic minority women. This is explained by the prestige theory: women and ethnic minorities are most likely to attain judicial office in less prestigious courts.[49] This reflects family responsibilities; one study found family responsibilities motivated men to be promoted, while women saw them as reasons for not wanting promotion.[50] This is supported by Allen's explanation that more than 50% of women obtain pupillage but between their 30s and 40s, they leave the bar or enter part-time positions due to caring responsibilities.[51] Millicent Grant said that women might not feel welcome due to under-representation of women in the judiciary.[52] As argued by the Bingham Centre for the Rule of Law, women or ethnic minority candidates may be willing to put themselves forward or accept a nomination if they know they are likely to share a background with some members of the selecting or

legal-professions-new-appointments-and-current-post-holders-2023-statistics#:~:text=and%20tribunals%20judges.-,Judges%20in%20post,in%202014%20(Figure%206)> accessed 27 March 2024.
[42] Burnett (n19).
[43] MOJ (n41).
[44] Ibid.
[45] House of Lords (n16) 33.
[46] Ministry of Justice (MOJ), 'Diversity of the judicial 2021 Statistics' < https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2021-statistics/diversity-of-the-judiciary-2021-statistics-report> accessed 7 May 2022.
[47] MOJ (n41).
[48] Ibid.
[49] Thomas (n16) 7.
[50] Ibid 44.
[51] House of Lords (n15) 37.
[52] Ibid 37.

interviewing panel.[53] This demonstrates the importance of a diverse appointment panel to encourage more women and ethnic minorities to seek senior roles.

The judiciary is not representative of socio-economic background. Across all legal exercises, candidates who attended a UK state school had a slightly lower recommendation rate from application compared to those who attended a UK independent or fee-paying school.[54] In the senior judiciary, 65% attended private schools, marginally larger than 7% of the general population.[55] This is problematic because privately educated judges may lack experience or knowledge of the concerns of those from lower socioeconomic backgrounds. As stated by Barack Obama, judges from a variety of backgrounds better empathise with the lives and hardships of different people, supported by the studies that empathy has a role in decision-making.[56]

For a diverse judiciary, selection methods must encourage diversity. In South Africa, the racial and gender composition *must* be considered when judicial officers are appointed.[57] This flexible approach gives a considerable amount of discretion to the Judicial Service Commission. Contrastingly, in England and Wales, where two or more applicants are assessed as being of equal merit, the JAC can select an applicant to increase judicial diversity using the Equal Merit Provision.[58] If diversity is necessary for jury impartiality, then it makes sense for it to be necessary for judges.[59] There is merit to this argument; Johnson argues a diverse jury pool representing the community is needed to deliver justice, thus the same democratic principles apply to judges.[60]

However, as argued by Burnett, there is scepticism about the use of quotas because judges make important decisions that fundamentally affect the parties in the proceedings before them thus the best solution is to increase the available pool from which appointments are made.[61] The judiciary has worked on outreach programmes to aspire people to become lawyers and judges in schools; set up a judicial role models scheme; a judicial work shadowing scheme; and pre-education programmes.[62] This is making the judiciary more accessible.

This article argues that it is important to have diversity in the judiciary because the studies discussed demonstrate diverse panels lead to better decision-making, which is more debated

[53] BICIL, The Appointment, Tenure and Removal of Judges under Commonwealth Principles (2015), 40.
[54] MOJ (n41).
[55] Sutton Trust, The Educational Backgrounds of Britain's leading people (2019), 55.
[56] Glynn (n29).
[57] BICIL (n53) 8.
[58] Burnett (n19) 21.
[59] Ibid 69.
[60] Thomas (n16) 11.
[61] Burnett (n19) 20.
[62] Ibid 27.

and considered, in line with the law. Empathy has a role in decision-making hence it is important to have a judiciary made up of varied people and perspectives.

Pursuant to s.9(3) of the Copyrights, Designs and Patents Act 1988 read in conjunction with s.178, should the United Kingdom continue to protect computer-generated works in the creative industry?

Siew Hui Yap

INTRODUCTION

The advent of AI, particularly Generative AIs such as DALL-E, Midjourney, and Stable Diffusion, has prompted discussions on the applicability of traditional copyright principles to computer-generated works. Despite precedents dating back to the 1970s[1], concerns regarding legal and ethical implications persist, amplified by recent innovations like text-to-image generators. These AI systems autonomously produce artworks imitating various styles, often using copyrighted materials without explicit consent, leading to a surge in copyright infringement cases. The inadequacy of current copyright laws in safeguarding the rights of original human artists, who lack effective control over their works, is evident, particularly amid the growing challenges posed by AI-generated creations.

Nevertheless, this provides good competition for human artists and an opportunity to collaborate with machines. For example, a trio in Paris known as 'Obvious Art' used a form of Generative AI and created the "*Portrait Painting of Edmond Belamy*" by feeding it with 15,000 portrait paintings between 14th and 20th century.[2] This AI-generated painting was successfully auctioned off for $432,500, at nearly 45 times higher than its estimate. This fuels the idea that the world is ready for computer-generated works in the creative industry. Furthermore, Generative AIs are used to bring 'dying' masterpieces back to life through AI restoration.

The technological advancements in AI have brought tremendous transformations to the artistic world. Nonetheless, there is a need to consider whether the law should protect computer-generated works. Thus, this paper questions whether the current legal framework in the UK can adequately cover the current AI developments in the creative industry with references from other jurisdictions and proposed recommendations.

The Current Copyright Law in UK

Where a literary, dramatic, musical or artistic work ('*original works*') is computer-generated, S.9(3) of the Copyright, Designs and Patents Act 1988 (CDPA) illustrates that 'the author shall

[1] Jo Lawson-Tancred,'The Prophecies of AARON' (*Outland*, 4 November 2022)<https://outland.art/harold-cohen-aaron/> accessed 8 January 2024

[2] 'The First Piece of AI-Generated Art to Come to Auction'<https://www.christies.com/en/stories/a-collaboration-between-two-artists-one-human-one-a-machine-0cd01f4e232f4279a525a446d60d4cd1> accessed 2 December 2023

be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken'. And by 'computer- generated', S.178 defines it as works 'generated by computer in circumstances such that there is no human author of the work'.

s.9(3) is initially enacted to protect works created using the computer as a 'clever pencil' i.e. to protect weather maps and AI-assisted outputs.[3] Considering the rise of new Generative-AI technology, should the law continue to protect works that may have been created without human intervention?

(1) COMPUTER-GENERATED WORKS DO NOT FALL WITHIN THE AMBITS OF THE LAW

Berne Convention

The Berne Convention is the main international treaty governing copyright and is binding on the UK.[4] Under copyright law, 'originality' is an essential prerequisite for copyright protection. Although the statutes are silent on its definition, Art.2(5) of the Berne Convention provides that original works should be 'intellectual creations'. Where originality is concerned, copyright can only arise when the work is of the author's own intellectual efforts. This is because the roots of copyright focus on protecting the 'fruits of human authorship' and not commercial reasons.[5] The rationale aligns with the humanist nature of the Berne Convention. If an 'intellectual creation' is not a human creation, it would not satisfy the test of originality and would thus defeat the fundamental purpose of copyright of protecting the outcome of human intellectual labour.

The Mother of UK Copyright & the Lockean Labour Theory ('the Theory')

The strong concept of copyright protection was established upon the enactment of the Statute of Anne of 1709.[6] This Statute compliments the Lockean Labour Theory. The Theory, coined by British philosopher John Locke in the 17th century, the principles illustrate that a proprietor should own the work created out of his own effort.[7] Thus, when one has instilled labour to create a work, copyright protection would be vested in him.

Applying this doctrine, an AI should have the rights to the copyright of a work generated by it. However, granting authorship to an AI would be absurd as this does not preserve the

[3] 'The Copyright Status of AI-Generated Works'(*Internet for Lawyers Newsletter*, 6 September 2022)<https://www.infolaw.co.uk/newsletter/2022/09/the-copyright-status-of-ai-generated-works/> accessed 7 January 2024

[4] 'Berne Convention for the Protection of Literary and Artistic Works' <https://www.wipo.int/treaties/en/ip/berne/index.html> accessed 2 January 2024

[5] Jane Ginsburg, 'People not Machines: Authorship and what it means in the Berne Convention'(2018) 49(2) International Review of Intellectual Property and Competition Law 131

[6] Ursula Smartt, *Media and Entertainment Law* (5th edn, Routledge 2023) 539.

[7] Yangzi Li, 'AI Restoration Brings "Dying" Masterpieces Back to Life, But Tricks Copyright?' (25 November 2022)<https://papers.ssrn.com/abstract=4285979> accessed 1 January 2024

traditional protection of human creative expression and intellectual effort. Furthermore, there is no incentive or reward for AIs in creating work. Since the Theory is based on a reward for effort, it is meaningless for AIs to own the rights. AIs only create because they are programmed to do so. They also do not possess the means to exercise their rights. In this regard, it is not feasible for computer-generated works to be protected by copyright. They are not human creations and thus do not fall within the protective net under the law.

Arguably, the creation of the programming of the AI system originates from human labour. Applying this rationale, an AI is a creation in which the ownership shall be vested in the programmer who has laboured to create the AI. In instances where intellectual labour has been employed to devise a programme so advanced, that it can produce works that are just as advanced, would it not be justifiable that the output from the AI should be attributed to its human creator?

In essence, this approach aligns with the contemporary understanding that copyright protection should extend beyond traditional notions that confines copyright protection to human-authored works and acknowledge the evolving landscape where AI plays a pivotal role. This paradigm shift will not only foster innovation but also ensure a balanced and inclusive approach to intellectual property rights in the digital age.

(2) HUMANS ARE PRIMARY CREATORS AND AIs ARE MERE TOOLS

It is acknowledged that the AIs are creators of an artwork. However, it is the artist who 'holds the vision and wants to share a message'.[8] To clarify, multiple art experts opine that AI is ultimately a mere tool for human creators to peruse. Hugo Caselles-Dupré from Obvious Art acknowledges unequivocally that the machine did not possess the intention to imbue emotions into the images.[9] Moreover, within the realm of research, the concept of a robot undergoing an open-world experience and utilizing it to generate novel outputs remains purely speculative and fictional, at present.[10]

In essence, computer-generated works should be protected by copyright as they bear elements of human influence. There are more drawbacks than benefits as the removal reflects that computer-generated works will fall within the public domain. Consequently, the authors will lose their rights to it and have other people gain access to their works. By ensuring protection, this prevents the risks of disincentivising the creators, investors and developers.

Alternatively, since there are no exclusive rights in the public domain, computer-generated works become free for anyone to use. This promotes competition in creative expressions, low

[8] ibid (n 2)
[9] ibid
[10] ibid

cost to free access to information, creation of new knowledge or public access to cultural heritage.

(3) EXISTING PROTECTION ON COMPUTER-GENERATED WORKS REMOVES EXTENDED CONFLICT BETWEEN AUTHORSHIP AND COPYRIGHT AS WELL AS CURTALILING INFLUX OF LITIGATION

As s.9(3) of the CDPA provides a broad exception to originality, whereby intellectual endeavours regardless of human authorship can still be safeguarded. This unique approach contrasts with other jurisdictions, where courts emphasize the prerequisite human authorship with entitlement to copyright protection.

Australia

Australian courts have on several occasions stressed on the principle that copyright authorship can only be vested in a human author. French CJ in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* ('*IceTV*') emphasised that 'originality means that the creation of the work required some independent intellectual effort'.[11] Applying the reasoning from Chapter 1 above, intellectual effort is a human attribute. *IceTV*'s decision was later upheld by the Federal Court in *Acohs Pty Ltd v Ucorp Pty Ltd.*[12] In *Acohs*, even if the programmers own the authorship to the computer system in general, the authorship to the source codes belonged to the system as the legal principles have limited the scope of 'intellectual effort' within the frameworks of 'originality'.[13] In this regard, human programmers cannot be authors as the HTML codes were machine-generated.

To demonstrate the complexity of this issue, the Court in *JR Consulting & Drafting Pty Ltd v Cummings* had devised a test on originality and authorship to evaluate whether the author had 'deployed personal independent skill, labour, intellectual effort, judgment and discrimination' in creating the work.[14] The Full Federal Court held that, for the purposes of copyright, the author of the software's source code and the code's subsequent updated versions, had been the respondent. This is because the programmer had made the revisions to the work with sufficient skill and judgment in such a way that each revised version was made 'as updated and revised an original work in its own right'.[15]

[11] [2009] HCA 14, 474, [33].
[12] *(2012) 201 FCR 173*
[13] ibid 404
[14] (2016) 329 ALR 625, [264]
[15] ibid [304]

US

In March 2023, the US Copyright Office issued guidelines stipulating that computer- generated works may be susceptible to copyright protection if they have a human touch.[16]

This supports the safeguarding of human creative expressions. Nevertheless, this applies on a case-by-case basis which could potentially lead to increased legal challenges following the inevitable rise of computer-generated works.

UK

In almost forty years, there is only one case on s.9(3) CDPA, and originality was not contested.[17] The High Court in *Nova Productions v Mazooma Games Ltd* [2007] EWCA Civ 219, recognised that individual frames in a computer game constituted computer-generated works. Kitchin J, in his deliberation, explicitly applied s.9(3) by scrutinizing Mr. Jones's actions, encompassing his comprehensive involvement in the arrangements for the creation and his significant financial responsibility as one of the two shareholders. This legal stance rejected the proposition that players, through the act of pressing the play button, could be considered authors, highlighting their lack of artistic skill or labour.

However, caution was emphasized that this conclusion is not universally applicable to all computer-generated-works scenarios, raising concerns about varying circumstances where the proximity between the programmer and the work is more remote. Furthermore, the lack of elaboration of s.9(3) by the courts leaves room to interpret who would constitute the person responsible for 'arrangements necessary to create the work' within the vertical line of the work e.g. creator, investor, or the user.

In this respect, the UK is wise to retain the protection of computer-generated works and make no changes to the current law. The draftsmen have demonstrated prudent foresight by establishing originality as a self-standing requirement that is independent of authorship, irrespective of potential shifts in its original purpose (from 'clever pencil' to AI creations). A broad interpretation of the statute underscores the indispensability of s.9(3) and s.178, serving as crucial safeguards from an influx of litigation concerning human authorship. Yet, such protection remains crucial considering the relevant legal, social, and economic dimensions.

(4) ELABORATION OF THE LAW UNDER SECTION 9(3)

Hailed by Lord Young of Graffham in 1987 as "the first copyright legislation anywhere in the world which attempts to deal specifically with the advent of artificial intelligence"[45], the law

[16] 'Copyright Registration Guidance:Works Containing Material Generated by Artificial Intelligence'(*Federal Register*,16 March 2023)<https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence>accessed 1 January 2024

[17] [2007] EWCA Civ 219

remains ambiguous as to who the person responsible for the 'arrangement' can be. Except for AIs as they are not human and thus, cannot be a joint author with another human. Such person(s) could be the programmer, investor and/or user. These are all possible options as the term 'arrangements' refers to the preparation or the organisation of something leading to the creation of the work.[18]

Hence, depending on various factors, the person responsible may change depending on various factors based on the work e.g. the distance between the initial and final creation, the initiative in creating, and the extent of the arrangements responsible for the creation. Given the advanced capabilities of AI tools, it is crucial to broaden the definition of 'arrangements' beyond programmers to encompass individuals like investors or project leaders in the copyright protection framework to embody their financial efforts and other investment contributions.
However, the lack of clarity in the definition does not imply that the English law is not fit for purpose. Though the originality in computer-generated works may differ in each case, the English law gives computer-generated works a safety net of protection. And this should be maintained.

RECOMMENDATIONS

Evidently, existing laws are insufficient to keep up with the erratic pace of technological advancements in AI. As a start, it would be helpful for the practitioners and field experts if the UK government would elaborate on the criteria to be 'the person by whom the arrangements necessary for the creation of the work are undertaken' and what constitutes 'computer-generated work'. There were recommendations on the adoption of a *suis genesis* approach in computer-generated works, though caution should be exercised when doing so as *suis genesis* provisions may attract legal uncertainty.

Subject to the contrasting views of art experts, future AIs may gain the ability to self-aware and self-learn from experience, thereby harnessing the ability to transform its style through self-criticism and judgment. Such AIs may well be classified as smart robots or even robots with humanistic abilities as having these characteristics may allow them to overcome their restraints of only doing what they are programmed to do. Consequently, they may even start to develop intention and content states such as desire and belief, which could allow them to harness creativity and imagination. In light of this, it is perhaps feasible to create a legal status for robots 'so at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and

[18] Jani McCutcheon 'Curing the authorless void: protecting computer generated works following Ice TV and Phone Directories'(2013) 13 Melbourne University Law Review 46, 51

possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently.[19]

The essence lies not in limiting the innovation and investment of AI, rather in limiting or regulating the use of AI with consideration to the safety and compliance of AI usage. In fact, this has been within the ambits of the EU. On 8 December 2023, the European Council and Parliament agreed on the European Union's Artificial Intelligence Act ("EU AI Act"). Hailed as being the first-of-its-kind on AI regulation, the EU AI Act endeavours to regulate the development of AI through the adoption of a risk-based approach with plans to classify AIs into four risk categories and ban groupings of AI systems that create 'unacceptable risks' e.g. biometric surveillance.[54] It is unclear how the EU plans to regulate computer-generated works particularly, in the creative industry as the EU is consolidating the legislation. Nevertheless, it is worth seeing the direction that the EU AI Act will take and what references the UK can adopt.

All countries should exercise a global and unified regulatory framework on AI governance. In the 'AI Summit' initiated by UK Prime Minister Rishi Sunak in November 2023, the attending countries have agreed to the Bletcher Agreement which recognises a common goal to address the risks and opportunities of AI.[20] In response to the White Paper published in March 2023, a House of Commons interim report is devised to urges the government to address the 12 challenges of AI governance posed and suggests that all jurisdictions collaborate and coordinate to tackle AI as a global issue.[21]

At the time of writing, UK has no intention to enact laws to regulate AI copyright. The UKIPO is instead, drafting a new voluntary AI copyright code of conduct on the use of Generative AIs which aims to balance the interests of AI developers in their access to data and compensate the creators for the developers' use of their copyrighted works.[22] Unlike the EU AI Act proposal, the White Paper in March 2023 holds little mention of Generative AI. This action waters down the UK's ambition to enhance the nation's potential as an innovation powerhouse and a global pioneer in AI considering the boom of activities in AI technology AI in the past year.

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[19] Kanchana Kariyawasam, 'Artificial Intelligence and Challenges for Copyright Law' (2021) 28 International Journal of Law and Information Technology 279,292

[20] 'Chair's Summary of the AI Safety Summit 2023, Bletchley Park' (*GOV.UK*) <https://www.gov.uk/government/publications/ai-safety-summit-2023-chairs-statement-2-november/chairs-summary-of-the-ai-safety-summit-2023-bletchley-park>accessed 7 January 2024

[21] The Science, Innovation and Technology Committee, 'The Governance of Artificial Intelligence: Interim Report' (House of Commons, 2023) <https://publications.parliament.uk/pa/cm5803/cmselect/cmsctech/1769/report.html#heading-3>accessed 6 January 2024

[22] 'The Government's Code of Practice on Copyright and AI' (*GOV.UK*)<https://www.gov.uk/guidance/the-governments-code-of-practice-on-copyright-and-ai>accessed 7 January 2024

CONCLUSION

Real-world developments are rapidly overtaking the legal framework which sought to encourage authors to create and disseminate original expressions and restrict copying, the global reach and sheer potential of Generative AIs in promoting free copying and remixing have well surpassed the copyright authorities' ability to curtail, much less regulate. Consequently, there have been urgent calls on a global scale to subdue this legal discord.

Undoubtedly, there is an anticipation of increased autonomy and sophistication in the evolution of AI. As opposed to contemplating the removal or reduction of copyright protection for computer-generated works, the preservation of s.9(3) is essential. Such preservation is crucial for safeguarding the interests of pertinent stakeholders and upholding the foundational tenets of copyright law. Nevertheless, it is still premature to determine the future direction of the law. Moreover, the innovative use of AI to create computer-generated works is still in its infancy and is difficult hard to predict. Even so, other jurisdictions should move on from the traditional view that copyright can only protect human creations and not creations without a human author. Excluding computer-generated works from copyright protection would only seem arbitrary and challenging to justify.