"Obiter"

A unique publication by the University of Essex law society

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Published by
University of Essex Law Society
Wivenhoe Park
Colchester
Essex
CO4 3SQ
Tel: +44 (0) 1942 678705
Fax: +44 (0) 1942 678705

e-mail: administrator@lawfile.org.uk

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Editorial

This first issue of “Obiter” contains a number of pages on recent reforms by the Government to the legal system. These will give an in depth guide to how the up dated legal system now works.

Articles by two lecturers at the University of Essex, Professor Janet Dine and Bob Watt, are at the forefront of the magazine and hopefully supply a groundbreaking edge to the publication. However, as the Law Society is behind the magazine it is important that the Students themselves also form part of the publication, for we believe it is they who are our most valuable supporters. From this base of contributors we have tried to draw together their knowledge of legal aspects and the legal experiences that they have been through.

Many thanks must go to the main people who have established “Obiter” by contributing articles and especially to Macfarlanes Solicitors whose financial support contributed towards making our dream become reality. “Obiter”.

Robert Nash
Editor &
Executive Vice President,
University of Essex Law Society.

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Honorary President
Laura Cox QC
Head of Cloisters, London

President
Alan J. P. J. Lowe (Jnr)
Lincoln's Inn Representative.
Tel. 07967 224146
Fax 01942 678705
e-mail: ajjlow@lawfile.org.uk

Executive Vice President & Editor "Obiter"
Robert Nash
Inner Temple Representative.
Tel. 01427 872256
e-mail: rcnash@essex.ac.uk

Vice President
Robert Carr
e-mail: rjcarr@essex.ac.uk

Treasurer
David Roitman
3rd Year Representative
e-mail: droitm@essex.ac.uk

Master of The Moots
Jonathan McDonald
e-mail: jpmcdo@essex.ac.uk

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e-mail: gaphil@essex.ac.uk

IT Officer
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e-mail:
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Olaitan Kupoluyi
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Publicity.
e-mail: ookupo@essex.ac.uk

Heather Mead
Gray's Inn Representative.
e-mail: hmead@essex.ac.uk

Jonathan Sank
Entertainment.
e-mail: jesank@essex.ac.uk

Would you like to be involved in the Law Society?
If the answer is "YES" and you are a student at the University of Essex then please contact any member of the Law Society or e-mail us at lawsoc@essex.ac.uk. It's as simple as that. Really!

We presently have vacancies for Secretary, 1st Year Reps, "Obiter" editorial team, Law Ball Committee and Ordinary Members of the Executive of the Law Society.

University of Essex Law Society

" Promoting excellence in legal education"

The President

Congratulations to everyone who has had a hand in bringing "Obiter" to fruition. It started as a vision and it is now reality.

Many thank's must surely go to Robert Nash, the Executive Vice President of the Law Society and also Editor of "Obiter", for all the hard work which he has put into the creation of this, our very first issue. We must also thank all of our contributors for without them there would be no publication. We hope to be able to make this THE legal journal for students and staff alike at Essex, if not further afield. We also hope to make the publication of "Obiter" a regular event undertaken by the Law Society.

We are constantly striving to ensure that we offer value for money to our members and students at Essex and in producing this publication I hope that we have gone some way to doing just that.

"I have a dream!", said Martin Luther King, and so do we. Our vision is to be able to offer legal practitioners, and yes, here we include law students as well, a service second to none offered by the 'ordinary, every day run of the mill university law society'. Or are we?

So, what do we mean by this. As you read through the pages of this issue of "Obiter" you will see that we have a rather interesting year ahead of us. We at the Law Society have spent a considerable amount of time organising this years forthcoming events, only a few of which are listed in "Obiter". A prime example would be that of "Obiter" itself. From the vision to the reality has taken two people, not to mention the contributors, little over twelve months to get to the stage of final production and print. If we'd have known what was entailed in its' production would we have gone ahead with it. You bet! The rewards have been immense for both Robert and myself. At this point I feel that a special word of praise must go to all previous members of the Executive, and you know who you are, for their dedication to our efforts in the Law Society over the years.

Without further ado let me wish all of the law students who are reading "Obiter" the very best of luck in your future studies.

Alan Lowe
President.

Economic Contractualism: use with caution

By Janet Dine
Barrister, Professor of Law,
University of Essex.

The use of economic analysis in the Law Commission's Consultative document on Director's Duties[1] is to be welcomed but it should not be forgotten that economic analysis is a tool and not an ideology. Korten[2] has given us a chilling analysis of the consequences of becoming enslaved by market liberalism fuelled by free market liberalism using money as a sole measure of value;

"The freedom of the market is the freedom of money, and when rights are a function of property rather than priesthood, only those with property have rights. Furthermore, by maintaining that the only obligation of the individual is to honour contracts and the property rights of others, the "moral" philosophy of market liberalism effectively releases those who have property from an obligation to those who do not. It ignores the reality that contracts between the weak and powerful are seldom equal and that the institution of the contract, like the institution of property, tends to reinforce and even increase inequality in unequal societies. It legitimises and strengthens systems that institutionalise poverty, even while maintaining that poverty is a consequence of indolence and inherent character defects of the poor."[3]

The economic analysis starts from the perspective that "the company has traditionally been thought of more as a voluntary association between shareholders than as a creation of the state"[4]. Cheffins argues that "companies legislation has had in and of itself only a modest impact on the bargaining dynamics which account for the nature and form of business enterprises. Thus, analytically an incorporated company is, like other types of firms, fundamentally, a nexus of contracts". For the purposes of economic analysis individuals rather than the state are the legitimisation for the operation of the commercial venture. Denial of personality to the group of actors[5] is a necessary foundation for the application of market theories since the underlying assumption is the creation of maximum efficiency by individual market players bargaining with full information[6]. Taking the view that free markets are the most effective wealth creation system[7] neo-classical economists including Coase have analysed companies[8] as a method of reducing the costs of a complex market consisting of a series of bargains among parties.[9] Transaction costs are reduced by the operational design of the company.[10]

The theories rest on notions of rationality, efficiency and information. The economists posit that a person acting rationally will enter into a bargain, which will be to his benefit. In a sale transaction both parties acting rationally will benefit both themselves and therefore society.[11] However, notions of the measurement of efficiency vary. Pareto efficiency requires that someone gains and no one loses. However, the Kaldor-Hicks test accepts as efficient "a policy which results in sufficient benefits for those who gain such that *potentially* they can compensate fully all the loses and still remain better off".[12]

The explanation of what is "rational" also varies widely, from simple wealth maximisation to complex motives including altruism leading to the somewhat exasperated criticism that "From the point of view of understanding motivation in terms of rational self interest ... if we expand backward with self-interest as an explanation until it absorbs everything, including

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[1] Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties Law Commission Consultation Paper No 153.

[2]When Corporations Rule the World, Berrett-Koehler 1995.

[3]Korten op cit, p.83.

[4]Company Law: Theory, Structure and Operation. P.41. Gower disagrees: "...it is clear that without the legislative intervention, limited liability could never have been achieved in a satisfactory and clear-cut fashion, and that it was this intervention which finally established companies as the major instrument in economic development. Of this the immediate and startling increase in promotions is sufficient proof" Gower, 6th ed. Paul Davies, Sweet and Maxwell 1997.

[5]S.J. Stoljar Groups and Entities: An Enquiry into Corporate Theory, ANU Press, Canberra 1973, p.40 and G. Teubner "Enterprise Corporatism: New Industrial Policy and the "Essence of the Legal Person" (1988) 36 American Jnl of Comparative Law 130.

[6]Cheffins op cit p.6.

[7]After A. Smith The Wealth of Nations, Everyman, London.

[8]And firms, which are not, always companies.

[9]Alice Belcher *The Boundaries of the Firm: the theories of Coase, Knight and Weitzman Legal Studies (1997)* Legal Studies Vol. 17 No. 1, p.22.

[10]O E Williamson Contract analysis: "The Transaction cost approach" in P. Burrows and C G Velanovski (Eds.) The Economic Approach to Law, Butterworths, London 1981, Williamson, Transaction-Cost Economics: The Governance of Contractual Relations 21 Journal of Law and Society 168.

[11]Ogus gives the following example;

"Bill agrees to sell a car to Ben for 5,000 pounds. In normal circumstances it is appropriate to infer that Bill values the car at less than 5,000 pounds (say 4,500) and Ben values it at more given than 5,000 (say 5,500). If the contract is performed, both parties will gain 500 pounds and therefore there is a gain to society- the car has moved to a more valuable use in the hands of Ben ... this is said to be an allocatively "efficient" consequence.

[12]Explanation given by Ogus, op cit, 24, who immediately points out that there is no requirement for the gainers to compensate the losers, see below in criticism section.

altruism, then it signifies nothing- it lacks explanatory specificity or power".[13]
The third pillar for the economic analysis is information flows. The rational actor is seen as making rational choices with full and perfect information at his command.

Rational actors utilising perfect information will produce maximum allocative efficiency by making choices, which exploit competition in the market. However, allocative efficiency by making choices which exploit competition in the market. However, allocative efficiency will not occur unless all the costs incurred in the transactions are internalised. Thus, if a company pollutes a river, causing damage to other river users but incurring no penalty, the goods produced by that company would be underpriced. That this type of behaviour causes real problems for those whom would impose minimal regulation and rely instead on market behaviour and private law instruments are evident.

Applying market economics to company law involves seeing the company not as a free standing institution but a network of bargains between all involved, all acting rationally with perfect information. The utility of company law is to prevent the high costs of reaching individual bargains with every involved person. Company law thus reduces transaction costs.

Criticism of economic theories

The economic contractualist attracts criticism both at the level of the conception of companies and company law and on the basis of the perceived political results of the analysis. The formers are criticisms, which go to the utility and accuracy of the analysis itself. Further problems may arise when the economists view the company in action and designate the interaction between the company and the state (the justifications for regulation) and the relationships between individuals concerned with the working of the corporate constitution. It is at this level that the theory impacts with the designs for regulatory structure.

On the first level we have seen that the conception of rationality is variously perceived and that the further away from pure wealth maximisation as motivation the less valuable it is as an analytical tool. Further, rationality is bound up with the amount of information possessed by the rational factor. Accepting that "perfect information" is a myth, most economists accept the notion of "bounded rationality" or "satisficing". Bounded rationality accepts that the capacity of individuals to "receive, store and process information is limited".[14] Satisficing is "searching until the most satisfactory solution is found from among the limited perceived alternatives".[15] Thus, the "pure" concept of rationality suffers from the twin problems of simplistic motivation and a defect in the theory of perfect information.
At a political level, economic contractualism has the effect of putting the corporation into the sphere of private law, of viewing the legitimisation of the power it wields as coming from the entrepreneurial activities of the members and lessening the state's justification for regulatory interference.[16] As Korten has shown the results of a wholehearted espousal of this philosophy is a type of corporate colonialism which widens the divide between the very poor and the very rich. "Markets are useful for implementing public priorities but inappropriate for setting them"[17] *European Influences.*
The implications of the UK's position in the European Union is not the subject of extensive analysis in the consultation document[18] although one important thrust behind recent European Initiatives is to build a real partnership between capital and labour, and to replace the outdated fiction of the shareholder control with the "community interest" identified by the Davignon group. The report of the group was published in May 1997. The group took as a starting point the importance of the involvement of the workforce in company decision making:

"Globalisation of the economy and the special place of European industry raises fundamental questions regarding the power of social partners within the company. The type of labour needed by European companies – skilled, mobile, committed, responsible and capable of using technical innovations and of identifying with the objective of increasing competitiveness and quality – cannot be expected to obey the employer's instructions. Workers must be closely and permanently involved in decision making at all levels of the company" (Davignon para19).
Further, the group accepted that a concerted approach to work organisation within the company "will improve industrial relations, increase worker participation in decisions and is likely to lead to an improvement in product quality" (para 20). The One successful initiative has been the directive establishing European Works Councils[19]. Once established a European Works Council is "to be informed and consulted ... on the progress of the business ... and its prospects ... in particular ... the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies."[20] The "definitions" provide that "consultation" means the exchange of views and the establishment of dialogue between employees' representatives and central management or any more appropriate level of management"[21]. This is a minimum requirement. Thus, the requirements go someway to meet the call for "a framework of labour law which circumscribes and limits management's control of the

[13]Ayres and Braithwaite Responsive Regulation OUP 1992, 23.

[14]Ogus, op cit, p.41.

[15]ibid.

[16]Ibid. p.209.

[17]Korten op cit, p.98.

[18]See paras 1.55 and 11.27-11.28 (regarding s.309 CA 1985).

[19]Directive 94/45/EC of 22nd September 1994. And see Wheeler (1997) Journal of Law and Society 44.

[20]Directive, Annex para 2.

[21]Article 2(1)(f).

enterprise"[22]. Thus, despite the provision which asserts in relation to ad hoc meetings where exceptional circumstances 'affecting the employees' interests to a considerable extent' that this information or consultation meeting "shall not affect the prerogatives of the central management"[23] it seems clear that these prerogatives no longer extend to the ability to take unilateral action in the absence of consultation with an EWOC.[24]

What tools have we at our disposal in order to ensure the comfortable implementation of such a restraint on managerial power?
This author has argued elsewhere[25] that the development of fiduciary duties can be a central plank in meeting these challenges, moving the law away from its contractual emphasis in this regard and putting employees in a central corporate governance position. It is to be hoped that the final report of the Law Commission makes no recommendations, which prejudice taking on board these wider concerns.

[22]Bercussion in *Workers, Corporate Enterprise and the Law* in R. Lewis (Ed) "Labour Law in Britain" OUP 1986. Can Company law be integrated into labour law so that employees become a central concern of the law governing the enterprise? Could the functioning of enterprises become dependent on compliance with standards and procedures laid down by the labour law? So long as the two spheres of company and labour law are kept distinct, "one is necessarily led" in the words of an eminent French labour lawyer (Lyon-Caen 1983) "to the conclusion that non-compliance with a labour law obligation [will] not affect the validity of a transaction in commercial law."

[23]Annex para 3 subparas 3 &4.

[24]Bercusson op cit. p.299-300.

[25]*Implementation of European Initiatives in the UK: The Role of Fiduciary Duties*, Company, Insolvency and Financial Services Law Review, forthcoming 1999.

Anton Piller Orders & Mareva Injunctions

By Jo Bishop
Third year Law (1999)
University of Essex

The combination of *Anton Piller* orders and *Mareva* injunctions has been described as "nuclear" in effect[1]. Much of the case law concerns fraud: especially video piracy and the use of confidential information for profit. Once the fraudulent defendant is issued with a writ, in standard court proceedings, he may destroy the evidence then remove his assets from the jurisdiction of the court so he can escape the payment of damages. The combination of measures allows a defendant's property to be searched and assets frozen without notice, by way of an ex parte application. This is especially useful in the case of fraud as a defendant can be caught "red handed". But this nuclear weapon is in fact a two edged sword. The defendant is given no chance to present his case (because an application made is ex parte), and further he faces charges of contempt of court if he does not comply. The measures infringe both principles of natural justice and proprietary rights. It is because of this infringement of rights that the orders are so useful. It is also the reason why the judiciary is keen to ensure that the use of discretionary power[2] is tightly controlled. The courts in deciding the grant of either or both *Anton Piller* orders and *Mareva* injunctions are faced with a paradoxical situation. They must weigh the benefits to the plaintiff against the detriment to the defendant. This has led to the development of obligations imposed on the plaintiff to guard against excessive abuse of the orders and the defendant's rights. The question for analysis, therefore, is how far do the safeguards go in protecting the defendant and do they stifle the purpose of the remedies?

The safeguard for both interlocutory measures have been added to and refined over the years but the fundamental principles of the early case law have been upheld. These fundamental principles form the substantive basis for granting *Mareva* injunctions and *Anton Piller* orders. *Anton Piller* orders took their name from the case of **Anton Piller v. Manufacturing Processes Ltd.** (1976) Ch 55) while *Mareva* injunctions took their name from the case of **Mareva Naviera v. International Bulk Carriers** (1980 1 All ER 213). In both types of relief there are common grounds which the applicant must satisfy:

(1) The plaintiff must have a good arguable case and be able to show that the defendant is likely to either destroy the evidence (*Anton Piller* orders) or remove assets from the jurisdiction (*Mareva* injunctions).
(2) The balance of convenience in granting the relief must be in favour of the plaintiff; and
(3) The plaintiff must give full and frank disclosure of all material facts known to him; and
(4) The plaintiff must give an undertaking in damages.

It is recognised that injunctions in general are imposed to preserve an existing right from injury[3]. But where interlocutory injunctions in general are concerned, such as *Piller* orders and *Mareva* injunctions, the right in question has not been fully established. The closest a court can get is to establish if the applicant has a good arguable case. To do this is to look at the merits of the case. Some clarification was provided by Lord Diplock in **The Sisinka:**

> "*A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant on there being a pre-existing cause of legal action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may not include a final injunction."*[4]

This requirement was, more recently, stressed by Scott J. in relation to *Mareva* injunctions in this case of **Polly Peck International v. Nadir** ([1992] 4 All ER 769). He argued a *Mareva* injunction could never be justified unless a fair arguable case for liability could be shown. In **Polly Peck** the plaintiff's case was regarded as no more than "merely speculative". This would seem to deny the possibility of an interlocutory injunction. Scott J., however, said there was a need to consider also the impact that the injunction would have (the balance of convenience, including the impact of an injunction on third parties). In this case a bank's business would have been seriously interfered with and the injunction was denied also on that ground. This reasoning would suggest that even though the plaintiff's case may not be particularly strong on its merits if the injunction will not have serious impact on the other parties it may be granted anyway. The use of this second test undermines the protection afforded to the defendant by the first head. An injunction may be granted against a defendant although the charges against him are substantively weak.

The question of what constitutes a good arguable case was considered in **Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft mbH and Co. KG.** ([1983] 2 Lloyd's Rep. 600). Here it was defined as "a case which is more than barely capable of serious argument,

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[1] Bank Mellat v. Nikpour [1985] F.S. R 87 at 92.

[2] The jurisdiction to grant *Mareva* injunctions and *Anton Pillers* is given by s.37 Supreme Court Act 1981.

[3] Zuckerman, MLR 1993.

[4] [1979] AC 210.

and yet not necessary one which the judge believes to have a better than 50 per cent chance of success". Further guidance on how this is to be applied spartan. J. W. Harris commented:

> *"in practice ... it is rare for courts to consider expressly whether the plaintiff's case really is extremely strong; or whether damage to the plaintiff is very serious; and other often seem to have been made (at least where commercial piracy was alleged) on a mere suspicion and without any direct evidence that incriminating property would be destroyed if proceedings were commenced openly."*[5]

Whether this is truthful or not it seems evident by the lack of case law that the judiciary is failing to look at what is an arguable case in the circumstance before them. Without review of the merits of the case it is an unjustified breach of natural justice to grant such draconian measures as *Mareva* injunctions and *Anton Piller* injunctions. Although the courts have been vigilant to form a fundamental rule, in order to have an effective safeguard that rule must be applied rigorously in every case.

In both types of remedies the plaintiff must show either that the removal of assets from the jurisdiction is likely or the destruction of evidence is likely. These requirements are both very similar and fundamental to both applicants. In order to prove this the evidence will rely heavily on the plaintiff's case as a whole. The problem is that much of fraud investigation is concerned with discovering the evidence and assets available and this is the reason the orders are required. Before the order is granted the case may seem weaker because the plaintiff has not been able to examine all the evidence. Very often the plaintiff only really possesses a very strong suspicion. In order to protect the defendant's rights some convincing evidence should be shown by the plaintiff. To get around this problem the courts have developed rules for exercising the injunctions to try and "minimise the damage" and have tended to ignore the fundamental principles on which the injunctions are founded (see Universal Thermosenors, discussed below).

Lord Denning stated that an injunction must on balance favour the plaintiff; **Rasu Maritima S.A. v. Perusahaan etc.** ([1978] QB 644). This was reaffirmed by his Lordship in **Third Chandris Shipping Corporation v. Unimarine S.A.** ([1979] 2 All ER 972). This is a very basic way of protecting the defendant. The plaintiff must show that the imposition of the interlocutory remedy would not be too onerous on the defendant's business. Lord Denning's example was of bringing the defendant's business to a halt, though the balance of convenience test can also be reinforced with the procedural direction of 1994 ([1994] 4 All ER 52). This includes the payment of money into court. This payment discharges the unnecessary use of the injunction as well as providing a remedy if the court gets its assessment of convenience wrong.

Even if the court were to consider whether the applicant had an arguable case this decision is often based on evidence presented in an ex parte hearing. Harris suggests that the way affidavits are drafted by counsel does not draw attention to the substantive issues. The requirement of full and frank disclosure is meant to combat this problem. Unless judges are trained to probe deeply into affidavits, which is a difficult job bearing in mind constraints of time, the substantive issues may still be their own. The plaintiff's main aim is to put the defendant out of business. *Mareva* injunctions combined with *Anton Piller* orders can be very effective at doing this (as demonstrated below in Universal Thermosenors case). As a result payment of damages for non-disclosure may not be a sufficient deterrent to the plaintiff, and therefore provides no protection for the defendant.

The undertaking in damages is useless if the courts do not adequately inquire into the merits of any given application. A good illustration of this is **Universal Thermosenors v. Hibben** ([1992] 3 All ER 257). An *Anton Piller* order was obtained to acquire documents that the plaintiffs alleged would show that the defendants, who were former employees, had set up their business using confidential information. The injunction forbidding the use of the information had the effect of putting the defendants out of business. The defendants were able to sue for the faulty way in which the injunction was executed. As a result Sir Donald Nicholls V-C laid down some procedural requirements. These included the right of the defendant to be able to seek legal advice. However, none of the requirements related to the substance of the plaintiff's claim. As a result the court faced with the same decision would have granted the orders again and the defendant's business would still have become insolvent. A factor, which should have prohibited the grant of the injunction according to the fundamental requirement, stipulated by Lord Denning in **Rasu Maritima**. This is the sort of inquiry to the defendant that can not be properly compensated by an award in damages.

Much of the common law on *Anton Piller* orders is concerned with requirements ancillary to those stated. They are concerned with the way in which the order is exercised as to minimise the extent to which the defendant's rights are infringed. These are procedural rather than substantive requirements. Those included in **Booker McConnel plc. v. Plascow** ([1985] RPC 425, 442) stipulated that the defendant be provided with copies of the affidavits against him, that the solicitor who serves the order will explain it to the defendant, and to generally advise the defendant he can apply to have the order discharged. Dillon J. stated that his list was not exhaustive and it was not. **Universal Thermosensors** provide that the order must be served during working hours, and that it must be served in the presence of a company representative, and that the order was not a fishing expedition allowing the plaintiff to examine all of his competitors documents. In fact the lists are longer and there are more of them. The 1994 Practice Direction contains a refinement to all of these rules.

The point is that these extra rules do not alter the decision of the court to grant the relief. It is the relief itself that causes the most damage to the defendant's rights although the way it is exercised can aggravate the infringement of rights. Both sets of rules are necessary and important and the courts have been vigilant in foreseeing the problems those Mareva injunctions and *Anton Piller* orders present. The creation of comprehensive rules is not enough. To ensure that the use of the court's discretionary jurisdiction is tightly controlled the rules must be applied equally vigilantly. The focus must be on whether there is a substantive case in which there is a need to grant the injunction. In the way the number of times the injunctions can be abused is immediately reduced (much like the leave requirement for judicial review reduces frivolous challenges to government action). It is only once this is decided that the court

[5] Zuckerman, '*Piller Problems*' (1990), LQR.

should consider ways in which the infringement of the defendants' rights can be reduced.

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University of Essex
Law Society Lectures

This year the University of Essex Law Society is pleased to announce that it will be hosting a series of FREE public lectures which we hope will be of interest to both our members and members of the General Public. We are constantly trying to improve the services which we offer and are still arranging lectures for the present year. As a result of this we are not able to provide details of all of the lectures. Despite this we are able to announce the following lectures.

THURSDAY 21st OCTOBER 1999

7:30pm LTB6

Jason Beer - Barrister

"REPRESENTING THE METROPOLITAN POLICE IN THE STEPHEN LAWRENCE INQUIRY"

THURSDAY 28th OCTOBER 1999

7:00pm LTB 10

Dr. Evelyn Pollock - Barrister

"THE ACTION FOR MEDICAL NEGLIGENCE"

THURSDAY 11th NOVEMBER 1999

8:00PM LTB (TBA)

Dr. Marwan Bukhari

Clinical Research Fellow

ACCOUNTABILITY OF THE MEDICAL PROFESSION

THURSDAY 18th NOVEMBER 1999

7:00pm LTB 10

Mr. David White - Rouge Croix Pursuivant

ENGLISH HERALDRY - IT'S DEVELOPMENT & PRACTICE

Further lectures will be announced throughout the year.

If you would like to attend any of these lectures then please contact any member of the Law Society Executive as entry is restricted to ticket holder. Tickets are available FREE of charge.

What is the world doing about HIV/AIDS?

By Bob Watt
Lecturer,
University of Essex

This article does not set out to be a comprehensive survey of global efforts to contain the HIV/AIDS pandemic. If the point is taken that HIV/AIDS currently represents the biggest threat to human life on earth it is clear that no article could hope to provide such a survey. The plan is first to set out the threat posed by HIV/AIDS. then to set out briefly why HIV/AIDS is perceived as different to other threats to human life and health, at least by the population at large, and finally to consider some of the legal measures developed in a number of jurisdictions to counter the threat.

If the European person in the street has a perception of the typical person living with HIV/AIDS it is that of a man, probably a homosexual man, aged between 25 and 40. This stereotype is almost wholly wrong. Whilst it is true that over 50% of AIDS cases and reported HIV-1 infections in Britain are concentrated in this group, this percentage representing slightly more than twenty-four thousand out of some forty-seven thousand such cases.[1] This state of affairs is replicated to a greater or lesser extent throughout most E.U. Member States, however the majority of continental HIV/AIDS cases are concentrated in the southern European states of the Iberian Peninsula and Italy and are associated with intravenous drug abuse. There are thought to be more than half a million people living with HIV/AIDS in the forty Member States of the Council of Europe.[2] Eastern Europe has recently become the focus for a virulent outbreak of the disease; there has been a dramatic rise in the number of cases from practically zero in 1994 to at least 150,000 by the end of 1997. [3]

However, these numbers pale into insignificance on a global scale. The UNAIDS/WHO Working Group on Global HIV/AIDS estimated that worldwide some thirty million people are living with HIV/AIDS. ,most, that is to say more than ninety percent of these people live in the developing world. The country with the largest number of people living with HIV/AIDS is India with estimates ranging from three to five million people. This represents 1% of the Indian population and it is believed that the number will double in the next five years. Recent estimates indicate that approximately 1800 new infections occur each day in South Africa.[4]

The UNAIDS/WHO Working Group believes that, worldwide, one in every hundred adults in the sexually active age range of fifteen to forty-nine is infected with the virus. The split is very roughly half-and-half, male and female. Indeed in developing countries there is a preponderance of female sufferers because of the greater ease with which the disease is passed to the recipient in penetrative sex.

Clearly this global figure of thirty million cases does not include the nearly twelve million AIDS related deaths since the beginning of the epidemic in the late 1970s. Over two million people died of AIDS in 1997, nearly a quarter of whom were children.

The wider economic effects of the pandemic cannot be underestimated. For example, the WHO Report on Kenya notes that life expectancy projections are lower than in 1990-95 due to the HIV/AIDS epidemic, that the ratio of dependent people relying upon those who are independent has increased, that the number of people in the labour force and the gross national product have both fallen. The situation in Zimbabwe is worse. The 1997 WHO figures reveal that nearly 26% of the population is infected by the virus, The average life expectancy was 61 in 1993, it is now believed to be approximately 49 and, if present trends continue, will fall to 40 by 2010. The New York Times quotes UN officials as saying that this 'would push development back nearly a century.'[5] The weekly death rate in Zimbabwe has soared from about 500 in 1996 to approximately 750 at the time of writing.

Peter Piot, the Executive Director of UNAIDS,[6] has said[7] that

> It is no exaggeration to state that the AIDS epidemic has created an unprecedented crisis in sub-Saharan Africa. It is the greatest threat to its development, together with wars. But AIDS is threatening other parts of the world as well. It is a threat to the very fabric of our society, and business as usual is not acceptable, as the consequences of inaction are enormous.

The bottom line for the present is that we must act now with the knowledge and tools we have in hand. It is now within our collective capacities to radically slow this epidemic in the next five years – to reduce by 25% the

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[1] PHLS AIDS Centre, AIDS/HIV Quarterly surveillance tables No.40 (98/2). These figures, together with the other statistics quoted in this article, may conveniently be found on the AVERT (AIDS Education and Research Trust) website at http://www.avert.org .

[2] These statistics are taken from the WHO/UNAIDS website. Readers are advised to consult the website: http://unaids.org in order to see the most up to date picture. Some unconfirmed reports from reputable sources put these figures even higher, see Halweil, B. 'HIV/AIDS pandemic is worsening' (1999) 12 *World Watch* 31

[3] See http://www.avert.org/ecstatee.htm.

[4] Sidley, P. South Africa plans to make AIDS a notifiable disease. (1999) 318 BMJ 1308

[5] 'Doctors find themselves powerless as AIDS devastates Africa' New York Times August 6 1998.

[6] The Joint United Nations Programme on HIV/AIDS (UNAIDS) is a programme involving the efforts of a number of UN agencies as cosponsors. The agencies are listed as UNICEF, UNDP, UNFPA, UNESCO, WHO and the World Bank. Full details of the establishment of the programme are to be found at http://www.unaids.org/highband/projects/strat_plan.html.

[7] Statement in Plenary to be made by Peter Piot 'Mobilizing against the AIDS epidemic in the context of the International Conference on Population and Development +5 (ICPD+5). To be made at The Hague Forum, United Nations General Assembly (30 June-2 July 1999). Published at The Hague, 8 February 1999.

current rate of new infections among young people – and to prevent tens of millions of infections over the next decade.

This does not require new breakthroughs in technology, but rather new breakthroughs in political will.

When, later in his speech, Piot considered the steps through which these advances in political commitment to defeat the epidemic will be made he said:

First, we need to break the silence around this epidemic. How can we ever win this battle without openness about sexuality and about AIDS? This requires at the same time an uncompromising fight against the stigma and discrimination associated with HIV.

Why is there so much secrecy, stigma and discrimination associated with the disease? Why is so little said in the British media about the disease? Compare the newspaper coverage of the recent conflict in Kosovo with the coverage of HIV/AIDS. The words of David Satcher are instructive.

> HIV/AIDS can be likened to the plague that decimated the population of Europe in the 14th Century. While the modern epidemic affects people of all age groups, those of working age are at highest risk, posing potentially dire economic, social and political consequences for the global community. Unfortunately, the world continues to devote greater attention and resources to traditional national security issues such as wars, postponing notice of an epidemic that, if left to spread unchecked, will kill more people than any of the terrible conflagrations that have so marked this century.[8]

In part it must be because of the means of transmission. The major routes for transmission of the disease are those which involve the transmission or exchange of bodily fluids. Clearly the most important of these, because it is the most common, is penetrative sex. Passage of the disease during pregnancy, childbirth and breastfeeding constitute an important route of transmission. It is clear that, without intervention, between 15 and 30% of babies are infected with the HIV during labour and a further 15-30% by breastfeeding. However, blood transfusions, intravenous drug use and abuse, and a number of minor routes all have a part to play.[9] Particularly risky behaviours are those which involve prolonged contact between semen, and other infected bodily fluids, and the mucous membranes of the vagina or anus. The risk of infection is heightened where these membranes are damaged or diseased. HIV/AIDS is particularly dangerous when coupled with other sexually transmitted diseases. The importance of this statement is brought home when one learns that sexually transmitted diseases are the third most common infectious disease in the People's Republic of China. Only dysentery and the various forms of hepatitis are more widely distributed.[10] Worryingly Britain has the highest rate of pregnancy and sexually transmitted diseases amongst young people in Europe.

Secondly it could be because the disease is so serious. HIV/AIDS is not curable. Once a person is infected with the virus it seems impossible to eliminate it from the body.[11] Nonetheless, recent years have seen enormous advances in the treatment of HIV/AIDS at least in the developed world. At the annual cost of some £10,000 for the necessary drugs, people living with HIV/AIDS in the developed world may survive for long periods. It seems that the most recent combination therapies 'appear to be changing AIDS from a fatal disease to a chronic disease. Investigators are finding that we can decrease viral load, … and improve the clinical status of patients with HIV illness.'[12] Combination therapies,[13] which include the administration of protease inhibiting drugs, disrupt the propagation and spread of the virus in the immune system and have greatly improved the prognosis for people living with AIDS in the developed world.[14] Perinatal transmission rates may also be reduced by treatment with the drug zidovudine. A short course of the drug has been shown to halve the rate of mother to child transmission in women who do not breastfeed and reduce the incidence of transmission by one-third in those who do breastfeed. The most effective prescription regimes reduce the rate of perinatal transmission to 6%.[15]

Thirdly, there is the widespread, though erroneous, perception that HIV/AIDS is fundamentally linked to non-mainstream sex. The first recognised cases of HIV/AIDS were diagnosed amongst members of the gay community. Furthermore, the particular members of the community affected were alleged to live a promiscuous lifestyle. In the words of the sympathetic commentator, Cindy Patton,[16] the early victims were seen as living proof of the media myth that 'perverse promiscuity is eventually bound to bring you into

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[8] Satcher, D. The Global HIV/AIDS Epidemic, (1999) 281 *JAMA* 1479. David Satcher MD is the Surgeon-General of the USA and Assistant Secretary of the US Department of Health and Human Services..

[9] For an authoritative survey see, Howe, J.M. and Jensen, P.C., An Introduction to the Medical Aspects of HIV disease, §§ 1.7 – 1.13 in Webber, D.W. (ed.) *AIDS and the Law* (New York; Wiley 1997) .

[10] South China Morning Post Online (05/07/99) In 1998 there were 632,512 reported cases of non-HIV/AIDS STDs; an increase of 37% over the previous year.

[11] Graham, B.S., Clinical review: Science, medicine and the future, Infection with HIV-1, (1998) 317 BMJ 1297, cf Perelson, N., et al, Decay characteristics of HIV-1-infected compartments during combination therapy (1997) 387 *Nature* 188

[12] Joycelyn Elders MD in Webber (ed) n.11 above at p.X.

[13] Carpenter, C.C.J. et al , Antiretroviral Therapy for HIV Infection in 1997: Updated Recommendations of the International AIDS Society- USA Panel, (1997) 277 *JAMA* 1962-69. This paper has been updated by a number of 'Question and Answer' sessions. For the most recent additions review the on-line library at http://www.ama-assn.org/special/hiv/library .

[14] Elders' foreword to Webber's book should be read in its entirety. Before her dismissal by President Clinton for her helpfully forthright views on sexuality, Ms Elders was US Surgeon General.

[15] Kmietowicz, Z., Short course zidovudine cuts vertical transmission of HIV. (1999) 318 *BMJ* 691.

[16] See above n.00 at p.6.

contact with a deadly germ. … (G)ay men's bodies had been worn out by too much sex, drugs, previous infections, cheeseburger dinners, quiche and fast-lane life.'

Clearly, the view set out accurately reflects the offensive position adopted by some people. However, even if the fundamental view that HIV/AIDS was restricted to gay men was factually sound at some stage in the past, it can no longer be supported. HIV/AIDS is a pandemic.

Finally there is the public perception that HIV/AIDS is something that happens to somebody else. If not a homosexual or an intravenous drug abuser, then a foreigner.

In 1996 the United Nations at the Second International Consultation on HIV/AIDS and Human Rights adopted guidelines aimed to ' assist States in creating a positive, rights-based response to HIV/AIDS that is effective in reducing the transmission and impact of HIV/AIDS and consistent with human rights and fundamental freedoms'.[17] These twelve guidelines read as follows:

1. States should establish an effective national framework for their response to HIV/AIDS which ensures a coordinated, participatory, transparent and accountable approach, integrating HIV/AIDS policy and programme responsibilities across all branches of government.

2. States should ensure, through political and financial support, that community consultation occurs in all phases of HIV/AIDS policy design, programme implementation and evaluation and that community organizations are enabled to carry out their activities, including in the field of ethics, law and human rights effectively.

3. States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS and that they are consistent with international human rights obligations.

4. States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups.

5. States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation, and provide for speedy administrative and civil remedies.

6. States should enact legislation to provide for the regulation of HIV-related goods, services and information, so as to ensure widespread availability of qualitative prevention measures and services, adequate HIV prevention and care information and safe and effective medication at an affordable price.

7. States should implement and support legal services that will educate people affected by HIV/AIDS about their rights, provide free legal services to enforce those rights, develop expertise on HIV-related legal issues and utilize means of protection in addition to the courts, such as offices of ministries of justice, ombudspersons, health complaint units and human rights commissions.

8. States, in collaboration with and through the community, should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups.

9. States should promote the wide and ongoing distribution of creative education, training and media programmes explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/AIDS to understand and acceptance.

10. States should ensure that government and the private sector develop codes of conduct regarding HIV/AIDS issues that translate human rights principles into codes of professional responsibility and practice, with accompanying mechanisms to implement and enforce these codes.

11. States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights, including those of people living with HIV/AIDS, their families and communities.

12. States should cooperate through all relevant programmes and agencies of the United Nations system, including UNAIDS, to share knowledge and experience concerning HIV-related human rights issues and should ensure effective mechanisms to protect human rights in the context of HIV/AIDS at international level.

The guidelines make it clear that implementation is a matter for nation states and it is here that the main problem arises. Some examples are necessary. British Home Office policy[18] is that neither a diagnosis of HIV seropositivity nor AIDS is sufficient ground for refusing a person entry to the UK. Whilst this ground might, when combined with other grounds such as an inability to pay for treatment, be used to deny entry; it is quite clear that the British policy is in stark contrast to that adopted in the USA. US policy is quite clear; HIV seropositivity is in most circumstances an explicit ground for denying entry. [19] Thus, not only do some states use HIV as a means for denying persons immigration, some people fall into the gap between states.

Secondly there is the matter of the cost of treatment. Whilst it is clear that HIV/AIDS is treatable in the northern and western world, the situation is quite different in, for example, Africa. The fifth and eighth of the UN Guidelines set out above are of especial relevance to, amongst others, children and should be considered in conjunction with the relevant provision of the UN Convention on the Rights of the Child as amplified in AVERT's paper on the particular

[17] See HIV/AIDS and Human Rights; International Guidelines, (New York & Geneva, UN, 1998) HR/PUB/98/1 at para.8

[18] See Home Office Policy, *AIDS and HIV-Positive Cases* (BDI 3/95, August 1995) especially paras. 2.1 –2.2.

[19] See 52 Fed. Reg. 32,540 (1987)

application of the Convention to children living in a world with HIV/AIDS.

Children have a right to be protected from discrimination and exploitation, irrespective of their HIV/AIDS status or that of members of their families.

No discrimination should be suffered by children on any grounds, including in education, leisure, recreational, sports and cultural activities because of their HIV/AIDS status. Children have a right to access health and social services on an equitable basis, irrespective of their HIV /AIDS status or that of members of their families. All infected children should be provided with adequate HIV/AIDS treatment and care. Attention must be paid to ensure that orphans receive adequate support services.'[20]

It is difficult not to lapse into cynicism and despair when reading such plainly well intentioned, virtuous material. If the statistics set out above are not sufficient to evoke such a response the interviews conducted with medical staff in Zimbabwe and set out in the New York Times certainly suffice. Dr Bart Vander Plaetse, who works in the Tsholotsho District Hospital, is reported as saying ' AIDS is the basic fact of all our lives. But it is not the only fact. And to be honest, it is not a fact we can do that much about. It may sound callous, but there may be better ways to spend our time and money than treating a complicated disease we will never have the drugs or the money or the ability to cure.' A nurse in the hospital, Sithozile Nkala, commented 'That's why I do not think you can write about the effect of AIDS on the health care system. Most people just stay home to die. And we encourage that, because really there is very little we can do for them except try and make them comfortable. And people at home can do that better than we can.'

Clearly there is a fundamental problem with the implementation of economic and social rights in the context of tightly limited resources. One may have the paper right, but it is simply impossible to enforce. Furthermore whilst the identification of the right-bearer is simple, it is not so clear who bears the correlative obligation. Is it the nation state in which the child lives? Or, perhaps the non-governmental agency such as the WHO or UNAIDS or some more diffuse international community? The formal answer is, of course, that the Convention is signed by nation states, and the Committee on the Rights of the Child is charged with monitoring the degree to which national governments have succeeded in meeting their obligations. A Report is then published. Nations will no doubt do all that they can and will record some modest and progressive successes. To that extent one might see the rights, whether in their raw form as set out in the Convention, or in their articulated form as set out by, for example, UNAIDS and AVERT as aspirations towards which the world is working. One cannot see them as enforceable rights, for in the context of the HIV/AIDS pandemic there is simply no sanction which can be imposed upon a country which does not provide sufficient resources for adults and children affected by the virus. If a state denies a child or a section of the child population access to education, it is clear that the opprobrium that would attach to a state following the publication of the Report would, at least, provide a powerful impetus for change. Bodies within and outside the country would question the government and there would be agitation for change. To say to a nation, such as many of those in sub-Saharan Africa, or South-East Asia, that it is not doing enough for people with HIV/AIDS is merely to provoke the response 'Well, what more ***can*** we do?' The Zimbabwean health care workers quoted above have surely answered the question.

It is suggested that the true answer to the problem is quite unpalatable. One might well be forced to admit that the answer will come too late for the majority of those who are already living, or dying, with the virus. It is quite clear that HIV/AIDS is being held at bay in the developed world, but that it is the major problem facing the developing world. It has to be recognised that nothing will be done in the short-term to treat those with HIV/AIDS in the developing world.

Finally there is the issue of stigma and discrimination. Many countries, including the USA, the United Kingdom and South Africa have laws which provide protection against discrimination against people with disabilities. These laws generally provide some protection for people living with HIV/AIDS. Certainly the person living with HIV/AIDS who is experiencing some symptoms of the disease, but who is not so unwell so as to be unable to work and whose work poses no special risks of transmitting the disease is generally protected against discrimination at least in theory. To this extent it would seem that a number of countries both in the developed and the developing world have complied with the fifth and ninth of the UN Guidelines. Problems arise in a number of ways. Firstly there have been controversies over whether people with asymptomatic HIV infections are covered by the national laws.[21] Secondly there are some cases in which it has been successfully argued by the respondents that the person living with HIV/AIDS presents too great a risk of transmission of the disease.[22] However the most important type of case is that involving the privacy of the individual infected with the virus. The problem is that whilst anti-discrimination laws might well be available to protect the individual they are inhibited from using the law because so to do would lead to their identification. For example, the writer is aware, of a case which he has been told is 'certain to settle before the hearing' of a man who has been dismissed because his HIV seropositivity has made him unacceptable to other employees and their wives who have petitioned the employer to dismiss. This is despite the fact that even the standard labour law texts all make it clear that such a practice is unlawful.[23]

English law does not currently recognise a general right of privacy,[24] although the courts may be willing to

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[20] This quotation is exactly reproduced from the AVERT website at http://www.avert.org/kidright.htm

[21] See, e.g., *Bragdon v Abbott* 118 S.Ct. 2196.

[22] See, e.g., Doe v Washington University 780 F Supp (USDC ED Miss., ED 1991).The case involved an HIV+ dental student.

[23] See, e.g., Deakin, Simon, and Morris, Gillian, S., *Labour Law*, 2 ed. (London; Butterworths 1998) citing Watt R.A. 'HIV, discrimination, unfair dismissal and pressure to dismiss' (1992) 23 *Industrial Law Journal* 280.

[24] *Kaye v Robertson* [1991] FSR 62. Here an actor who was injured in a car accident had his hospital room invaded by the press. He sought to restrain them from publishing photographs and a purported interview. The case is useful because the judges compare and contrast the situation in Britain and the USA

estrain the publication of a person's address[25] or place of work,[26] or name.[27] The courts may use the power contained in s11 Contempt of Court Act 1981 but it is by no means certain that they will always do so,[28] and they sometimes confine their decision to the most narrow and extreme of grounds. In Re D [29] the court restrained publication of the applicant's name on the sole basis that medical reports indicated that the release of his name would be likely to cause him psychological damage. The press wished to reveal D's name and to allege, it would seem, that he was an HIV+ unlawful overstayer claiming state assistance and thus an 'undeserving "scrounger"'. This was thought by the court to be a legitimate matter of public concern and comment, despite the fact that D was acknowledged to be likely to face physical attack or serious harassment which may have been exacerbated by such a report. D was in an intolerable position because he felt unwanted in Britain and unable to return to his native Brazil because of the treatment meted out to homosexuals in his native country. Nevertheless the court held that his identity should only be protected because of the risk to his psychological health. Clearly when people living with HIV/AIDS hear that the courts may allow the publication of their name and address it must discourage them from seeking to enforce their rights in the courts. Furthermore many of the actions likely to be brought by people living with HIV/AIDS will be brought in the Employment Tribunal under the unfair dismissal provisions of the Employment Rights Act 1996 or the provisions of the Disability Discrimination Act 1995. Here the tribunals only have the power to restrain reporting of the some matters that may be litigated until the promulgation of the decision when the matter may be reported.[30] Unfair dismissal claims which do not involve matters alleging sexual misconduct or which do not refer to the sexuality of the applicant may not be the subject of a restriction of reporting order. Accordingly it would appear that there are a variety of circumstances in which an application to a court or tribunal may lead to the applicant being identified and liable to harassment or attack.[31] Clearly this discourages applications to the tribunals and courts.

However the welcome decision in *Z v Finland* [32] in which the Finnish State was found liable for a breach of Z's privacy indicates the direction in which the British courts and other public authorities will be obliged to move. Z made a number of complaints alleging that her privacy had been breached. These ranged from complaints about the seizure and disclosure of medical records to one regarding her identification by name. Z was identified by name in the Finnish courts as the spouse of a person who was charged and found guilty of a number of serious crimes involving unprotected intercourse whilst being knowingly seropositive for the HIV. This was held to be in breach of Z's right to privacy guaranteed under the Convention. It must be made clear that the right being protected is privacy simpliciter rather than the right to privacy in one's family life, because Z divorced her sometime husband, probably because he was facing trial for rape. In holding that Z's right to privacy had been breached the Court held that the Finnish Court of Appeal should have exercised its discretion first to omit the publication of any names in the judgment. Secondly, they should have used their power to publish an abridged version of the reasoning, the operative part of the reasoning and an indication of the law it had applied.[33] The reasoning behind this far-reaching decision is set out in paragraph 96 of the judgment. The Court stated that considerations of privacy are especially valid in the circumstances of HIV seropositivity because the disclosure of such information

> 'may dramatically affect … her private and family life, as well as social and employment situation, by exposing … her to opprobrium and the risk of ostracism. … (t may also discourage persons from seeking diagnosis or treatment and thus undermine any preventative efforts by the community to contain the pandemic.'

Clearly the European Court of Human Rights was acknowledging at least the spirit of the contributions to the HIV/AIDS debate repeatedly made by UN speakers and set out in the UN Guidelines.

The Court went on to state the level of protection to be given to the privacy of the person in these circumstances. It would seem that the protection is little short of absolute, save in the circumstances where the information must be made public for the investigation or prosecution of crime, or in the interest in the publicity of court proceedings. The Court stated that interference with privacy 'cannot be compatible with Article 8 of the convention unless it is justified by an overriding requirement in the public interest.' It is argued that the interest in the public nature of any court proceedings can be satisfied by the publication of the judgment using a pseudonym for the applicant and respondent . Clearly then in the states which belong to the Council of Europe the UN Guidelines appear to be being followed and developed.

In the USA the practice of allowing plaintiffs to bring actions under the pseudonym of Doe (or Roe) has long been recognised. Furthermore the development of the decisions of the Supreme Court in *Time Inc. v Hill*,[34] *Cox Broadcasting Corp v Cohn*[35] and subsequent

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[25] *Birmingham Post & Mail Ltd v Birmingham City Council* (1993) 17 BMLR 116 (QBD. Div. Ct). This is a non-AIDS tuberculosis case, it is believed that identical principles would apply in HIV/AIDS cases

[26] See *X v Y and others* [1988] 2 All ER 648

[27] *Re D,* unreported , CO/3369/97, 17 November 1997

[28] See *R v Westminster County Council ex parte Castelli; R v Same ex parte Tristan-Garcia [*1996] 1 FLR 534.

[29] Above n.27.

[30] See Employment Tribunals Act 1996 s11 (sexual misconduct) and s12 (disability).

[31] For examples of the sort of attack which may be visited upon persons with HIV/AIDS see Watt, HIV in the workplace: Prejudice and Objectivity in Dine & Watt (eds) Discrimination Law: Concepts, Limitations and Justifications (Harlow; Longman 1996) pp 162-173 esp. nn. 8,17,& 19 and associated text. Furthermore se n. xx above in which it was reported that a woman was killed in KwaZulu Natal because 'she had openly admitted that she had AIDS.

[32] (1998) 25 E.H.R.R. 371 (Eu. Ct. H.R.)

[33] See paragraph 113 of the judgment.

[34] 385 US 374 (1967).

[35] 420 US 469 (1975).

cases has meant that individuals have been able to sue and recover substantial damages for disclosure of the fact to inappropriate persons that the individual was living with HIV/AIDS.[36] Here too privacy seems to be given the degree of protection envisaged by the UN guidelines.

In South Africa, one of the countries most affected by the pandemic, s14 of the Bill of Rights provides that privacy is protected under the Constitution. The AIDS Law Project at the University of the Witwatersrand[37] has commented that this means that 'If you have HIV/AIDS, you have the right to keep that information to yourself. An employer or hospital cannot force you to tell them or force you to have a blood test to find out this private information.'[38]

In conclusion, it would seem that some progress is being made in the implementation of the UN Guidelines. Whether this will be enough to stem the pandemic is another matter. My own view is that, unless significant additional resources are devoted to finding a cure and making the presently available medications affordable by the majority of the world's population, the future is bleak.

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[36] See, for example, *Doe v Borough of Barrington* 729 F.Supp. 376 (DNJ 1990). This matter is discussed extensively in Webber (ed) AIDS & the Law (New York, Aspen, 3 ed. 1997) at pp 373-376.

[37] See HIV/AIDS and the Law, (Witwatersrand, ALP, 1997) p. 41.

[38] It seems that a similar right to the latter is available to citizens of the European Union. *See X v Commission of the European Communities Case* C-404/92P [1995] IRLR 320 (ECJ).

By Julian Trahair, Victor Tettmar & Simon Hewes. Bond Pierce Solicitors

ANALYSIS

Voluntary arrangements – drafting issues

Two recent cases have prompted the necessity to reconsider certain standard provisions, which are or may need to be incorporated in voluntary arrangements.

The first is *Sea Voyager Inc and others v. Bielecki,* which are not or may need to be incorporated in voluntary arrangement and a creditor's rights under the Third Parties (Right against Insurers) Act 1930. The 1930 Act was passed for the purpose of enabling victims of insured claims to recover the proceeds of such insurance in preference to the general body of creditors of an insolvent insured. The standard procedure in such circumstances for the creditor to obtain a judgement against the insolvent insured by which liability and quantum are determined see *Post Office v. Norwich Union Fire Assurance Society Limited* and *Bradley v. Eagle Star Insurance Co. Limited.* As will be appreciated an explicit or implicit moratorium on the commencement or continuation of proceedings by creditors will prevent a creditor obtaining such a judgement to trigger the benefit of the 1930 Act. Given this obstacle the creditor in the *Bielecki* case applied under section 262 of the Insolvency Act 1986 on the basis that the voluntary arrangement. If that was right how could the creditor be entitled to judgement for 100 pence in the pound? The Judge thought that the creditor would not be so entitled or at least there were significant prospects that the voluntary arrangement would be so construed. This therefore provided an additional ground for the successful unfair prejudice application.

As is pointed out above the answer lies in the drafting of voluntary arrangements so those creditors can pursue their remedies and trigger the 1930 Act notwithstanding the existence of a voluntary arrangement.

The second case is *Horrocks and others v. Broome* and concerned the effectiveness of a provision in the voluntary arrangement permitting subsequent variations. The relevant provision was in the following terms:

'If the supervisor shall consider that the interests of creditors are best served by variations to this arrangement being incorporated after this arrangement has been approved by my creditors, the supervisor may circulate creditors with details of the proposed variations and any such variations shall be deemed to be incorporated in this proposal if they receive the approval of the requisite majority of creditors either by postal vote or at a creditor's meeting. For these purposes the requisite majority means a majority in excess of three quarters in value of the creditors voting on the resolution in person or by proxy such value to be determined [in the case of a creditors meeting] at the date of the meeting and in the case of a postal vote at the date when the supervisor posts the details of the arrangement unfairly prejudiced his interests as a creditor in the moratorium prevented him getting the necessary judgement. The Judge held that the creditor had in fact been unfairly prejudiced.

One's first reaction is that this problem could have been overcome by suitable drafting of the arrangement or modifications made to it so that a creditor of this type could proceed with a claim to enable him to obtain the benefit of the 1930 Act. Apparently the creditor proposed various modifications but for reasons, which are unclear, the debtor refused to agree to them. Ultimately this led to the successful 262 application.

The Judge went on to consider what the position would have been if, contrary to his view, there had been no effective moratorium on the commencement or continuation of proceedings. In particular he considered whether the creditor would have been entitled to judgement for the full amount of the claim. It was submitted that the creditor would be prevented from obtaining such a judgement because of the limitation on its rights under the voluntary arrangement. It was said that the creditor was restricted to its rights to recover judgement by the terms of the voluntary arrangement and therefore could not get any more in the proceedings than its entitlement under the voluntary arrangement. The Judge found that the parties could not have envisaged that the creditor should be entitled during the continuation of the scheme to any more that the sum available under the proposed variations to creditors. The provisions of rule 5.18 (3) – (6) of the Insolvency Rules 1986 shall apply to the voting in respect of any such matter'.

The judge indicated that in his view such clauses are open to the objection that they potentially visit on dissentient creditors unpredictable variations. In those circumstances the fact that such variations would be unknown to creditors at the date of the meeting does not mean that they would necessarily escape successful challenge at that stage. For that reason great caution should be exercised by debtors and nominees before including such clauses in proposals and where they are included care is required to be taken to ensure that they are drafted so as to meet the objections that might be taken to them.

In this regard it is suggested that the drafting should take account of at least the following points:

?? The variations or modifications should be limited to those, which could have been validly included in the original proposal.

?? Nothing by way of variation should be permitted which would cause the proposal to cease to be a proposal for the purpose of section 253.

?? No variation should be permitted which would offend against the prohibitions in section 258(4) and 258(5).

?? The modification should not unfairly prejudice a creditor or creditors.

On the basis that the variation clause is adequately drafted to cover the above points and any other necessary protections there then arises the question of how any modification which offends any of the protective provisions is to be challenged. One way would be for any creditor to apply to court under section 263(3) on the basis that he is dissatisfied by the decision of the supervisor to call a meeting or conduct a postal vote in respect of a proposed variation which offends against the protective provisions. It will then be possible for the court to decide whether any proposed modification offends against the original voluntary arrangement.

REVIEW
LPA Receivers

The bank appointed a LPA receiver where a tenancy had been granted in breach of the terms of the mortgage which required the bank's written consent to be given. Whilst it was true that receipt of rent by the Receiver was not a recognition by the bank of the tenant's position, the fact that such a Receiver was in office did not prevent the bank from accepting the tenant as a tenant by the virtue of the bank's estate in the land. The inference to be drawn from all of the facts of the case, in particular the conduct of the sale of the property, was that a fresh tenancy had arisen between the bank and the tenant.

(*Mann v. Nijar and another*, Court of Appeal)

NON ASSIGNABLE CONTRACTS

Depending upon the construction of a contractual bar on assignment it may be that such contracts could not be the subject of valid security without the consent of the contracting parties. This may be of particular significant in the construction and shipbuilding sectors.

(*Bawejem Ltd. and another v. M C Fabrications Ltd. and others,* Court of Appeal
S.423 CLAIM

In litigation involving an Irish Defendant, amongst others, a claim was included that the transfer of land in Ireland to another Irish Company should be avoided under section 423 o the Insolvency Act 1986. It was held that the English Court could exercise jurisdiction in relation to the transaction, as the jurisdiction of the Irish Courts was not exclusive in that the claim involved an allegation relating to fraud on creditors. However, it would be necessary in due course to invoke the assistance of the Irish Courts. The Judge also held that the relevant test in relation to the purpose under section 423(3) was that it had to the dominant purpose.

(*Jyske Bank (Gibraltar) Ltd. v. Spejeldnaes (2),* Chancery Division)

EMPLOYEE CLAIMS AND CVA'Ss

Where a dismissal in breach of a director's service agreement took place after the relevant date for calculating claims in a CVA, it was nevertheless the case that, on the true construction of the CVA, the director's claim was subject to the CVA.

(*Millwall Football Club and Athletic Co. (1985) Plc,* Chancery Division)

PREFERENCE CLAIM

A bankrupt was not influenced by a desire to prefer where, in making various payments, his desire was to avoid legal proceedings and general hassle.

(*Re Das (a bankrupt)*, Chancery Division)

DEMAND UNDER GUARANTEE

A demand was made on Mr. Sullivan under the terms of his guarantee on 1st September 1997. A few minutes later on the same day a statutory demand was served upon Mr. Sullivan. Mr. Sullivan applied to set aside the statutory demand on the basis that the debt was not due at the time of service of the demand. It was held that the debt was due but, even if this was incorrect, the Court had to determine whether, at the time of the hearing, the statutory demand should be set aside and, at that time, plainly sufficient time had been given for payment.

(*Sullivan v. Samuel Montaqu & Co. Limited,* Chancery Division) ?

LAW SOCIETY VISIT

1st Year Students Only

Colchester Police Station

Thursday 4th November 1999

7:00pm

This visit is only open to 1st year students who are members of the Law Society and the number of places is limited to 16. If you would like to attend you should write your name and contact details on the form on the Law Society Notice Board which is situated on the Law Corridor.

We will contact you with further details of the event closer to the time.

Your Law Society is working hard to provide you with quality activities and opportunities to enhance your legal education. Please support us in our efforts by participating.

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WE don't exist!"

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WORKING TIME REGULATIONS

By Julia Palica, Catherine Taylor, Daniel Aherne, Maya Cronly & Achara Tait
Bond Pierce Solicitors

WHAT ARE THE WORKING TIME REGULATIONS?

These Regulations were issued on 30th July and come into force on 1st October 1998. They are intended to implement two European Directives:

?? The Working Time Directive.

?? The Young Workers Directive.

As the name implies, the Regulations are aimed at introducing minimum standards to protect workers against the health and safety risks of working excessive hours.

UPON WHOM DO THE REGULATIONS CONFER RIGHTS?

In a word; workers.

What does "worker" mean?

It does not mean an employee. The Government has long been concerned about what it calls "spurious self-employment". Many businesses are anxious to avoid conferring employee status on those that work for them. The business may, for instance, want to avoid any possibility of unfair dismissal proceedings being brought against it. As self-employed workers do not (as yet) have access to the same range of rights and protections, businesses commonly devise complex (and the Government believes, artificial) contractual relationships in order to ensure that its workers are treated as being self-employed. Discrimination legislation has a broader scope and protects those who work under a contract "personally to execute any work or labour". This broader definition includes many people who would ordinarily be treated as being self-employed. The Government seems to want the Working Time Regulations to be broader then unfair dismissal protection but narrower than the protection against discrimination. So, the Regulations apply to those who:

> *"work under any... contract.. whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".*

Whilst, in theory, it is possible to envisage a half-way house between employees and professional service providers, in practice, developing a test is likely to be fiendishly difficult. In its Guidance, the DTI sets out a proposed test which has a certain eerie familiarity about it – it is the same "balance of factors" test presently used by Tribunals to determine whether one is employed or self-employed for the purposes of unfair dismissal protection.

WHAT RIGHTS ARE CONFERRED?

The 48 working week

The most important of the new rights is the requirement that workers should not work more than an average of 48 hours in any 7 day period (the average is calculated, normally, using a 17 week period of assessment). The period of assessment may be modified by agreement with the workforce through a collective or workforce agreement - of which more below). The 48 hour limit includes overtime. The employer must take all reasonable steps to ensure that the limit is complied with.

What does "reasonable steps" mean?

As always, it depends. Considering examples best approaches the matter.

If you run an agency and supply temporary workers to client companies, you are nevertheless the "employer" for the purposes of the Regulations if you pay the workers directly. What steps can you take to ensure that your workers do not exceed the average? The first sensible step is to make it a term of the agreement with the client that the workers should not be required to work more than the permitted number of hours. You should also try to ensure that a record of the hours worked is authenticated by the worker.

The Regulations apply to part-time as well as full-time workers. Part-time workers often have more than one job. How will the 48-hour limit such workers? The 48-hour maximum applies to the aggregate of the worker's house across all his part-time jobs. The DTI Guidance suggests that an employer should enquire whether the worker has other employment, and as to the hours that are being worked. If it looks likely that the 48-hour period will be exceeded, the DTI suggests negotiating an opt-out (for which see below).

What counts as working time?

The clock starts ticking whenever a worker is:

?? Working;

?? At his employer's disposal; and

?? Carrying out his activity or duties.

These factors are cumulative. It is not enough to satisfy one or two of them. They **all** have to be met. As a result, the DTI's Guidance suggests that time spent "on call" would not, generally, count as working time. Similarly, a lunch break is classed as a break and not works. Time spent travelling to and from work is, in the DTI's view, "unlikely to be working time". Time that would not ordinarily count as working time can nevertheless be treated as such if the employer and worker agree that it should be.

Opt-outs

Workers are free to agree to work more than 48 hours a week. However, a formal, individual agreement in

writing has to be in place, specifying any conditions on the opt-out.

What if a worker changes his mind after he has signed an opt-out agreement?

The Regulations entitle him to his change of mind. The worker may terminate the agreement on notice. If no provision is made in the agreement itself the worker need only give 7 days notice in writing. The agreement may provide for a longer period but it cannot exceed 3 months.

Where's the catch?

An employer can only rely on the opt-out if he meets certain conditions. The conditions relate to record keeping. The employer must keep a record of:

?? Those who have spent the opt-out;

?? Any terms on which the worker that the limit should not apply; and

?? The number of hours worked by the worker for the employment during each reference period since the opt-out. Time sheets or clock records should be sufficient, therefore, where the worker is engaged on annualised hour's terms.

The employer must also allow Health and Safety inspectors or Local Authority Environmental Health Officers to look at the records and provide them with any information that they may request about any particular worker.

NIGHT WORKERS

Special rules apply to Night Workers. They must not be required to work more than an average of 8 hours in any 24 period (again the average is calculated by considering a period of 17 weeks). If the work involves "special hazards or heavy physical or mental strain" the 8-hour limit is absolute.

Is there an opt out?

Once again, the limits described above may be excluded by agreement. However, the opt-outs have to be secured by way of a collective or workforce agreement.

WHAT ARE COLLECTIVE AND WORKFORCE AGREEMENTS?

A collective agreement is one reached between the employer and an independent trade union. A workforce agreement, on the other hand, is one reached between the employer and the workers employed by him or their representatives. The latter is a novel concept, a sort of non-union collective agreement. Its purpose is to avoid obtaining individual conditions wholly or partly determined by reference to a collective agreement, their opt-out has to be obtained by way of a collective rather than a workforce agreement.

An employer may make an agreement with the workforce as a whole, or with a particular group of workers (i.e. members of a workforce who all perform the same particular function, work at a particular workplace or belong to a particular department or unit). Where there are more than 20 workers affected, the agreement is signed on their behalf by elected workforce representatives. Elected workforce representative's sign where there are fewer than 20 workers an agreement on their behalf. Where there are fewer than 20 workers an agreement may either be made with their representatives or else with the employees directly. Provided the majority of them sign the workforce agreement, all are bound.

Who are these work-force representatives?

They are workers elected to represent their colleagues. It is up to the employer to decide how many there should be. It is up to the workforce to decide who they should be. The representative must be someone who will also be subject to the agreement; however, no one who meets that criterion may be reasonable to exclude them. Voting, so far as is reasonably practicable, should be secret.

Once I've secured an agreement does it matter if there is a turnover of staff?

New workers will be bound by the terms of any existing workforce agreement. However, the Regulations provide that agreements should have a maximum duration of 5 years. Thereafter, negotiations recommence.

RECORD-KEEPING

The Regulations require employers to "keep records which are adequate to show whether the [working time] limits... are being complied with in the case of each worker employed by him in relation to whom they apply".

Adequate records?

The DTI's Guidance suggests that it be up to each employer to decide what is necessary. It is not envisaged that the employer will have to keep a running calculation of each worker's average working hours. Nor does the Government anticipate that employers will have to establish new record-keeping procedures. The guidance suggests that employers' existing payroll may well be sufficient where the payroll records the actual number of hours actually worked. Whereas one might expect the Guidance to require the employer to start keeping such records it states instead that "it may be sufficient to meet the requirement by using management systems to ensure that the specified hours are kept". However, the means of monitoring must be "adequate to highlight instances of workers working in excess of the standard hours". Records must be updated every two years.

REST AND RELAXATION

The Regulations aim to ensure that workers get their fair share of rest and relaxation. Minimum rest periods are stipulated as described in the table below. The daily and weekly entitlements are separate. Daily rest does not count towards the weekly rest entitlement.

Rest Breaks

Where an Adult Worker works more than 6 hours in any day, he is entitled to a rest break. The length of the rest break may be determined by a collective or workforce agreement. However, if there is no agreement, the worker's break must be at least 20 minutes long. He is entitled to spend that period of time away from his workstation. Young workers are entitled to a rest break of 30 minutes if they work for more than 4 and half-hours in any one-day.

If work is monotonous or where the work-rate is pre-determined and, as a result, the health and safety of a worker is put at risk, an employer must ensure that the worker is given "adequate rest breaks".

	Minimum Daily rest	Minimum Weekly rest
Workers older than 18 ("Adult Workers").	11 consecutive hours.	An uninterrupted period of 24 hours in each 7 day period, or (at the employer's option) one uninterrupted period of 48 hours in each period of 14 days.
Workers aged between 15 and 18 ("Young Workers").	12 consecutive rest hours.	A period of 48 hours in each 7 day period (technical reasons may allow a reduction to not less than 36 hours).

Is there an opt-out?
The various rest-related entitlements may be altered or excluded but only by means of a collective or workforce agreement.

ANNUAL LEAVE

The Regulations create an entitlement to a period of paid annual leave.

Who is entitled?

Anyone who has worked for an employer for longer than 13 weeks becomes entitled to a minimum period of annual leave. The worker does not accrue any entitlement under the Regulations during the first 13 weeks of his employment. However, once the 13 weeks are up, the full entitlement is immediately conferred.

How much holiday are they entitled to?

The precise entitlement depends on when the particular leave year commences. For instance, if the worker is entitled to a number of days' leave in each calendar year, the present year will have commenced on 1 January 1998. Their entitlement for this leave year is 3 weeks. That is true of any leave, which commences prior to 23rd November 1998. Leave years which commence on or after that date create an entitlement to 3 weeks' leave plus "a proportion of a fourth week equivalent to the proportion of the year beginning on 23rd November 1998 which has elapsed at the start of the leave year". For leave years that commence on or after 23rd November 1999, the entitlement is 4 weeks. If a worker joins part way through a leave year, his entitlement is pro-rated.

What if our contracts of employment don't specify a leave year?

If the contract of employment is silent as to the commencement of the leave year, it is treated as being 1st October for those workers employed as at 1st October 1998 and the anniversary of their start date for every worker taken on or after 1st October 1998.

Can the leave entitlement be carried over into subsequent leave years?

No. Nor is there any obligation to pay for untaken holiday unless the worker has left your employment.
Can't I just agree to make a payment in lieu?

No. The intention behind the Regulation is to encourage workers to take their holidays.
Can I stipulate when the leave is to be taken?

Yes. The Regulations entitle an employer to require that a worker should work on a particular day or that he should take his leave on a particular day. The employer must give notice of the requirement. If the employer wants to insist on holiday being taken on a particular day the period of notice must be twice as long as the period of leave he wants the worker to take. So, if he wants the worker to take 3 days at Christmas he must give him six days' notice. The same period applies where the worker wishes to give notice of his proposed holiday dates.

If the employer wants to prevent holiday being taken on a particular day or days the period of notice must match the number of days on which leave is not to be taken. For example, if an employer wants his workers to be available for the third week of July he must give them a week's notice.

What if the worker leaves part way through a leave year?

The employer has to pro-rate the entitlement to the proportion of the leave year that has elapsed on the date of termination. If the worker has had more holiday than his pro-rated entitlement he may be required to make payment to the employer, or perform some additional work, to make up the difference.

DO THE REGULATIONS APPLY TO ALL WORKERS?

No, there are exceptions. Most of these exempt particular industry sectors such as transport seafishing and domestic service. There is one general exception: workers whose working time is not measured or predetermined or who can determine their own working time. The Regulations include examples of the sort of worker they have in mind:

?? Managing executives or other persons with autonomous decision-taking powers;

?? Family workers; and

?? Workers officiating at religious ceremonies in churches and religious communities.

The DTI's Guidance summarises the provision as relating to "workers who have complete control over the

hours they work and whose time is not monitored or determined by their employer". Seasoned Employment Tribunal veterans will immediately recognise this as exactly the sort of ambiguous definition that is likely to give rise to complex, lengthy and expensive litigation.

If a worker falls into this category he will not have the right to a 48 hour working week, to the minimum periods of daily or to weekly rest breaks. The entitlement to annual leave still applies.

Special Categories

The restrictions on which working hours for night workers and the entitlements to periods of uninterrupted daily and weekly rest and to work breaks within the working day are excluded in relation to a number of specific categories of worker:

?? Those who work away from where they live or who have two or more places of work which are a long way apart;

?? Those engaged in security or surveillance activities at places of work that require a "permanent presence in order to protect property and persons";

?? Those engaged in activities that require continuity of service or production. Those who work in hospitals or prisons, and dock, airport, postal or television workers may all fall within this exception (the Regulations provide other examples);

?? Those engaged in work affected by a foreseeable surge of activity. This might include candy floss salesmen who will be busier during summer than winter, or postal workers at Christmas or on Valentine's Day; and

?? Those whose activities are affected by unforeseen or exceptional events or the risk or occurrence of an accident. If the sea wall is crumbling, rest periods may be suspended. The Regulations suggest, however, that the entitlements may not be suspended where an "exceptional event" occurs whose consequences could have been avoided if the employer had taken "all due care".

Shift Workers

Where a worker is changing shifts, he may find it impossible to take his entitlement to a daily or weekly rest break. The Regulations specifically exclude the entitlements in such circumstances. There is a similar exception to those engaged in activities involving periods of work split up over the day (the Regulations give cleaning staff an example of the sort of worker covered by this exception).

WHAT IF I DON'T COMPLY?

The Government has made sure that failure to comply is an unwise option. The right to a 48-hour working week and the restrictions on night work are considered to relate to the health and safety of the workers. As a result, the Health and Safety Executive or, where relevant, the Local Authority have an obligation to ensure that the Regulations are enforced. A failure to comply with the requirements of the Regulations may result in a criminal conviction and a fine.

The individual workers have the right to make a complaint directly to an Employment Tribunal where the employer has failed to comply with rest or holiday-related obligations (though not the 48-hour working week or the restrictions on night work).

If you subject a worker to a detriment for refusing to comply with a requirement imposed in contravention of his rights under the Regulation, refusing to forgo his rights, refusing to sign a workforce agreement, acting as a workforce representative (or standing for election as a representative), or alleging that you have breached his rights (whether by bringing proceedings or otherwise) the worker may again make an application to the Tribunal. Similarly, a dismissal for any of those reasons will be automatically unfair.

Compliance is advised!

SILLIEST QUESTIONS ASKED BY LAWYERS
- Taken from official court records -

1. Were you alone or by yourself?
2. Was that the same nose you broke as a child?
3. Do you have any children or anything of that kind?
4. So you were gone until you returned?
5. You don't know what it was, and you don't know what it looked like, but can you describe it?
6. How far apart were the vehicles at the time of the collision?
7. How long have you been a French Canadian?
8. The youngest son, the 20 year-old, how old is he?

PRACTICAL EMPLOYMENT LAW

LEGAL DEVELOPMENTS FOR EMPLOYERS AND LEGAL EXECUTIVES.

NEW DATA PROTECTION ACT TO BE IN FORCE BY JUNE 1999

By Melanie Russell
Solicitor,
Olswang Solicitors &
Registered Foreign Lawyers

As we predicted in our update of March 1998, the new Data Protection Act has now received Royal Assent but substantial supporting legislation will be necessary to fully implement it. Consultation papers already have been issued by the Government and the numerous responses received are being considered. Present indications are that the Act will come into force during the second quarter of 1999. However it will be of retroactive effect and will apply to all processing of personal data that was underway from 24 October this year.

A REMINDER OF THE ODD RULES

Under the former data protection provisions, information processed for payroll or accounts purposes was expected from the data protection registration requirements. Also, the former Act did not generally apply to other information usually held regarding employees, such as holiday entitlements, periods of sick leave, training records etc. Unless computer processed such data, in which case registration with the Data Protection Registration was required and the "Data Protection Principles" applied.

A SUMMARY OF THE NEW PROVISIONS REGARDING TO EMPLOYMENT.

When the new Act comes into force it will repeal and replace the old Act. In summary, its main provisions affecting the employment field are as follows:

The Data protection provisions will be extended to cover paper-based personal information stored in filing systems.

✍✍ Employees will have the right to receive a copy of their personnel files on request (subject to payment of a fee which has not yet been fixed but is unlikely to be substantial) and to demand that any inaccuracies be corrected or removed. This right will be enforceable through the Courts.

✍✍ Employees will also have the right to be told:

- Whether and for what purposes personal information relating to them is being processed;
- The nature of the information; and
- The people to whom such information may be disclosed.

✍✍ The Act introduces a number of new principles governing the processing of data and introduces new safeguards in relation to sensitive personal information and computerised methods of decision-making.

WHAT SHOULD I BE DOING NOW?

Although transitional provisions will give employers time to comply with the new rules, prudent employers will start reviewing their existing arrangements now. In particular, you should consider the following:

✍✍ Have your employers consented to you processing their personal data? If not, existing employees need to be approached for consent and you should review your standard form offer letters and contracts to ensure you are adequately covered.

✍✍ Do you hold lots of old, out of date information such as former addresses and telephone numbers on your personnel files? These should be purged from the files, and indeed, all files should be periodically reviewed and information retained only if you have a sound business reason for doing so.

✍✍ Do you have adequate systems to ensure that you are informed of changes to your employers' personal details? Bear in mind that employees will be able to check the information you hold.

✍✍ Check your security and back-up systems, particularly computer-based systems, to ensure that personal information is subject to appropriate technical and organisational measures to protect against unauthorised or unlawful processing and accidental loss, destruction or damage. If you do not, you will be in breach of the provisions of the Act.

✍✍ Do you send information regarding your employers overseas to countries, which are not part of the European Economic Area? For example, this will cover performance or salary information which, you may send to your parent company. Such transfers will only be permitted to countries, which have their own adequate data protection rules, unless you have each individual employee's consent. Note that, for example, the EC does **not** consider that the USA has adequate protection for these purposes. Further exemptions apply but these are likely to be very limited in scope.

✍✍ Check your data protection notification to the Data Protection Commissioner. Does it properly cover the information you hold and the processing you undertake?

SENSITIVE PERSONAL INFORMATION

You will need to be especially careful regarding "sensitive personal data" as particular rules apply to

this. Such data is widely defined to include details of ethnic or racial origin (although ethnic monitoring for equal opportunity purposes will still be permitted), political opinions, religious beliefs or other beliefs of a similar nature, trade union membership, physical or mental health, sex life or details of the commission of alleged commission of any criminal offence.

As well as being subject to the general data protection principles, you will need to ensure that each employee has given his or her explicit consent to the processing of such information and be satisfied that the holding and processing of such information is absolutely necessary for your employment purposes. Another reason to review your files and check contracts.

RIGHTS FOR EMPLOYEES

A new right for employees will be to issue a written notice requiring their employer not to process data where such processing is likely to cause "substantial and unwarranted damage or distress". Possible examples might relate to divorce proceedings and some medical details.

Employees can already, under the old Act, recover compensation through the Courts where they suffer damage as a result of inaccurate information or unauthorised disclosure. The new Act will extend these compensation rights to permit recovery of or damage caused by **any** breach of the Act and/ or distress in certain circumstances.

WHAT IF I DO NOT COMPLY?

The new Data Protection Commissioner has extensive powers of enforcement, including powers of enforcement, including powers of entry and inspection. Failure to comply with enforcement notices, which the Commissioner may also issue in certain circumstances, is a criminal offence. The Commissioner has indicated that she intends to be proactive and has already demonstrated this with a number of high profile enforcement actions

RECOMMENDATIONS:

- ✍✍ *Start reviewing, your personnel files now, especially as this may be a substantial task if you have numerous employees.*
- ✍✍ *Check that your application forms offer letters, contracts and medical forms contain the appropriate consents and protections.*
- ✍✍ *Review your authorisation procedures and systems to ensure compliance with your obligations.*

REDUNDANCY HANDLING – A TIMELY REMINDER?

Two recent cases in the EAT serve as a salutary reminder of the uncertainty which can, on occasion, exist in identifying a redundancy situation.

The test is whether or not a dismissal is due to a reducing requirement for the particular employee to carry out the job. In the first case, the BBC replaced one producer with (according to the BBC's grading structure) a more senior producer to work on a particular programme in order to change its emphasis. Although the BBC still needed a producer, the EAT held that a redundancy arose because the BBC's need for producers at the Applicant's level had diminished. The dismissal was therefore unfair.

In the second case, an employer sought to replace a part-time secretary (who worked three and a half days per week) with a full-time secretary working five days per week. The employer did not offer the position to the existing secretary as it thought that she would not be interested. The EAT decided that there was no reduction in the requirement for work of a particular kind because the employer still needed a secretary. Therefore there was no redundancy situation. The EAT nevertheless found that her dismissal was fair as it occurred for a fair reason, namely business reorganisation.

RECOMMENDATIONS:

- ✍✍ *The above cases reiterate that dismissals through restructuring of jobs or reorganisations may not involve clear-cut redundancy situations. It is safer to proceed on the basis that the grounds for dismissal are redundancy and business reorganisation rather than redundancy alone.*
- ✍✍ *A fair procedure involving proper selection, individual, where required, collective, consultation and consideration of alternative employment should always be carried out. Save in the most extreme circumstances, failure to do so will render the resulting dismissal unfair.*
- ✍✍ *Where the job content of the new role has not changed significantly, the employee should be offered the new position unless patently unsuited to it.*
- ✍✍ *Remember that where large-scale redundancies are carried out (20 or more within 90 days at once establishment) the minimum statutory consultation periods must be adhered to and the notification requirements to the DTI should be compiled with. The financial and other penalties for failing to do so can be significant.*

AGE DISCRIMINATION

GOVERNMENT ANNOUNCES NON - STAUTORY CODES OF PRACTICE

In "Action On Age", the Government's consultation document on age discrimination, it has indicated that it intends to promote training, rather than legislation, as a means of keeping older people in work.

The Government is unlikely to introduce age discrimination legislation in the near future, partly convinced by arguments not to further regulate the labour market and not to introduce additional, inevitably complex, laws.

While the Government will be promoting training and ensuring that its Welfare to Work policies such as its new deal, employment pilots and employment zones are designed to benefit older as well as younger workers, the only nod towards legislation which it is currently contemplating is the drafting of a non-statutory code of good practice.

The aim of the code is to provide advice on best practice in avoiding unfair age discrimination. Consultation on the code is taking place now and it should be finalised by February 1999. It is likely to deal with recruitment, training and promotion issues as well as dismissal, and will discourage both direct methods of discrimination (e.g. age limits in job advertisements), and indirect methods (such as stereotyping employees

by believing, for example, that older employees will not adapt so readily to change or be so keen on promotion).

Once the code is established, it is likely to be used as a guide by Employment Tribunals in assessing standards of reasonable behaviour cases. This will, in effect, introduce by the back door laws preventing age discrimination in general and redundancy dismissals.

RECOMMENDATIONS:

✍✍ *While employers do not yet need to take immediate steps, it might be prudent for them to remove direct and indirect references to age in job advertisements, unless vital, and to make sure that, say, in any redundancy policy undue weight is not given to issues such as adaptability in a way that would discriminate against the older worker.*

BARGINNING UNITS – A WAY FORWARD?

The Queen's speech announced that the Government's Fairness at Work proposals would be included in the legislation for this Parliament. Those provisions will give collective bargaining rights to unions if there is a sufficiently high vote in a ballot of relevant employees.

Employers, who believe their work force might for union recognition, but who do not want to negotiate with a number of different unions, might wish to consider News International's example. It is suggesting to its work-force that an independent body should be set up which would have the right to negotiate pay and conditions, represent members in disciplinary matters and grievance issues, and maintain good relations between employees and the company. The proposal is that this body would be legally independent, with an elected general secretary and that it, instead of traditional unions such as NUJ and NGA, should represent the employees.

RECOMMENDATIONS:

✍✍ *This move, which emulates the German model of one union per employer rather than one union per trade, is one which employers whose workers follow a number of different trades would be sensible to contemplate.*

DISABILITY DISCRIMINATION

An increasing number of employees have brought claims under the Disability Discrimination Act 1996 ("DDA") against their employers alleging that they have been discriminated against as a result of stress-related depression. So far, such claims have had very little success.

The key issue in many cases turns on whether an individual's depression stress-related or otherwise, can be classified as a disability.

The DDA says that a disability can be either a physical or a mental impairment. The essential ingredients are that the impairment must have a long-term (i.e. 12 months or over), substantial adverse effect on normal day-to-day activities. In practice, only people with a medical history of severe depression, or who have or are likely to suffer severe depression for over 12 months, are likely to convince a Tribunal that they are "disabled" for the purposes of the DDA.

Employers, however, must exercise caution in dealing with employers from such problems. While tribunals accept that employers cannot be expected to retain in employment those employees who are absent or performing unsatisfactorily after a certain period of time, employers are under a statutory duty to investigate whether that individual's difficulties can be alleviated by an adjustment in his working conditions if that person is "disabled". Unless that employee has a history of medical or mental illness, an employer will not necessarily know if his current condition will have a long-term effect or not.

RECOMMENDATIONS:

In these instances an employer can take steps to protect its position by:

✍✍ *Approaching the employee's GP(although the employee's consent is required) to investigate the extent to which that employee needs support and to obtain an expert opinion as to their prognosis; and*

✍✍ *Making credible attempts to explore whether there are positions elsewhere in the work place, which would be more suitable or less stressful to the individual. Tribunals will not accept a half-hearted enquiry as to whether an employee would like to move.*

£103,146 AWARD FOR DISABILITY DISCRIMINATION

THE HIGHEST AWARD TO DATE

The Employment Appeal Tribunal has upheld a Tribunal decision that an Applicant who has a severe visual impairment was discriminated against because his disability tainted the way in which he had been scored for redundancy selection purposes.

The bulk of the award turned on the fact that visually impaired people face huge barriers in securing employment and was calculated on the assumption that the employee concerned would not find alternative employment for the rest of his working life (15 years). The award was reduced by 20% for the risk that, had he remained in employment, his eyesight would have deteriorated to such an extent that he would have been unable to perform his duties. He was also given £7,167 for past loss of earning and £3,500 for injury to feelings.

This case also established that the DDA, unlike race and sex discrimination legislation, does not require the Applicant to nominate a "comparator" – another employee whose treatment the Tribunal can compare with the employer's treatment of the Applicant.

COMMENT:

✍✍ *The decision in this case may mean that it is easier for an Applicant who is disabled to prove discrimination. However, there is a conflicting case, which has yet to be heard by the Court of Appeal so this position may change in the future. We will keep you updated.*

✍✍ *Note also that with effect from 1st December 1998 the DDA applied to all employers with 15 or more employees rather than the 20-employee threshold, which applied previously.*

EMPLOYMENT RELATIONS BILL 1999

A GUIDE TO THE NEW BILL FOR EMPLOYERS AND SENIOR EXECUTIVES.

By Julia Palica, Partner and Melanie Russell, Solicitor. Olswang Solicitors & Registered Foreign Lawyers

INTRODUCTION

The Employment Relations Bill ("ERB") was presented to the House of Commons on 27 January 1999 and embodies the provisions of the Government's Fairness at Work proposals. It has already had its second reading in Parliament and will become law later this year.

In summary, it covers the following:

?? The maximum compensatory award for unfair dismissal is increased to £50,000.

?? New rights for employees facing sanctions for involvement in Union activities.

?? The right workers to be accompanied at disciplinary hearings.

?? Waiver clauses in fixed term contracts excluding unfair dismissal rights are now prohibited.

?? Provisions tackling discrimination against part-time workers

?? Parental leave and time off for domestic incidents.

?? Revisions to existing maternity leave rights.

?? A statutory procedure for unions to obtain compulsory recognition.

In addition, regulations likely to be made by the Secretary of State will reduce the qualifying period for unfair dismissal protection from two years to one year.

In this update, we explore some of these changes and offer our views of how these may be accommodated in your business in the future. We also include a flow chart, which aims to simplify the complicated new procedures for compulsory union recognition and derecognition.

NEW MAXIMUM UNFAIR DISMISSAL AWARD

When the ERB comes into force in mid-1999, the limit for unfair dismissal awards will rise from £12,000 to £50,000. The Secretary of State will appoint the date when the new maximum award will apply. The overwhelming likelihood is that it will only apply to dismissals where the effective date of termination (i.e. the termination date assuming that appropriate statutory notice has been given) falls on or after the introduction date. It is highly unlikely that it will apply retrospectively.

The new maximum, along with all other statutory awards such as the maximum amount of a week's pay for the calculation of an unfair dismissal basic award or redundancy payment – currently £200 will rise each September by the rate of inflation.

?? **COMMENT:**

?? *The increase in the maximum compensatory award will have a significant effect on all future claims, particularly for high-earning employees, where previously the potential unfair dismissal award formed a relatively small proportion of their overall compensation entitlement.*

?? *It is essential to note, however, that employees will be expected to keep their losses to a minimum by seeking alternative work, and earnings from new positions will be taken into account by the Tribunal when assessing compensation, potentially reducing awards to minimal levels if a new job at an equivalent salary is swiftly found.*

?? *Effective settlement negotiations, if appropriate to the case, will be more crucial than ever with the above factors in mind, to avoid the costs of a full Tribunal hearing.*

?? *The increases in these sums will not affect compensation for discrimination – which remains without limit.*

MINIMUM SERVICE FOR UNFAIR DISMISSAL AND OTHER EMPLOYMENT RIGHTS

We expect that, at the same time as the ERB becomes law, the Secretary of State will issue a Statutory Instrument shortening the minimum length of service before which a person becomes entitled not to be unfairly dismissed, and entitled to a redundancy payment, from two years to one year.

TACTICAL CONSIDERATIONS

?? *Employers contemplating the termination of an individual's contract of employment, whether because of conduct, poor performance or redundancy, would be well advised to implement the termination sooner rather than later, to take advantage of current low maximum compensation awards and the longer period of minimum service presently required.*

FIXED TERM CONTRACTS

Many employers have taken advantage of provisions, which have allowed them to avoid any sanction should a fixed term contract for a period longer than one year is allowed to expire without renewal. This will no longer be possible in relation to unfair dismissal.

Thus, in future, if a fixed term contract expires and is not renewed and the relevant employee has the minimum (one year's) continuous employment, all the normal protections on termination will apply to the employee. The only exception to this will be:

?? If the contract is for a fixed term of two or more years: and
?? If the contract contains an express exclusion of the entitlement to a redundancy payment.

In which case the employees will not have the right to a redundancy payment but may, depending on the circumstances have other valid claims.

This will only help the employer if it makes the employee redundant **fairly** – if the employee is, say, unfairly selected for redundancy on the expiry of his fixed term contract, he will still be able to claim damages (up to the new £50,000 maximum) for unfair dismissal.

These changes, which will be brought into effect for dismissals occurring after the date when the ERB is implemented, will diminish the attraction of fixed term contracts.

RECOMMENDED ACTION

?? *Employers should revisit fixed term contracts to check that their provisions relating to redundancy are adequate.*

DISCIPLINARY HEARINGS

When the ERB comes into force, any worker facing a disciplinary hearing (whatever the potential sanction, from warning to dismissal) is entitled to be accompanied at the hearing either by a work colleague or a trade union official. It may be that regulations or the CAC code to be announced later will limit the right to disciplinary matters concerning "serious issues" only.

If the appointed date is not convenient to the chosen companion, the worker can demand that it be postponed to another reasonable time within five working days. The ERB is silent on whether i the companion is going to be unavailable on the new date, the hearing can be postponed again. If the companion is a colleague, the employer must allow him time off to attend the disciplinary meeting, and neither the worker nor the companion must be subjected to any detriment or dismissed for trying to exercise their rights. If the principal reason for a dismissal is connected with this, the dismissal is connected with this; the dismissal will be automatically unfair. There is no minimum or maximum length of service or age qualification.

The companion will be allowed to address the hearing but not to answer questions on behalf of the worker, and can also confer with the worker during the hearing. It will therefore not be possible to prevent a worker discussing a potential answer with his companion before giving it.

There are two sanctions upon employers who fail to allow workers facing disciplinary charges to be accompanied:

?? A Tribunal can award compensation of up to two weeks' pay. This is two weeks' normal pay and therefore could be reasonably substantial for high-earning workers.

?? It is likely that any dismissal, which arises out of the disciplinary hearing, will be deemed to be unfair because of procedural unfairness, even if the reason for dismissal is itself fair.

RECOMMENDED ACTION:

?? *Employers will not be able to avoid these provisions. It should be noted, however, that they do not apply to family members, solicitors and so on but not to work colleagues (whether employers of freelancers) and trade union officials.*

?? *Disciplinary procedures should be revisited and consideration given to reflect this new right to representation.*

PART-TIME WORKERS

While the ERB does not specifically any rules, it paves the way for the Secretary of State to bring in regulations (which only need to be presented to Parliament) to ensure that part-time workers are not discriminated against in any way as compared with full-time workers. These rules can be introduced without proper parliamentary discussion or consultation. We will keep you updated.

LEAVE FOR FAMILY AND DOMESTIC REASONS

MATERNITY LEAVE

Full details of the changes to maternity leave rights will not be available until regulations, to be made enabling provisions in the ERB, are brought before Parliament. However, the main changes are as follows:

?? **Ordinary Maternity Leave –** All employees, provided they satisfy the prescribed conditions, will now be entitled to a maternity leave period of no less than 18 weeks, rather than the 14 week minimum which previously applied. The extension brings the entitlement to leave into line with the maximum period for which statutory maternity pay is payable. Such as the employee will be entitled to the benefit of the terms and conditions of employment which would have applied if she had not been absent and she will be entitled to return from leave to the job in which she was employed before her absence. The ERB envisages that the new regulations will clarify a difficulty often encountered under the old rules: employees on ordinary maternity leave have no right to their contractual "remuneration" (which is replaced by statutory maternity pay) but what is included in "remuneration" for these purposes? What about car allowances, meal subsidies, holiday entitlement and pension arrangements? The ERB hints that remuneration may include fringe benefits, which are not set out in a formal contract of employment, but only the regulations will give the full picture.

?? **Additional Compulsory Maternity Leave –** The former maternity absence (the right to return to work up to 29 weeks after the birth of a child) applied only to employees who, at the beginning of the eleventh week before the expected week of **child**-birth, had been employed by their employer for not less than two years. Regulations under the ERB are likely to extend this right to employees with only one year's service at the relevant date. Again the ERB should put an end to another difficulty which arose under the old rules: what happened to the contract of employment of an employee whilst she is absent and before she exercises the right to return? The ERB states that her contract will continue to exist and she will benefit from all terms of it, other than "remuneration".

?? **Redundancy and Dismissal –** Provisions similar to those currently in force will apply to redundancy and dismissal during maternity leave and as now, dismissal for a "maternity-related" reason will be automatically unfair and an act of sex discrimination (for which compensation is unlimited).

PARENTAL LEAVE

As with the new maternity leave rules, the fine details of the provisions governing parental leave will have to await the regulations. However, the new right can be summarised as follows:

A period or total period of leave of at least three months.

Leave is for the purpose of "caring for a child".

Employees absent on parental leave will continue to be entitled to all benefits under their terms and conditions of employment, except "remuneration".

A "parent" includes an adoptive parent.

The regulations will specify when leave may be taken and it is likely to be referable to the age of the child or, for example, the data of adoption.

The regulations are likely to include provisions enabling the employer to postpone parental leave in specified circumstances.

Employees who had their parental leave unreasonably postponed or whose employer prevents or attempts to prevent them taking, will be able to apply to a Tribunal for "just and equitable" compensation which may also reflect any loses they incur as a result. For example, this latter element could include child-care expenses.

DOMESTIC INCIDENTS

Under the new rules, an employee will be entitled to take a reasonable amount of time off during working hours where it is reasonable for him to do so to deal with a "domestic incident".

A domestic incident is one which:

Occurs in the home of the employee; or

Affects a member of the employee's family or a person who relies on the employee for assistance.

Detailed regulations will again be required to cover, for example, such matters as how "reasonable" will be defined, provision for notices to be given, evidence to be produced and other producers to be followed.

The remedy for employees who are refused time off will be compensation through an application to the Tribunal.

RECOMMENDED ACTION:

?? *Prudent employers are already reviewing their existing policies in the light of the likely new rules, although definitive revisions will not be possible and should not be implemented until the regulations are published.*

?? *The costs implications of the new rules (the continued provision of benefits to absent employees, temporary staff cover, the impact on any enhanced maternity pay scheme etc.) may be substantial for many employers and budgets should be revisited accordingly.*

NEW RIGHTS RELATING TO UNION ISSUES

DETRIMENTAL TREATMENT AS A RESULT OF PARTICIPATING IN PROCESS FOR COLLECTIVE AGREEMENTS.

If a worker (employee or freelance) is treated detrimentally because of what he has done in relation to collective bargaining arrangements (for example, because he acted with a view to obtaining or preventing recognition, or tried to influence the way in which most votes were cast), then he will be able to complain to a Tribunal (within three months unless extended by the Tribunal).

There is no ground for complaint if the worker was unfairly treated because his actions amounted to a breach of his contract of employment or were an unreasonable act or omission on his part.

If the Tribunal decides that an employee or worker suffered detrimental treatment (short of dismissal) it will award him compensation. There is no limit, but it must be just and equitable having regard to the infringement complained of and any loss sustained (e.g. any expenses incurred or loss of benefit) subject to a duty on the worker to keep losses to a minimum. If a non-employee worker (e.g. a freelancer) loses his contract because of a detrimental treatment in such circumstances, the Tribunal can award him compensation up to the maximum of the current basic and compensatory award for unfair dismissal.

If an employee is dismissed because of his activities in connection with an application for recognition or derecognition, it will be automatically unfair unless his actions amounted to a breach of contract or an unreasonable act or omission. This applies irrespective of the period for which the employee has been employed.

OTHER PROVISIONS RELATING TO COLLECTIVE MATTERS

?? **Lists of Union Members –** It will be illegal to make lists ("blacklists") of union members for the purposes of using that list as part of the recruitment selection process. Sanctions may include criminal charges.

?? **Extending Strike Period –** Currently, if employees vote to strike or to take other industrial action, the action must start with in four weeks of the ballot. The ERB allows for the union and the employer to extend that period by up to a further four weeks.

?? **Training Meetings –** If a trade union is recognised, employers must meet with its representatives at least every six months to discuss training for workers within the bargaining unit. Discussions will revolve around both the adequacy of training during the previous period and proposed training during the previous period and proposed training during the period until the relevant bargaining unit.

The sanction for failing to have these meetings will be compensation of up to two weeks' full pay for each worker within the relevant bargaining unit.

?? **Sacking for Taking Part in Industrial Action –** If an individual is sacked for participating in

industrial action for less than eight weeks, the dismissal will automatically be unfair. Even after the eight week period (which relates to the period in which the employee has participated in the industrial action, not to the duration of the industrial action itself) an employer must have attempted to resolve the dispute before it can dismiss any workers taking the industrial action.

?? **Individual Contracts –** An employer will not be able to force an employee to enter into an individual contract – i.e. a contract that differs from a collective agreement. This provision was included in response to a number of cases where employers gave employees who opted for individual contracts an extra pay rise, which they refused to give to those who remained subject to collective bargaining. Employers will not be able to do this in the future.

This provision, too, will only come into force when the Secretary of State lays down the appropriate regulations. The ERM does not give any indication of what the detail of those regulations might be.

RECOMMENDED ACTION:

?? *As we mentioned above a number of employers are attempting to pre-empt the new rules by exploring alternative collective bargaining processes.*

The Weekly Law Reports Moot

For the first time ever the Weekly Law Reports is sponsoring a Moot competition.

The University of Essex Law Society is pleased to be hosting The Weekly Law Reports Moot here at The University of Essex. This moot is an Inter-varsity moot and will be attended by teams from other Universities. After consultation with The Incorporate Council of Law Reporting they kindly agreed to sponsor a moot to be held at Essex. The teams should consist of two people, Senior and Junior Counsel. Each member of the team must presently be reading Law at a recognised University.

The prize for the winning team will be a years subscription each to The Weekly Law Reports. An invaluable aid to any law student or budding lawyer as I am sure you will agree. As well as this there will be a trophy for the fist and second place.

The results of the moot will be reported in the next issue of "Obiter" as well as being reported by the official reporter from Mooting Net. The UK Internet site dedicated to mooting for Universities.

If you would like to take part in The Weekly Law Reports Moot then you should contact the University of Essex Law Society. Entry is restricted to one team per University.

Mr. J. P. McDonald
Master of the Moots
University of Essex Law Society.
Wivenhoe Park,
Colchester,
Essex,
CO4 3SQ. UK.

Tel./Fax. +44 (0) 1942 678705

E-mail : lawsoc@essex.ac.uk

Birkett Long Moot

For many years the University of Essex Law Society has been pleased to be associated with Birkett Long Solicitor from Colchester. Birkett Long have long been supporters of the University of Essex Law Society and have sponsored our annual moot. Last year Birkett Long agreed to sponsor our annual moot for the next three years and we are therefore able to offer you the opportunity to participate in it this year. If you would like to take part in this moot please contact Jonathan McDonald, Master of the Moots.

Entry is restricted to Members of The University of Essex Law Society.

SHOULD YOU BE CONCERNED ABOUT THE WOOLF REFORMS?

By David Stewart, Partner and Martin Davies, Senior Assistant Solicitor Olswang Solicitors & Registered Foreign Lawyers

Our Guide to how the Woolf Reforms to Civil Justice in England and Wales will affect your business.

THREE REASONS TO TAKE NOTICE

On Monday, 26 April 1999, litigation in England and Wales will change significantly when the reforms proposed by Lord Woolf are implemented in the new Civil Procedure Rules. These will govern all civil cases brought in the Courts after that date and they are also likely to radically influence those cases, which are already proceeding. The reforms are designed to enable lower value (£15,000 and below) cases to be dealt with on a streamlined "Fast track", but the reforms will also impact on High Court litigation. The old Green and White books will be pulped. The reforms will not directly affect Employment Tribunal proceedings.

Three reasons to take notice:

?? The decision to litigate will now need full preparation and evaluation.

?? Now, more than ever, it is your case, requiring your involvement at all stages of the proceedings, from initial instructions to trial and beyond.

?? Disregard the new rules and you could find yourself paying interest on damages, and later on costs, at up to 10% above base rate.

In this guide, we explain some of the main aspects of those changes and how they will fundamentally alter the approach which businesses will be required to take to dispute resolution in the future.

The practical implications of the Woolf Reforms are not always immediately apparent. We aim to help you ensure that your business is prepared for the changes.

The reforms are voluminous and so the information in this briefing is merely a summary.

A LAST REPORT – "LITIGATION WILL BE AVOIDED WHEREEVER POSSIBLE" AND THIS WILL LEAD TO AN ENHANCED ROLE FOR ALTERNATIVE DISPUTE REVOLUTION

Lord Woolf stated in his final report on the Reforms that:
"People will be encouraged to start Court proceedings to resolve disputes only as a last resort and after using more appropriate means where these are available".

Must claims involving up to £15,000 will be allocated to a new "fast track", where recoverable legal costs will be fixed in advance. Small claims (those involving less than £5,000) will be dealt with in a revised "small claims procedure" where entitlement to recover any legal costs at all will be extremely restricted. Higher value rules will be placed in a "multi-track" system. Clearly, this "track" system is an indication from Lord Woolf that cases involving relatively small amounts should not even reach the courts.

The new rules bolster this fundamental aim in several ways:

?? the consideration of **alternative dispute resolution** ("ADR") will be an essential pre cursor to commencing Court proceedings;

?? even where Court action is recommended, the emphasis is on **a spirit of co-operation** between the parties to resolve their dispute. Parties should not conduct litigation unreasonably or oppressively, and should abide by the Court's directions for the progression of the case;

?? there is now a formal process requiring each party in all but the most exceptional circumstances to make a **pre-action offer to settle** the proceedings (which Robert Harvey discusses in more detail below). Crucially, claimants as well as defendants can make these.

Harsh costs sanctions can be imposed for those who flout the new rules.

Is ADR for you?

A first step in every dispute will now involve consideration of whether ADR is appropriate. In Court, the judge will expect to hear cogent reasons for any rejection of ADR and will require parties to re-assess whether ADR is a suitable alternative throughout the proceedings as they progress.

Obviously ADR will not be suitable for all cases but can have significant advantages, highlighted by Lord Woolf in his report:

?? relationships may be preserved;

?? mediation in particular focuses on the ongoing commercial relationship;

?? ADR may offer increased flexibility, both in terms of the resolution process itself and the ultimate result;

?? Confidentiality may be maintained. A co-operation approach is encouraged;

THE NEW "OVERRIDING OBJECTIVE" – TO ENABLE COURTS TO DEAL WITH CASE JUSTLY

Lord Woolf's "overriding objective" is that new rules should enable courts to deal with cases justly. The Rules specify that, so far as practicable, this means:

?? **Ensuring that the parties are on an equal footing –** conceivably, this means that large complainant companies will be expected to "assist" smaller defendants...

?? **Saving expense –** parties will be penalised if they fail to focus on the core issues in dispute or

unreasonably pursue issues, which have little prospect of success or are merely ancillary...

?? **Dealing with cases in ways which are proportionate:**

- **To the importance of the case to the parties –**
  For instance one claim from a consumer worth only £500 may open the floodgates to thousands more.

- **To the complexity of the issues;**

- **To the financial position of each party -**
- Large companies facing claims from impecunious individuals could be obliged to bear more of the costs of the case's preparation.

-**To the amount of money involved –**
-Cases involving less than £15,000 will be dealt with under the small claims or fast track procedures and recoverable costs will be very limited.

?? **Ensuring that the case is dealt with expeditiously and fairly –** there will be sanctions for failing to follow the Court's directions and cost penalties are increased.

?? **Allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.**

The Court must seek to give effect to the overriding objective throughout the proceedings and so will consider it when it makes an order or when it exercises any power it has at its disposal. The parties to litigation and their advisers, as well as expert witnesses, are also obliged to give effect to the overriding objective. Anyone failing to do so can expect to be penalised by the Court, whether in terms of costs or in having his or her action or defence struck out.

CASE MANAGEMENT – VERY EARLY PREPARATION THE KEY AND AN INCREASED USE OF OFFERS TO SETTLE – WITH TEETH

Lord Woolf has introduced several measures to give effect to his aim that the commencement of Court proceedings should be the "last resort". These changes will fundamentally alter what has often been the traditional approach to litigation.

The emphasis will now be on pre-action disclosure and settlement exploration and Lord Woolf has ensured that those parties who act reasonably and only resort to Court action as a final option, will receive increased protection against adverse cost awards.

The main reforms to note in the area are:

?? **Pre-action Protocols –** these outline the steps which parties should take to seek information from and to provide information to each about a prospective legal action. The new Rules enable the Court to take into account compliance or non-compliance with an applicable protocol when giving directions for the management of proceedings and when making orders for costs. Presently, **protocols exist only for personal injury claims and clinical disputes** (formerly medical negligence) but provisions enable other protocols to be introduced and they are likely to follow soon after the rules come into force.

?? **Letters Before Action –** The letter before action is now part of the Court process and must be carefully drafted as any court document.

Even if no protocol is relevant, the Court will expect these letters to be **much more detailed** than previously. They will require careful formulation and must:

?? Set out all the relevant legal and factual issues.

?? Be sufficiently analytical and clear to elicit a detailed and accurate from the other side.

?? In all but exceptional cases will need to disclose the identity of key witnesses and be accompanied by the documents, which would normally be disclosed, on discovery.

?? genuinely offer initiation or other forms of ADR.

?? address the costs.

A hasty demand, which has no merit legally or factually, can lead to costs penalties even if ultimately you win your case.

Of necessity, protocols cannot be observed nor the requisite letters before action written without a **"legal critical path analysis"**. Such analysis is expected in every case and is designed to highlight the legal issues involved in the case and to detail the expected budget for the proceedings. Some well-informed commentators on the new Rules consider that judges may ask to see these documents at the case management conference (see next column) or when considering an application for costs.

A pre-requisite to the preparation of the legal critical path analysis is a full evaluation of all the relevant evidence. Consequently, relevant witnesses will need to give a full account of their evidence and all the relevant legal advisers at an early stage, before proceedings are threatened.

In short, the new Rules mean that most proceedings should not be issued until there has been a proportionate investment of time (and expenditure) in these initial steps – any litigation not doing this could face hefty cost penalties.

Pre- and post-offers to settle

Parties to potential and actual litigation have always been able to make offers to settle or, once proceedings have begun, defendants may make payments into Court. The new Rules refine this procedure and, crucially, enable parties to make pre-action offers to settle even before Court proceedings have been instituted which, provided they comply with the requirements set out in the Rules, may have significant consequences when costs are considered after the outcome of the trial.

Broadly if a party decides not to accept a pre- or post-offer to settle and, at trial, fails to better the offer it may be liable to pay:

?? all the other party's costs from the latest date upon which the offer could have been accepted.

?? interest on the damages awarded at **a rate not exceeding 10% above base rate.**

?? Interest on the other side's costs at **a rate not exceeding 10% above base rate.**

These provisions are a great incentive to ensure that whether you are a potential claimant or defendant, you make an accurate pre-action offer to settle.

HOW MUCH WILL LITIGATION COST IN THE FUTURE? – TIGHTER CONTROLS, BUDGETING AND THE RISK OF HARSH COST SANCTIONS FOR TRANSGRESSORS

One key aspect of Lord Woolf's "overriding objective" is that of proportionality and inherent in that principle is control of costs to ensure that they remain reasonable in light of the sums in dispute. If you have a good claim, and ultimately you win at trial, will the new Rules make a difference to whether you recover your legal costs? The answer is a resounding "yes" as Lord Woolf has added some further incentives to ensure that all parties effectively manage costs throughout the proceedings.

?? **The case management conference –** as part of the more "hands on" approach of judges to controlling the progress of cases under the new Rules, case management conferences will take place early in the proceedings with the judge, parties and their advisers present. The case management judge will expect both parties to have **full and accurate** details of their cost to date (broken down on a step-by-step basis) and their likely costs for each future stage of the action. Potential litigants will need to recognise the costs investment that such budget preparation will necessitate.

?? **Limiting disclosure, number of witnesses, expert witnesses and the duration of the trial to ensure that only the key issues between the parties are dealt with –** at trial, witnesses are likely to be allocated a specific time to give their evidence and a "guillotine" process will be likely to apply. Discovery will be narrowed – making it more difficult for a party to gather information by a "fishing expedition".

?? **Costs before proceedings are commenced will be recoverable.** In a radical departure from previous practice and to reflect the increased pre-action case management required by the new Rules, costs incurred before a claim is issued are likely to be recoverable and complied with relevant pre-action protocols and the "overriding objective".

In deciding what order to make about costs, **the court is now obliged to have regard to all circumstance,** including:

?? The **conduct** of the parties before as well as during the proceedings – oppressive or unreasonable behaviour can and will be heavily penalised;

?? Whether a party has succeeded on part of his case, even if he has not been **wholly** successful, but note:

-The Court can decide not to award any costs for issues which have been unsuccessful or unreasonably pursued; and

- Can take account of whether a claimant, even if he has wholly or partly succeeded, exaggerated his claim;

?? any payment into Court or admissible offer to settle which is drawn to its attention.

Furthermore, the Court can order costs to be paid immediately after any hearing in the proceedings (whatever the eventual result at trial) and judges have power to fix the amount of a costs order without a detailed assessment (formerly taxation) of them. This could seriously erode your ultimate winnings or increase your eventual losses.

LITIGANTS WILL "OWN" THEIR OWN CASES FROM INITIAL INSTRUCTIONS TO TRIAL

We have already referred to the increased involvement which litigants will enjoy under the new Rules. This was one of Lord Woolf's key concerns – that litigants should "own" their own litigation. Only a handful of cases have traditionally reached trial, which has meant that only a handful of clients ever, see inside a courtroom. However, close involvement in aspects of the case will now, more than ever, be the norm, and parties will be encouraged to attend interlocutory hearings (and may even be ordered to do so).

The main changes are as follows:

?? Individual claimants or duly appointed officers of corporate claimants will be required to sign a **"statement of truth"** verifying that the facts stated in a document are true. The statement of truth will be required for:
?? A statement of case(formerly a statement of claim in the High Court or particulars in the County Court, and also a defence, a reply or a counterclaim);
?? Responses to requests for further information (broadly equivalent to the former further and better particulars);
?? And any witnesses statement (in which case the maker of the statement must sign the statement of truth).

?? Failure to demonstrate an "honest belief" in any statements verified in this way could ultimately result in contempt of court proceedings.

?? Parties will have **increased involvement in the disclosure process** (formerly "discovery"). Where a party is a company or firm or other organisation, an appropriate supervising officer will need to be appointed, charged with the task of identifying individuals within the organisation who are likely to recollect relevant documents. On the basis of their combined recollections, the supervising officer will assist in the preparation of the *"disclosure statement"*. In this statement, the officer will be required to:

?? Set out the extent of the search that has been made to locate the documents he is required to disclose i.e. giving details of those whose recollections he has been canvassed; and

?? Certify that he understands the duty to disclose documents; and

?? Certify that to the best of his knowledge he has carried out that duty; and

?? Explain why he is considered an appropriate person to make the statement (it will **not** be

appropriate to delegate this responsibility to junior employees).

THE WAY FORWARD

Litigation needs forethought and planning, now more than ever. We recommend that you:

?? Only consider litigation when you are fully and properly advised on the merits of the claim, and the potential costs.

?? Work with your legal advisers to try to avoid Court proceedings if possible, and give the other party the opportunity to do the same; even if you are unsuccessful this could help you recover more of your legal costs when you do litigate, and help to narrow the issues early on.

?? Do not issue Court proceedings until you and your legal advisers are sure that your case is fully investigated and prepared.

?? Once proceedings are underway, keep involved at all times and work in partnership with your lawyer.

The Honourable Society of Lincoln's Inn

If you are interested in a career at the bar then you are cordially invited to visit Lincoln's Inn on

Wednesday 24th November 1999

The visit commences at 12:15pm at the Treasury Office and will be proceeded by a free Lunch in Hall at 1.00pm, taking time to talk with Benchers and Barristers of the Inn.

After Lunch an organised short tour of the Inn will take place.

The group must contain at leas 10 people but not more than 15.

Dress code: Smart

All those wishing to take advantage of this visit must submit their names and contact details to the Lincoln's Inn Representative no later than
Monday 22nd November 1999 at 12:00 noon

THIS VISIT HAS BEEN ORGANISED BY
THE UNIVERSITY OF ESSEX LAW SOCIETY
AND IS STRICTLY FOR MEMBERS ONLY

WOOLF – REVOLUTION FOR INSURANCE LITIGATION

By Miranda Whitley
Professional Support Lawyer,
Mills & Reeve Solicitors

The new Civil Procedure Rules, Practice Directions and Forms come into force on 26 April 1999. The new culture, which accompanies them, is intended to change civil litigation in this country beyond recognition. All signs so far indicate that this intention will be accomplished. This article looks from a defendant's perspective at how to survive in the new system.

The aim of the new system is to make litigation simpler, quicker and cheaper. In very broad terms, the following major changes will be introduced to achieve this:

?? There will be one set of rules and forms in clear language which will apply to both fast (below £15,000) and multi-track claims (more than £15,000);

?? Costs will be reduced by making settlement a realistic and attractive option at an early stage and by limiting the volume of paper in each case;

?? The court process will be accelerated by imposing tight timetables and a trial date or window shortly after service of the defence;

?? To ensure compliance with the new culture of co-operation and efficiency, judges will have significantly increased powers to determine issues summarily, to tailor procedure to fit each case and a wider discretion as to costs and other sanctions.

KEY TO SURVIVAL – THE PRE-ACTION PROTOCOLS

So how can a defendant survive changes or, even better, turn the new systems to his advantage? The answer lies rather surprisingly in the pre-action protocols. There are at present two pre-action protocols, one for personal injury and the other for clinical negligence claims. They set out the steps which potential parties to litigation should take before proceedings are begun. Despite the fact that they do not form part of the Rules and only apply to the specified type of case, they are the cornerstones of the new system.

The reason for this can be found in Lord Woolf's Final Report on Access to Justice where he states that protocols will set out codes of sensible or best practice which will operate within a general structure of court approval. They are intended to enable parties to settle or make an appropriate offer and if settlement is not achievable, to lay the ground for the "expeditious conduct of proceedings".

Even though not yet applicable across the board, there is no doubt that they are an integral part of the new regime. The Protocol Practice Direction makes this clear by referring specifically to cases not covered by an approved protocol – in such cases "the court will expect the parties... to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of the proceedings".

But there is another related reason why a defendant who never deals with personal injury or clinical negligence claims should look to the pre-action protocols for the secret to survival under the new Rules. When one looks at the new Rules and Practice Directions in detail, it becomes clear that attempting to follow the steps set out in the existing protocols may be the only way of ensuring that you swim rather than sink once proceedings are begun.

PRE-ACTION STEPS

Taking the essential elements, which apply, to all types of cases, the potential parties are required to take the following steps before proceedings are begun:

?? Before issuing proceedings, the claimant must send a clear summary of the facts upon which the claim is based together with sufficient detail of injury if appropriate, any financial loss suffered and relevant documents in order to enable the defendant to begin investigations and, at the least, to put a broad valuation at the risk;

?? After an initial response identifying insurers where appropriate, the defendant should reply setting out his position in detail within a reasonable period (about 3 months). Disclosure of material documents should be given at the same time;

?? Before either party instructs an expert, the other party must be given the opportunity to agree or object to instruction of that particular expert, with a view to an expert being instructed jointly.

Whatever the type of claim, the most compelling reasons for following the protocol approach are as follows.

INITIAL RESPONSE

The most critical stage occurs immediately after receipt of the letter of claim. If the defendant or his insurer fails to reply within a reasonable period (21 days in the personal injury protocol), there is nothing to stop the claimant, who is already likely to have prepared his claim fully, from steaming ahead and issuing proceedings. The court will offer no sympathy or extensions of time to a defendant in these circumstances. Protocol pilot studies showed that insurers were particularly vulnerable at this stage of the pre-action process.

SERVICE OF EVIDENCE

Even if a defendant makes an initial response to the claimant, if he takes none of the other pre-action steps, he will find it very difficult to keep his head above water once the court fixes a timetable and trial date. A detailed defence has to be served 14 days after the claim is received, or at most 28 days after, if the defendant has filed an acknowledgement of service. The maximum extension of time, which can be agreed by the parties, is 28 days. Whilst an application to the court can be made, in circumstances where the defendant has had notice of the claim for some time, it

is difficult to see why in the new climate an extension of any length should be granted.
The defence must give full details of the defendant's case; general denials will no longer be acceptable, nor will arguments put in the alternative be looked on favourably. To produce such a defence within a short period, detailed witness statements will have to be obtained and material documents located before the claim is issued.

DISCLOSURE

Identifying relevant documents at the outset will be necessary for compliance with the timetable after issue. Disclosing them to the other side will also be necessary because a refusal to do so indicates a lack of co-operation (with protocol costs consequences at a later stage) and may lead to an application for pre-action disclosure. The courts will have power to make such an order in all cases and not as at present only in claims concerning personal injuries and death. This of course also benefits the defendant: if the claimant sends a letter before action or makes a pre-action offer to settle but does not volunteer to disclose material documents in an appropriate case, the defendant can also apply to the court for pre-action disclosure.

Disclosure, whether before or after proceedings have begun, will differ considerably from the present requirements for discovery. Standard disclosure will generally be required, although limited, or even no disclosure is likely to be ordered in some fast track cases. The documents, which must be disclosed, are those upon which a party relies and those which adversely affect his case or support another party's; disclosure of background and train of inquiry documents is no longer required. On the contrary, handing over files of documents to the other side instead of singling out which documents are directly relevant to the dispute may have adverse costs consequences.
A party is required to make a reasonable search for documents other than those on which he relies. He, and not his solicitor or his insurer, must make a disclosure statement identifying the ambit of the searches carried out and if appropriate the reasons for limiting them, such as the costs of searching a particular office. Since the needs to be done before the proceedings begin, time will be saved if the appropriate person to make the statement is identified and fully briefed as soon as insurers become aware of a potential claim.

The decision as to which searches to make will have important costs consequences. Limiting searches limits costs; the costs of unnecessary or disproportionate searches may not be allowed. On the other hand, limiting searches may be challenged successfully by the other side. Deciding which searches to carry out and justifying this in the disclosure statement will become a subtle art.

OFFERS TO SETTLE

There will be a crucial new weapon in a claimant's armoury – the Part 36 offer to settle. At present defendants can protect their position as to costs by making a payment into court after proceedings have begun. Under the new rules, both parties to a dispute can additionally make a pre- or post-action offer to settle which may relate to the whole claim or any particular issue. This new weapon is intended to help claimants persuade recalcitrant defendants to deal with realism. If a claimant's offer is refused but he ultimately recovers more than his offer, he may be awarded "premium rate interest" at base rate plus up to 10% and/ or indemnity costs, with premium rate interest on those costs.

If a defendant is not to be put at risk as to costs plus premium rate interest, he will need to be in a position to decide whether or not to accept a pre-action or early offer to settle. The only way of achieving this is by investigating a claim fully, by obtaining relevant documentation and witness statements, as soon as its existence is known. This in turn will require new systems to be set up in insurers' offices (or where the manpower is not available, turning to outside assistance from solicitors or elsewhere) to enable claims to be handled from the outset by someone with authority at high speed.

EXPERT EVIDENCE

The judges have a dramatic new power to exclude expert evidence if appropriate and to impose a single expert upon the parties where one has been agreed. Separate experts will become the exception, single experts the rule. There is therefore a real incentive to attempt to agree an expert from the outset.

The art of being the first on the draw with your list of experts is likely to be an important one to acquire. The party who receives a list of possible experts has either to agree to one effectively chosen by the other side or to justify his objection to them, which may be difficult. Well-organised claimants in claims governed by protocols should send their list with the letter of claim. If they do not, the defendant should act like lightening and send his by return. In order to act swiftly, where possible it will be essential to draw up lists of relevant experts now and to discuss the new system with experts used regularly before April.

There are likely to be cases which demand separate expert evidence, even at the risk that it will be obtained entirely or partly at the party's own cost. In such cases and generally in relation to all steps to be taken, it will be important to ensure that contemporaneous correspondence with the other side explains why such a step was taken. Unless the care settles, it will be scrutinised by the court as the later date and may affect any order as to costs.

COSTS

Another significant incentive for following practice is the new rule concerning costs. Where a protocol applies, contrary to earlier fears that the courts would have insufficient teeth to punish non-compliance, the Practice Direction identifies possible sanctions such as costs on an indemnity basis or a reduction or increase in interest. Even where a protocol does not apply, the court will be able to take into account pre-action behaviour when determining costs at any stage in a case. A failure to co-operate before proceedings are resorted to by for example, refusing to go to mediation, could result in a costs penalty at a later date.

TURNING THE SYSTEM TO YOUR ADVANTAGE

On a more positive note, early investigation of a claim will give a defendant a head start in the litigation race. If the claimant fails to respond to requests for information or to suggest mediation before beginning proceedings, the defendant will be able to rely upon this lack of co-operation when the court considers costs at a later stage.

The well-prepared defendant will be able to make a pre-action protocol offer to settle which, if not accepted, may protect him against costs; this will have to be followed by a payment into court of at least the amount

offered if proceedings are issued. A defendant will also usefully be able to make a Part 36 offer limited to accepting liability up to a specified proportion. Tactical refusals to admit liability will incur adverse costs consequence and are likely to become a thing of the past. Where liability is not admitted, split trials are expected to become the norm.

If the system works as intended, the early exchange of information and mutual instruction of experts combined with pre-action offers to settle and what amounts almost to compulsory mediation, should lead to settlements in many cases without the commencement of proceedings. Whilst significant costs are likely to have already been incurred in such a case, the total sum involved is highly unlikely to approach the level of costs which could accompany court proceedings. The opportunity is there to settle claims cheaply, quickly and fairly, which is, after all what Lord Woolf set out to achieve in the first place.

Miranda Whiteley can be contacted at Mills & Reeve by telephone on (01223) 222292 or by e-mail at mwhiteley@mills-reeve.com

"JUDGE DREDD 2" THE CIVIL JUSTICE REFORMS COMING TO A HOSPITAL NEAR YOU –

By Stuart Knowles
Partner,
Mills & Reeve Solicitors

From the 26th April life will never be quite the same. Not just for lawyers, but for you as well. Make no mistake the new Civil Justice rules will require the NHS to handle claims faster and in more detail. You will have to allocate resource to this and although we will be here to help and guide you through the process, you must not become dependant upon your lawyers!

THE GUIDING PRINCIPLE

Now this sounds good!

"The overriding objective of these (new Civil Justice) Rules is to enable the Court to deal with cases justly"

But behind this laudable objective lay traps for unwary litigants.

The purpose of the change is to promote wider access to the Courts with a system based upon dealing with cases justly, more quickly and with 'proportionality'. Justice is no longer to be seen as a 'Ferrari' approach to law. Instead we are to be guided by principles where the parties are on equal footing; costs are reduced and expense is to be proportionate to the size, importance and complexity of the case. Litigants will be encouraged to use litigation as a last resort and legal processes will be less adversarial and more co-operative. Litigation is to be less complex and time scales much shorter.

INTERACTION WITH THE PRE-ACTION PROTOCOL

You must be familiar with this. The courts will be and you will be expected to have complied with its terms. Failure to comply with, for example, a forty day turn around for disclosure of records, or making a detailed investigation when a letter before action is received, will bring no sympathy from the court. The Civil Justice Rules are designed to speed up the litigation process and the Protocol is part of this process. If you have not complied do not expect more time from the courts to investigate the case and you can expect to be penalised in costs. In other words you will end up paying what ever happens!

Its crucial that early investigation is made of all claims and that you are in a position to make decisions and to rebut claims (where appropriate) within a few weeks of receiving a writ.

Its also worth noting that parties will build up a 'track record' within litigation and so when you apply to the court to decide issues of granting extensions of time or whether you should pay costs thrown away, the court will look at your performance to date. Persistent defaulters on the pre-action protocol and the Civil Justice Rules will incur even more wrath from the judiciary.

THE MAIN CHANGES

The new rules for the first time will control lall civil litigation, both High Court and County Court. It is quite simply a revolution, although the rules will be refined and expanded over time.

The main revolution is the metamorphosis of the courts from reactive into proactive creatures. Judges will no longer simply responds to the applications made by the parties to the litigation instead they will actively control the litigation and push the parties into considering the issues, discussing settlements and setting the trial agenda and timetable. The courts will actively enquire into whether parties have a case or defence that has a reasonable chance of success. Money won't be spent on progressing unless cases in the hope that the other party will give in. The court will aim to narrow the issues between the parties and insist that everyone consider some form of mediation to settle the matter before proceeding to trial.

The timetable will be tight. Following a detailed letter of claim, defendants have three months to investigate and admit or give reasons for a denial. Proceedings can then be commenced and a formal defence must be served within 28 days with a possible extension of time (by agreement) of only 28 days. The court will then allocate the case to the appropriate 'track' and it is likely that a case management conference will be set up.

The rules are detailed, but here are some of the main points that affect clinical negligence:

?? Both parties are to give greater consideration to Alternative Dispute Resolution.

?? There will be a reduced duty to disclose documents limited to relevant documents easily located and not being too voluminous.

?? There will be a three-tier system of cases and a 'Procedural Judge' into 'Arbitration', 'Fast Track', or 'Multi-Track' will allocate matters.

?? Most clinical negligence cases are likely to be 'Multi-Track' and subject to a case management conference following service defence.

?? Case management conferences will determine trial dates; timetable for disclosure of evidence; dates for meetings of experts and an assessment of the costs and appropriateness of litigation. The judge will manage the case.

?? The litigants themselves may well attend the case management conference. You may be expected to turn up.

?? Either party can make an 'offer to settle' at any stage of the proceedings. This is similar to the defendant making a payment into court (which is retained). If the plaintiff refuses an offer to settle made by a defendant and fails to better the award at trial then they will suffer cost consequences. If a defendant fails to beat an offer to settle made by the plaintiff then there are severe interests and cost penalties payable.

Interestingly an offer to settle can be made at any time even before commencement of proceedings and the other party has 21 days to respond. If an offer is made before proceedings are commenced the 21 days for acceptance does not run until the writ arrives. Just how

will defendants respond to an offer made before the writ has arrived and before sufficient information has been given to allow for any investigation? Presumably the court will allow more time but we shall see.

PRACTICAL IMPLICATIONS

The Civil Justice Rules and the Pre-Action Protocol will mean that defendants will have to make an early decision on liability and defendants will have to secure all relevant documentation immediately if liability is to be denied. Systems must be put in place to handle this requirement. Undoubtedly the workload will increase and that means cash investment now is needed.

On the face of it the changes could be seen as an advantage for the plaintiff. They control the start of litigation. The timetable does not run until they have issued proceedings and only a well-prepared plaintiff should issue! The defendants will be on the back foot and will need every weapon to assist them. This is why its important to get information early so that decisions can be made, and reasoned defences can be put forward.

There are clear advantages for us however. The new ethos of 'co-operation' between the parties can be used to our benefit. Plaintiffs will have to give full and accurate allegations before proceedings are issued. Failure will be penalised by the courts. More information and a faster timetable should mean reduced legal costs for defendants and a clear timetable will remove the 'air of uncertainty' which pervades current litigation.

Remember that lawyers can only help if they are fully informed and briefed early. If there are clear signs of litigation bring in your lawyers before proceedings are commenced to check that proper investigation has been made and to assist in gathering information and assessing the evidence to make an early decision.

TAKE ACTION NOW!

It is imperative that Trusts help themselves now. Of course there are resource issues, but you must invest in your own staff and systems to make sure that the demands of the process are met. Failure will lead you into embarrassing and fatal conflict with the court. It will simply be cost effective. An inability to deal with the new system will lead you to paying settlements where you should not have to at all. In the end the Trust will simply be 'punished' by the courts – and that does not make economic sense!

"JUDGE DREAD 2" THE CIVIL JUSTICE REFORMS A SAMPLE TIMETABLE UNDER THE NEW SYSTEM

By Stuart Knowles
Partner,
Mills & Reeve Solicitors

1. BEFORE PROCEEDINGS ARE COMMENCED

- ✍✍ Deal with pre-action discovery under the protocol (40-day time limit).
- ✍✍ Plaintiff must supply detailed letter of claim.
- ✍✍ Defendant to acknowledge within 21 days (essential to prevent Plaintiff from issuing immediately).
- ✍✍ Defendant now has three-months before proceedings issued.
- ✍✍ Trusts to investigate claim and admit the claim. Alternatively a denial can be given accompanied by reasons and relevant documentation.
- ✍✍ Consider (with reasons) alternative dispute resolution.

2. ISSUE OF PROCEEDINGS

- ✍✍ Plaintiff to use standard form with certificate of value and statement of truth.
- ✍✍ Proceedings to be served within four months of issue.
- ✍✍ Statement of claim (within 14 days of service) to include precise but concise allegations.
- ✍✍ Defendant to acknowledge within 14 days. Admission or partial admissions to be made if appropriate.
- ✍✍ 28 days to serve defence with signed statement of truth. 28-day extension allowed by consent.

3. TRACK ALLOCATION

- ✍✍ When defence served court issues an 'allocation questionnaire' on each party.
- ✍✍ Court may stay the action for parties to attempt settlement.
- ✍✍ Court will allocate case to a track. Likely to be multi-track for Clinical Negligence.
- ✍✍ Procedural judge is allocated to the case and case management conference set up.

4. THE CASE MANAGEMENT

- ✍✍ Court will give full directions for management of case to trial.
- ✍✍ Courts will expect parties with authority to make decisions to attend.
- ✍✍ ADR must be considered.
- ✍✍ Details of witnesses and experts will be considered and disclosure of evidence timetabled.
- ✍✍ Costs already incurred and to be incurred will be considered by the court.
- ✍✍ The court will review the issues and attempt to drive any possible settlement or partial agreement between the parties.
- ✍✍ The court will set a timetable for a pre-trial review hearing and an approximate date for trial.
- ✍✍ A trial date will be set as soon as possible (listing requirements etc).

5. EARLY DISPOSAL OF THE ISSUES

✍✍ Possible interim remedies (e.g. Interim payments).

✍✍ Possible summary judgement. Either party can apply for summary disposal of any part of all of their opponent's case if they can show that an issue has 'no realistic prospect of success at trial'.

✍✍ Either party can make an offer to settle at any time. Usually 21 days to accept.

6. DISCLOSURE OF DOCUMENTS

✍✍ Parties remain under a duty to disclose documentation.

✍✍ Disclosure initially limited to documents upon which a party relies or which could adversely effect or support any party's case.

✍✍ A reasonable search for documents should be made.

✍✍ Documents should be listed and signed by the defendant.

7. WITNESS STATEMENTS

✍✍ Statements are likely to be shorter and simpler.

✍✍ Court will give directions as to service requirements.

8. EXPERT REPORTS

✍✍ Expert has over riding duty to the Court.

✍✍ Permission of the court must be given to call an expert.

✍✍ Either party can put written questions to the opponent's expert.

✍✍ Court will direct on disclosure of expert evidence.

✍✍ Court will direct that a single joint expert be appointed.

✍✍ Court may direct on payment of expert's fees.

✍✍ Court may direct a 'without prejudice' meeting of experts.

✍✍ Court may appoint an expert assessor to assist.

9. THE TRIAL

✍✍ The parties must complete a listing questionnaire. A trial date should be set.

✍✍ The court may list a pre-trial review to access progress towards trial and prepare the issues.

✍✍ If a trial date has not yet been fixed it will be now.

✍✍ The trial will be conducted in accordance with previous directions.

✍✍ The Court service has a duty to ensure that a court and judge is available on the due date for the entire listing.

Stuart Knowles can be contacted at Mills Reeve by telephone on 0121 454 4000 or by e-mail at stusrtk@mills-reeve.co.uk

ADVOCATE'S IMMUNITY – THE TIDE TURNS

By Sarah Hunter
Solicitor,
Mills & Reeve Solicitors

Until recently, the scope of an advocate's immunity from suit (or forensic immunity) had been gradually extending far beyond the representation of a client in court. To the disappointment of advocates (barristers and solicitors) and their insurers, the tide has turned and the Court of Appeals has, in *Arthur J S Hall & Co v. Simons* and related appeals, taken the opportunity to haul in the nets.

The concept of forensic immunity grew from the decision of *Rondel v. Worsley (1979) 1 AC 191* and *Saif Ali v. Sydney Mitchell & Co (1980) AC 198* when it was established that, in relation to acts or omissions occurring during the conduct of a case in court, an advocate is immune from a claim for damages.

The justification for such a role is clear – public policy. It would be undesirable, for example, for decisions made in one court (against which an appeal could be issued) to be reopened in a different court at a later date. Not only would costs escalate and advocates find they were continuously 'watching their backs' but, as Rupert Jackson QC (now on the bench) commented " it would make a mockery of the legal system if the courts sent a person to prison and awarded him damages on the basis that he should not be there". ('Disappointed Litigants and Doubtful Actions', Counsel, May/ June 1995).

Forensic immunity has, for example, protected a barrister who advised a client to settle a case during trial and, in relation to allegations concerning preparation for trial, a barrister who represented a client at trial but had not previously advised him or assisted in the preparation of the case.

The principle was, however, extended by the decision in *Rees v. Sinclair (1974) 1 NZLR 180* to encompass pre-trial work which was so intimately connected with the conduct of the trial itself that it was considered to be a preliminary part of the trial. While it is easy to understand the rationale behind this extension, it is difficult to apply in practice and, with the benefit of hindsight; it can be argued that this was the beginning of the 'slippery slope' for immunity.

In *Kelley v. Corston (1998) QB 686*, it was held that a barrister who advised her client to settle ancillary relief proceedings before the hearing, 'at the door of the court', was also entitled to the protection of immunity. The decision was explained firstly by reference to the impossibility of distinguishing between a settlement reached immediately prior to the hearing and one reached during the hearing and, secondly, by the fact that the settlement in question was approved by the court.

However, that decision prompted a desire for solicitors and barristers alike to cry "Immunity!" in response to any claim concerning advice given which led to a settlement of proceedings. It has led commentators to ask where one draws the line; a question which the Court of Appeal has attempted to answer.

Three of the four cases which were before the Court of Appeal arose for ancillary relief proceedings; the fourth (*Simons v. Arthur J S Hall & Co* itself) arising from a building dispute.

In all three matrimonial cases, the claimant had compromised the ancillary proceedings and the terms of the settlement were embodied in a consent order. The claimant in each case had issued proceedings against his/ her solicitors who had each defended the claims on the ground that they were protected by forensic immunity.

Simons relates to the settlement of a building dispute one day before the trial was due to commence, the terms of which were also embodied in a consent order made by the trial judge (although which did not require nor receive the approval of the judge as to its terms). Mr. Simons complained that his former solicitors had failed to advise to him that his defence in the original proceedings was weak or that the claim against him was likely to succeed and therefore should be settled at an early stage, or to obtain expert evidence in good time or at all. He also claimed that it was an express term of his contract with his solicitor that he would recover his costs in any event, of which they were in breach. Again, the defendants sought the protection of forensic immunity.

Before relating its decision in each of the appeals, the Court of Appeal explained its reasoning and, in doing so, set out some guidelines for the future operation of the principle.

First and foremost, the Court held that it is not necessary to consider the thorny question of immunity unless and until the claimant in any particular case has leapt the not insubstantial hurdle of abuse of process. Only if he/ she can show that the claim is not a collateral attack upon the decision of a court of competent jurisdiction will it be necessary to consider whether the advocate concerned is immune from suit. If it is such an attack, it should as a rule be dismissed or struck out.

This deals with the public policy concern that a decision made by a court, which is capable of being appealed, should not be questioned in fresh proceedings and flows from the House of Lords decision in *Hunter v. Chief Constable of the West Midlands and Others (1982) AC 529,* in which the Plaintiff attempted to challenge his criminal conviction in a civil action.

Not all challenges will amount to a collateral attack and it is necessary to consider the nature and effect of the earlier judgement, the nature and basis of the subsequent claim and the grounds relied upon. The Court of Appeal has listed three categories of claim in descending order. An attempt to challenge a conviction made following a full criminal trial is most likely to be a collateral attack and therefore fail. The Court considered the outcome of a full civil trial to be almost as difficult to circumvent.

However, for obvious reasons it is likely to be easier to persuade a court that a challenge against a settlement embodied in consent order does not amount to a collateral attack.

In any event, it will be necessary for the claimant to explain why he/ she did not take steps to set aside or repeal the judgement or order which forms the basis of complaint. As the Lord Chief Justice commented in *Simons* "it will never be enough that the Plaintiff is suffering from post-settlement remorse".

Not surprisingly, the Court of Appeal did not consider any of the three ancillary relief cases to amount to an abuse of process. Likewise, as the allegations in *Simons* did not amount to a challenge against the conduct by the defendant solicitors of the action, it was held that the claim did not amount to a collateral attack.

The second step is to consider whether the defendant can justifiably hide behind forensic immunity.

The Court has re-asserted the importance of public policy as the foundation stone of immunity, which applies to both solicitors and barristers, provided they are acting in the capacity of advocate. It remains the case that actions or omissions during a hearing should fall within the protection of immunity.

However, in relation to steps taken before trial (or not, as the case may be), the question to be answered is whether immunity can be justified for public policy reasons even though it might seem on first sight to fall within existing precedent. The Lord Chief Justice made it clear that further extensions of the principle were undesirable and that, in relation to advice leading to the settlement of proceedings, "immunity does not depend on when or where such advice is given. All depends on the advice given, the reason for it and the complaint made about it".

Applying those general views to the four cases before it, the Court of Appeal held that forensic immunity did not afford protection to any of the defendants. In *Simons, Barratt v. Woolf Seddon (a firm)* and *Harris v. Schofield Roberts & Hill (a Firm),* the claim for immunity was thrown out in part because the defendant solicitors were not acting as advocates. Even if they had been, the Court would not have granted them the protection of immunity because the acts or omissions of which complaint was made were not suitable for such protection when the public policy test was applied.

In *Cockbone v. Atkinson, Dacre & Slack,* as the claimant alleged negligence by his solicitors in failing to obtain sufficient enquiries before advising him to settle the ancillary relief proceedings, the claim did not relate to the settlement but to preparation which would not have attracted immunity even if the matter had gone to trial.

In 1995, John Powell QC called for advocate's immunity to be reconsidered and abolished (Barrister's Immunity – Time TO Go, Counsel, March/ April 1995). It seems his voice has finally been heard and we wait with interest the view of the House of Lords when it has the opportunity to consider the issue afresh.

That opportunity will present itself in the form of *Atwell v. Perry (1998) 4 All E.R. 65.* In considering that case, the Vice Chancellor held that, where a barrister received a brief a few days before the trial and wrongly failed to advise his client to run a particular defence, the immunity in relation to the conduct of a case applied. However, it was decided that the extension of immunity to cover negligent advice on the prospects of an appeal could not be justified on public policy grounds.

The case is due to be heard by the Court of Appeal at the end of March. The word on the street is that the issue of immunity will then be referred to the European Court of Human Rights and in any event is likely to be challenged when the Human Rights Act 1998 comes into force this year.

Watch this space!

Sarah Hunter can be contacted at Mills & Reeve by telephone on 01603 693261 or be e-mail at: shun@mills-reeve.com

CHINESE WALLS AND CHINESE WHISPERS

By Philip Jones
Litigation Executive,
Mills & Reeve Solicitors

Could a firm of accountants who had provided litigation support services to a former client *and* possessed confidential information relating to him, undertake work for a second client with an adverse interest?

Just how effective was the "Chinese Wall", established by the firm, in maintaining its duty of confidentiality to its former client?

These issues were considered by the House of Lords in *His Royal Highness Prince Jefri Bolkiah v. KPMG.*

WHAT WAS THE BACKGROUND TO THE CASE?

In 1996 KPMG were instructed to undertake an investigation on behalf of His Royal Highness Prince Jefri Bolkiah ("Prince Jefri") in connection with litigation in which he was involved. The assignment ("Project Lucy") was mainly conducted by KMPG's London forensic accounting department and involved the provision of litigation support services. During Project Lucy KPMG acquired confidential information relating to Prince Jefri's financial affairs.

After the litigation had settled and they had ceased to act for Prince Jefri KPMG were asked in 1998 whether they could assist with an investigation on behalf of the Brunei Investment Agency ("the BIA"). It was common ground before the Court that at least some of the confidential information acquired by KMPG in the course of Project Lucy was or might be relevant to the investigation and that the interests of the BIA in relation to it were adverse to those of Prince Jefri. KPMG accepted the assignment ("Project Gemma"), which was to be undertaken by their forensic accounting department, but considered that additional special arrangements were necessary to protect the confidential information relating to Prince Jefri from leaking to those working on Project Gemma.

To achieve this KMPG established a Chinese Wall within the forensic accounting department. This included procedures such as carefully selecting staff to ensure that nobody who possessed the information could work on Project Gemma, establishing a separate building from the rest of the forensic accounting department, using separate computer file servers and deleting all electronic information relating to Project Lucy from KMPG's server.

Prince Jefri, who was not informed of Project Gemma and whose consent was not sought to its acceptance, made an application to the Court for an injunction to restrain KMPG from continuing with work on it.

WHAT DID THE HOUSE OF LORDS DECIDE?

?? Where a firm of accountants provides litigation support services of the kind provided by KPMG to Prince Jefri the Court exercises the same jurisdiction to intervene on behalf of a former client of the firm as it exercises in the case of a solicitor.

?? The basis of that jurisdiction is the protection of confidential information.

?? The continuing duty to the former client is to keep the information communicated during the client relationship confidential, not simply to take all reasonable steps to do so. Furthermore, it is not just a duty not to communicate it to a third party, but also not to misuse it, that is, without the former client's consent to make any use of it, or cause any use to be made of it by others, otherwise than for its benefit. The former client is entitled to prevent his former solicitor from exposing him to any avoidable risk. This includes the increased risk of the information being used to his prejudice where instructions are accepted to act for another client with an adverse interest in a matter where the information is or may be relevant.

?? A plaintiff who seeks to restrain his former solicitor from acting in a matter for another client must establish that:

- The solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented; and

- Such information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.

Although the burden of proof is on the plaintiff it is not a heavy one, as the former may readily be inferred and the latter will often be obvious.

?? If the former client establishes these conditions the evidential burden shifts to the Defendant firm to show that despite this there is no risk that the information will come into the possession of those now acting for the other party. The Court should restrain the defendant firm from acting unless it is satisfied that there is no risk of disclosure. The risk must be a real one, and not merely fanciful or theoretical, but it need not be substantial.

?? Had KPMG discharged the burden? There is no rule of law that Chinese Walls are insufficient to eliminate the risk. The starting point, however, is that unless special measures are taken, information moves with a firm. The Court should restrain the firm from acting for the second client unless satisfied on the basis of clear and convincing evidence that effective measures have been taken to ensure that no disclosure.

?? Rules published by the Financial Services Authority recognised the effectiveness of Chinese Walls as a means of restricting the movement of information between different departments of the same organisation. Also, the Law Commission in 1992 had recognised Chinese Walls as normally involving a combination of established organisational arrangements, including the physical separation of departments to insulate them from each other.

?? An effective Chinese Wall, therefore, must be an established part of the organisational structure of the firm, that is not simply created ad hoc, and be designed to prevent the flow of information between separate departments.

It is one thing, for example to separate the insolvency, audit, taxation and forensic departments from one another and erect Chinese Walls between them, such departments often working from different offices and with little movement of personnel between them, but quite another to attempt to place an information barrier between members of the same department accustomed to working with each other.

This would be particularly difficult where the department concerned provided litigation support services.

?? The Chinese Walls in the present case, however, was established ad hoc and within a single department. Accordingly it was decided unanimously that KPMG had not discharged the heavy burden of showing that there was no risk that confidential information in their possession relating to Prince Jefri, and obtained in the course of a former client relationship, might unwittingly or inadvertently come to the notice of those working on Project Gemma. The appeal of Prince Jefri was therefore allowed and the injunction granted in the terms proposed.

WHAT ARE THE IMPLICATIONS OF THE DECISION?

In the Court of Appeal, which discharged the injunction against KPMG, the Master of the Rolls Lord Woolf, stated that:

> *"To continue an injunction would be to set an unrealistic standard for the protection of confidential information which would create impediments in the way large international firms conduct their practice which are not justified".*

How firms will now conduct their businesses to deal with these "impediments", following the reversal of the decision of the Court of Appeal by the House of Lords, is at this stage unclear. Media reports have suggested that the Big Five accountancy firms may be considering seeking the opinion of leading counsel to advise upon the implications of the decision.

Other organisations, such as insurance companies, brokers, banks and finance houses, may also consider it necessary to alter their procedures in the light of the decision, particularly where they also undertake litigation or provide litigation support services.
The comments on the strict nature of the duty of confidentiality owed to former clients, and the guidelines on what constitutes an effective Chinese Wall, may also make it required generally.

The decision may also place a brake upon the growing trend in the City and elsewhere towards the creation of huge international organisations where professionals provide a range of services within a multi-disciplinary practice which includes lawyers and other professionals.

How accountants, lawyers and other professionals may alter the conduct of their businesses to comply with the decision, and how the courts will interpret and apply it in future cases, is awaited with interest.

Philip Jones can be contacted at Mills & Reeve by telephone on 01223 22303 or by e-mail at: philipj@mills-reeve.com

WELLS v. WELLS: ITS IMPACT FOR INSURERS

By Lin Topham
Solicitor,
Mills & Reeve Solicitors

"One of the most significant revolutions in personal injury litigation this century..." proclaimed one legal commentator only a few weeks after the long-awaited decision of the House of Lords in the joined cases of *Page v. Sheerness Steel, Wells v. Wells* and *Thomas v. Brighton Health Authority.* The importance of the ruling – which was announced in July 1998 – is universally acknowledged and its practical impact has been considerable.

In the September 1998 edition of Cover Note, Sarah Garrood (Solicitor, General Liability) explained the immediate impact of the House of Lords decision. She described the method used for calculating further loss and how the House of Lord's views had affected this. Now that the hype generated by the media and legal press immediately after the ruling has died down, we consider the actual influence the case has had for Defendant Lawyers and their clients.

We will highlight some of the important features of the House of Lords' decision and examine the actual impact of the judgement in practical terms, providing comments and advice for minimising and controlling the effect of the ruling from a Defendant's perspective.

As Their Lordships commented, calculating damages in a personal injury action is not an exact science. Past loss can be accurately calculated but assessing the injured party's future loss is a matter of prediction.

The present system requires a lump sum to be awarded based a multiplicand/ multiplier calculation. When assessing the appropriate multiplier to use, the House of Lords had to consider whether the correct assumed discount rate on the invested damages should be 3% rather than 4.5%. The latter rate had been used since the 1970s. Their Lordships considered that the former rate was a more accurate reflection of the actual rates of return achievable by most Plaintiffs (see next column). The rate was based upon investment in index-linked government securities where the return was fully protected against inflation.

Adopting a 3% rate of return increases the multiplier and consequently, the damages awarded for future loss of earnings or claims for continuing care costs have significantly increased – often as much as 45%

Although this was bad news for the Defendants' solicitors, insurers and the insured, it was not wholly unexpected. Both the Law Commission and Michael Ogden QC and his Working Parties had either recommended or actively campaigned for a reduction in the assumed rate of return in the calculation of multipliers. Lawyers with specialist knowledge of personal injury work had anticipated the House of Lords decision and had been preparing for its impact.

Particular actuarial tables – know as the Ogden Tables – are widely used by personal injury lawyers to select an appropriate multiplier. Such an approach had not been wholeheartedly embraced by the judiciary but the House of Lords stressed in this case that "the Tables must be regarded as the starting point, rather than a check" (Lord Lloyd).

Owing to the decision, firstly, to apply one assumed rate for investment return and, secondly, to encourage the use of the Ogden Tables, the House of Lords have at least settled an agreed approach to the calculation of future damages. This will reduce the need for experts such as actuaries, accountants and economists to be instructed. This may enable Defendants to raise a point in taxation if such experts appear to have been unnecessarily involved.

Their Lordships emphasised that there would be no judicial cap to the level of multiplier used in calculation of future loss. This was further depressing news for Defendants. Previously, Defence lawyers could argue that the maximum multiplier traditionally allowed by the court was 18. Following *Wells v. Wells*, this argument can not be used in settlement negotiations.

The House held that multipliers for whole life loss (such as the cost of future care) should not be discounted for contingencies. This was something that Defendant's lawyers had argued to reduce multipliers. Their Lordships argued that the only relevant contingency in whole life loss was that of morality and that had been accounted for by actuaries when compiling the Ogden Tables.

The effect of the House of Lords ruling is not only to alter the rate of return to 3% for future damages. Their Lordships also decided that in a *Roberts v. Johnstone* calculation, a rate of 3% should be adopted rather than the historically accepted 2%. A *Roberts v. Johnstone* calculation is used to assess the capital sum of compensation that a Plaintiff should receive when owing to the nature of his injuries, he has been forced to purchase an alternative home or make adaptations.

As a consequence of that reasoning, it appears that the interest awarded on general damages for pain, suffering and loss of amenity will now be 3% rather than 2%. This means that awards in personal injury cases where proceedings have been served will be greater irrespective of whether there is any future loss. However, given that the House of Lords did not specifically consider this issue, it is open for Defendant solicitors to continue to argue interest at 2% although this approach is not likely to be successful before a court.

PRACTICAL IMPLICATION

So now the dust has settled and we have had time to absorb the decision, what can we do as defence lawyers to mitigate the damage?

We can look to Lord Lloyd who gave the leading judgement in *Wells v. Wells* for some small comfort. He said that the decision was appropriate in most cases. Watch out, then, for opportunities to argue that the Plaintiff is not in the usual position of having to protect his money for his future needs. A wealthy Plaintiff is more likely to risk placing his damages in investments carrying a higher return and if this can be established it is possible that you could agree against a 3% discount rate.

Since the effect of reducing the discount rate has been to increase the multiplier in every case, Lord Lloyd emphasised the need to keep firm control of the multiplicand to ensure a Plaintiff's entitlement to reasonable care is not exceeded. It is now more important than ever to try to reduce it as much as possible, particularly in substantial claims, which include a large element of loss of earning, costs of care and equipment.

FUTURE LOSS OF EARNINGS

It is still possible and reasonable to reduce the multiplier for future loss of earnings to allow for contingencies such as redundancy, sickness or the hazards of a dangerous occupation. This is more attractive to the court in the case of a young Plaintiff, such as in the CA case of *Davies v. Clark (1984)* where the multiplier was reduced from 16 to 14 (the Plaintiff was 24 at the date of the trial) when it was that "all cases of calculating loss of future earnings for young men must be a matter of speculation...".

Full investigation of the Plaintiffs previous employment and evidence from an Employment Consultant on market conditions may become more important. Details of the Plaintiff's Curriculum Vitae and employment history should be studied critically – was the Plaintiff's work of a sporadic or casual nature? Has the Plaintiff demonstrated a history of episodic changes of employer? Was the industry in decline either nationally or in the specific geographic location? An uncertain job market can be advantageous to Defendants....!

As Defendant lawyers we should obtain and consider the Plaintiff's medical records on discovery and ascertain whether the Plaintiff had any medical condition, e.g. a pre-existing back injury or depression, which could have affected his or her ability to work in the future and which could be used as a basis for a reduction in the multiplier.

FUTURE COST OF CARE

There are possibilities of reducing damage for future cost of care:

?? Expert care reports should be considered in detail in conjunction with the Plaintiff's statements – is the claim supported by the evidence? Has there been any duplication between the experts?

?? Try to restrict your care experts and quantifying other elements of the claim which are out of their remit – it is easier to supplement a brief report than to persuade an expert to remove "unhelpful" sections.

?? Condition and prognosis evidence will now be paramount, so try to pin your expert down on whether the amount of care claimed is justified.

AND IF ALL ELSE FAILS....

Apart from the above however, there are very few means of reducing the claim, so if you can not beat them – pay them! The decision in *Wells v. Wells* highlights the need for thorough and early investigation of every significant claim. Your (Mills & Reeve) lawyer must be pro-active and should assimilate as much information as possible to advise you on liability, quantum and risk. Time can be turned to your advantage by paying in realistically and early, which will put pressure on the Plaintiff to accept the money before having the time to properly quantify the claim or instruct a plethora of expensive experts. Alternatively, if you do decide to fight the case make sure it is rock solid by investing more in a thoroughly prepared and supported defence, as the losses are potentially greater if you lose.

Finally, push hard for structured settlements in cases of severely injured Plaintiffs. The obvious attraction to the Courts of a structured settlement is, of course, that if the Plaintiff survives beyond the expected period then the Court has the comfort of knowing that payments continue but if he dies early then his estate does not obtain a windfall. The judges in *Wells v. Wells* emphasised the advantage settlements the advantage of structured settlements and expressed their frustration at not having the power to order them independently of the parties' consent. It remains to be seen whether this will be the next development.

To summarise, the decision in *Wells v. Wells* has confirmed Defendants' worst fears that multipliers would increase and as a consequence awards to Plaintiffs for future loss would be significantly higher. Defendant lawyers cannot change the law, but should employ tactics to reduce their clients' exposure to inflated claims and minimise their overall loss.

Judith Chrystie & Lin Topham can be contacted at Mills & Reeve by telephone on 01223 222239 or by e-mail at: itopham@mills-reeve.com

HEARD IT ON THE INTERNET?

By John Enser
Partner,
Olswang Solicitors &
Registered Foreign Lawyers

Music is one of the most popular categories of Internet content; sites proliferate, offering fanzines and samples of music, selling CDs and, increasingly, offering full-length sound recordings for users to download. We now have PC processing power and software capable of encoding music into manageable-sized digital files for distribution and real-time decoding and the Internet has sufficient bandwidth for these files to be delivered effectively. So why don't we get all our music from the Internet – what is holding the market back, particularly from a legal perspective?

INSUFFICIENCY OF COPYRIGHT LAWS?

The international nature of the Internet means that for music on the Internet to be fully protected by copyright law, the laws of all nations need to be sufficient. Even though the World Intellectual Property Organisation adopted two new instruments in December 1996 designed to fill some of the gaps in copyright law in a digital age, they remain unratified and unenforceable.

The laws of many countries (the UK included) are already sufficiently robust to deal with most types of copyright theft, including the widely publicised MP3 problem (see next page). What are less established are the rules for determining where copyright infringement takes place? For example, if a server is situated in a country with less well-developed copyright laws?

ENCRYPTION CONSTRAINTS

Copyright law only ever provides part of the answer. Technology will also play its part in ensuring that those exploiting music on the Internet will respect the rights of authors and producers. For they're to be a means of distributing music to consumers on-line by electronic stores, as opposed to merely selling physical product on-line, there must be effective encryption solutions. These need to solve the following challenges: how to allow the consumer to sample a recording before buying; how to stop the buyer from copying his purchase and distributing it further for free; how to implement a secure and reliable payment infrastructure; and how to permit the purchaser to listen not only on a computer, but on audio hardware. Secure encryption is capable of achieving these things, but there are regulatory issues holding back widespread implementation. Encryption technology is subject to usage and export controls, largely inspired by countries' national intelligence authorities.

There has been a long-running battle, both in Europe's capitals and in Washington, to allow the use of strong encryption without controls. In the UK the electronic commerce bill has been proposed and a consultation document is currently available. If technology is available, despite regulatory hurdles, it is important for companies to obtain contractual protection from technology vendors about the degree of security available.

CONTRACTUAL UNCERTAINTY

Contracts are still racing to catch up with the times. The existing contractual fabric of the industry is predicated on territorial markets and physical distribution. Artists are still signed on "split territory" deals, and sub-licences are granted for particular territories without addressing on-line rights; royalty calculations may not deal with on-line exploitation, or if they do, they may contain an informed guess, with no real reference point in relation to the still-developing economies of operating in the on-line market.

The European Commission is at least trying to address the territorial problems to allow Internet services to develop across the EU. Draft legislation currently proposes that on-line businesses can offer their services anywhere in the EU provided they comply with the laws of the country where they are based; that intermediaries that transmit and store information are exempted from liability; and that contracts can be concluded by electronic means.

It also proposes that Member States can block Internet services from another country only to protect the public interest, with the Commission judging whether or not this is necessary. Clearly, this is not going to be of much help to those seeking to stop the theft of music!

MP3

MP3, or to give it its full name MPEG1 Level 3 audio, is an audio compression standard. Those offering downloadable music on the Internet have adopted it as their compression technology of choice. An MP3 file, reproducing near-CD quality sound, is small enough to be downloaded very quickly. There are literally thousands of MP3 files on the Web; mostly containing unauthorized copies of copyright sound recordings. There is now a world-wide initiative, co-ordinated by IFPI (the International Federation of the Phonographic Industry) to track down the MP3 pirates, but the task is hampered by the case with which MP3 libraries may be replicated and moved from one server to another. Although MP3 files are normally free to consumers, advertising and, in particular often finances the sites, advertising for pornographic web sites, to which young music fans may be exposed.

The most recent MP3 development is the launch of hardware, which allows MP3 users to listen anywhere to music they have downloaded. These devices, no bigger than portable cassette players, contain the decoding software and enough memory to hold an hour or more of music.

INFORMATION TECHNOLOGY – A CHALLENGE AHEAD

By John Lapraik
Partner,
Mills & Reeve Solicitors

With the creation of the NHS Web many Healthcare organisations are revisiting there IT requirements. Here are a few ideas to mull over.

BACKGROUND

It seems most unlikely that anyone ever woke up early in the 19th century marvelling at the advance and benefits, which might be gained from what we now refer to as the "industrial revolution".

The fact that the Industrial Revolution began in England gave that country a significant gain in efficiency (and a competitive advantage) by virtue of the fact that it was ahead -in a sense more innovative- in terms of the speed with which the benefits from industrialisation were gained.

In the same way, it is striking that most organisations have yet to adjust to take advantage of the technology currently available.

In many ways the recent publications of Information for Health (NHS Executive report A1103, September 1998) does not seem to address the fundamental issues as to who is to "own" and control the information which has traditionally resided on patient records and the odd proprietary database within a particular organisation.

THE DIGITAL REVOLUTION

What impact has the much hyped "Digital Revolution" had on the way that business is currently conducted?

Often the net effect of the introduction of computers capable of holding and manipulating information is that they are used to:

1 Generate (more perfect) word processed documents of the same sort that would traditionally have been produced on a typewriter and;

2 Create large, generally underused and inflexible databases of information held within that organisation exclusively for the purposes of that particular organisation.

Even in the cases where the potential of IT to change the way that organisations operate has been harnessed to re-engineer the processes being undertaken, the changes tend to be limited to the organisation.

The other organisations with which the Authority/ Trust/ GP Practice deals have not made the necessary changes to enable the efficiencies and savings potentially available to be secured at the point where there is the greatest scope for saving: at the interface where each organisation has to employ people to collect and send or receive and disseminate information as it flows between the two organisations.

The other organisations may well themselves have invested in IT but the lack of any underlying standard or protocol tends to result in a relatively fragmented professions –in IT terms- with a large number of different entities being involved in the overall provision of health services.

One aspect of the Digital Revolution is that communication is becoming progressively easier.

A high profile development is e-mail but at present it tends to be used very much in the same way that a fax might have been used. Essentially pieces of digitised information are being "fired" from one organisation to another with someone being paid either to create and send or to receive and act on the information being transferred.

The point which often seems to be missed is that whilst the ability to communicate instantly by using e-mail or fax is undoubtedly convenient it does not really change the way in which the two organisations and the fact that an e-mail has replaced a letter does not really change very much.
The use of e-mail and also the development of NHSnet can be likened to a situation with a new town where the basic infrastructure such as roads and sewers need to be put in place.

The issues as to how the infrastructure is to be used, the conditions in which sensitive information should be stored on a relatively open system such as NHSnet and, finally, the safeguards that need to be put in place have yet to be resolved.

Often the technology already available could be used to allow collaborative working with a shared pool of information relating to the matter in question. Adopting such an approach has the potential drastically to reduce the cost of the exercise in question which goes far, far beyond any conventional goal of perhaps shaving 5% off the overheads by tightening up one or other aspect of the current procedure.

If information is stored in a digital format with each piece of information held as separate field the cost of manipulating, monitoring, communications or storing that information is to all intents and purposes nil.

The majority of transactions are routine and there is either a general underlying pattern or alternatively a less routine transaction which nevertheless contains a number of significant routine "modules" within what may otherwise be perceived as being unique.

It is only when the information leaves this form and becomes "trapped"- either in the mind of an individual or a piece of paper – that cost is incurred. The traditional security and feeling of control that one feels when one has a piece of paper has a price: the information can no longer be communicated or shared with others without a significant cost in terms of time and personal involvement – at least until the information is captured again in a structured digital form.

OPPORTUNITIES

It is suggested that there are three principal opportunities, which we face.

First there is the need to devise a more efficient means of transferring information so as to automate the process of extracting information the database held in one organisation, transferring it to a second organisation and then allowing the information held in the communication to be stored in that second organisation's database.

The second challenge is that there is a need to create virtual/ shared databases, which are specific to the transaction in hand, where, on a collaborative basis, the organisations involved pool the information they each collect during the course of the matter for mutual benefit. The goal should be that any piece of information which is identified or created by any party to a transaction should be recorded in such a way that that piece of information is available for reuse by other parties without any additional cost –the information should be available, held in digital format, when next needed.

The third challenge is to identify ways to re-engineer processes with a view to avoiding processes being bogged down as a result of data becoming trapped during the course of the process in a non digital form – thus incurring an overhead when the information needs to be converted back into digital form.

Looking at these three challenges it is suggested that the goal should be to work up the documents which pass between the organisations so that they –at least in their digital format- are turned into a framework or table in which data is held in such a way that the information can be (automatically) extracted by the organisation receiving it.

The path of the process needs to be considered and if necessary changed to try and ensure that the information continues to be held in an accessible, digital form –one of the ironies is that there are still parts of the Health sector which have not introduced computers on grounds of costs.

There is a strong argument that although there is an initial up front cost in investing in computers and IT, it is actually more expensive not to do so: not doing so deprives the organisation of the opportunity to (re) create itself as a digital process where the costs of data transfer is capable of being drastically reduced – potentially to zero.

Those organisations which not only adopt this sort of model internally – and there are some – but also manage to encourage/ coerce those other organisations with which they work into doing the same thing both for themselves and more importantly for mutual benefit will derive benefits which go well beyond one which relate to their internal processes.

One of the first issues, which will need to be addressed, is who is to be trusted to hold the shared databases, which can be used collaboratively, and what level of security is needed.

The traditional, hard copy, patient notes are secure for the very reason that the information written on them is "trapped" on the pages and not usable by anyone who does not have physical access to them. A consensus will need to develop as to how the electronic equivalents such as the "electronic patient record" are to be used. Who is to "house" it? Who is to be authorised to update or change it?

A similar consensus as to how paper documents should be held and safeguarded has evolved over the last few thousand years. Perhaps the greatest challenge is to work up an equivalent, which is now with us.

John Lapraik can be contacted at Mills & Reeve by telephone on 01223 222448 or by e-mail at: jlapraik@mills-reeve.com

RULES OF THE GAME – SPORT AND COMPETITION LAW

By Howard Cartlidge
Partner,
Olswang Solicitors &
Registered Foreign Lawyers

Sports are, it seems, becoming a permanent fixture with competition authorities around Europe – and not just because of the well-known personal interest in soccer of EC Competition Commissioner Karl Van Miert. The commission recently indicated that it is handling more than 50 complaints involving sport and it is engaged in a wide-ranging review of its policy in the sector.

WHY SPORT?

The reason for this heightened scrutiny is not difficult to find. Sports generally – and especially mass-audience sports such as soccer and Formula One motor racing – are amongst the key drivers in the revolution affecting television broadcasting in Europe. The new broadcasting media have from the start been a policy battleground for competition authorities developing in the way the authorities believe will maximise their international competitiveness. Moreover, the vastly increased revenues from television broadcast rights have taken sports into a new age of big business- itself likely to expose owners of sports clubs and rights to greater competition law scrutiny. The central issues for sport from a competition law viewpoint are currently as follows:

COLLECTIVE SELLING OF BROADCASTING RIGHTS

In most industries, a long-term agreement between competitors to sell their principal revenue-generating asset collectively would be condemned as a cartel. So it is, perhaps, not surprising that competition authorities have reacted negatively to collective selling of rights by football clubs. The UK Office of Fair Trading has brought proceedings against the English Premier League (with a court hearing due to begin in January 1999), and there have also been proceedings in The Netherlands, Germany and other EC countries. The European Commission is examining collective selling in relation to Formula One – where the Commission's investigation has already been a factor in the sport's abandoned flotation and proposed Eurobond issue.

EXCLUSIVE LICENSING

Consistent with its approach to other exclusive broadcasting licences, the Commission does not consider that a grant of exclusive rights to broadcast a sports event in itself infringes EC competition rules. However, it will be concerned if rights are granted for an excessive duration or may foreclose a market to new entrants. This is particularly likely where the "big four" European broadcasters (BskyB, Canal Plus, Bertelsmann and Kirch) are involved.

MERGERS AND ACQUISITIONS

The ever-closer links between sport and media groups are beginning to move to the inevitable next level of outright merger. The bid by the UK's top pay-TV broadcaster, BskyB, for England's most famous soccer club, Manchester United, has aroused huge interest and is now the subject of a detailed investigation by the UK Monopolies and Mergers Commission. A favourable outcome to the inquiry is likely to prompt a wave of take-overs in the sector.

CONCLUSION

Sports are already high on the agenda of competition authorities around Europe, and are likely to face ever more rigorous threats. The Commission's challenge last summer to ticketing practices for the 1998 soccer World Cup showed that it is not afraid to take on cases however high profile and whatever the political pressure from EC Member State governments. The Formula One decision (expected in 1999) and UK rulings on Premier League football and the Manchester United bid will also be key to setting the framework for the industry in the near future.

MEETING EXPECTATIONS

By Robert Halton
Director of Human Resources,
Dibb Lupton Alsop

Before starting your search for a training contract it is worth reflecting upon the process upon which you are about to embark. It is all too easy to rush into form filling and preparation of CV's without actually taking time to reflect upon what firms are looking for from their prospective trainees. Time taken at this early stage will pay dividends later on because you will be able to tailor your experience to meet the desired criteria.

At Dibb Lupton Alsop we are looking for a range of attributes from students. The list below is intended as a guide for you to think about:

?? General intelligence – a track record of academic success is an important factor because it is an indicator of future potential and a measure of an individual's capacity for original thought. It is not, however, the only quality we are looking for.

?? Practicality – the ability to get things done, conscientiousness, attention to detail and the ability to meet deadlines.

?? Judgement – the ability to make decisions and not sit on the fence.

?? Analytical skills – legal problems require the ability to handle complex data and to think and reason logically to produce solutions to problems.

?? Communications skills – the ability to be cogent and persuasive in both oral and written communications. It is important that individuals can produce complex legal concepts into plain English.

?? Commerciality – an understanding of the business world and its commercial aims and objectives and an awareness of how the law fits into this environment.

?? Loyalty and resilience.

?? Teamwork – increasingly Solicitors need to work as part of teams both within internal groups, with other professional advisors and with the client themselves. Indication that a candidate will make a good team member and has the potential to lead a team in the future is increasingly important.

?? Organisational skills – there are many demands on lawyers and individuals need to be able to keep a number of projects running at the same time as well as fit in their own social life. How organised are you?

?? Fun – people need to enjoy the work that they do because if you enjoy your work you will work harder and that pays dividends for everybody involved.

Hopefully that gives you the food for thought. Now you need to do a bit of self analysis; examine your own strengths and weaknesses and from the varied experience that you have had at University, with part-time jobs and other areas, match your experience with what firms are looking for and this will increase your likelihood of securing a training contract.

Robert Halton is the Human Resources Director for Dibb Lupton Alsop and a member of the Warwick Careers Advisory Board.

Dibb Lupton Alsop has opportunities for training contracts in Birmingham, Leeds, Liverpool, London, Manchester and Sheffield.

If you are interested in finding out more about the firm please contact Sally Carthy on 0345 26 27 28.

THE FIRST STAGE OF THE SELECTION PROCESS

By Sally Carthy
National graduate Recruitment Manager,
Dibb Lupton Alsop

Remember filling in an application form or sending in your Curriculum Vitae (CV) is not going to get you a Training Contract. It is only going to get you to the next stage of the selection process. Therefore, it is essential that you put the necessary time and commitment into the task. Believe me, if not it shows!

There are two methods of applying for a Training Contract. Firstly, there is a personal CV and secondly, which is becoming increasingly popular, is through a firm's own application form.

What are the Differences?

A CV allows you the freedom to write your personal details and history as you want and to include the information you want them to know. It should, however, always be clearly laid out, chronological and truthful. As a general guide it should not go over three pages of A4.

An application form is slightly different. It asks for pretty much the same information as CV but in a format, which is consistent for all applicants and therefore seen as a fairer by many. The benefit for both the applicant and the employer is that though the questions asked on the form there is the opportunity for the applicant to express himself or herself more.

Once the firms receive your application, the selection process begins.

Whatever the mode of application most employers' selection criteria start by looking for a solid and consistent academic base. But, of course, having the biggest brain in the world will not make you the best lawyer! On the contrary, because this is a "people" business you must be able to demonstrate a healthy balance between academics and a good extra-curricular life to show you would be able to communicate with clients. Therefore, many firms also look for:

?? Work experience in a similar type of firm.

?? Languages.

?? Excellent interpersonal skills.

?? The ability to communicate well.

?? Drive and determination.

?? Willing to be a team player.

?? Why you are interested in law.

These last five can be easily expressed through writing about your experiences in life. Remember skills are transferable. One of the students I have recently offered a training contract to is currently working part time as a store detective. He was able to use this experience to highlight on his application form the following skills – analytical ability, problem solving, negotiation, handling difficult people and judgement.

One of the things to remember when applying to the firms is the number of application we receive – up to 3,500. Therefore, your application needs to stand out and get noticed for the right reason. The following are some really useful tips, which will hopefully help you to avoid regular pitfalls, which many applicants make:

?? Don't regurgitate phrases from the recruitment brochures. Read these and try to identify in other ways what the firms are looking for.

?? Don't be colloquial in your writing. Trendy hip phrases are not appropriate at any stage of the recruitment process. Also clichés and sound bites can sound shallow.

?? Take pride in the presentation of your application. Coffee stains or crumpled scruffy forms will be viewed as a candidate not having pride in their work. Get a friend or relative too proof-read it. We all miss our own mistakes. Parts of a recent application form I received had been typed separately and stuck onto the form. The candidate had managed to mix up the various pieces of paper, so the form I received had another firm's name on it.

?? Don't forget that any form of contract with the firm can get noticed, whether it's initially requesting recruitment information, speaking to representatives at a University law fair or finding out what's happening with your application. Get noticed for the right reason and don't forget you never get a second chance to make a first impression.

?? Be fully aware of closing dates. Most firms look at the end of February for vacation placements and the end of July for training contracts, but there are exceptions. Don't take chances – check. If you prepare an application make sure you allow more than enough time for it to get there.

?? Don't be tempted to give false grades. Many firms ask to see certificates right back to GCSEs and I know that training contracts have been withdrawn because of this.

?? Research the firms who you're applying to and try to mention what you've found out in your application.

I hope after reading the above advice you will be able to prepare a well-structured and interesting application, which leads you on to the second stage of the recruitment process- the interview!

Sally Carthy is the National Graduate Recruitment Manager with Dibb Lupton Alsop. She has worked with trainee solicitors, in both recruitment and training, for the past five years.

APPLYING FOR A TRAINING CONTRACT WITH CITY FIRMS

By Charles Gothard
Solicitor,
Macfarlanes

INTRODUCTION

This article aims to provide some practical advice to applicants for training contracts with City firms of solicitors but it is also relevant generally to anyone applying for vacation experience. The views expressed are those of the author personally and not the recruitment committee at Macfarlanes.

Competition for jobs remains extremely fierce but many students are insufficiently prepared for the application process and often shoot themselves in the foot when applying. All too often applicants know hardly anything about the firm which they are applying to and incorrectly believe myths which hinder their confidence, such as "you won't get over the doorstep unless you prove that you will get a 2.1" or "there are fewer places for women or applicants from racial minorities" or "you need to be good at two foreign languages to be considered".

So, if firms are not looking for multi-lingual white males with a 2.1, whom do they want? Most would say that they want interesting, pro-active, intelligent and personable people. Although this might sound a tall order to many applicants, this article aims to explain how you can best demonstrate these attributes and give a good impression.

1 COVERING LETTER

Students often ask what a covering letter should contain, how long it should be and whether it should be typed or hand-written. A covering letter should:

?? Say in more than one or two sentences why you are attracted to that firm in particular.

?? Be seen as an opportunity to explain any "problem" with your application e.g. late submission or a poor exam performance.

?? Be typed unless you are particularly proud of your handwriting, which must be very clear and neat.

?? Not include <u>any</u> typos or poor grammar.

The key to a good covering letter is to express yourself succinctly (since this is a skill that partners appreciate when they have several hundred applications to read each year) and demonstrate that you have found out one or more significant reasons why this firm, rather than any other, appeals to you in particular. Firms like to be flattered with comments like *"I am particularly interested in your firm because of its strong reputation for advertising and intellectual property work. Intellectual property is a subject which I have greatly enjoyed during my second year".* If you could then go on to say that you have met their Mr. Smith at your University's law fair so much the better. The firm will then think that you have tried to find out about them in more ways than one and that their investment in going to the law fair was not a complete waste of money!

Beware however of flattering a firm for something, which would be irrelevant to your training contract, for example an area of their practice which you would not be exposed to during training.
If you have performed badly in your second year exam results (or other exams on which you are basing your application) then the covering letter is your golden opportunity to put forward a plausible excuse for your poor performance. The key here is to give an excuse, which is itself of interest to the firm. For example, *"my second year exam results suffered due to the considerable amount of time that I devoted to my role as Chairman of the College Judo Society. This required me to organise an inter-college championship and a foreign tour as well as chair monthly committee meetings".* Although Judo is unlikely to be of enormous interest to the firm, the organisational and leadership qualities associated with such activities sound impressive. Many a student (the author included) has fallen down in second year exams through excessive social activity. It is always better to be honest about your exam performance than to try and disguise it. Even if you disguise it successfully initially, you might well be found out through an academic reference or when the firm asks to see exam certificates.

Many students think that they do not have the time or resources to find out information about a firm beyond the number of partners and foreign offices that it has. In reality, the task is made very easy by "The Legal 500" and the "Chambers and Partners' Directory" which give a short synopsis on all the firms as well as details of specialisation's and the firms' strength in these.

For up to date information about a firm's current work, check the index of "Legal Business" each month or scan the first few pages of "The Lawyer" regularly. This is particularly useful when preparing for an interview.

If your predicament is particularly dire but your tutors remain confident that you will achieve a 2.1 overall, then consider submitting a one page open testimonial to this effect from one of your tutors with your covering letter. This should reduce the likelihood of your application being thrown in the bin.

It should go without saying that if you know anybody at the firm, you should contact them beforehand to make yourself known and your application less anonymous. Bear in mind though that competition for places is such that who you know is no longer likely to get you a job in itself and also that your application certainly will not be prejudiced if you do not have a contact at the firm.

2 THE CV

Again, it should be succinct, typed and thoughtfully laid out. Do not bother with laser printing unless you have easy access to a laser printer and never be flashy by giving your CV a cover.

One reason why many firms insist on an application form rather than a CV is to get explanations from applicants as to why they have done something or what benefit they have gained from it, for example foreign travel. Read a few application forms and you will soon see that firms want far more than just a list of where you have been and what you have done whilst at University.

Travel gives you an opportunity to talk about doing things independently, improving language skills and finding out about foreign cultures. Emphasise these benefits. As already mentioned, involvement in University societies enables you to show off about

leadership, organisation, interpersonal skills and possibly public speaking. Bear in mind that even city firms recognise the importance of pro bono work (for example at community law centres) and therefore many will be interested if you display a social conscience.

When specifying your exam results, there is nothing to stop you printing down course work grades as well as written exam results. The two combined may give a better impression of your ability in the subject than your overall grade. By mentioning a coursework topic that you have done well in, you are also providing a good talking point for an interview.

Although people often talk about the importance of a wide variety of activities for the benefit of their CV, the motto is quality rather than quantity. If you have had a busy committee post in one society, this is more impressive than merely turning up to functions organised by five other societies. If you have excelled in something, then make this clear in your application, since irrespective of what it is, it is likely to help.

3 INTERVIEWS

Prepare by reading in the legal press what the firm has been up to recently and possibly find out what the firm's strategy is. For example, is it merging with another firm in the next few months or has it announced that it is opening a foreign office? If you know who is interviewing you, there may be a potted biography about them in the Legal 500 or The Chambers Partners' Directory.

It goes without saying that you should be punctual and look smart, although you should not be paranoid about getting a brand new suit if you already have a reasonable one (provided that it conforms to the sober City dress code). You must look the part since interviewers will want to be confident that you would look presentable with clients. Women in miniskirts or pigtailed men with an earring however will not impress some clients!

I was once told that firms want somebody who could go and meet a client at Heathrow at short notice and then spend an hour chatting to them and giving a good impression in a taxi coming back to the office.

Styles of interview vary enormously. Many firms conduct two, interviews, one being a cosy chat and the other a confrontational style discussion. The latter may well be designed to put you off guard to see how you cope with questions about which you know little or nothing. Try and remain calm and measured in your response. It is also better to admit that you do not know the answer rather than waffle ineffectively.

Experience is extremely helpful and you will feel far more confident after your first few interviews. Firms do know this and most are sympathetic to nerves.

It is a good idea to go armed with a few questions that you can ask at the end since you will usually be asked if you have any. Do not ask if the answer is given in the brochure, but do ask about anything vague in the brochure such as *"the firm is continuing to implement its computer strategy".* Since you are applying to be trained, some pertinent questions about the training offered usually go down well.

4 ASSESSMENT

Many firms, including mine, now have assessment days either in addition to or instead of a second interview. Understandably, many students are very wary of what an assessment day might involve.

Their purpose is to find out more about a student's ability through a series of exercises, each of which usually test a different skill. Examples might include:

- Translating a clause from legalese into plain English for a client.
- A role playing exercise with a given set of facts enabling you to argue a case.
- Giving a short presentation on a subject of your choice.
- Drafting a letter.

If you do badly in one test, it is unlikely to affect your overall result for the day. Partners usually give at least equal weight to a student's performance at interview as they do to the tests. It is impossible to prepare specifically for an assessment day although any experience that you have gained of law firms, for example through open days, will usefully have shown you the importance of the skills, which are tested.

One important part of an assessment day, which many students fail to take advantage of, is the lunch or drinks gathering with partners and other members of the firm. This is an opportunity for an influential chat. If as a result of the morning tests and first interview you are a borderline candidate then such a chat may become very important. Therefore, avoid getting drunk or slumping in a chair and looking inert. Instead, try and gather what little energy you have left and appear enthusiastic about the day's activities and the firm in general. Without being obsequious, use the opportunity to ask intelligent questions that may further your application and make you memorable for having the "spark" that all firms are looking for.

If all this seems insurmountable or unnecessary, then do not waste either your time or the firms' by applying. However, if you "use" the application process wisely, then even if you are not the world's strongest academically, you can still maximise your chances of getting one of the increasing numbers of offers that are available.

SUMMARY JUSTICE - A PERSONAL VIEW

By Jim Haydock
DML, Barrister.
Clerk to the Leigh and Wigan Justices

I read this morning in The Times newspaper, whilst making my way towards the law reports, that the Chancellor of the Exchequer, Gordon Brown, had confirmed his spending plans for the next three years. The Home Office were due to receive an extra 1.1 billion pounds whilst legal aid is to be cut by some half a billion pounds but the focus of attention is clearly on Health and Education. The present Lord Chancellor is on record as expressing the view that every penny spent on the Criminal Justice System is a penny less for Health and Education so I think that we can safely assume that our budgets in the criminal justice service will remain at best static and at worst in decline! As for the Home Office no doubt their allocation of funds will be targeted on reducing delays in line with the manifesto commitment of the government, and more specifically to cut the time taken in the case of young offenders by half.

I'm sure that victims of crime in particular and local communities in general will applaud this initiative. Justice delayed is justice denied and for too long now we have endured the delays created by numerous well-intentioned but ultimately flawed pieces of legislation. Good intentions can and often are frustrated by those who seek to abuse the system and delay the progress of justice. Victims and witnesses are angered and frustrated by a system which appears to be completely divorced from the reality of the crime that they have witnessed or worse still suffered. But the tide is beginning to turn and there are some real prospects, under the Crime and Disorder Act 1998, of achieving the targets set by government. In the last twelve months we have seen some real improvements and I for one hope that the next twelve months will deliver many more.

As an example of the thinking now current, Magistrates in the Youth Court have been advised to sentence as soon as they are able to do so and not to wait until all cases in the system are ready to be dealt with. This change of tack, initiated by the Lord Chief Justice and Lord Chancellor and overturning previous advice from the higher courts has had a dramatic effect. Young offenders no longer have anything to gain by committing further offences so as to delay the outcome of the cases before the court. Quite the opposite, there is now every incentive for an early plea of guilty so that other offences can be brought forwards to be dealt with here and now! In similar vein, at the first hearing of an offence triable either way, the defendant is asked to indicate whether she or he intends to plead guilty (the plea before venue procedure). Either way offences cover a vast range of moderately serious offences (e.g. burglaries, theft, assaults etc.). If a guilty plea is indicated the Magistrates go straight on to sentence themselves or commit the case to the Crown Court for sentence. A simple procedure but one that can save many weeks in time and countless hours of police and prosecution resources with no detriment to the rights of the defendant.

The Crime and Disorder Act will introduce yet further practical measures designed to speed up the progress of criminal cases. At long last action has been taken to streamline the process of sending cases from the Magistrates' Court to the Crown Court. The present lengthy, complex and resource intensive process of preparing statements and files for committal proceedings takes a minimum of six weeks for those in custody and eight weeks for those on bail. This is an opportunity (on both sides) for considerable delay for what should in this day and age be a simple process of moving the case from Magistrates Court to Crown Court. Under the Crime and Disorder Act 1998 for all indictable only cases, the present committal system will be replaced by a simple transfer procedure. There will be a single hearing before Magistrates to decide issues relating to bail and legal aid, followed by a plea and directions hearing at the Crown Court. Those defendants who are guilty and wish to attract the maximum discount on sentence will enter their plea and the Judges will then proceed straight to sentence.

This will reduce by months the time delay in dealing with those cases. Just as importantly it will relieve the prosecution of the considerable administrative burden and cost to the public purse, of preparing full files for committal proceedings. All of this because at long last somebody in authority asked the simple question *" why do you do that? "* The answer given *"because we always have done "* simply isn't good enough when history and the harshness of the criminal justice system in centuries long gone largely dictate what we have done.

The advent of the Crown Prosecution Service, the introduction of 24 hour of Duty Solicitor Schemes and the wide availability of Legal Aid to those charged with serious offences has cost the taxpayer literally billions of pounds. Yet the benefits have not been realised because the system still has its roots firmly fixed in the late nineteenth and early twentieth century, even as we approach the advent of the new millennium. Regrettable the government has not yet seen fit to introduce the same procedure for offences triable either way so we will have to endure the delay, injustice and waste of resources associated with those cases for the present at least.

Fast Tracking of cases has also been recognised as a way of reducing delay and of ensuring effective progress of criminal cases. Youth Courts throughout England and Wales are now encouraged to set up schemes to put persistent young offenders before the court and not to delay for weeks (sometimes months) between charge and the first hearing of the case. This places control of the progress of the case in the hands of the court and it also reinforces the connection in the mind of the defendant between the offence and the outcome of the prosecution. In time, I trust that fast tracking will become a feature of all criminal justice proceedings.

We labour at present under the misapprehension that those within the system actively seek to progress the case to its conclusion, when in fact the opposite most often applies in practice. For those who are truly guilty, what benefit is there in effective progress? From experience I would suggest little or none. Yet the system affords the opportunity at every stage to delay the outcome. For example, three weeks are allowed between charge and first hearing. This in theory affords the defendant the opportunity to seek legal advice,

obtain documentary evidence of means, apply for legal aid, request advance disclosure of information and thus be ready to proceed at the first hearing to decisions about venue and plea. Why then in practice are solicitors so busy every day taking hasty instructions on or off the court corridors, filling in legal aid forms, pestering crown prosecutors for copies of the advance disclosure or more likely making applications on the day of that first hearing to adjourn the proceedings for two weeks (or more) to consider the advance disclosure and to take instructions. This is of course just one of the many steps to the final outcome of the case and already we have lost a month or more for little or no benefit in moving towards an outcome.

I started this piece by reference to finance. No longer can we plead that the money must be found. As a public service we are and now have been found to be wanting. Justice is not being delivered. The Youth Justice System has a new principle aim, which is to prevent offending by children and young people. Perhaps now thought should be given to the principal aim for the criminal justice system as a whole. Once we have our principle aim established we could then determine how to achieve that aim, within the constraints of the budget allotted. In seeking to achieve that aim a firm grip would have to be taken to ensure that the processes within the system recognise that the sword of justice has two edges. Fairness must go hand in hand with firmness and a real recognition in practice that justice delayed is truly justice denied. The taxpayer pays dearly for our system of criminal justice. They have a right to expect value for money and that an effective service is delivered.

I also read recently an in depth report about the Lord Chancellor, Lord Irvine. He wants to be remembered as a great reformer and indeed the Modernisation of Justice Bill, likely to be referred to in the Queen's Speech will lay the foundation for the many reforms that he no doubt has in mind. For those of you about to enter the profession, as well as for those of us well and truly in the midst of it, mark well that we live in interesting times. The expectations of a public who expect excellent service and value for money do not fit well with the present system of criminal (or for that matter civil) justice. Neither are we likely to receive a large injection of funding. Indeed expect the opposite as public funds move to support the needs of health and education. But the public wants and the government intends to deliver a system that meets the needs of the twenty-first century, where crime and the fear of crime no longer feature in the public's perception. That is our challenge and therein lies our future!

L A W I N A C T I O N

The Law in Action programme has been running at the University of Essex for a number of years and is offered to students within the Law Department by Liz Cassell. The popularity of this voluntary course means that ultimately the numbers of participants usually has to be limited to 50 per year.

The course is offered in three parts and although it is voluntary it is a prerequisite that part one of the course, which is offered to first year students only, is undertaken and completed before parts 2 or 3 may be entered into. Parts 2 and 3 of Law in action are usually undertaken in year 2 or sometimes year 3 of a Law Degree at Essex.

Part 1 of Law in Action usually runs for about 10 weeks and consists of ;

- ?? Lectures by visiting Judges, Barristers and Solicitors,
- ?? Visits to court,
- ?? Two days with a solicitor and a barrister,
- ?? Preparing for and making a bail application for an imaginary client in front of a qualified lawyer,
- ?? Writing an essay about an independent visit to court, the author of the winning essay usually wins a prize and the article will be published in "Obiter",
- ?? And finally, all students participating in part 1 of the course are invited to a party given by a local set of barristers in their Chambers.

Students who successfully complete part one of the course are presented with a certificate from the University.

Parts 2 and 3 of the course are about "Mediation" and "Advocacy" respectively and involve attending lectures to discover how to become a successfully Mediator and Advocate. These are useful skills to acquire by anyone who is hoping to enter the legal profession and will be taught to anyone undertaking the Legal Practice Course (LPC) of Bar Vocational Course (BVC).

On reflection Law in Action is well worth the time and effort each week.

The following three articles are the winning essays from the last three years by students who have completed Law in Action part 1. As this is the first issue of "Obiter" we have taken the unusual decision to produce all three essays from 1997 - 1999. We hope that by reading these essays you will be able to see how the lives of these students have been enriched by their participation in the Law in Action programme.

Watch this space or your years notice board for any details of Law in Action in the future.

LATE BAR

Level 2, Monday December 13th 1999.
7:00pm - 1:00am ~ Tickets £2.00

Contact lawsoc@essex.ac.uk

SPECIAL THANKS TO

Mrs. Sylvia Harrison - Proof Reader
Ms. Sue Phillips, Deputy Under Treasurer (Education) at Lincoln's Inn for reviewing this issue.
Mrs. Lorraine Newton for correcting and amending this issue

A LAW IN ACTION WINNING ESSAY - "THE LUCK THAT CHANGED MY LIFE"

By Stuart Long
University of Essex
1996 - 1999

It was the night of Thursday 20 February and I'm busily preparing my clothes for our trip to the Old Bailey. Taking time over such things as the pattern of my tie was all-important to me that night as I was actually going to *the* court. Now call me naive but, I was really excited. This was mainly due to the fact that anything to do with the law in action turns me into an impassioned schoolboy eager to see those who I try to emulate in mooting competitions at work. I daydream about "The Lawyer" running the headline, "Long does it again" as I save another dishonest bank chairman from impending fraud conviction or prove lying through your teeth is not a material inducement to enter a contract, thus saving my giant corporate client from paying damages. I love the thought of it, standing in my gown and wig, everyone in the room putty in my hands as I verbally duck and weave like a championship boxer. To be honest, after reading my first judgement during the formative days of my law A level I realised that all my mental pictures of lawyers in action were somewhat blurred. I know in the real world it is a different story, but it still did not stop a tingle of excitement run down my spine as I attempted to get an early night.

Initially, entering the Old Bailey was like waking up on Christmas Day and discovering your only present is a pair of socks. The only case we were able to attend was a fraud case while those who had arrived that bit earlier had managed to get in one of the two murder cases. (The equivalent of a new bike and a computer for Christmas in the court attending stakes.) Wishing we had actually been able to find a parking space quicker than the forty minutes it had taken; we quietly entered ignoring the guard's words of "its so boring you'll be out in two minutes". It was enlightening, as I was unaware of the logistical complexity in such cases in relation to evidence. The judge and every barrister, solicitor and juror had a computer screen and a mountain of files. In approximately forty-five minutes the prosecuting counsel managed to ask only seven questions. The time was taken up by directing the court to the right file, section, sub heading and paragraph and then asking for it to be compared with this sub section in that appendix at that paragraph. After patiently telling the judge, "No your Honour, the small blue not green folder" and then asking the witness if they were aware of the disparity, he would get a reply of a request that the court look in yet another file in order to explain. The reason for the blank looks on the faces of the jury became clear. I thought about writing an essay on the complexities of trials and the effect on the jury but not only has it been done so many times before, but also we had come in search of *action.*

We had decided to take a gamble and go to the Royal Courts of Justice. It was a risk for a bail hearing involving the Bridgewater Three was to take place and the high press coverage dictated a packed public gallery and little hope of entry. It was pure luck that we were in London on the same day and, driven by feelings of an opportunity too good to miss and the fact that we stood little chance of seeing anything else at the Old Bailey, we jumped on the tube.

Walking down the Strand, we suddenly found the circus. Everywhere there were people screaming into mobile phones, setting up satellite dishes and talking into microphones while civil liberty campaigners waved banners proclaiming the system was corrupt. It was mayhem and we worked our way to the front of it. The pavement was full with people squeezed tight against the railings protecting the entrance and this caused us to spill onto the pavement. A policeman politely ordered us across to the other side. I asked why we were not allowed in and before I started to rant about knowing my rights of access to the courts, he replied that he was not stopping us going in, just stopping us from getting run over. As I was not at all certain as to my rights of access I took this as authorisation to push through the crowd and, on finding a gap in the barrier, we walked into the court pretending to look as if we knew what we were doing. Expecting the interior of the court to be equally as packed, we were shocked to see it empty. The security guard joked about all the attention outside as I frenziedly tried to discover what aspect of my person causing the alarm to sound each time I walked through the metal detector. This took some time and I started to get fearful that I would either be refused entry for being a problem case or end up naked still walking back and forth through the metal detector!

A metal lighter was located which I had not emptied from my back pocket. I embarrassingly stuffed the several thousand items, for some reason I needed that day, back into my pockets as quickly as possible as we were informed that the hearing was about to restart in court four. Reaching the door we were told that the public gallery was full, so we joined the twenty or so people just outside. My companions were a combination of eager journalists and friends of the Three. All had anxious looks on their faces although I suspected for different reasons. I pressed my face to the glass in the door as I heard the applause as Jim Robinson, Vincent Hickey and Michael Hickey entered and took their seats directly in line with my view. Although, we could not hear all the proceedings we were kept informed by the notes that, when passed out to the journalists, were read in hushed tones spreading like gossip through our small group. The only other indication of what was going on was the expressions and gestures of the three men who entered the courtroom as murderers.

It was only then, as I stood there, that the gravity of what these men had been through finally dawned on me. Although I had heated discussions with fellow students about the new evidence and had spoken of the possible injustice that befell the men, I had given no thought to the people indirectly involved in the case. Indeed I do not think I even would have had it not been for a ten minute recession at one o'clock. At that time the people who were in the court flooded the corridor. I found myself next to Theresa Robinson, the wife of Jimmy, who in floods of tears damned the judges for the mistaken belief regarding the break in proceedings. "He's waited eighteen years for this and those bastards want to go for lunch!" she screamed as the journalists swarmed round her. I turned to see a man my age shaking as tears flooded down his face. Michael's mother, Ann Whelan, was bombarded by questions until another woman threw her arms around her and they both burst into tears.

After a few minutes I have identified most as family or friends and feel somewhat out of place. I felt like I had no right to be there and my presence was an invasion of their privacy. In retrospect it was not a sad moment as the tears were tears of relief but, at the time, I could not help but feel so guilty that all these people had suffered so much pain and I would never experience anything like it. I love my family so much that they are undoubtedly the most important things in my life. The thought that any member of it would find himself or herself in a situation so abhorrent I can't describe how it feels. Those who have experienced it can only describe the feeling. The family of the three must have been living a nightmare since the 9th November 1979, the day the men were convicted, with a day like this only existing as a hopeful picture in their minds.

The emotion as the announcement came for the court to resume changed to one of great anticipation. Again outside, I heard the screams of support as the Three enter again and give the thumbs up to the gallery. It was obvious when bail was granted as the screams and clapping were louder than ever and the doors flew open again with journalists running out to phone through the news. I waited with the families, friends, journalists and by now a growing number of well wishers before being moved outside and greeted by shouts from the press photographs to get out of the way. When the Three walked through the main doors and into the street, the TV report you probably watched took up telling the story of my day. The frustration temporarily displaced by tears of joy and relief as the Three, surrounded by their family, openly displayed their feelings. Around me journalists complained that they could not hear what was being said and photographers angrily pushed the protestors' banners out of the way and scrabbled to retain their positions.

The street is blocked with the only person not moving towards the court being Mike Mansfield who makes an almost unnoticed exit. I let everyone push past as I have seen all there is to see in the reaction of the families as bail was granted.

Now, when I daydream of being a barrister, it usually involves me cleverly protecting the interest of the innocent although still in my unrealistic make believe Hollywood style. It is unlikely that I will ever be involved in a case like this but anything that involves both an innocent party and myself will bring back the memory of that day and in turn encourage me to continue until justice is done. The luck of being at the Bridgewater Three hearing not only changed my dream but also reminded me it is not only the wrongly convicted who suffer.

A WINNING LAW IN ACTION ESSAY

By Richard Gibbard
University of Essex
1996 - 1999

Many of the people who received the brief for this essay may have looked on the task of visiting a Crown Court as a chore. I certainly did. Although one of the aims of the course is to make practical law interesting and accessible for the uninitiated, the early rising dressing up and formality may be too much for the established student. The events I encountered when I entered the Courts were however much different to these negative expectations.

Having seen the requirements fellow student Stuart and I decided we needed to go further afield than East Anglia. It made sense to go to London since the capital is so close and so central to the law of England. We did not pick a day for any reason other than the absence of lectures on a particular Friday – in fact the decision was made at least a month in advance of the trip.

The decision ultimately became an important one. As the day drew closer the news became more and more relevant. A young paperboy who had been killed twenty years ago was gradually becoming a household name. Carl Bridgewater's "murderers" were proceeding well with their appeal against their convictions eighteen years ago and their release was imminent.

Waking up early on an unprecedented sunny 21st February our main concern was probably parking the car in London. Four men elsewhere were waking up about to appreciate that day beyond the sunshine. Having realised the Royal Court of Justice were by this time under siege from media and public Stuart and I elected to make our way to Old Bailey Street to see if we perhaps could catch another Bridgewater case this time in its infancy. Procrastination is indeed the thief of time and we were left ruing the loss of a windscreen wiper on the Ilford Road, subsequently the Court merely offered us a consolatory fraud case. An illustration of the interest in the case was demonstrated by the attendance in the public gallery, which doubled with our entry. At the same time the judge raised his eyes to the public seating as we sat down, if you looked hard enough a cry for help could have been interpreted from his expression. The jury seemingly occurred.

It is at this point that I begin my discussion of what I learnt that morning. The twelve peers that had been selected to try the defendant were mesmerised. I am certain many people have preconceived ideas about law – especially the criminal law- clearly we did, else we would not have chosen to go to London. The problem lies in that the jury, on receiving their call in the post may have relished the opportunity to add another defining point in law – all be it a small one – by their verdict in a criminal case. The enthusiasm had faded by noon on 21st February. It was sunny outside and they were in Court. The two young men in the front row were not much older than me and they were almost disbelieving when they saw two like individuals enter into this monotony of their own free will. It is at this point when one wonders if, by the end of the trial, they would have listened to all the evidence, watched all the witnesses closely and appreciated the arguments of the esteemed QCs. However they will decide on the individual's liberty and leave the Courtroom a free man – the defendant may not.

The link to the major news of the day here is obvious. I will not attempt to compare the trials of a Middle-Eastern fraud and the violent murder of a young man yet I feel I can illustrate that the system is not infallible. The seats in the public gallery at the Old Bailey are not too comfortable and so we made our excuses and left.

The tube flung us around the City and spat us out onto the Strand. The walk up to the Courts is not a long one although it seemed like it. The media presence was large enough to occupy a significant portion of Her

Majesty's Highway and we fought our way through the assembled ranks the London buses and cabs followed us. In stark contrast to the single local TV camera and willing interviewee outside the Old Bailey, here emotion was running high. Oddly not many were attempting to get inside the building and our ease of entry was a little surprising. The security staff directed us to the action, and, as we walked through the halls and corridors the atmosphere was tense. The Courtroom was not difficult to find since the gallery was stuffed to the brim. Reporters scurried out of the Court room to dial furiously on mobile phones relaying the latest utterings of Mike Mansfield QC or the latest facial movement from William Hickey. Inquisitive Barristers leaving the robing rooms of the adjacent Courts peered through the glass into the foyer of the public gallery where it was possible to view those in the dock. The public outside recounted stories of their individual role in the campaign, their friendship with the woman who once saw William Hickey's mother at the delicatessen in Tescos or their dismay at "the exploitation of the innocent" and the "disgraceful tactics of the police". As the stone corridors filled with noise the message that an adjournment for lunch was due, spread. The family members of the appellants spilled out of the Court for a well-earned cigarette and a tear. One of the women declared her disgust at the fact that her son had been locked up for eighteen years and he was being made to wait for his liberty merely so that a judge could eat his lunch – the plethora of willing sympathisers nodded in agreement. The addition of expletives and animation demonstrated true feeling and pressure-cooker tension.

When the Court resumed, the release of the four was clearly imminent. The cheers from behind the doors told the story and the crowd flowed down to the entrance hall to greet the petty thieves more than a decade late. Here celebrities had assembled and were pounced on by the more alert reporters as they recalled their "personal involvement with the families of the accused and the long campaign for their release". Relief had replaced tears of frustration as the closest family members were taken up to the cell doors. Twenty or so minutes passed and the message came that the hall was to be cleared before the men were to walk free. We ambled down the hallway and out of the entrance.

It was at this point that one of the more amusing events of the day occurred. The doors had apparently not opened for a while and the news of the end of the hearing had reached the outside world. Consequently shouting and screaming as the press anticipated the arrival of the subjects greeted Stuart and my appearance onto the steps. Among shouts asking us to clear the steps we found our niche in the swarming mass of people. The Police struggled to hold the crowd back and we were buffeted into the likes of members of the Birmingham six, Winston Silcott's brother and irate legal professionals battling to get in.

The placards waved frantically and the arrival of the tearful four and families onto the steps was quite astonishing. The passing buses slowed, cameras whirred and the crowd cheered for a quarter of an hour or so until the Bridgewater four were taken back in only to be seen again on the television

The phenomenal amount of attention that these men got for their case astounded me. I later went to Ipswich Crown Court and sat in on two more cases. In both I watched the proceedings with interest comparing my experience of everyday law with the Hollywood law just weeks earlier.

So much law is executed by the hour around the country and only a small proportion of the nation bats an eyelid. Yet the subject has the ability to stir up the most controversial and groundbreaking issues we may encounter. The "Arthur Daley" character charged with handling stolen goods, the Irish burglars being charged several years late after a time on the run and the businessman in the Old Bailey going over his books with a number of Barristers are all as important as the Bridgewater four yet their liberty does not matter at that time. It is only when we see the mistakes in a case or we encounter facts, which amaze us that, the public ever gets involved.

On that day in the Strand a man came up to us and handed out a leaflet containing information which he said demonstrated a "Conspiracy against the Crown, Government and our Democracy". I have hardly read this leaflet and I merely looked at Winston Silcott's brother's placard urging for his release, I acknowledged that a member of the Birmingham six stood next to me yet I appreciated that they were part of a public desire to see justice. The feelings on that day for justice and that something should be done were strong but very little of it seemed to filter through to the Courtrooms in Ipswich several weeks later. The fate of the individuals that day remains unknown to me however I still see the faces of the Bridgewater four on the steps of the High Court occasionally on the news.

The paradox of law, that it can be both anonymous and attract high levels of attention at the same time, is a fascinating one. Yet whether this is the correct situation or not is debatable, however it is unlikely that the situation will ever change. I personally feel it is better to bring the law further to the public's attention and yet not highlight to such an extent the errors and anomalies that can occur. With other high profile cases of miscarriages of justice do the public really need to lose faith in *all aspects* of the system (as was argued by many on the Strand) by witnessing another sensationalised case? As people blame the police, the Judges, Barristers and procedure I feel they lose sight of the individual issues of the case and ultimately criticise more generally than the situation warrants. By paying more attention to judgements and their precedents public awareness of the law would be improved and not merely revolve around the unfortunate cases which hit the headlines.

A WINNING LAW IN ACTION ESSAY - R v FARRELL, CAMBRIDGE CROWN COURT

By Emma Hall
University of Essex
1998 - Present Day

I had been looking forward to today, it was the second week of my work experience with Metcalfe, Copeman and Peetefar, solicitors, Kings Lynn, and this was the highlight of the criminal agenda during my time there: a sentencing. Fairly basic business ordinarily, but to me it was special. I would not merely be observing court today, but would be involved more personally: I had read the defendant's file and knew the background, and more importantly would have met him as we would all be travelling down together.

In addition to reading his file I had been advised by the instructing solicitor as to what to expect regarding the client, however this did not prepare me for the meeting. Like most people, I had an irrational image in my mind of the hardened criminal type, a stereotype that naturally the client did not fit. I spent the whole of the journey attempting to reconcile the defendant, a married man in his mid twenties with one child and another soon to be born, with the arrogant petty criminal impression created by his file.

As expected the defendant did not object to me accompanying the solicitor; he did not say much at all and remained immersed in his magazine, to my relief. I was not only embarrassed ever so slightly by having a preconceived idea of what he should look like, but was also concerned about the possible effect anything I said might have. The situation was awkward; the defendant seemed unaware of my knowledge regarding himself, his case and his circumstances. Moreover he had convinced himself, his case and his circumstances. Moreover he had convinced himself and his heavily pregnant wife that he would not be served with a custodial sentence, on account of the imminent birth, despite warnings from Counsel and from his solicitor to the contrary.

I was curious as to how the defendant felt about appearing in Court and the threat of a custodial sentence. However, his relaxed and comfortable attitude once we were in the courthouse, and the fact that he was the only one who confidently knew the way from the car park suggested that this was fairly routine, and that he genuinely believed that he would not receive a prison term.

We had been expecting David Owen-Jones, whom I had met the previous week at King's Lynn Crown Court whilst again shadowing a solicitor, to represent the defendant. Instead his colleague Jonathon Dunn of 3 Temple Garden Chambers, London, greeted us at Court. Whilst Counsel and the defendant conferred, I was able to observe the others in the waiting area. Of particular interest was a young Spaniard with his interpreter who was running through the court procedure with the usher; a stark remainder of Britain's territorial jurisdiction and judicial power.

While we waited I put the time to good use by quizzing the solicitor about the more practical aspects of the job and upcoming fixtures, the details or which I had been privileged to read. We were last but one before lunch – last for all practical purposes as the case after us was apparently immediately adjourned. The gradual emptying of the waiting area was somewhat sobering; the heightened anticipation and also watching the contrasting faces and attitudes as people left in the courtroom.

Eventually we were called before HMJ Haworth, who did not appear in a good mood. Whilst I savoured the atmosphere or majesty, tradition, power and above all justice from the public gallery – I have been to various courts before but never fail to be overawed by the experience – I could not help but feel sympathetic towards the defendant, who was still denying his fate.

Although this was essentially just a sentencing, the facts were somewhat unusual, and were briefly recapitulated in court. The defendant had pleaded guilty at a Newton hearing to various driving offences, in particular dangerous driving and taking without consent. HMJ Haworth had sentenced him to a period of community service on the understanding that the offences in truth merited a custodial sentence and that this was a last chance. He then breached that order, so was brought back in front of the judge for resentencing. Therefore, argued the prosecution, the defendant should be sentenced to a term in prison.

On the facts of the case this indeed seemed inevitable, and as I was aware, was accepted as such by the defence. They then did not argue against a custodial term, but rather attempted to mitigate.

Counsel's initial argument was that the community service order had been issued under the wrong county (he lived just inside the border of Norfolk, but a Cambridgeshire centre was in fact nearer and more easily accessible) so the breach was insignificant. This failed as the judge knew the area and was able to verify the location for himself.

Various alternatives were then suggested, however the defendant's record showed that curfew orders and electronic tagging had no effect on him. Community Service was obviously out of the question, so Counsel finally tried for mercy and sympathy, citing the defendant's family circumstances: an eighteen year old wife due to give birth at any moment, struggling with a new born and a three year old toddler without her husband's help and support.

Tragic though the circumstances were, needless to say the defendant was sentenced to custody, however he only received the minimum length of term. As sentence was pronounced I watched his face closely; he betrayed no emotion however I knew he was shocked. Indeed, the first thing he said to Counsel and the solicitor when they went down to the cells was to ask if they could appeal, which would be futile given the length of sentence and the facts of the case.

I sympathised with the defendant; whilst I waited for the solicitor to return from her conference in the cells I tried to put myself in the defendant's place. It was not the sentence that was so difficult to accept, but rather the enormity of the emotional implications. At the same time I was able to observe the judiciary as ordinary members of the public, as I watched the same judge who had just pronounced sentence go to lunch quite casually.

Although we had been resigned to a prison term, one problem still remained and that was informing the pregnant wife, and the effect the news would have on her. It was more of a responsibility than it seems we were aware that she believed her husband would be returning home that afternoon, and she was already three days overdue. Thankfully that was taken out of our hands by the senior solicitor back at the firm.
Reflecting on the day, it showed me the supreme power, yet humanity of the legal system. My sympathy for the defendant was born out of his sheer naivety regarding the law, and also partly because of the circumstances surrounding the sentencing. He had been warned at his hearing about the consequences of a breach, he decided to disregard the judge and now seriously thought the court would be lenient on him because his wife was about to give birth. He believed that the judge would simply grant him an exception, which he was not prepared to and moreover could not do. I found the judge – HMJ Haworth – to be quite fair in granting the minimum custodial sentence.

THE LIFE AND TIMES OF A PROPERTY TRAINEE

By Amanda Berg
Second Year Trainee,
Berwin Leighton Solicitors

It is true to say that the Berwin Leighton property department is not just any property department. It is now officially (according to the Legal 500 1998 index) *the* number one property and planning department. The quality of work is second to none and the experience gained is first class.

I didn't particularly enjoy property law at law school and I positively detested it at university (can someone please explain what an equitable interest in the fee simple means?) but in practice it is entirely different. To begin with all the jargon goes out the window.

A property trainee is thrown in at the deep end. Trainees can conduct their own files and be party to large commercial transactions. When my first client contacted me seeking learned and considered advice, I was struck dumb. Thoughts ranged in my head from "don't ask me you idiot - I'm not a proper solicitor I am a trainee" to " you should know that, its your property not mine". So, I learnt very quickly the art of sounding terribly professional whilst "checking out that point" and "getting back" to whoever as soon as possible. What shocked me was that a few weeks into my seat I was actually advising clients and sounding quite good. You acquire a certain confidence that you didn't think you had, and actually begin to enjoy client calls - you can sound quite learned and mature!

Property work is interesting. It is a misconception that you spend your entire traineeship poring over old deeds and drafting licences to assign.

The workgroup I was in deals mainly with retail letting and acts for a major developer and manager of factory outlet stores, all over the UK. This, was my dream seat, I like nothing more than milling around the shops and I therefore assumed that negotiating a few leases for major tenants such as Armani and DKNY would grant me instant access to London fashion week and a 40% discount voucher for the same designers. No such luck but the commercial experience gained from watching experienced property lawyers at work is invaluable. I learnt what a Landlord will and will not accept, and saw that commercial considerations underpin all these decisions.

A commercial property seat is consistently busy and pressurised for 6 months. The idea that a property lawyer clocks in at 9.30 and is home in time for Neighbours is wholly inaccurate. The reality is that your time in a commercial property department will be frantic. You will be surprised at how quickly the day passes. Berwin Leighton is renowned for its property department and the resources available to you are enormous. They include standard leases and licenses; information packs for tenants; standardised court and land registry forms on each PC; Hot Docs programme to speed up drafting; on line Land Registry and Companies House access; Estate Gazette Interactive to provide market information; lectures and continued training.

You are given a tremendous amount of responsibility for the conduct of your own files. I am not suggesting that you single handedly draft a development agreement for £20 million pounds, but you will be expected to handle the day to day management of your files. That said it is reassuring to know that people are always on hand to advise, assist and if necessary annihilate the work you have done. People are aware of the work you have done thanks to the "Blues" that are circulated each week. These are copies of all your correspondence and are circulated round the group. The idea of people scrutinising your work is horrifying at first.

I thoroughly enjoyed my time in the property department and was particularly fortunate to have spent 6 months in a department that has recently been rated number 1. I found the work challenging and stimulating and a far cry from the intangible and unintelligible world of equitable fee simples - and if they'll have me back I'd quite like to qualify there (and I am completely normal…).

THE OBSERVER NATIONAL MOOTING COMPETITION NOVEMBER 27 1998.

The University of Essex
V
Kings College London.

Mooting sucks. After all the etiquette and maturity of the moot courtroom has faded into the night the real world can resurface. Make no mistake about it mooting is not the real world. For those students that have attended the internal moot finals over the past few years or have watched an external inter-university moot you will appreciate this statement.

Preparations for these competitions (much like the internal moot final) are extensive and time consuming. The incentives to work through the numerous arguments are few and far between. You keep asking yourself what you are getting out of this in hindsight you are sure you will discover that elusive motivation. Yeah right.

Junior Counsel and I managed to lose the internal final last year and a return to the Senate Room, suited and unnaturally serious was not high on my final year wish list. Unless I stood a good chance of winning. Nearly all students reading this article who have mooted will have lost. You know why I had to do it again. It was not because we lost on the most infuriating of technicalities; it was not because the winning team in that final had already beaten us once in the competition; it was not because we like dressing up - it was simply that we had mooted and lost. True there are some of you out there who hated the whole experience but the majority got a buzz out of it and wanted to moot again and again – and to go all the way.

Opportunities to take on possibly the third best undergraduate law school in the country do not come

around often. The national moots are a step up, the Champions League; the lecturers are willing to help you out, as it's essentially Essex against the rest. A worthy cause. Preparations for this moot took nearly two weeks of library research and digging up the forgotten relics of first year contract law notes, and to think I was so close to selling Beale, Bishop and Furmston to the bookshop for the price of a large night down Level 2. The point we lost on in the internal final was that of our skeleton arguments. An unknown concept to the majority of mooters. These brief summaries of your submissions must be exchanged with your citations and are usually a feature of semi-final and final rounds in internal competitions. Mine was poor in the final last year and lost us the moot; consequently expert assistance was drafted in for the forthcoming battle royale. As a result Junior Counsel and I were quietly confident.

Until the day of the moot, I had not actually written out my speech onto my cue cards until I had checked over the submission with the esteemed academics that loiter in the recesses of the law corridor. Now, since I participated in public speaking and debating competitions for my school I have experimented over the years with notes, speeches, cue cards and total fly-by-wire forms of presentation. I've usually done ok with the cue card business so I thought I'd stick with Old Faithful. At three o'clock and twenty-one cards later I knew something was wrong. I did not have time to trim it down and besides, I could not think of anything I might confidently expunge.

The formal meeting and greeting of the teams and judge passed without incident (although I did find the Junior for the respondent alarmingly attractive). Coffee and tea are hardly the beverages of choice in the calm before the storm. It's all far too pleasant. Exchanging small talk about living as a student in London and the obvious parallels with sunny Colchester all I could think was how stupid I was going to look all suited and booted when I went down to the SU Bar when it was all over. It's always good to think about the important things: law, presentation, strategy and what your mates would say.

Jacques as always was the quintessential professional. Appearing for one night only as my Junior Counsel he had a significantly more difficult legal argument to present than I did. Consequently I was not looking forward to try to any possible rebuttals that I might have to give on his submissions. Boiler room temperatures in the Senate Room were not adequately eased by the presence of a small bottle of luke-warm abhorrent mineral water. Twenty minutes and it'll all be over.

"Court will rise". Oh, great. He's wearing a robe and a wig. Marvellous. "If it may please your Lordship my name is Richard Gibbard I will be appearing..." Three minutes and he's off. Questions. Just clarifying a point. All too easily he got me in trouble. A tactic I'd confidently told potential mooters in the Law Society Moot Clinics was to be particularly vague in an area and the judge will ask you a question, but, cunningly, you have prepared a comprehensive answer to any potential questions. Attempting to deploy this little device I was caught out. I had to cover a part of my submission that I wasn't planning on dealing with until the end. It's easy at this point to turn to the judge and state that you will be coming to that point later in your submission, but to our cost some judges prefer to be addressed on the point as they raise them. Undone by my own undoings. Riding out that little storm he continued to pepper me with questions, then, as I finished; I said the fateful words "That concludes my submission My Lord unless I can assist you any further in clarifying any issue?" 'Disastrous' is not the word, and 'red rag to a bull' is an equally unjust simile. It was a living nightmare. Ad-libbing my way through and being more repetitive than I care to remember I was finally allowed to sit down.

It seems quite unfair but I can not accurately give an account of the other mooters' submissions since, like most people, I switch off after my job is done. I recall only that we all got a similar passing. One thing that will stick out, however is the fact that the Leading Respondent Counsel impudently stood up for his twenty minutes and pushed the lectern to one side addressing the judge quite astonishingly cogently from a scattering of words on one side of A4.

This was later to be the turning point of the contest. At the end of the submissions the judge left the "Court Room" with the self-satisfied swagger of a heavyweight boxing champion and I felt like I'd gone ten rounds. More small talk followed with each team congratulating the other on a wonderful performance – "oh you were soooooo good", "oh please you were so much better", "no really you do yourself an injustice" – ra ra ra.

When the judge came back in he delivered his judgement on the law – we won on my point, lost on Jacques. Good start? No. As mooters will know the law is often irrelevant. The real decision goes on the advocacy skills. Apparently we were "tied" on the points so the judge had had to find a way to separate the two teams outside the official criteria he had to go on. Well, not that I'm a bitter man but differentiating on the fact that Abraham Chang for Kings did not use a lectern and notes and the fact that our rebuttals were unnecessary were the points against us. How lame is that?

I would imagine you are sensing something here. Although I will have left this esteemed institution by the time the next mooting opportunity comes around I will be back. I can see a pattern emerging here that will probably persist throughout my life as a lawyer – not the recurring frustrating defeat (hopefully) but the addictive nature of advocacy. As something of a post script to this article I would like to add that very team from Kings went on to win a different national mooting competition – beaten by one point by national champs. Mooting sucks.