

THE WEEKLY LAW REPORTS STUDENT NEWSLETTER



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'Citation of judgments in Court

3.1 For the avoidance of doubt, it should always be emphasised that both the High Court and the Court of Appeal require that where a case has been reported in the official law reports published by the Incorporated Council of Law Reporting for England and Wales it must be cited from that source. Other series of reports from England and Wales may only be used when a case is not reported in the Law Reports.'

Lord Woolf

Supreme Court Practice Direction [2001] 1 WLR 194



Industrial Relations, Contract Law, Justice Kirby and the Equitable Doctrine of Unconscionability.

By Lucy de Vreeze

Introduction

Justice Kirby is well known for his thoughtfully tempered judicial activism and liberal views in the High Court of Australia. He is often the only dissenting judge in a High Court decision and he stands as a bastion, to many, of a progressive High Court, where judicial activism serves to the benefit of the rule of law.

As could be reasonably assumed with any reified figure, Justice Kirby does not always live up to such expectations. The majority decision handed down in the case of *Bridgewater v Leahy*(1), of which Justice Kirby was part, is potential proof of this embarrassing truth regarding avatars. Although underpinned by a commitment to values of law and justice, the decision seems radical in the light of Justice Kirby's self-proposed guidelines of 'opportunity, need, inclination and methodology' (2) for judicial activism.

The concern here is with the scope of the equitable doctrine of Unconscionability in contract law and the effects of Justice Kirby's judicial activism in this area, specifically in the case of *Bridgewater v Leahy*. It has been noted that, in this case, the equitable remedy offered by the doctrine of Unconscionability goes beyond traditional boundaries. It rectifies an injustice, not at law, but in outcome, endorsing far less stringent requirements for the finding of exploitation by a stronger party of the specially disadvantaged party. (3)

This may indicate a trend that, in growing, would create instability and upset the boundaries of contract law and equitable doctrine by advocating a judicial activism untempered by reasonable assessment of 'opportunity, need, inclination and methodology' in regards to the process of contractual agreement.

The Doctrine of Unconscionability

There are several elements to the Doctrine of Unconscionability, which must be satisfied for inequitable circumstances to be established. The key element is that of unconscionable conduct on the stronger party's behalf; the stronger party must use the special disadvantage of the other party with the knowing exploitation of this disadvantage. Three elements are required: proof of the special disadvantage, knowledge of it and exploitation of it by the stronger party.(4)

The special disadvantage must be identifiable – such as infirmity of mind or excessive emotional dependence (*such as in Louth v Diprose*) (5). Knowledge on the behalf of the stronger party of this disadvantage is essential alongside an active exploitation of it to their benefit. Cases such as *Commercial Bank of Australia Ltd v Amadio* (6) demonstrate the process of the court in ascertaining the nature of the Unconscionability in terms of conduct rather than result, which cannot be said for *Bridgewater v Leahy*.

Bridgewater v Leahy

The majority decision in *Bridgewater v Leahy* is potentially indicative of a movement toward arbitrary application of the principles of Unconscionability.

The facts involved the sale of a property at far less than the market value by a farmer (Bill) to his nephew, the Respondent by an option granted in his will. Bill's daughters, Appellants before the High Court, sought to have this option put aside by claiming Unconscionability on the grounds of a special disadvantage on Bill's behalf and an exploitation of this alleged special disadvantage by the nephew/Respondent.

The key phrase in the majority judgment that demonstrates the shift away from a focus on the conduct of the stronger party is:

"The equity to set aside the deed may be enlivened not only by the active pursuit of the benefit it conferred but by the passive acceptance of that benefit (7)." (italics added)

The court describes the option as an 'improvident transaction' on Bill's part, and ascribes unconscionable conduct to the Respondent in the passive acceptance of this benefit. It was conferred by a man deemed mentally competent at the time of his inclusion of the option, to his nephew, in the will. Here we are lacking all of the major components of the doctrine of Unconscionability; without the initial special disadvantage there can be no knowledge of it, and without either there can be no exploitation. To find on grounds of Unconscionability thus seems a strange step to take. To attempt to understand this we must

(1) (1998) 158 ALR 66

(2) Kirby, M., 'Part II The Law and its Institutions' in *Through the World's Eye*. (Sydney, 2000) p. 93

(3) dalPont, G., 'The Varying Shades of "Unconscionable Conduct"' in *Australian Bar Review*, Vol. 19 (2000) p. 144

(4) dalPont, G., 'The Varying Shades of "Unconscionable Conduct"' in *Australian Bar Review*, Vol. 19 (2000) p. 138

(5) (1992) 175 CLR 621

(6) (1993) 151 CLR 447

(7) (1998) 158 ALR 66 at 92

"The equity to set aside the deed may be enlivened not only by the active pursuit of the benefit it conferred but by the passive acceptance of that benefit."

look at Justice Kirby's views on Judicial Activism.

Judicial Activism

The four elements that Justice Kirby ascribes to judicial activism are: opportunity, need, inclination and methodology. In relation to *Bridgewater v Leahy* we must ask 'what was the opportunity presented? What need is there to divert the previous course of equity? Why were the judges inclined toward an active change? What methodological framework is employed to bring the preceding three into a harmony of decisive action?'

Methodology

Justice Kirby suggests that the courts should be perceived as a mechanism for change tempered by 'the very nature of the judicial function'.⁽⁸⁾ The adversarial nature of the court and its inevitable reliance upon the cases brought before the bench limits the capacity for radical change. Despite these specific limitations the decision in *Bridgewater v Leahy* does not seem tempered at all by the need for 'certainty and predictability', which Justice Kirby also endorses.⁽⁹⁾

Opportunity

Bridgewater v Leahy is a case concerned with the role of equity in contractual relations, specifically the doctrine of Unconscionability and how it affects issues regarding freedom of contract. There is, according to Justice Kirby, an 'abiding judicial obligation to provide reasons for decisions to put a brake on purely idiosyncratic judicial change.'⁽¹⁰⁾ The decision in *Bridgewater v Leahy* was a majority judgment and cannot be claimed to be entirely idiosyncratic. What need was there then to make a shift in the principles of the doctrine of Unconscionability?

Need

Perhaps, as Justice Kirby discusses, the increasing tendency of the legislature to reform law on the basis of political value⁽¹¹⁾ leads to a need for judicial activism. An increased pressure from the legislature to consolidate civil control has potentially inspired a broadening of the recourse to equitable remedy in the event of legislated contractual inequality. This has much relevance to the current problems with IR legislation.

Inclination

Kirby bears witness to the possibility of 'judges who have a large confidence in their own abilities to foresee the direction in which the 'river' of the law is flowing.'⁽¹²⁾ He suggests that 'valuable reformist work may be done' and that it may be a 'justifiable adaptation of

underlying legal principles.'⁽¹³⁾ An adaptation takes place in *Bridgewater v Leahy*. Accusations of idiosyncrasy are defensible as a majority handed down the judgment. A need was perceived in a changing world climate, and the prescience of the adaptation of the principles of Unconscionability seems to be borne out by the current political climate. It does not seem to be a justifiable adaptation.

The Relevance of the Adaptation of the Equitable Doctrine of Unconscionability

The Howard government's proposed Industrial Relations legislation gives legal justification to a stronger party's exploitation of the weaker, whilst denying the intervention of the Doctrine of Unconscionability by this self-same justification.

The stronger party can surely not be a stronger party if legislation allows for the inequalities that become inherent in the bargaining positions between the two parties. The weaker party conversely cannot be specially disadvantaged if the legislature has enshrined the contractual process to invalidate such distinctions as 'weak' and 'strong'. There are many other issues of law concerned with the proposed IR legislation including Constitutional law and conflict between Federal and State power, this is another problem entirely.

The weaker party to a contract based upon the inequalities that would be a part of the IR legislation may not have recourse to the courts through a traditional interpretation of the principles of Unconscionability. The decision in *Bridgewater v Leahy*, on the other hand, provides recourse by focussing on the result rather than the conduct or process. Like colloquially named 'Sleepers Laws' the potential of *Bridgewater v Leahy* is to provide relief where circumstances are stacked so as to deny remedy by ordinary course of law and where equity is the last option.

Conclusion

Judicial activism is an ever-present part of the system of law in Australia. Justice Kirby, amongst others, inescapably presents judgments that contain policy-based reasoning, such as a broader view to contractual fairness. Considering the surrounding cases, such as *Louth v Diprose* and *Amadio* where the principles of Unconscionability are retained there seems little possibility that *Bridgewater v Leahy* will have any significant impact. Considered in hindsight it could appear that the decision has some relevance to

⁽⁸⁾ (10) Kirby, M., 'Part II The Law and its Institutions' in *Through the World's Eye*. (Sydney, 2000) p. 94

⁽¹¹⁾ *ibid.* p. 95

⁽⁹⁾ (12) (13) *ibid.* p. 96

emerging issues of freedom of contract in industrial relations law.

Despite hopes as to the purpose of such radical changes in the doctrine of Unconscionability it is questionable whether this departure from established law has any pertinence or use beyond introducing an uncomfortable instability. But, as we have waited for a possible relevance in the changes to the doctrine, we perhaps should wait to see whether the possibility bears fruit.

Lucy de Vreeze is 23, lives in Hobart, Tasmania, and is currently studying an Arts/Law degree.

Spring 2006 Quiz Questions

1. The Inland Revenue last year merged with HM Customs & Excise. What is the new department's name?
2. Who will be the first chairperson of the Judicial Appointments Commission?
3. What date did the Civil Partnership Act 2004 come in to force?
4. What Chambers does the former Lord Chief Justice, Lord Woolf, work from as an arbitrator?
5. "trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives". Who originally gave this quotation?
6. Which case affirmed the principle that a drunken individual, who mistakenly believes they are under attack, cannot rely on the defence of self-defence?
7. When was the last occasion legislation was passed using the Parliament Act 1949?
8. What is the name of the last Statute that was passed using the procedure mentioned in question 7?
9. Which QC's book is entitled "The Tyrannicide Brief"?
10. What is the voluminous practitioner text on employment law/industrial relations commonly known by?
11. What year did the Bank of Credit and Commerce International (BCCI) collapse?

12. Who appoints a Notary?

13. Which jurist wrote the book "The Authority of Law"?

14. What percentage of all criminal cases are tried by District Judges (Magistrates' Court)?

15. Which case held that where a party has signed a written contract, that party will be bound by those terms even if they did not read them?

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Megarry House, 119 Chancery Lane, London,
WC2A 1PP (or email your answers to)
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Answers must be received by June 23 2006 when the draw will take place. The Judge's decision is final and no correspondence will be entered into. Answers will be printed in the next issue.

See last issue's answers on page 24

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Romance by David Mamet

Almeida Theatre, London N1, from 6 September 2005
(Script: Methuen £8.99)

The American playwright David Mamet is famous for such stage triumphs as *Glengarry Glen Ross*, *American Buffalo* and *Oleanna*. His screenwriting credits include *The Postman Always Rings Twice*, *The Untouchables* and *Wag the Dog*. So the prospect of seeing a new play by him would have been fairly tempting, whatever the subject matter. What tipped the balance for me, as a law reporter, was that this one was billed as “an uproarious courtroom farce which lampoons the American judicial system and exposes the hypocrisy surrounding personal prejudices and political correctness”.



Actor Nigel Lindsey gets angry as the defendant

The American legal system is, it is fair to say, far from perfect. So there is certainly scope for ridicule. But Mamet's attempt at farce is so over the top it falls flat on its face. In short, a wasted opportunity, all the more disappointing given the premise of the play and his promise as a playwright.

The courtroom he conjures up is more fanciful than farcical. The judge is a pill-popping hypochondriac with a bad case of hay fever, who is so doped up on antihistamines he seems to have lost his marbles, or at any rate bearings. The prosecutor, who preaches traditional hard-line morality, is a closet homosexual whose gay lover has made a secret assignation with... (all right, just in case, I won't give the game away). The defendant is a chiropractor who may or may not have been in Hawaii when he shouldn't have been (though it never becomes clear why not) and who wants his attorney to frame a suitable alternative hypothesis to fit such facts as have, inconveniently, come to light. When his attorney refuses, he grows indignant: “Why did you go to *law* school? If you didn't want to *lie*?”

The action takes place during some sort of criminal proceedings, the precise nature of which is never

made clear. Nor do we ever learn of what crime the defendant stands accused. As there does not seem to be a jury present, one might infer that it was some sort of preliminary hearing. This lack of specificity may be deliberate, an attempt to recreate the sense of bewilderment and confusion which any casual observer is likely to feel on wandering into a courtroom while proceedings are in progress, but it detracts from the play's effectiveness as satire because it feels less rooted in, and therefore less targeted on a particular aspect of, the real world.

The farce seems to consist mostly of sudden revelations of hypocrisy or latent prejudice, as for example when defence counsel, during a private consultation with his Jewish client, suddenly comes out with a string of anti-Semitic insults. His immediate and abject apologies are accepted magnanimously, only to be countered afterwards with an equally vile stream of anti-Christian prejudice. It's the sort of stuff that makes you gasp, or wince, rather than laugh. A bit like watching the guests on Jerry Springer dismantle their own dignity for the sake of a brief candle-flame of talk show celebrity, only without the presumption of verisimilitude enjoyed by reality TV.

Back in court, the judge reveals that he, too, is anti-Semitic, and homophobic as well. When the prosecutor's gay lover turns up and turns out to be the same man (nicknamed “Bunny”) that the defendant was pretending not to have gone to Hawaii to meet (oops, now I've given the game away), and then the defendant confesses to bestiality (with a goose!) all sense of courtly decorum would seem to have been abandoned. But again, while a lot of people shouting at each other might be “uproarious”, it isn't necessarily funny. In the end things get so silly that it begins to feel more like an opera by Donizetti (but without the jolly music) or one of those feeble sitcoms that descend into slapstick when ratings falter.

It is embarrassing too, because Mamet is no mere



Frasier star John Mahoney dons the judge's robes for his part in *Romance*

beginner. I came away with the impression that, far from exposing the latent prejudices, he was simply exploiting them, even revelling in them; and that his confrontational theatre was aimed not at catharsis but a sort of gleeful smug titillation. The comparison with reality TV seems ever more apt.

There are hints in the text (I bought the script) of something better. "This is the age-old problem facing Jurisprudence", the judge says at one point. "Oh, I'd like to sit up there, and sentence people to death, and have a reserved parking space, and so on. It never occurs to you that there's a *burden* which comes with it. Nooo. The Burden of Office. That burden is ... (pause) uh.... (pause). It's *uncertainty*." One can see where Mamet might be coming from. He's not entirely unsympathetic to the judge's position, but he can't resist spicing up what is ultimately a fairly routine observation about the legal process with a cheap laugh about free parking and an opportunity for the actor (in that drawn-out "Nooo") to ham things up a bit.

As it happens, the judge in the production I saw, at Islington's Almeida Theatre, was played by John Mahoney, best known to viewers of the sitcom *Frasier* as the radio-shrink's plain speaking dad, Martin Crane, and probably the main reason why most of the audience had come. He did his best with the part, and the rest of the cast was also good — notably Paul Ready as the gay lover Bernard, aka Bunny. In fact the production as a whole was excellent, as you'd expect from this trendy, cutting-edge theatre. It just seems a pity they hadn't something a bit more cutting, a bit more edgy, to work with.

CRIME: Human rights — Right to fair trial — Suspected international terrorists — Secretary of State issuing certificates to detain under temporary emergency statutory provisions — Detention on basis of reasonable suspicion — Alleged reliance on evidence of third parties subject to torture in foreign state — Whether evidence admissible — Anti-terrorism, Crime and Security Act 2001, ss 21, 23, 25 — Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034), r 44(3) — Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1990) (Cm 1775), art 15

A and others v Secretary of State for the Home Department (No 2) [2005] UKHL 71

HL: Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord

Carswell and Lord Brown of Eaton-under-Heywood: 8 December 2005

Evidence procured by torture, whether of a suspect or witness, was not admissible against a party to proceedings in a British court, irrespective of where, by whom or on whose authority the torture had been inflicted.

The House of Lords so held when allowing appeals by A and nine other appellants from the Court of Appeal (Pill and Laws LJ, Neuberger LJ dissenting) [2005] 1 WLR 414 which dismissed their appeals from the "generic judgment" dated 29 October 2003 of the Special Immigration Appeals Commission (Ouseley J, Mr CMG Ockelton and Mr J Chester) which, when refusing to cancel certificates issued by the Secretary of State under s 21 of the 2001 Act, concluded that the fact that evidence had or might have been procured by torture by foreign officials without the complicity of British authorities was relevant as to its weight but did not render it inadmissible. The Commonwealth Lawyers Association with two others and Amnesty International with 13 others intervened in the appeals

LORD BINGHAM OF CORNHILL, having referred extensively to common law and Strasbourg jurisprudence and international instruments and pronouncements of the United Nations and the Council of Europe on the need to adhere to humanitarian law in adopting measures to counter terrorism, said that the principles of the common law, standing alone, compelled the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But those principles did not stand alone; effect had to be given to the European Convention on Human Rights which itself took account of the all but universal consensus embodied in the Torture Convention. Given the nature of the proceedings before it the commission could not adopt a conventional approach to the burden of proof: the detainee had to give a plausible reason for alleging that a statement sought to be adduced against him had or might have been obtained by torture. If he did so, it was for the commission to direct necessary inquiries to form a fair judgment whether the evidence had, or there was a real risk that it might have been procured by torture or not. If the commission was unable to conclude that there was not a real risk that it had been so obtained they should refuse to admit it, otherwise they should admit it. He disagreed with Lord Hope's test which he considered, in the real world, could never be satisfied.

LORD HOPE OF CRAIGHEAD, agreeing that the appeals be allowed and that a conventional approach to the burden of proof was inappropriate, said that the applicable test was that stated in art 15 of the Torture Convention: Was it established, by means of such

diligent inquiries into the sources that it was practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State was obtained under torture? If so art 15 required it to be left out of account. If the commission were left in doubt, they should admit it and bear their doubt in mind when evaluating it.

LORD NICHOLLS and LORD HOFFMANN delivered opinions concurring with Lord Bingham; LORD RODGER, LORD CARSWELL, and LORD BROWN delivered opinions agreeing with Lord Hope.

Appearances: *Ben Emmerson QC, Philippe Sands QC, Raza Husain and Danny Friedman* (Birnberg Peirce & Partners, Tyndallwoods, Birmingham) for the appellants; *Sir Sydney Kentridge QC, Colin Nicholls QC, Timothy Otty, Sudhanshu Swaroop and Collen Handley* (Freshfields Bruckhaus Deringer) for the first interveners; *Keri Starmer QC, Nicholas Grief, Mark Henderson, Joseph Middleton, Peter Morris and Laura Dubinsky* (Leigh Day & Co) for the second interveners; *Ian Burnett QC, Philip Sales, Robin Tam and Jonathan Swift* (Treasury Solicitor) for the Secretary of State.

Reported by: Diana Procter

Bailment – Damage to bailed chattel – Lease of rolling stock to train operator – Rolling stock damaged – Bailor having reversionary title not in possession during term of lease – Bailor fully indemnified by bailee – Whether bailor entitled to recover damages from negligent track operator

HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd (formerly Railtrack plc) [2005] EWCA Civ 1437

CA: Sir Andrew Morritt, C, Longmore and Lloyd LJ: 25 November 2005

A bailor of goods with no right to possession of the goods during the term of the lease was not entitled to recover the repair costs and the full value of the lost goods from the negligent wrongdoer in circumstances where the bailor's proprietary interest in the reversion had suffered no permanent injury and the bailor had been indemnified by the bailee.

The Court of Appeal so held dismissing the appeal of the claimant, HSBC Rail (UK) Ltd, from the decision of David Steel J on 16 March 2005 hearing a preliminary issue as to whether the claimant, as owners of rolling stock leased to a train operating company, GNER, was entitled to claim against the defendants, Network Rail

Infrastructure Ltd (formerly Railtrack plc), in respect of damage caused to that rolling stock by the defendants's breach of its duty to take reasonable care. The judge held that the claimant was only entitled to recover in respect of any permanent injury to its reversionary interest.

When a train was derailed near Hatfield in 2000 two of the claimant's carriages were damaged beyond economic repair and a number of others damaged and subsequently repaired. The defendant owner and operator of the railway track infrastructure admitted liability in negligence for the purpose of the proceedings. The relevant insurance provisions contained a clause limiting liability to an aggregate sum of £5m.

LONGMORE LJ said that the convenience of the claimant as bailor being able to sue for substantial damages (if they were entitled so to do) was that, in such an action, the contractual limitation clause could be neatly side-stepped. A reversionary owner of chattels could sue a negligent wrongdoer if there was permanent damage to his reversionary interest: see *Mears v London and South Western Railway Co* (1862) 11 CBNS 850 and *Tancred v Allgood* (1859) 4 H & N 438. In the present case there was no doubt that the carriages were destroyed or seriously damaged. The real problem was to assess the damages to which the claimant was entitled. If one ignored insurance for the moment, the position was that the claimant had been paid the full value of the carriages which were beyond repair and the repairable carriages which had been repaired. In those circumstances whatever may have been the position shortly after the derailment occurred the claimant was now not out of pocket in any way and, on ordinary principles, had suffered no loss and could make no recovery. The claimant could cite no authority in support of its proposition that a goods-owner without possession, or the immediate right to possession, could recover the value of the goods even where he had been compensated by his bailee. There was, however, just no need for a bailor or lessor to be compensated if the goods had been repaired or replaced and he had suffered no loss. The limitation or exception clause in his contract with the tortfeasor which a bailee wished to avoid was no part of the bailor's loss.

In the alternative the claimant contended that the only reason which it had suffered no loss was that it had been compensated by insurance which had to be left out of account. It was unrealistic to regard an insurance policy which insured the respective rights and liabilities of both the claimant and GNER as indemnifying the claimant rather than GNER. The reality was that the claimant had, in the event, suffered no damage to its reversionary interest because GNER had fully indemnified it, not because it had been indemnified by insurance. The appeal would be

dismissed.

LLOYD LJ and SIR ANDREW MORRITT C agreed.

Appearances: *Christopher Butcher QC* and *James Brocklebank* (Burgess Salmon) for the claimant; *Michael Crane QC* and *Katherine Watt* (Kennedys) for the defendant.

Reported by: Carolyn Toulmin, Barrister



All cases are selected from:

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The London Law Review Gathers Momentum

Following an extremely successful, widely praised first issue, The London Law Review returns with another journal of academic excellence. The content in the latest issue is as diverse as that of the last. My own paper on funding access to justice is followed up by an insightful piece on the law of restitution and an article on the payment of damages claims from Denzil Lush, Master of the Court of Protection.

The main body of the journal looks closely at citizenship, personality, privacy, and human rights both in the UK and in Europe. At a time when the threat of terrorism continues to weigh on our minds, Elspeth Guild, a senior partner at Kingsley Napley, offers her thoughts on the UK courts, human rights and foreigners in exceptional times. Joanna Krzeminska of the University of Bremen provides an insight into the freedom of commercial speech in the European Union, while Eugenia Dacaronia of the University of Athens gives us an overview of the interpretation of wills under Greek law.

It gives me great pleasure to express my support for this publication. Students involved with the editorial side of the Review gain critical exposure to the work of leading academics and legal practitioners while honing their writing, research and analytical skills. Revenues created through subscriptions go straight back into legal education in the form of scholarships and prize money. I would encourage the legal community to support The London Law Review in its aims and objectives, as articles and notes in the Review provide an important source of academic scholarship. This provides both barristers and solicitors with a forum to broaden their knowledge, while leading and inspiring tomorrow's generation of legal advocates.

by Kevin Martin

President of the Law Society of England and Wales

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The Civil Partnership Act 2004 by Joanna Pratt

The Civil Partnership Act 2004 will come into force on 5th December 2005. This Act will enable same sex couples to obtain formal recognition of their relationships. The rights and responsibilities which they gain will place them in an almost identical position to married couples.

Previously, same sex couples were treated differently to married couples in a plethora of areas irrespective of the length of their relationship and the level of commitment. Highlighted below are a few of the ways in which the 2004 Act alters other statutes to provide for equal treatment. It is not a resume of all the changes introduced - the Act runs to 264 Sections and 30 Schedules.

REGISTRATION

Section 1 of the Act defines a "civil partnership" as a relationship between two people of the same sex which is registered. Relationships registered overseas are recognised if they fall within Part 5 of the Act. The eligibility criteria to register a civil partnership in England and Wales are similar to those for marriage. Both parties must be 16 or over. For parties who are under 18, the consent of their parent or guardian is required. They must both be single i.e. neither is married nor already registered as the civil partner of someone else. There are also prohibitions against the registration of the relationships of certain relatives. A registration ceremony may not take place within religious premises, even if the religion or faith supports and recognises same sex unions.

Before a civil partnership can be registered, 15 days' notice must normally be given to a registration authority. The first date on which any civil partnership can be registered will therefore be 21st December 2005. Both parties must have resided in England and Wales for at least 7 days prior to the giving of the 15 days' notice.

CHILDREN

The Children Act 1989 is amended by Section 75 of the Civil Partnership Act 2004. Section 112 of the Adoption and Children Act 2002 has already amended the Children Act to enable step parents to acquire parental responsibility. (The Children Act refers to Parental Responsibility as all the rights, duties, powers, responsibilities and authority which a parent has for a child.) The 2004 Act extends the acquisition of parental responsibility to civil partners. Where one partner has parental responsibility for a child, and is in a civil partnership, the second partner can acquire parental responsibility by :

(i) The written agreement of the partner who already has parental responsibility if he or she is the only person who has parental responsibility for the child;

(ii) The written agreement of both the parents of the child; or

(iii) An order of the court.

Section 77 of the 2004 Act also extends the category of applicants for residence and contact orders under the Children Act to include current or former civil partners in relation to a "child of the family". The Civil Partnership Act 2004 amends Section 144(4) of the Adoption and Children Act 2002 to include civil partners as potential joint applicants for an adoption order.

RIGHTS OF OCCUPATION OF FAMILY HOME AND DOMESTIC VIOLENCE

Section 82 and Schedule 9 of the 2004 Act amend Part IV of the Family Law Act 1996. The right of a spouse to occupy a property which the other spouse is entitled to occupy is now extended to include civil partners. They will be able to apply for an occupation order under the 1996 Act. The definition of "associated person" in Section 62 of the Family Law Act 1996 will also be amended to include a former civil partner, a same sex cohabitant or former cohabitant, a relative of a civil partner or cohabitant and a party to a civil partnership agreement. (Section 73(3) of the 2004 Act states that a civil partnership agreement is an agreement between two people to register as civil partners or to enter into an "overseas relationship".) Civil partners or other associated persons will also be able to apply for a non-molestation order.

DISSOLUTION

Once a same sex relationship has been registered, it can only be brought to an end by death, annulment or by a "dissolution". The consequences of death upon a civil partnership are considered later in these notes.

As with divorce, the parties must wait until 12 months after their registration ceremony before they can bring proceedings to formally dissolve the partnership. Section 44 deals with the dissolution of a civil partnership. A dissolution order can only be made where the partnership has "broken down irretrievably". In order to prove that ground, the party applying for the dissolution must show one of four facts. These are the same as in divorce law, save that there is no fact of adultery, but it would be possible to rely upon sexual misconduct as the basis for unreasonable behaviour. If the court accepts the Applicant's fact for dissolution, a conditional order will be made. Six weeks afterwards,

a final order can be granted.

The majority of the provisions relating to dissolution and annulment follow the divorce procedures, but there are some differences. For example, unlike a marriage, a civil partnership cannot be rendered void on the basis of non-consummation. A civil partnership is however voidable on the basis that at the time of its formation, the respondent to the application for annulment was pregnant by someone other than the applicant.

A civil partnership can also be the subject of a Separation Order (Sections 56 and 57). This is equivalent to Judicial Separation in divorce law. Under the provisions of Section 63, in any proceedings for a dissolution, nullity or separation order, the court must consider the position of any children of the family and whether it needs to exercise any of its powers under the Children Act 1989. This mirrors the requirements within matrimonial proceedings.

FINANCIAL CLAIMS UPON TERMINATION OF A CIVIL PARTNERSHIP

Section 72(1) of the Act envisages that Schedule 5 is to provide financial relief which "...corresponds to provision made for financial relief in connection with marriages by Part 2 of the Matrimonial Causes Act 1973". Clearly Parliament intended that the financial claims which can be made should be the same as in matrimonial proceedings currently. It is assumed therefore that all the existing case law relating to Ancillary Relief proceedings within divorce will be applied to civil partnerships which are being terminated. The factors which the court is required to take into account in Schedule 5 are almost identical to the provisions of Section 25 of the Matrimonial Causes Act 1973 which deals with financial relief following termination of a marriage. The concept of the court trying to achieve a clean break if possible is also adopted - see Schedule 5 paragraph 23. As in divorce law, the court's first consideration will be the welfare of any child under the age of 18.

An application for financial relief must be made before a new civil partnership or marriage is entered into or the right will be lost - Schedule 5 paragraph 48. As in divorce proceedings, a financial order does not become effective until the final order is made dissolving the partnership. The types of orders which are set out in Schedule 5 are identical to the provisions of the Matrimonial Causes Act 1973.

DEATH

In general, the Act seeks to put the survivor of a civil partnership in the same position as a widow or widower.

A. Schedule 4 amends the Wills Act 1837 to make provision for surviving partners identical to

spouses. An existing will is automatically revoked on the registration of a civil partnership. Equally a civil partner will be on the same footing with a surviving spouse for intestacy. The Inheritance Tax Act 1984 will also be amended by other legislation. Registered partners will be entitled to the 'spouse exemption' upon the death of the other partner and the same rules will apply for lifetime asset transfers between civil partners.

B. The Fatal Accident Act 1976 is amended by Section 83 of the 2004 Act to include civil partners in the category of dependants who may make a claim as of right, and also for unregistered same sex partners to apply if they have been living in the same household for at least two years before the date of death.

C. A surviving civil partner will have exactly the same entitlements in respect of the State Pension as widows and widowers. The 2004 Act does not amend all private sector pension schemes in the same way.

D. Schedule 4 paragraph 15 amends the Inheritance (Provision for Family and Dependents) Act 1975. Civil partners have the same claims as spouses. The same method is to be adopted by the court when considering what provision is appropriate, namely what financial award would be made upon dissolution of the civil partnership. Former civil partners are also on the same footing as former spouses.

E. Civil partners will be entitled to register the death of the deceased partner. The Coroners Rules will also be amended by delegated legislation by adding civil partners to the list of persons entitled to ask questions as of right at an inquest.

CONCLUSION

In the vast majority of situations, the parties to a registered civil partnership will be in the same position as spouses. Numerous statutes are amended by the Civil Partnership Act 2004 to engrain this. There is, at last, a means for same sex relationships to have legal status, but the legislation makes no mention of "marriage" itself. The fact that the statute specifically prohibits the registration ceremony from taking place on religious premises may be viewed by some as discriminatory - although there is nothing to prevent some form of religious blessing of the union.

Of most concern to matrimonial lawyers is the fact that no legislation has yet been enacted to deal with the wholly unsatisfactory provisions which cohabiting heterosexual couples and unregistered same sex partners have to fall back on when their relationships

break down in order to resolve any contentious financial issues. The Civil Partnership Act 2004 is nonetheless a piece of legislation which should make the legal position of a large number of people in society clearer, and also rectify a significant amount of inequality between heterosexual spouses and same sex partners.

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Notes from the Editor

Dear Readers,

Welcome to the Spring 2006 edition of the Student Newsletter. In this extended issue we have more articles and news than ever before.

Remember this is your Newsletter and we need your input! If you are interested then please send material to: DanC@iclr.co.uk or at the usual address.

Any letters or questions submitted will not only be published in the Newsletter but also on our website via our new student forum at www.lawreports.co.uk. You can have your articles posted online, or ask one of our reporters a question direct.

I hope you continue to contribute and help this Newsletter to grow and thrive.

All the best for the term ahead and I hope you all have a productive and rewarding 2006.

Best wishes
Dan Collacott

‘Mr Civil Rights’-Thurgood Marshall

1908 - 1993

By Helen Yates

In administering subscriptions for universities and institutions overseas I often find myself wondering about the names of libraries and who the people were that led to the namings - John Adams Courthouse, Hugh F Macmillan Law Library, Edward Bennett Williams Law Library. In the summer I decided to look some of them up out of curiosity and the first I picked out was the Thurgood Marshall Law Library at the University of Maryland. I never got beyond this one because what I discovered led to a rather obsessive search into the life and work of this man, who became known as “Mr Civil Rights”. Since I began reading about Thurgood Marshall, so many things occurring around the world have shown how the liberties, rights and recognitions that he fought for continue to be threatened and how deep the divisions continue to be.



Thurgood Marshall Memorial Figure, Located in State House Square, University of Maryland. Erected in 1996 to mark his first important victory within his fight for school integration.

The ravages of Hurricane Katrina aroused resentments in the Southern USA, the perceptions it aroused making it timely to remember the struggle of the black South and the sacrifices and suffering of many to bring about fair representation and justice for all non-white Americans. In the UK at the moment, questions of constitutionality and civil rights are at the forefront especially following the 7th July bombings. The recent death of Rosa Parks, whose courageous refusal to give up her seat on a bus to a white man in 1955 as required by law was a catalyst for the modern civil rights movement, was yet another reminder of the long struggle for integration and equality. Reading the story of Thurgood Marshall, about the injustices of the segregational "Jim Crow" laws in the Southern US, and the brutality, bigotry and contempt with which Negro citizens were treated, whether openly or slyly, and learning how difficult it is still to change attitudes, all this has at times reduced me to tears and despair. But it has also inspired and humbled me, to see how many people of honesty and integrity, and especially this one man, could make a difference and break down walls. Most of the story I have learned from one book, "*Dream Makers, Dream Breakers: the World of Justice Thurgood Marshall*" by Carl T Rowan (Little, Brown & Company, 1993), and I cannot recommend this book highly enough to anyone who is interested in American history, particularly civil rights history, the Constitution or just in a wonderful biography of a dedicated individual. It is a sometimes harrowing, roller-coaster read and pulls no punches, particularly when the author discusses some of the "dream-breakers" and how he feels that during the later years of Marshall's time on the Supreme Court several of the presidencies and the changed make-up of the Court had been threatening the gradual erosion of so much that had been fought for long and hard. The book ends with a mixture of despair and hope, and also a warning: America and other nations are nations of men, not laws, and we have to ensure that no one person or group can destroy fundamental liberties and rights or the independence of the judiciary; and it is up to all of us to build bridges as although laws can be made to protect rights and equality it is for us to believe in them and foster those attitudes.

Marshall, born in 1908, was to be a man of "firsts" - not only in the first victories that he won for civil rights as director and chief attorney of the National Association for the Advancement of Colored People (NAACP)'s Legal Defense and Educational Fund but also as the first black judge to sit on the United States Court of Appeals for the Second Circuit, then the first black solicitor general and finally the first black Supreme Court justice. He won 29 of the 32 cases which he argued for the NAACP before the Supreme Court and as solicitor general he argued 19 cases before the Supreme Court of which he lost five. Although he came to be known as "Mr Civil Rights" it should be emphasised that he fought passionately for the rights

of all and not just black southerners; for women (eg in *Roe v Wade*, concerning abortion rights, a woman's right to privacy and control over her own body), for accused prisoners and condemned criminals (eg he vehemently opposed the death penalty, and was in the 5 to 4 Supreme Court majority who brought in the *Miranda v Arizona* decision whereby police were forbidden to interrogate suspects in their custody unless they were informed of their right to remain silent, that their words could be used against them in evidence, and that they had the right to a lawyer) and for all who for reasons of poverty or ethnicity had little or no voice in society or the justice system.

He was born at a time when Jim Crow laws meant segregation and humiliation in many areas of life for black Americans in the South such as transportation and education, where property laws discriminated against them and where as a child he had come up against lynchings as a commonplace occurrence. He became tough and a little wild and learned to stand up for himself. One early punishment at high school, however, did stand him in good stead later. Rather than any physical punishment his principal would consign him to the school's furnace room and make him memorise the US Constitution document which would be so fundamental to his thinking.

Although he got through high school he was deeply resentful that he could not be admitted to the University of Maryland because it was whites-only. Instead he enrolled at Howard University where he met and had his life changed by Charles Houston. Houston was a dedicated lawyer, a perfectionist who could spend a whole day looking for what he felt was exactly the right word needed for a brief. He took a personal interest in Marshall and set alight his determination to fight injustices. Although after law school Marshall began by setting up in private practice, it was impossible in those times, during the Depression, to make a living. Houston was able to persuade Walter Francis White of the NAACP to take Marshall onto his legal department team.

The NAACP was formed in 1909 actually by a core of whites determined to put right the racial injustices in many states, where, for example, judges could be biased to one element of society who had the voting rights while blacks were disenfranchised. It merged with the black Niagara movement to be a more powerful force for the rights of the black population. At this time even Congress and the media were becoming increasingly concerned about the lawlessness that was rife, particularly the numbers of lynchings. Although much of the NAACP activity at this stage was centred around trying to stop this, and there were many areas where justice and liberties had to be sought, Marshall saw education as key, as all the while the black population were forbidden from attending the influential colleges, universities or professional institutions they

could have no real chances or futures in society. In June 1935 he was able to win the right for a black applicant, Donald Murray, to enrol at the University of Maryland (a particularly rewarding victory considering his own rejection), and in 1938 he won a further victory in the case of *Missouri ex rel. Gaines v Canada* (which tragically had then to be dismissed, as the applicant, Lloyd Gaines, inexplicably went missing). At the time of these cases it had appeared to the NAACP that the best policy was to begin attacking the segregation system by insisting that if black applicants could not be enrolled in existing white institutions they must be afforded totally equal facilities in every way in segregated institutions; and where no completely equal institution existed or could be established they must be integrated with whites. This strategy followed the historic principle decided in the 1896 landmark case of *Plessy v Ferguson* that negroes were entitled to equal facilities but that they had to be separate; and it was hoped that the logistical problems and costs of maintaining such a segregated system would wear away the authorities until they eventually accepted complete integration. Yet it became apparent that this would not work or would not work fast enough to make the required breakthroughs; of the cases filed, *Gaines* had collapsed and the University of Missouri had been able to continue with a segregated law school, another suit against the University of Tennessee had failed on a technicality and only the Murray suit had succeeded. Even this had been appealed, but the Court of Appeal had confirmed the ruling, and the importance of that case was that it was the first to really expose or especially to make judges understand the fallacy or ridiculous nature of "separate but equal". Pressure against the university authorities was maintained in further cases, *Sweatt v Painter*, *McLaurin v Board of Regents* and *Sipuel v Oklahoma State Regents*. In the course of the some five years that these cases were running, they attracted media attention and huge discussion and all were eventually won. However, all these were again only partial victories because they did not overturn the "separate but equal" principle, although they did show that the Fourteenth Amendment forbade difference in treatment solely on racial grounds and that those who had won the right to be admitted to a university should be on a completely level playing field to all others. It was also significant that although they were initially enforced in the teeth of strong opposition and antagonism in the institutions and every means including court appeals were tried to get the decisions reversed or otherwise render them useless the dire warnings that had been given as to what would happen if integration was attempted were not fulfilled, and at this level of education it was at least being accepted.

The campaign needed to move on to a new phase, and it was felt that the evils of segregation needed to be proven at elementary and secondary school level, particularly elementary since this was where lasting

psychological damage began. Between 1947 and 1951 in Columbia a campaign had started, inspired by an NAACP speaker and instigated by the Revd Joseph Armstrong DeLaine, to provide bus transportation for black children who often had to walk many miles to their separate school facilities. The authorities refused, saying that they could not ask white taxpayers to pay extra for the provision and the black taxpayers did not pay enough to cover it. This initial petition evolved over these years as the NAACP stepped in and sought to find enough brave people to sign their names to an action requesting equal educational facilities and prospects for the children of Clarendon County. The first two signatures belonged to Harry and Eliza Briggs. They and others involved in the case later suffered greatly as a result of their action, being "punished" by losing their employment. Mr Briggs was later forced to find work in another state which led to ten years of effective separation from his family. Their petition failed before the school board, but Judge Waties Waring, a Federal District Court Judge who had previously ruled against the unfair white primary in South Carolina, was seeking a case which would not only ask for equal facilities but would actually challenge the whole concept of segregation. With the help of Walter White of the NAACP the case of *Briggs v Elliott* (1951) was taken by Marshall to the Federal Court. Marshall introduced expert testimony from a psychologist, Kenneth Clark, who demonstrated by the use of two dolls, identical except that one was black and one white, the psychological harm or "stigmatic injury" that state-imposed segregation did to children. "Which do you prefer?" he asked sixteen negro children aged between six and nine. Ten chose the white doll and said that they thought it was a nice doll. Eleven said that they thought the brown doll looked bad. Clark said that his findings supported other tests carried out with much larger numbers of children which all showed that at a very early age negro children had already suffered the damage of discrimination, developed low self-esteem and feelings of instability and accepted an "inferior" status in society.

The case was lost at federal court level by 2 to 1, with Judge Waring giving a key dissent. He wrote that segregation was per se inequality and unconstitutional. The majority only ruled that the County had to make existing facilities equal. An appeal to the Supreme Court was therefore lodged.

Five Supreme Court desegregation in school education cases, including Briggs, were eventually litigated together under the name of *Brown v Board of Education of Topeka, Kansas*, but their importance went beyond the need to integrate the schools - they brought to the nation's attention all aspects of segregation and discrimination and especially the incredible absurdity of some of the

laws and rules governing race. The brief outlined why, under the Constitution, both segregation and racial discrimination were unreasonable. It also drew once again on the expert testimony of Kenneth Clark as to the extreme psychological harm caused to African American children by such segregation and discrimination. Here Marshall and his principal deputy, Robert Carter, had to hold out for what they believed to be the right strategy in the face of some scepticism from others involved in preparing the case. They doubted the value of such testimony, but it was later vindicated by the fact that the trial court did make a factual finding that the segregation of white and coloured children in public schools had a detrimental effect upon the coloured children, especially when it was seen to have the sanction of law.

Although argument was heard in 1952, the Supreme Court held their decision and in June 1953 asked to rehear the case during the next term, laying out the particular questions that it wished to hear argued. The delay, while disappointing, proved a twist of fate, in that by the time the case was reheard Earl Warren had become Chief Justice in place of Fred Vinson. Vinson had been against any overturning of the *Plessy* principle of "separate but equal", while Warren would later prove to be another towering force for justice and fairness in his time as Chief Justice.

The importance of the eventual victory in *Brown* was that it finally did overturn the principle of separate but equal, and the Supreme Court had ruled that segregation was unconstitutional. Many, including many black people, had been prepared to accept the *Plessy* principle and stop the fight there, because they believed that it would cause greater resentment and anger amongst whites, and in the end make their already hard lives worse. Despite huge and bitter divisions within the NAACP over this dilemma, Marshall was adamant that nothing less than an overturning of the *Plessy* principle would do - only the complete acceptance and integration of the black population which was their due - and made personal interventions and travelled when he could least afford it to try to persuade doubters of the importance of holding out. However, the victory was marred because the Court could not be persuaded to lay down a deadline for the integration. It opted instead to rule that it should be carried out "with all deliberate speed". This gave every opportunity to the hostile boards to stall and place obstacles, tactics which in many cases wearied the federal courts who felt that it was becoming unenforceable. Given the proven damage that segregation was doing to the African American children any delay was in Marshall's eyes a crying shame. Substantial desegregation only came about through such threats as the withdrawal of federal funds to segregated schools, and other strategies such as the opening of private white-only schools also sought to get around the decision. Notwithstanding

this and the slowness of any real change, the 1954 decision was still of paramount social and political importance because the Supreme Court had finally come out against segregation and given notice that the law would now enforce for all the rights enshrined in the Constitution.

Other Campaigns

Even in wartime the black servicemen and others who wished to serve their country suffered terrible abuse and injustices. Perhaps they would be blamed for unsuccessful battles; accused of cowardice or desertion; denied military honours; or just treated cruelly by their fellow servicemen and officers. Marshall spent a great deal of time in Korea and Tokyo fighting the cause of these servicemen. While white supremacy continued it was evident that the black population would remain semi-slaves unless they could win for themselves true political power. The case of *Smith v Allwright* saw Marshall win the right for black Americans to vote in the Texas primary. Marshall could never decide which was more important, voting rights or school desegregation - without an education the coloured population would not have the necessary knowledge, skills, discernment and confidence to take on political forces, to win their causes through wise use of the electoral system and ballot box. Once this first voting case was won, however, it would begin to turn the tide and pave the way not only for more say in how the states were run and governed but also in the fullness of time for more black men and women to come to office. It would be a key stage in the fight for complete citizenship.

As regards the legal and judicial system, again non-white Americans came up time and again against injustice. Oswald Garrison Villard wrote in an article that in many states Lincoln would find justice enforced, if at all, by judges elected by one element in a community to pass upon the liberties and lives of another. The law in many areas was what the police, lawyers or judges said it was. Marshall would stand up and cite the Constitution or the state laws and statutes to embarrass courts by showing what should really be the letter of the law. One case that was a notable example of how the US judicial system of the time was stacked against coloureds, the weak or the poor was the case of *Lyons v Oklahoma* (1944). The case concerned two confessions made by the defendant after his arrest for the horrific murders of three members of one family in 1939. The history of the case is highly disturbing but in brief two separate confessions were brutally coerced from the young black man, W D Lyons, not only through beatings but by psychological means when the bones of the purported victims of the crime were placed in a pan in his lap. When the case came before the Supreme Court the question at issue was whether a

defendant's constitutional rights were violated when his confession to murder was admitted in his trial. The first confession had not been admitted but the second, which had taken place on the same night in a separate place, had. The court said that the question as to the admissibility of the later confession depended on whether it was voluntary, and ultimately decided that they could not conclude that the events leading to the first confession had stayed in the mind of the defendant so much as to influence his second confession. They also felt that the admission of the confession had not denied him a fair trial. Marshall did his utmost and attempted in his brief to raise the concerns many felt about police brutality and "third degree" but the Lyons case was ultimately lost and the defendant went to prison (the fact that the death penalty was not laid down even in such a horrific crime is probably evidence to how uncomfortable the people involved felt). Marshall never got over this defeat and many times sent Lyons what little money he could spare to buy cigarettes or necessities. The injustices and doubts involved in the case may have lingered on in other minds too and after 25 years Lyons was pardoned by the Governor.

Many times during his years with the NAACP Marshall's personal safety was threatened (he once narrowly escaped a lynching in Columbia and a rope and noose was later found at the place where it had been intended to take him), his health suffered and he worked in incredibly straitened circumstances, but his dedication to the cause overcame all and showed what such dedication could, in the end, achieve against all odds. He refused to take the credit for his achievements and often emphasised that it was the ordinary men and women who were courageous enough to take their cases to court in the face of dreadful persecution or threats that should gain the recognition.

The political leaders of the time and their opposition or support were always a key factor in the advancement of civil rights. Many could not afford to antagonise the southern states by openly supporting the cause of the non-whites. Even the FBI, most notably under J Edgar Hoover, was purported to be an enemy of the black civil rights movement and it is surmised that Marshall would have been more a victim of their machinations if they had not diverted their energies to following the rise of Martin Luther King Jr.

In 1961 he went to Kenya to help in writing its constitution and it is worth noting that he was particularly concerned to draft the section which protected the rights of the white minority.

Judicial Appointments

There was, predictably, a dubious reaction to his appointment to the Second Circuit Court of Appeal.

Many still believed that a black person was not intellectually equipped to serve as an appellate judge, even though Marshall had won the highest number of cases before the high court in modern times. It was also felt that perhaps because of his background at the NAACP he would not have the breadth of knowledge needed for the legal issues which were the daily business of the Second Circuit court, having concentrated on civil rights issues. President Kennedy was keen for him to get the appointment and Marshall himself felt that it was important to start the process of getting more black people into the judiciary. He was only the second black person ever to serve on a federal appellate court. According to Carl T Rowan, during Marshall's three and a half years on the Second Circuit he wrote 118 opinions and not one of these was reversed. Rowan also says that as a judge he "wrote for the people", bringing all his lawyer's craft and that ability to bring out the human side of a case, to his opinions. He believed that the law wrought real changes in social policy.

His appointment as Solicitor-General was in fact a part of President Lyndon Johnson's master-plan to get him finally appointed to the Supreme Court. It would give him the additional experience in arguing cases before the Supreme Court which would be an answer to any who would criticise his selection. He enjoyed this time, having all the best resources and skilled legal assistants at his disposal and arguing cases that were naturally of key importance.

To get an idea of the importance of the Supreme Court under the leadership of Earl Warren, Rowan gives the figures that between 1790 and 1865 the Court had overruled only two acts of Congress and 390 state laws, while the Warren court in only sixteen years overruled 29 acts of Congress and 150 state laws and reversed 46 previous Supreme Court decisions. A revolution in justice was indeed occurring and the Constitution was beginning to lead to laws according to the spirit of its founding fathers even in a new world that they could never have envisaged. Marshall's abhorrence of the death penalty was evident in his work, as was his conviction as to constitutional freedoms as evidenced in *Roe v Wade*, *Miranda v Arizona*, and *Stanley v Georgia* (an obscenity case, where Marshall's decision insisted on the right to privacy and that the state could not intervene in what was done or seen in the privacy of one's own home).

Achievements

The qualities that made Marshall such an effective trial lawyer and judge seem to be that he was able to paint vivid pictures of the real sufferings and day to day existence of the struggling black community, the poor and other "underclasses"; the discrimination

that they faced and their lack of opportunities and hope. He was able to bring out the human side of the case and had the ability to make the trial judges and those present imagine what they would feel about justice if they were in the place of those accused or seeking redress. He made them see the everyday realities of the people for whom he was pleading. He had the skill of being able to identify the nub of the issue or the vital facts in the case, and to put them across clearly and eloquently, in common-sense terms all could understand. He tried to change minds and attitudes, and had the gift of being able to get along even with his opponents. His total conviction and integrity were recognised and as well as stinging individual consciences and the conscience of a nation he was often, despite the complete and utter entrenched opposition of politicians, lawmakers, law enforcers and ordinary people in the south, finally able at other levels to move hearts that had seemed totally indifferent or intransigent. He retained an essential belief in the Supreme Court and its justice and a vision as to what the law could help society become. He was an effective speaker and relater of anecdote and paid great attention to detail, ensuring everything was well-recorded in order that he had all that might be valuable or necessary to a later appeal to increase the chances of an unfavourable ruling being overturned. Especially, he brought out the spirit of the Constitution, what had been intended by those who had drafted it and the freedoms for all American citizens that were envisaged by the statesmen, not the interpretations that many would have liked to give to the Amendments. Though many people had some very special things to say about his contribution to the American nation, one of the most moving quotes for me in Rowan's book comes in an extract from Justice Sandra Day O'Connor's tribute to Marshall. She said that his was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to heal them.

It was said of Marshall by Johnson that because of what Thurgood Marshall had done the American nation had finally progressed to the point where race was no longer a bar to anyone of experience and skill making their due way in society. Yet for all his achievements and his belief that the constitution should be a vital, fluid document capable of changing to adapt to new generations, new circumstances, new worlds, as his time on the Supreme Court went on and the composition of his fellow-judges changed, it was clear that political agendas were once again threatening all that he had ever fought for and the liberties and rights of all citizens once again being eroded. In particular the principle of "affirmative action" designed to reverse so many years of injustice by creating more opportunities in education and employment in specifying proportions of black people to be admitted etc, became undermined as resentment grew in difficult economic times that a black person "has taken my job" or "my place". Certain Presidents

were determined to discredit the Supreme Court, its status in society, and its adherence to the Bill of Rights, and to scare Americans into believing that for their own safety the balance of rights and powers needed to swing towards the police and security forces. Marshall could only try to continue to appeal to justice and sense through his forceful dissents (he once said that you have to "get real mad to write a dissent.")! He became increasingly isolated, angry, bitter and disillusioned.

Marshall died in 1993 at a time of hope for change when America had just elected a new president and vice-president, Bill Clinton and Al Gore, from the southern states.

This article can only skim the surface of the rich history of Marshall's life and career and of America, the personalities involved in the struggle, from the presidents and judges to those people who risked



everything to put forward their cases, and the many cases and achievements to which Marshall contributed including rights that we take so much for granted. I have now begun to read Marshall "in his own words", with "Thurgood Marshall: His Speeches, Writings, Arguments, Opinions and Reminiscences", edited by *Mark V Tushnet* (Library of Black America edition, Lawrence Hill Books 2001), and despite being a non-lawyer I am already being entranced and feel as if I am actually present to hear and be stirred by him. If I have learned anything from reading through his life story it is that, in the struggle for human rights, justice and non-discrimination in every society, *IT'S NOT OVER!* We need to keep up the fight and our vigilance always.



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Competition Update

The end of November 2005 saw the 1st Round of the Annual ICLR Mooting Contest take place, with 32 teams pitting their skills against one another.

Below is the draw for the first and second rounds and the teams involved:

1st Round

Oxford Brookes University v City University
Kingston University v Anglia Ruskin University
Christ's College Cambridge v Brunel University
Leeds Metropolitan University v University of Hertfordshire
Corpus Christi College Cambridge v Exeter University
University of Wales Swansea v UWE
LSE London v Cambridge University
Christchurch College Oxford v University of Bristol
Southampton Solent University v Northampton University
University of Wolverhampton v University of Derby
University of Birmingham v De Montfort University Leicester
Bradford University v Manchester University
Lincoln University v Open University
Sheffield Hallam University v Sheffield University
Northumbria University v University of Central Lancashire
Strathclyde University v Dundee University

2nd Round

UWE v City University
Sheffield University v Kingston
Christ's College Cambridge v Corpus Christi College

University
Christchurch Oxford v LSE London

OU University v Southampton Solent University
De Montfort University Leicester v Leeds Metropolitan University
Manchester University v Derby University
Dundee University v Northumbria University

The competition has been fiercely competitive and even produced its fair share of surprises.

At the time of going to press the draw for the quarter finals was about to take place, if you would like to know which teams made it through then please go to www.lawreports.com/Mooting/MootHome.htm to find out more.

The semi-finals are to take place at Gray's Inn on Thursday 28th February, and the final will be held at The Law Society on Thursday 23rd March. Please contact me on the email below if you would like to attend the final.

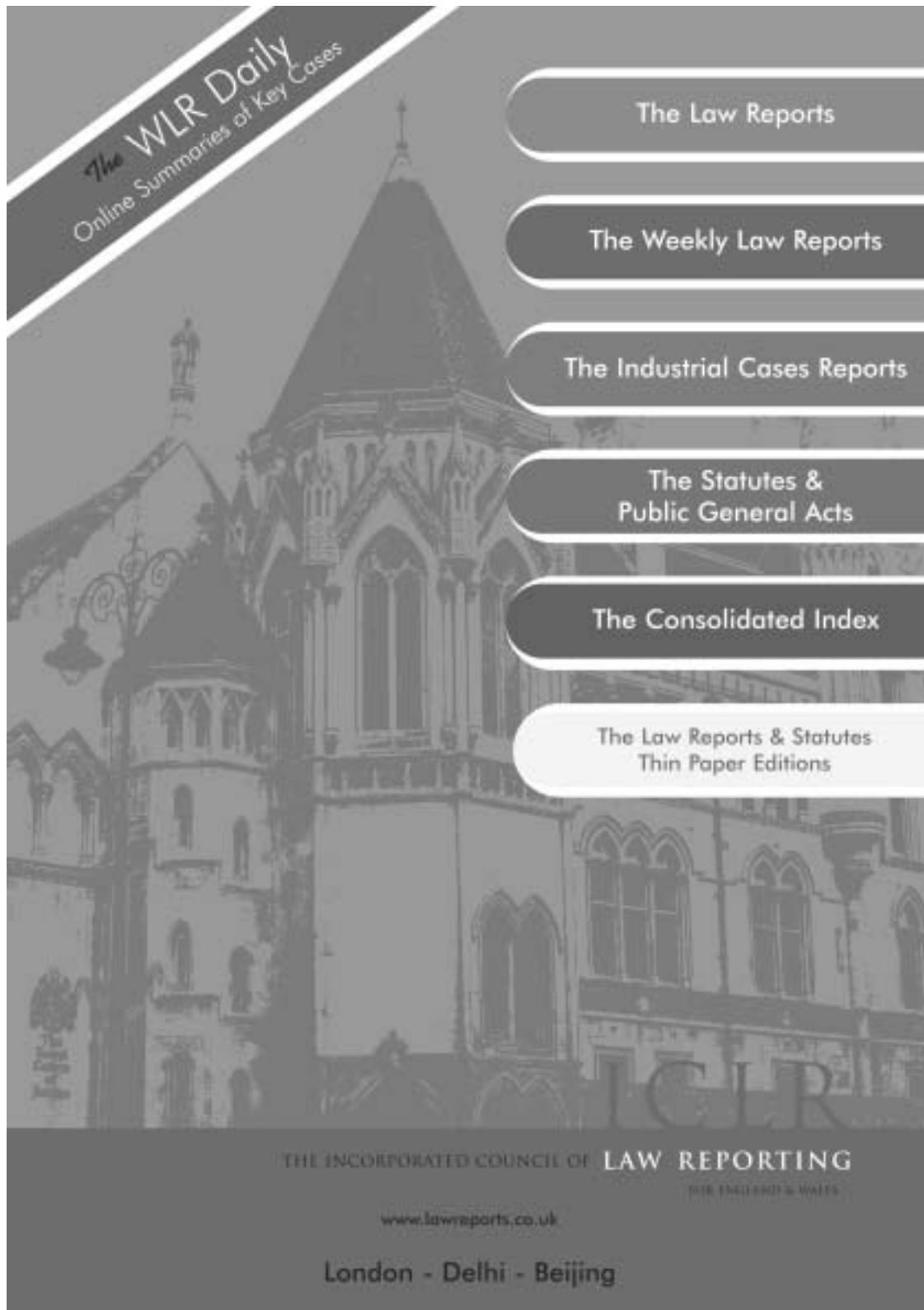
I would like to thank The Law Society, Justis Electronic Publishing and SAHCA for their continued and kind sponsorship of the competition. Thanks also to www.Mooting.net for their support.

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If you are helping to organise an internal or regional mooting contest and would like the ICLR to provide a prize of a free subscription to the Weekly Law Reports, then we may be able to help. We can also help you organise your mooting competition.

For more information please contact Dan Collacott at DanC@iclr.co.uk

If you would like to sponsor the ICLR National Mooting Competition then please contact me also at the above email address.



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BCCI v The Bank of England by Harriet Dutton

After 12 years of litigation incurring total legal costs estimated at £120 million, Deloitte, the liquidator of the rogue bank, Bank of Credit and Commerce International, has dropped its £1 billion claim against the Bank of England. The most expensive case in English history had been hotly contested by the Bank. It emphatically denied all Deloitte's allegations of its dishonesty in 1979 in licensing BCCI as a deposit taker and of its failure to protect depositors from what has become the world's biggest banking fraud which had emerged with BCCI's collapse in 1991 with debts of £9 billion.

BCCI had been founded in 1972 by a domineering, yet extraordinarily charismatic, Indian, Agha Hasan Abedi, who had migrated north to the new Muslim state of Pakistan. Abedi became a close ally of, first, Pakistan's military government, then of Ali Bhutto and subsequently of General Zia, Bhutto's executioner. BCCI had been built up as a world-class bank to manage covert funds that had poured into the secret war in Afghanistan. Thereafter it was used as a laundry for the vast amounts generated by the heroin industry. It was incorporated in Luxembourg but conducted its real business in London. Its meteoric rise in the 1980s made it a crown jewel in the British offshore "hot money system".

In 1991 the Bank of England took the unprecedented step of shutting down what was by then one of the world's largest banks. Assets of BCCI then estimated at \$23 billion had disappeared and still remain unaccounted for. Perhaps it is not surprising BCCI was by then being referred to as the "Bank of Crooks and Criminals International".

But leaving to one side the resulting financial misery and horror, BCCI has provided our legal system with an array of interesting and important judicial decisions, many of which are now reported. They cover various aspects of the law, including banking, liquidation, trusts, conflict of laws. and, perhaps most importantly, employment law.

The first reported decision, a case, heard by the Court of Appeal in 1988 whilst BCCI was still operating, concerned its successful efforts to enforce a charge against a wife notwithstanding the undue influence exerted over her by the husband: see *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923.

However, because of its closure and the resultant redundant and dissatisfied work force, BCCI's most important contribution has perhaps been to employment law. In *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 1 the House of Lords considered claims by redundant employees to "stigma" damages for the disadvantages they alleged they had suffered on the labour market because of the notoriety of their former employer and its misconduct blighting their prospects of fresh employment in the financial services industry. Citing the earlier decision in *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20, the House of Lords upheld in principal an employee's entitlement to such damages. Subsequently, however, the Court of Appeal held that the employees had failed to establish stigma

Assets of BCCI then estimated at \$23 billion had disappeared and still remain unaccounted for. Perhaps it is not surprising BCCI was by then being referred to as the "Bank of Crooks and Criminals International".

as being an effective cause of their inability to obtain new employment: see *Bank of Credit and Commerce International SA v Ali* (No 2) [2002] ICR 1258.

These decisions are but a selection from a large number. The extent of the BCCI litigation is exemplified by the liquidator's activities: already by 1996 the index of reported decisions reveals that In re

Bank of Credit and Commerce International SA (No 10) had been reached: see [1997] Ch 213, where Sir Richard Scott, then Vice-Chancellor of the Chancery Division, dealing with the Insolvency Rules 1998, held that in circumstances where the principle liquidation was in BCCI's original country of incorporation, the English liquidator could be directed to retain sufficient funds to satisfy a set-off claim in the English liquidation. Indeed there has even during the last week or so been listed for pre-trial review in the Chancery Division a case commenced in BCCI's name.

A prodigious amount of litigation has thus resulted from the Bank of England's 1991 action and BCCI's vast amount of missing funds.

But there are other litigants who, although not so prolific, have nevertheless much occupied the courts and the pages of the Weekly Law Reports. One example is the international dispute over missing aircraft and their spare parts between Kuwait Airways and Iraqi Airways. It has already been to the House of Lords where the Iraqi claim for state immunity partially succeeded: see *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 WLR 1147. Subsequent litigation – most recently *Kuwait Airways Corp v Iraqi Airways Co* (No 6) [2005] 1 WLR 2734 - has been mainly concerned with Kuwait's efforts to have the House of Lords' decision overturned on the basis that it was obtained by perjured and fraudulent evidence. It is a dispute that has also raised various important legal issues but nowhere near to the same extent as those given rise to by the BCCI fiasco.

A Mini Adventure by Catherine Gray

I do not know if doing a mini-pupillage can help you to decide to become a barrister. I am certain, however, that it could help you to decide not to become a barrister. Three days shadowing a barrister may be the most interesting, tedious and/or frightening three days of your life. But even if you leave thinking you have decided to throw your aspirations about being a barrister into the nearest rubbish tip, don't be so hasty.

A mini-pupillage is where students are given the opportunity to follow a barrister, or barristers, around during a 3 to 5 day period. By shadowing the barristers, a mini-pupil is able to get a feel for what a barrister's life is like in that particular Chambers. Court, meetings, drafting documents and reading drafts are just a few of the things you could see as a mini-pupil. As with any work experience, each mini-pupillage varies in content, structure and relevance. Also, each Chambers is different from the next; some are friendly while others can be a bit stuffy. But that is one of the important points of doing a mini-pupillage: for aspiring barristers to get to know a Chambers as the Chambers gets to know the student.

Each mini-pupillage experience is different from the last because of the characteristics of the law, Chambers and the barristers themselves. If you are studying or have studied law you are aware of the changing face of the law; read any broadsheet and you will understand how it is under constant moulding. Then take a look at the Chambers you want to undertake a mini-pupillage with. Specialisations differ with each Chambers, and unless you are convinced civil law is your calling, you should try sets with different specialties to get a feel for what law may be more interesting or more right for you. Even then, one set specialising in civil litigation will vary from the next.

Perhaps this is the most important lesson of all: a barrister's work life is forever changing. You must be adaptable to survive as a barrister, that is certain. Cases change: some are pled, others are dismissed and some are stayed to another day. Venues move: one day you might be in Nottingham while the next you're in Derby. The 'actors' you deal with on a day to day basis also change as barristers, solicitors and judges, too, move on around. As a mini-pupil you will gain firsthand knowledge of the flexibility needed to be a barrister.

Yet amongst all of this variation comes a hard truth: a lot of being a barrister is about waiting around. Barristers have to wait for their cases to be called, for the cases before theirs to finish, for witnesses to arrive, for the judge to preside and so on, virtually endlessly.

And as a mini-pupil it can be even worse. Sometimes you will not even know what it is you are waiting around for. So you will sit, or stand, or lean, for hours sometimes. You may get the rare opportunity to ask your pupil master/mistress some questions at this point, but more likely you will end up placed somewhere out of the way with nothing to do but contemplate your choice of career.

But all is not lost, for hiding behind a long wait before a sentencing may be a coffee break, or even an early day. Yes! Remember, court is in session only from 10am to 4.30pm (the latest), so you will probably be home a lot earlier than the barrister you're shadowing. And that is where mini-pupils win: no homework. So even though we have to dress in a suit, pay for our own transport to and from chambers or court, bow as we leave court and meet everyone with a smile and a 'nice to meet you', when we leave the courthouse we're done for the day and home just in time for The Simpsons. Well, usually, anyway.

I think the main point about doing a mini-pupillage (or several, in fact) is to learn from the experience. The barristers you are with may be helpful, but then again they may not be. Some are friendly and eager to offer words of wisdom to those of us aspiring to their chosen profession, while others may see you as little more than excess baggage for the duration of their work day. But the truth is, this is your learning experience, so glean whatever you can from it.

Most mini-pupillages are not formally assessed, though there are a limited number of them given out. If you are unsure as to whether you want to pursue a career at the Bar, hold your tongue when applying for mini-pupillages. They are great for your CV, discussion topics and for your own self-esteem but if you mention you're leaning more towards becoming a solicitor, you may not get a place.

As with much in the law profession competition is fierce, but don't let that put you off. Even if you don't get into the first few that you apply for, keep applying. A good rule is to try to do about 3; at that point you have a good idea of what barristers' working lives are like and whether you'd like to fight to join this prestigious 'club'. If you are not sure whether to do one or not, note that if you're wanting a full pupillage at the end of your BVC, some Chambers ask you to do an assessed mini-pupillage as part of the interview process. So it can be good practice as well for the, possibly, most important part of your career: getting a pupillage.

As a general rule, mini-pupillages are usually undertaken during school holidays in the second or third year of a full time law degree. If you are able

to secure one, there are a few things you should know. First, dress in a suit or something equivalent and make sure it's dark, preferably black. Make sure the shirt you wear is a solid colour, though pinstriped is fine, but no cutesy neckties: this is a formal event. Needless to say, do not be late. I know that is usually a given, but here if you're late you may actually miss your barrister or the case you were allocated to and be placed reading briefs in chambers for the remainder of the day. So plan to be there about ten minutes early to be on the safe side. Also, because barristers lead rather hectic lives, you may not get lunch on some of the days. Many times you might get invited to a coffee break, but other days your barrister will work straight through to 4pm. So if food is crucial to you during the day I'd suggest you bring a powerbar and keep it in your briefcase/handbag/pocket where you might be able to dive out to the restroom and re-energise.

There is one more thing that could be a sticking point for many of us. Unlike many of the training placements at solicitor's firms, I have yet to find one mini-pupillage that is paid. Not only are they not paid, but there is usually no reimbursement for travel expenses either. So when you apply to Chambers you may want to apply close to home in order to mitigate your expenses.

Hopefully this hasn't put you off from trying a mini-pupillage. I think it is a great experience for anyone entering the law profession. It gives you great insight into the workings of court from a perspective that you cannot achieve on your own. It is true there is a lot of competition but you don't know what a particular Chambers is looking for until they tell you that it is not you. Do your research, look the Chambers up on the internet, as most of them have websites, and find out if you're suitable. And good luck, doing a mini-pupillage is well worth the time, energy and expense.

On a personal note, during one of my mini-adventures I met a highly skilled and wholly interesting barrister who was eager to chat with me about my career path and his own. He said, more eloquently than I have remembered here, that becoming a barrister is a difficult process. But then he added, "If you think you might enjoy being a barrister, don't bother. If you think you really want to be a barrister, there is no point. But if years down the line you know that you'll always regret never having tried to become a barrister, then give it a try."

For further information and a listing of Chambers offering mini-pupillages, visit:

www.prospects.ac.uk/law
www.work-experience.org
www.legaltrainee.co.uk
www.doctorjob.com/law

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For more information please go to:
<http://oulawsoc.spymac.com/>



Unique

In addition to **The Weekly Law Reports** the ICLR also publishes **The Law Reports**, the only series with the edited argument of counsel which must always be cited in preference, **The Statutes and Public General Acts**, a companion to The Law Reports, **The Industrial Cases Reports**, covering cases heard in the House of Lords, the Court of Appeal, the Employment Appeal Tribunal and the European Court of Justice, and **The Consolidated Index**, a cumulative index to cases reported by ICLR plus those in The All England Law Reports, Lloyd's Law Reports, Road Traffic Reports, Criminal Appeal Reports, Local Government Reports, Reports of Tax Cases and Simon's Tax Cases.

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Love Hurts

The Ecloga on Sexual Crimes (8th Cent.)

We all know that the past yields many dark secrets, many of which attach themselves to the blackened wings of laws from centuries past. In that regard I present the below extract from the Ecloga of Leo III, which holds a stark light up to the evolution of our tolerance and attitudes towards sex and how this is reflected in law today.

I'm sure were the below laws to still apply today then many innocent adults would find themselves on the wrong end of 'twelve lashes' or encounter the misfortune of having their 'noses split'?

[Adopted from Genokoplos]

The Ecloga of Leo III (717-41) was meant as an abridgment of the Corpus Juris Civilis, but there are several modifications to be noted in it. These have led some scholars to term the Ecloga the first law code to be influenced by Christian principles. This influence is apparent in the following list of criminal punishments, taken from the Ecloga. Although the frequently mentioned punishment of mutilation might offend modern sensibilities, it is important to note that such measures often replaced capital punishment and were considered to provide a time for penance, thus presumably allowing the wrongdoer to secure the

forgiveness of God.

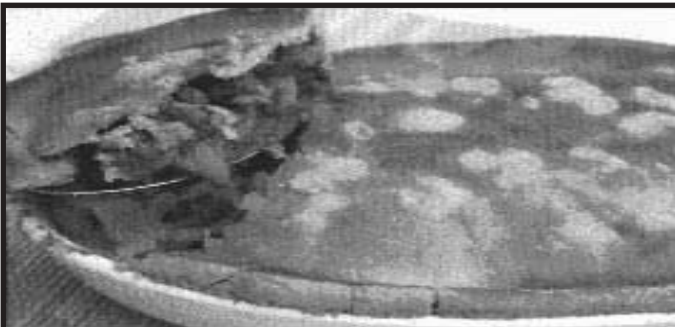
1. A married man who commits adultery shall by way of correction be flogged with twelve lashes; and whether rich or poor he shall pay a fine.

2. An unmarried man who commits fornication shall be flogged with six lashes.

3. A person who has carnal knowledge of a nun shall, upon the footing that he is debauching the Church of God, have his nose slit, because he committed wicked adultery with her who belonged to the Church; and she on her side must take heed lest similar punishment be reserved to her.

4. Anyone who, intending to take in marriage a woman who is his goddaughter in Salvation-bringing baptism, has carnal knowledge of her without marrying her, and being found guilty of the offence shall, after being exiled, be condemned to the same punishment meted out for other adultery, that is to say, both the man and the woman shall have their noses slit.

5. The husband who is cognizant of, and condones, his wife's adultery shall be flogged and exiled, and the adulterer and the adulteress shall have their noses slit.



"There is a flavour about them never surpassed and rarely equaled; the paste was of the most delicate construction, and impregnated with the aroma of delicious gravy that defied description."

Thomas Peckett Prest

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6. Persons committing incest, parents and children, children and parents, brothers and sisters, shall be punished capitally with the sword. Those in other relationships who corrupt one another carnally, that is father and daughter-in-law, son and stepmother, father-in-law and daughter-in-law, brother and his brother's wife, uncle and niece, nephew and aunt, shall have their noses slit. And likewise he who has carnal knowledge with two sisters and even cousins.

7. If a woman is carnally known and, becoming pregnant, tries to produce a miscarriage [abortion], she shall be whipped and exiled.

8. Those who are guilty whether actively or passively of committing unnatural offences shall be capitally punished with the sword. If he who commits the offence passively, is found to be under twelve years old, he shall be pardoned on the ground of youthful ignorance of the offence committed.

9. Those guilty of "abominable crime" [homosexuality?] shall be emasculated.

from E. Freshfield, trans, *A Manual of Roman Law: The "Ecloga"*, (Cambridge, 1926), 108-12.). Reprinted in Deno Geanakoplos, *Byzantium*, (Chicago: 1984), 78

Not quite the Spanish Inquisition

Bernard Gui: Inquisitorial Technique (c.1307-1323)

Bernard Gui: Inquisitorial Technique (c.1307-1323)

Few guilty or even innocent souls would have survived a Medieval Inquisition. Below Medieval Inquisitor Bernard Gui shows why he makes D.I. Burnside seem like your childhood home economics teacher.

When a heretic is first brought up for examination, he assumes a confident air, as though secure in his innocence. I ask him why he has been brought before me. He replies, smiling and courteous, "Sir, I would be glad to learn the cause from you."

I. You are accused as a heretic, and that you believe and teach otherwise than Holy Church believes.

A. (Raising his eyes to heaven, with an air of the greatest faith) Lord, thou knowest that I am innocent of this, and that I never held any faith other than that of true Christianity.

I. You call your faith Christian, for you consider ours as false and heretical. But I ask whether you have ever believed as true another faith than that which the Roman Church holds to be true?

A. I believe the true faith which the Roman Church believes, and which you openly preach to us.

I. Perhaps you have some of your sect at Rome whom you call the Roman Church. I, when I preach, say many things, some of which are common to us both, as that God liveth, and you believe some of what I preach. Nevertheless you may be a heretic in not believing other matters which are to be believed.

A. I believe all things that a Christian should believe.

I. I know your tricks. What the members of your sect believe you hold to be that which a Christian should believe. But we waste time in this fencing. Say simply, Do you believe in one God the Father, and the Son, and the Holy Ghost?

A. I believe.

I. Do you believe in Christ born of the Virgin, suffered, risen, and ascended to heaven?

A. (Briskly) I believe.

I. Do you believe the bread and wine in the mass performed by the priests to be changed into the body and blood of Christ by divine virtue?

A. Ought I not to believe this?

I. I don't ask if you ought to believe, but if you do believe.

A. I believe whatever you and other good doctors order me to believe.

I. Those good doctors are the masters of your sect; if I accord with them you believe with me; if not, not.

A. I willingly believe with you if you teach what is good to me.

I. You consider it good to you if I teach what your other masters teach. Say, then, do you believe the body of our Lord, Jesus Christ to be in the altar?

A. (Promptly) I believe that a body is there, and that all bodies are of our Lord.

I. I ask whether the body there is of the Lord who was born of the Virgin, hung on the cross, arose from the dead, ascended, etc.

A. And you, sir, do you not believe it?

I. I believe it wholly.

A. I believe likewise.

I. You believe that I believe it, which is not what I ask, but whether you believe it.

A. If you wish to interpret all that I say otherwise than simply and plainly, then I don't know what to say. I am a simple and ignorant man. Pray don't catch me in my words.

I. If you are simple, answer simply, without evasions.

A. Willingly.

I. Will you then swear that you have never learned anything contrary to the faith which we hold to be true?

A. (Growing pale) If I ought to swear, I will willingly swear.

I. I don't ask whether you ought, but whether you will swear.

A. If you order me to swear, I will swear.

I. I don't force you to swear, because as you believe oaths to be unlawful, you will transfer the sin to me who forced you; but if you will swear, I will hear it.

A. Why should I swear if you do not order me to?

I. So that you may remove the suspicion of being a heretic

A. Sir, I do not know how unless you teach me.

I. If I had to swear, I would raise my hand and spread my fingers and say, "So help me God, I have never learned heresy or believed what is contrary to the true faith."

Then trembling as if he cannot repeat the form, he will stumble along as though speaking for himself or for another, so that there is not an absolute form of oath and yet he may be thought to have sworn. If the words are there, they are so turned around that he does not swear and yet appears to have sworn. Or he converts the oath into a form of prayer, as "God help me that I am not a heretic or the like"; and when asked whether he had sworn, he will say: "Did you not hear me swear?" [And when further hard pressed he will appeal, saying] "Sir, if I have done amiss in aught, I will willingly bear the penance, only help me to avoid the infamy of which I am accused though malice and without fault of mine." But a vigorous inquisitor must not allow himself to be worked upon in this way, but proceed firmly till he make these people confess their error, or at least publicly abjure heresy, so that if they are subsequently found to have sworn falsely, he can without further hearing, abandon them to the secular arm".

Bernard Gui was Inquisitor in Toulousel 1307-1323. The medieval inquisition had been created during the reign of Pope Gregory IX (1227-1241). Its main technique was to extract confessions. (from H. C. Lea, trans., A History of the Inquisition of the Middle Ages, (New York, Harper & Brothers, 1887), Vol. 1, pp. 411-414.)

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Autumn 2005 Quiz Answers

1. Answer: London
2. Answer: 1st October 2005
3. Answer: A quia timet injunction
4. Answer: Lord Justice [Mark] Potter
5. Answer: £4,000
6. Answer: Sir Roger Toulson (The Honourable Mr Justice Toulson)
7. Answer: The International Court Act 2001
8. Answer: The reasonable man
9. Answer: R v. Camplin [1978] AC 705
10. Answer: 1966 – see the Practice Statement [1966] 1 WLR 1234
11. Answer: Costs
12. Answer: A coroner – see the Treasure Act 1996, s.8(1)
13. Answer: John Finnis
14. Answer: s.459
15. Answer: £56,800 (increased from £55,000 on 1st February 2005) – see Employment Rights (Increase of Limits) Order 2004, SI 2004/2989

Congratulations to the winner of the Autumn Quiz: Victoria Butler Cole

The question setter, Darren Sylvester, is a barrister, and I'd like to give special thanks to him for his continued support of the WLR Newsletter.



Report on the Commonwealth Moot and Commonwealth Law Conference 11th – 15th September 2005

By Ros Macdonald

Background

I have been the Commonwealth Moot Coordinator since 2000 and travelled to London to run the 2005 Moot. It was held at the Law Society's rooms (a mansion really) at 113 Chancery Lane. The venues for the Moot at the Law Society were wonderful rooms, very fitting for a moot. I arrived on 5th September and in the week before the moot I spent some considerable time each day at the Law Society preparing the venues with the help of the staff and organising judges for the moots, and at the QEII Conference Centre (where the CLC was held) preparing for the Moot welcome before the beginning of the CLC.

The Teams

Eleven teams took part: United Kingdom - City University London, Canada – University of Toronto, Australia – University of Melbourne, New Zealand – Canterbury University, India – West Bengal University of Juridical Science Kolkata, Sri Lanka – Sri Lanka Law College, Colombo, Caribbean – composite team from the three Caribbean law schools, South Africa - University of Pretoria, East Africa – University of Nairobi, South Pacific – University of the South Pacific and Malaysia – University of Malaya.

The Moot

The welcome and material handover for the moot was held at QEII Centre (opposite Westminster Abbey) on Sunday 11th September from 4 pm. Most teams turned up as requested on time. All except the Nigerian team eventually arrived – the Nigerians had visa problems at the last minute that prevented their attendance. From the welcome all teams were invited to the Conference Reception at QEII. This was paid for by the Commonwealth Lawyers Association, as was the team's accommodation at Beit College Imperial College London. This cost alone was £9,000.

The moot ran quite smoothly. I had no assistance at all from the Law Society staff as far as organising judges, teams and materials for each moot. It was very difficult as the two venues were two floors apart and the only unsecured internal access was a very slow, very small lift. I was exhausted at the end of each day.

At the end of the moot, after the final, there was a reception for the teams funded by the Commonwealth

Legal Education Association. This was held at the Law Society and was outrageously expensive. The winners of the moot were the Canadian team who were very polished and deserved to beat the United Kingdom in the final.

The Commonwealth Law Conference

The day after the moot finished I was one of the speakers at a very well attended session on human rights and the environment. I gave a paper entitled 'Environmental Rights as Human rights'. I had in my audience the Chief Justices of India, Lesotho and Botswana, as well as judges from Australia, other Indian Supreme Court judges and judges from the Court of Appeal for England and Wales. The chair of my session was Lord Justice Dyson. I was asked lots of questions and the paper will eventually be published with other CLC papers. I should say that I had been invited to talk, I did not send in an abstract. I was invited following my visit to India.

At the closing ceremony of the Commonwealth Law Conference I gave a short speech about the Commonwealth Moot to about 1,000 people. I think it was well received.

Conclusion

Besides being able to give a paper at one of the largest law conferences in the world (there were almost 2,000 delegates) I was able to promote the Faculty to the students, the judges and to the conference itself, and this implants the name QUT in the perceptions of people overseas as a progressive, competitive law school at which students could obtain good undergraduate and postgraduate qualifications.

The Commonwealth Mooting Contest was one of over ten Mooting events that the ICLR sponsored last year. If you would like us to sponsor your event then please email DanC@iclr.co.uk

Lectures & Seminars

The ICLR would like to make available to Colleges of Law, and Student Law Societies, lectures on law reporting and its role within our legal system. Talks can be given at Megarry House by our reporters, all of whom are qualified barristers or solicitors.

If you are interested in organising a talk please contact DanC@iclr.co.uk. More information can be found on our website www.lawreports.co.uk

Law reporting as a career by Susanne Rook & Jessica Giles

The ICLR received an interesting question by email which two of our reporters have answered. The question was:

"I should like some information on the long-term prospects of a career as a Law Reporter. I am a barrister with some law reporting experience already, but I am wondering where a career as a Law Reporter eventually leads. What is the salary range? Does it lead to other sorts of editorial work in the legal publishing field? Is it the sort of work you can do for the rest of your working life, or do people typically have to move on?"

Law reporting as a career:

This article is concerned with law reporting as a career within the Royal Courts of Justice as described by Ben Urdang in his articles, A Day in the Life of a Law Reporter Parts I and II in the ICLR Student News Letters, 11th and 12th editions, Summer and Autumn 2002.

Law Reporting within the Royal Courts of Justice is carried out by three general law reporting agencies and one specialist agency. These are the Incorporated Council of Law Reporting ("ICLR"), Butterworths and Sweet and Maxwell. Property cases are covered by the specialist reporters for The Estates Gazette. Of those, the ICLR is a registered charity, while the others are profit-making limited companies.

In addition there are a number of specialist series of reports published by small private companies, such as Lloyd's Law Reports, published by Informa UK Ltd, and Family Law Reports, published by Jordans Publishing Ltd.

There is a very useful guide to law reports and case law found at:
[http://library.kent.ac.uk/library/info/subjectg/law/trouble shoot/caselaw.htm](http://library.kent.ac.uk/library/info/subjectg/law/trouble%20shoot/caselaw.htm). The ICLR website has free access to digests of cases reported at
<http://www.lawreports.co.uk/>.

The employers

The law reporting field within the United Kingdom is dominated by the ICLR, Butterworths and Sweet and Maxwell. When considering whether to work in the field one should consider which type of business is more appropriate for you. The large corporate entities offer

the possibility of changing roles within the company and therefore provide flexibility and certain career prospects that are not available in smaller concerns. They also provide a large back up structure to the work, with dedicated Human Resources departments and social clubs etc. However, reporters working for these corporations have a narrow work remit in that they only write a short digested headnote for each case and do not have any role in the preparation of the final full published report.

The ICLR on the other hand provides a more intimate working environment, and close working relationships throughout the organisation. Those responsible for management are accessible and readily available. Moreover, the reporters for the ICLR are more autonomous and independent and have responsibility for the production of the whole case report, apart from the editing and production stages. That means that in addition to writing the online digests and the headnotes for the full reports, ICLR reporters do their own checking of quotes, case citations etc and their own copy editing and liaison with the judge, clerk and legal professionals.

Conditions of employment and career prospects

Because the reporter has to be in court when judgment is given and, sometimes, during argument, the job can only be carried out in situ in the Royal Courts of Justice in London. However, both Butterworths and Sweet and Maxwell have offices in Edinburgh with the reporters covering Scottish cases. Jordans have their offices in Bristol.

The current salary for new reporters is extremely competitive and includes additional health scheme, pension benefits, and excellent holidays (most of the court vacation). The ICLR law reporters also write freelance for the Times Law Reports for which they get paid an additional fee per case.

Most law reporters at the ICLR remain as law reporters until retirement, with a few moving over to the editorial side. However, in some of the larger organisations, law reporters can be promoted within the organisation to other roles, such as management and editorial positions, and there is a lot of staff movement.

Qualifications needed for the job.

Reporters must be qualified solicitors or barristers and although most reporters at the ICLR have practised at the Bar, it is not necessary to have completed pupillage. It is not necessary to have previous law reporting experience, although this would obviously be an advantage.

Suggestions

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