CASE AND COMMENT

THE EUROPEAN CONVENTION AND CHILD DEFENDANTS

The European Court of Human Rights’ decisions T. v. The United Kingdom (16.12.1999 E.C.H.R. No. 24724/94) and V. v. The United Kingdom (16.12.1999 E.C.H.R. No. 24888/94) represent one of the final stages in the notorious Bulger murder proceedings. The Court considered a number of applications by the defendants regarding the legality of their trial and sentences. The Court issued separate judgments for each applicant but, as they differ only in the details, they are considered here together. There are two main decisions that are of particular significance.

The first major ruling, by sixteen votes to one, was that the trial procedures to which the children were subject violated their right to a fair trial under Article 6.1 of the European Convention on Human Rights because they denied the children the opportunity to participate effectively in the trial, to consult and instruct counsel and to understand the proceedings. The Court criticised the fact that the children were tried in an adult courtroom, with judge and counsel in full regalia. They also criticised the fact that the trial was public, exposing the children to an intrusive press and hostile members of the public, who perpetrated various attacks on the boys during trial. The court recognised that the UK had tried to protect the children, but said that one such measure—the raised platform—only exposed them to greater scrutiny and embarrassment. The Court noted that both boys were suffering post-traumatic stress disorder throughout the trial, which further limited their ability to understand or participate.

In such circumstances, merely being represented by experienced counsel was insufficient to ensure a fair trial. The Court was clearly
uneasy with the English practice of trying juveniles accused of serious offences in the ordinary adult court. Whilst not condemning it outright, the Court said that if this was done there should be “a modified procedure providing for selected attendance rights and judicious reporting”.

This decision possibly illustrates a difference of perspective between Anglo-American adversarial and continental lawyers. Members of the Court from continental Europe may well have viewed the defendants’ non-participation particularly seriously, given the central role that the accused plays in continental trials, a role which adversarial lawyers tend to regard as oppressive, but which, by contrast, continental lawyers often see as essential to the protection of the accused.

The ruling had an immediate effect. On the day of its release, the Lord Chief Justice issued a draft Practice Direction regarding young defendants tried for serious offences accepting all of the Court’s suggested reforms and emphasising the trial judge’s responsibility to ensure that the child understands the proceedings.

In its second major ruling the Court unanimously condemned the Home Secretary’s power to set the tariff, or minimum term of an indefinite sentence, as contrary to Article 6.1, in so far as this requires that sentencing decisions should be made by independent and impartial judicial bodies. The defendants had received mandatory sentences of detention during her Majesty’s pleasure. The Home Secretary eventually set the tariff at fifteen years, although the House of Lords subsequently quashed his decision and sent it back for reconsideration.

The European Court ruling is the latest incident in a long-running battle between the Court and the UK Government over indeterminate detentions generally and the Home Secretary’s powers in relation to such sentences specifically (and particularly the power to set tariffs and to review the remaining length of sentence). After each ruling, the UK Parliament has legislated to remove the immediate cause of offence but has not curtailed the Home Secretary’s power over other aspects of sentencing. Thus, following the Court’s decision in Hussain v. U.K. (1996) 22 E.H.R.R. 1, declaring unlawful the Home Secretary’s power to review a juvenile’s remaining indeterminate sentence after serving the tariff, Parliament removed the Home Secretary’s power over the review but not over the tariff itself. In T. v. U.K. and V. v. U.K. the Court unanimously declared that the power over the tariff was also unlawful. It is to be hoped that the Government will now surrender and introduce legislation to remove not only this but all of the Home Secretary’s remaining sentencing powers.
The applicants also argued that the right to judicial review of the legality of continuing detention prescribed by Article 5.4 had been violated. The Court reiterated its ruling in Hussain that after the tariff portion of an indeterminate sentence expired, prisoners had the right to review because the only reason for continuing the imprisonment was public protection and an offender’s dangerousness could diminish. Further, during the tariff portion of the sentence and during fixed sentences generally there are in-built rights to review, or should be. However, this case fell into neither category because there was still no tariff decided since the Home Secretary’s decision had been ruled unlawful. In the circumstances, the Court unanimously agreed that the defendants were being denied their rights to review.

The Court rejected two other applications relating to sentence. It unanimously dismissed the applicants’ claims that detention at Her Majesty’s pleasure violated Article 5.1 (right to liberty and security). It also rejected, by ten votes to seven, an application that the sentence itself amounted to inhuman and degrading treatment, in breach of Article 3. A punitive element in a child’s sentence was reasonable. The six years already served were also acceptable, although if the tariff remained uncertain an application under Article 3 might succeed.

The Court also rejected (by twelve votes to five) the argument that to try a child publicly in an adult courtroom constituted inhuman and degrading treatment, in breach of Article 3. The attribution of criminal responsibility to children at ten was not in itself, in the Court’s view, a violation. It held that, as there was no consensus amongst States parties to the Convention, the English position, although at the lower end of the scale, could not be condemned. The Court also found that the adult procedure had not constituted inhuman or degrading treatment simply because it made the children suffer: any child would suffer intensely during any trial when forced to confront his actions. However, the Court did comment adversely on the failure to protect the children’s privacy.

The applicants sought only legal costs and expenses and the Court awarded a reduced amount, taking into account their failure in respect of some applications.

This is the first time the Court has considered the Convention’s application to child defendants. It is also significant as the first time that the Court has criticised the UK for its trial procedure, rather than for pre- or post-trial violations. The criticism may surprise some adversarial lawyers who regard adversarial trial procedure as unimpeachably fair, especially in comparison with non-adversarial systems. The judgment is likely to result in significant changes to
trial and sentencing procedure in cases involving child defendants. More widely, it is significant for the treatment of all children in criminal trials because it recognises the difficulty children can have in understanding and participating in adult-focused adversarial court proceedings.

EMILY HENDERSON

THE UNWANTED CHILD

When the news came forth from Downing Street last November that a fourth child was to be born to the premier and his wife, joy spread throughout the land. Gloom and despondency, by contrast, reigned in the McFarlane household when it transpired that Mrs. McFarlane was pregnant yet again, for in order to ensure that there would be no fifth child the couple had come to a decision: rather than rely on the physics of the condom or the chemistry of the pill the husband, like 9,000 other Scotsmen every year, was to resort to the surgery of vasectomy. So he did, and the health authority reported that the operation had been successful, but vital nature had counteracted medical art ... and Catherine was born. She was in perfect health. Mrs. McFarlane claimed £10,000 for the pain of pregnancy and childbirth and both parents claimed £100,000 for the cost of keeping Catherine. They thereby joined the long line of those who, relying on the Court of Appeal’s judgment in Emeh v. Kensington and Chelsea and Westminster A.H.A. [1985] Q.B. 1012, sought to throw on to the medical profession the cost of bringing up the child they had engendered and conceived, healthy though it was and in the event welcome—except for the expense.

For the fourteen years since Emeh the National Health Service, short of resources for curing the sick, has been disbursing large sums of money for the maintenance of children who have nothing wrong with them. To give but a single example out of very many: in 1993 the Lambeth Health Authority had to pay Mrs. Cort no less than £140,679 (“James might not have been planned, but I wouldn’t give him up for the world”). The House of Lords has now put an end to that (McFarlane v. Tayside Health Board [1999] 3 W.L.R. 1301), but Emeh was not formally overruled, and so deserves a moment’s notice.

In Emeh the child was not healthy, but handicapped. The principal defence, correctly dismissed, was that the mother should have had an abortion and was therefore solely responsible for the birth. The second line of defence was that the defendant was liable
only for the extra expense attributable to the child’s being handicapped, in as much as it was contrary to public policy to allow parents to claim for the cost of bringing up a healthy child. This defence was also dismissed, rather cursorily. But does a decision that a claim for the cost of a healthy child is not barred by *public policy* entail the rejection *sub silentio* of all other grounds, not argued in the case, on which it might be barred? And are observations about a healthy child in a case involving a handicapped child not obiter dicta, since, as we shall see, the cases are clearly distinguishable and ought to be distinguished? In these circumstances one wonders why in *Thake v. Maurice* [1986] Q.B. 644 (where again the issue was collateral, the principal question being whether the doctor had guaranteed the success of the sterilisation operation (No)) the Court of Appeal was so eager to be bound by *Emeh*, and why the House of Lords refused leave to appeal. After all, *Emeh* was an unreserved decision, that is, one in which their Lordships took no time to reflect on a holding which would clearly prove a major drain on public funds.

Fortunately the Senators of the College of Justice are not bound by the Court of Appeal and Scots litigants need no leave to appeal to the House of Lords, so Lord Gill was able to dismiss the McFarlanes’ claim as irrelevant and the defender could appeal from the reversal of his decision by the Inner House. The rule now laid down by the House of Lords is perfectly clear: the parents of a healthy child cannot claim the *cost of maintenance* from a person in negligent breach of his duty to take care to prevent that birth, although (Lord Millett dissenting) the mother can claim for the pain and suffering involved in the unwanted pregnancy and childbirth. The technical problem is how to distinguish these two claims, since both alleged harms are manifestly attributable to the same negligence—morning sickness and the cost of Pampers being equally part of the price to be paid for having a child.

The distinction cannot be drawn in terms of *fault*, if negligence is assumed, as here, nor in terms of *causation*, since both are equally foreseeable consequences of the negligence (it being agreed that neither the failure to have an abortion nor the decision not to put the child up for adoption could possibly constitute a *novus actus interveniens* or an unreasonable failure to mitigate the damage). Can one say that there was no *harm*? Not easily, since “There is another mouth to feed”. Can one say that there is no *net* harm, that is, can one set off against the economic expense the emotional benefits of parenthood and say that the cost of feeding is offset by the ensuing smile and gurgle? Not really, since the cost of the former is calculable and the value of the latter is not. So what
about the kind of damage? In three of the speeches the financial nature of the cost of maintenance is emphasised, with the indication that there was perhaps no undertaking of responsibility for such expense (as opposed to the pain of pregnancy), and that it was not “fair, just and reasonable” to impose liability for it.

Though prepared to accept these reasons, Lord Steyn preferred a bolder approach eschewing “formalistic propositions”. One can sympathise with this, since none of the grounds for rejecting the claim was in itself conclusive, especially as (though this was not mentioned) Lord Goff in Henderson had said that “fair, just and reasonable” has no place in Hedley Byrne cases, and in Hedley Byrne itself Lord Devlin had said that a doctor’s duty extends as much to the patient’s wealth as to his health. For Lord Steyn, the true reason for rejecting the claim for the cost of rearing is distributive justice, militating in this case against corrective justice: it could not be right—and he was sure that people on the London Underground would agree with him—to give people money for a baby they didn’t want when so many people want one so badly that they go to great expense (or even Romania) to have one. Distributive justice had admittedly been invoked in the latest Hillsborough case as indicating that it was invidious to compensate shocked policemen while denying compensation to shocked relatives, but there the question was of discriminating between two groups who sought compensation for an admitted harm not, as here, of allowing one group to claim compensation for what another group would not think a harm at all.

We must therefore revert to the notion of “harm”. Our law’s reluctance to treat “harm” as a legal rather than a factual concept has had sorry consequences. In the 1930s dead people, recently enfranchised by the 1934 Act, began to claim damages just for being killed. The courts agreed that being killed was a harm: if life was good, being deprived of it must be bad and therefore an actionable harm. Life being held good, the next question was “How good is it?” Ask a silly question, and you get the answer “Not very”—£200, said the House of Lords, recognising that you must take the rough with the smooth. Nowadays one can no longer claim for being killed. This is by statute. Statutes don’t give reasons. But there must be one. What is it? Surely it is that being killed is not in itself a harm at all, and the courts themselves should have so held.

It is true that in McFarlane Lord Millett stated that “The contention that the birth of a normal healthy baby ‘is not a harm’ is not an accurate formulation of the issue”, but he proceeded to say that “the birth of a healthy and normal baby is a harm only
because his parents... choose to regard it as such”, that “plaintiffs
are not normally allowed, by a process of subjective devaluation, to
make a detriment out of a benefit” and that “it is morally offensive
to regard a normal, healthy baby as more trouble and expense than
it is worth”. Is this not to say that in law there is no harm or no
net harm?

But if the rule is clear enough, as this rule is, does it matter
much if the reasons are doctrinally unconvincing? It does, rather,
for the next case to come up will involve a child not healthy but
handicapped—a situation which the House in McFarlane explicitly
refused to consider. We must not do an Emeh in reverse and hold
that the present dismissal of the claim for the healthy child entails
the subsequent rejection of the claim where the unwanted child is
handicapped, a distinction which cannot but turn on the condition
of the child and relate to the “harm or not?” question. After all,
while one must not say that the handicapped child is “more trouble
and expense than it is worth”—words which may come back to
haunt us—the birth of a handicapped child is surely a matter for
condolence whereas that of a healthy child is (despite the expense)
a reason for congratulation and a Hallmark card. It is perhaps
significant that in countering the side-effects of Emeh the House did
not overrule the decision itself.

The problem of the unwanted healthy child has been raised in
many jurisdictions, as the speeches in McFarlane note. Nowhere has
it proved unproblematic or uncontroversial. In Germany, after an
unseemly quarrel not only between the civil courts and the
Constitutional Court, but also between the two senates of the
Constitutional Court, parents can generally sue for their financial
loss (the claim being in contract). In France, by contrast, the birth
of a healthy child is said not to be a compensable harm at all, but
(contrary to the position here—McKay [1982] Q.B. 1166—and
elsewhere) the handicapped child itself has been held entitled to sue
for being born rather than aborted. Such diversity must be
anathema to Brussels.

The result in McFarlane is quite right, and we should not be
surprised if the reasoning is uneasy: whenever it enters the family
home the law of obligations—not just tort, but contract and
restitution as well—has a marked tendency to go pear-shaped.

Tony Weir
In five years on the statute book, the Unfair Terms in Consumer Contracts Regulations 1994, S.I. 1994/3159, generated great interest and very little case law. Their first consideration by an appellate court came in *Director General of Fair Trading v. First National Bank plc* [2000] 1 All E.R. (Comm.) 371. And while these proceedings were on their way to the Court of Appeal, the Regulations were repealed and replaced by the Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999/2083. Both developments are of considerable interest.

*Director General of Fair Trading v. First National Bank plc*

First National is among the largest providers of Consumer Credit Act loans in the United Kingdom. Clause 8 of the Bank’s standard lending conditions made provision for the Bank’s remedies in the event of the borrower’s default.

If the repayment instalment is not paid in full by that [due] date, FNB will be entitled to demand payment of the balance on the Customer’s account and interest then outstanding . . . .

Interest on the amount which becomes payable shall be charged in accordance with Condition 3, at the rate stated in paragraph D . . . until payment after as well as before any judgment (such obligation to be independent of and not to merge with the judgment).

The Bank admitted that clause 8 had potential to cause hardship, but claimed that it is a common provision which must be read in the light of the statutory protection conferred on borrowers by the Consumer Credit Act 1974. Should the lender issue enforcement proceedings, section 129 of the Act empowers the court to grant the borrower a “time order”, extending the repayment schedule by a system of instalments. Section 136 confers an additional power to protect the borrower by amending the credit agreement to vary the rate of contractual interest payable on the instalments.

The Director General took issue with clause 8, and used his powers under regulation 8(2) of the 1994 Regulations to seek an injunction preventing its future use. He argued that consumers were left unaware of their statutory protection. The bank would obtain judgment and a time order would be granted, but the borrower would not be informed of his right to seek a variation of the interest rate under section 136. Thus borrowers were unfairly exposed to large and unexpected liability for interest.

The Director General failed before Evans-Lombe J. ([2000] 1 W.L.R. 98), but succeeded on appeal. The Court of Appeal held that the term was unfair and agreed to hear further argument on
the form of relief to be granted after the parties had had an opportunity to consider the judgment. The case was decided on the basis of the 1994 Regulations, as the 1999 Regulations only entered into force on 1 October 1999, too late to apply to the present dispute. The Court of Appeal was asked to consider both the scope and the effect of the 1994 Regulations.

On the first issue, the Bank relied upon regulation 3(2)(b) to argue that clause 8 fell outside the court’s scope of review, in that it “concerned the adequacy of the ... remuneration as against the ... services ... supplied”. The argument was rejected. “Adequacy” must refer to the extent, not the existence, of remuneration. Clause 8 was not caught by regulation 3(2)(b) because it established only the Bank’s right to contractual interest upon default; it did not define the rate of interest that the Bank had contracted for as remuneration for its services.

Having determined the applicability of the Regulations, their Lordships then considered the unfairness of clause 8. Under regulation 4(1): “‘unfair term’ means any term which contrary to the requirement of good faith causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer”. Evans-Lombe J. had taken a three-stage analysis to this question, asking whether the term was “inherently”, “procedurally” or “substantively” unfair. The Court of Appeal was “not persuaded that the judge was correct in his approach”, and took a very different tack.

First, their Lordships remarked that the question of unfairness must be evaluated solely by reference to the terms of the Regulations, and the introduction of external concepts such as “inherent unfairness” is not a legitimate practice. With respect, this must be right. The Regulations provide clear conceptual tools for the definition of unfairness, and the introduction of other language would seem both unnecessary and confusing.

Instead, Peter Gibson L.J. identified three indicia of unfairness from the Regulations themselves: absence of good faith; significant imbalance in the parties’ rights and obligations under the contract; and detriment to the consumer.

Good faith is, of course, a civilian concept which derives from the German Standard Contract Terms Act. Referring to academic analysis, Peter Gibson L.J. noted that the concept encompasses both procedural and substantive aspects. “Terms”, he said, “must be reasonably transparent and should not operate to defeat the reasonable expectations of the consumer”. Clause 8 of the Bank’s agreement failed this test. The provision for post-judgment contractual interest in clause 8 was so powerful, and would be so
surprising to the average consumer, that it should be brought clearly to the borrower's attention. Expressed in this way, the concept of good faith is strikingly similar to the rule proposed over forty years ago by Denning L.J. in Spurling v. Bradshaw [1956] 1 W.L.R. 461, where he said: "Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient". The doctrine of good faith may not be entirely alien to English law, after all.

The Court had less to say on the question of significant imbalance. This is perhaps to be regretted, as the concept of significant imbalance was specifically included alongside good faith by the draftsmen of EC Directive 93/13 (upon which the Regulations are based), and adds much to the understanding of unfairness. Significant imbalance directs attention to the balance of advantage within the contract: whether the business derives illegitimate benefit to the prejudice of the consumer. It is a generalising concept, requiring an examination of the typical transaction (here, a typical Consumer Credit Act loan agreement) to see whether the disputed agreement fits the norm. Imbalance is central to the civilian approach to unfairness, and of particular importance in England, where the common law method tends to focus attention inwards on precedent and argument by analogy. "Unfairness" involves the recognition of broader considerations.

Finally, the concept of detriment required little exposition, either in the abstract or in its application to the instant facts.

The judgment of the Court of Appeal is certainly to be welcomed. It focuses proper attention on the wording of the Regulations, and re-establishes the purity of analysis that was undermined by the introduction of peripheral terminology at first instance. Greater attention might have been paid to the consideration of significant imbalance, but this is just a minor gripe about a judgment that displays admirable sensitivity to civil law concepts.

The Unfair Terms in Consumer Contracts Regulations 1999

While the 1994 Regulations were enacted to implement the European Council Directive on Unfair Terms in Consumer Contracts (93/13/E.E.C.), differences in structure, wording and content left some doubt whether this purpose had been fully achieved. The 1999 Regulations set out to transcribe the Directive more accurately.

The most significant feature of the 1999 Regulations is that they reproduce almost exactly the wording of the Directive. This results
in some important substantive changes from the 1994 version. First, Schedule 1 (which was never contained in Directive 93/13) has been removed to give the Regulations a significantly broader scope. Contracts relating to employment, succession, family law and the internal constitution of companies, which were formerly exempt from consideration under this schedule, are now subject to the Regulations.

Secondly, the new Regulations make changes to the definition of an “unfair term”, as the relevant sections of the 1994 Regulations have been replaced by provisions cut directly from Directive 93/13. In particular, the new Regulations omit Schedule 2, which had been inserted by the English draftsmen to offer guidance on the definition of good faith. This change is warmly welcome. The subtle analysis of their Lordships in the First National case, without any reference to Schedule 2, demonstrates that courts are well able to tackle the concept without the aid of formalistic criteria. Moreover, the civil law approach to good faith is defined by generalisation, and excessive definition was specifically avoided in the Directive, which offers only a “grey list” of prima facie unfair terms. It is to be hoped that the more expansive wording of the new Regulations will encourage a global approach to the definition of unfairness that sits more easily with the civil law origins of Directive 93/13.

Important procedural changes have also been made. Directive 93/13 requires Member States to provide “adequate and effective means . . . to prevent the continued use of unfair terms”, and it was generally thought that the scheme of supervision by the Director General of Fair Trading set up under the 1994 Regulations failed to meet this obligation. Therefore, the new Regulations extend the Director’s authority to confer greater powers of investigation and public information. Importantly, these powers have also been made available to a wide range of “qualifying bodies”, including public regulators and the Consumers’ Association. Qualifying bodies may now seek injunctions against unfair terms in the public interest, and it is hoped that this decentralisation will encourage more effective supervision from a wider range of litigants.

The new Regulations are to be welcomed as they now implement the spirit and detail of this Directive into English law. Some concerns remain over the effectiveness of injunctions as a means to control unfair terms. However, the new Regulations certainly go a long way towards providing “adequate and effective means” for the protection of consumers.

NEIL BERESFORD
DUTY OF CARE—INSURANCE BROKERS—ADVISE OR CONSENT?

Insurance brokers are liable to their clients in both contract and tort for any failure to carry out their mandate with reasonable care and skill. In most cases it makes no difference to the outcome whether a claim against a broker is based in contract or in tort. In the event of a dispute between broker and client on whether the broker has fulfilled his mandate, in the past the first question was to establish what the broker had agreed to do and then whether the broker had breached that duty. Until recently, it could be assumed that, if breach of duty by the agent was established, the kinds of loss recoverable by the client against the agent were those which were not too remote, i.e., those which were not only caused in fact (according to the “but for” test) but also caused “in law”: loss would be too remote unless it was of a kind reasonably foreseeable (tort) or reasonably contemplated (contract) by the agent, as a consequence of breach of duty.

Assessing remoteness, however, has never been a purely objective exercise. In practice it has been coloured by points of policy because the “question of the existence of a duty and that of whether the damage... is too remote are simply two facets of the same problem”: Perl v. Camden London Borough [1983] 3 All E.R. 161, 167 per Oliver L.J. (C.A.). Recently there has been a preference for taking points of policy at the earlier stage of analysis, i.e., when determining the existence and scope of the duty. In Caparo Industries plc v. Dickman [1990] 2 A.C. 605, 627 Lord Bridge said that it “is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.” For example, in South Australia Asset Management v. York Montagu Ltd. [1997] 1 A.C. 191 the House of Lords held that, when a lender used the defendant’s negligent valuation of the property offered as security for a loan, the valuation was just one of the factors affecting the lender’s decision to lend and the terms of the loan; and that the lender’s full actual loss, although of a kind that was reasonably foreseeable by the valuer, was one for which the valuer should be held only partly liable. The House drew a distinction between a professional who provided information, the role of the valuer in that case, and a professional who actually advised a client whether to enter or not to enter the transaction.

The position of insurance brokers was considered by the Court of Appeal in Aneco Reinsurance Underwriting Ltd. v. Johnson & Higgins Ltd. [2000] 1 All E.R. (Comm.) 129. The brokers’ clients
(Aneco) were themselves insurers: they were reinsurers of the liability of certain Lloyd’s underwriters. Aneco sought to cover their liability under this underlying reinsurance by taking reinsurance themselves (further reinsurance called retrocession) through the agency of the defendant brokers. However, the retrocession was vitiated as a result of the brokers’ (negligent) nondisclosure of material facts concerning the extent of Aneco’s liability to the Lloyd’s underwriters. In Aneco the brokers admitted liability to Aneco but submitted that the correct measure of Aneco’s loss was $10 million—the value of the reinsurance cover which Aneco lost when the retrocession was avoided on the ground of nondisclosure. Aneco, however, argued that the correct measure of loss was their full actual loss of $30 million, the sum they had to pay to the Lloyd’s underwriters. If, they argued, the brokers had made full disclosure, the brokers (and thus Aneco) would have been told that retrocession of that kind was not available on the London market, and Aneco would not have entered into the underlying reinsurance with the Lloyd’s underwriters at all and thus not suffered, as they did, a loss of $30 million.

In Aneco, the main judgment was given by Evans L.J. He referred to passages in recent judgments of the House of Lords on tort and concluded (p. 138) that “the former search for an effective cause has been replaced by an inquiry into the scope of the duty of care which was owed by the defendant to the claimant in the particular case”; and that among the relevant considerations were not only whether there is a sufficient (“but for”) causal connection but the reasonable expectations of the two parties, as well as common sense. In other words, he said (p. 139), words used in the duty of care cases, the question was whether it was a case in which “the risk was one which the claimant retained for himself” and which was not one for which “the defendant assumed responsibility”, as held in the South Australia case.

Ward L.J. (p. 163) concurred with Evans L.J, and (pp. 164–165) summed up the application of the law to the facts:

Here the express obligation assumed by the brokers was to obtain satisfactory reinsurance. The implied obligation was to tell Aneco if it was not available … They knew Aneco would not accept the risk without the comfort of others being prepared to share it … They accepted the responsibility of there being no contract without cover … Their duty was to protect Aneco from the very risk they knew Aneco would not accept if no satisfactory reinsurance was available.

So, in marked contrast with the decision in South Australia (above), the Court held by a majority (Aldous L.J. dissented) that to hold
them responsible for the full loss that has arisen does not impose upon them a liability greater than they could reasonably have thought they were undertaking”: per Ward L.J. (p. 165). The brokers were liable in full.

One difficulty about this decision is that the brokers were acting not only for Aneco but also for the Lloyd’s underwriters. So it is difficult to see how, as the House in South Australia seemed to insist, the brokers were advising Aneco whether or not to enter the relevant transaction—the reinsurance of the Lloyd’s underwriters. They could hardly do that for one party to the transaction and not the other and perhaps not for both.

In this state of the law, students of the law both young and old may well echo the sentiment expressed by Watkins L.J. in Lamb v. Camden Borough Council [1981] Q.B. 625, 644 (C.A.). Having agreed with Salmond on Tort, 17th ed. (1977), p. 538, that the “doctrine of remoteness of damage is one of very considerable obscurity and difficulty”, he continued:

On my way to providing an answer to the question raised in this appeal I have sometimes felt like Sir Winston Churchill must have done when he wrote: “I had a feeling once about mathematics, that I saw it all—depth beyond depth was revealed to me—the byss and the abyss. I saw, as one might see the transit of Venus—or even the Lord Mayor’s Show, a quantity passing through infinity and changing its sign from plus to minus. I saw exactly how it happened and why the tergiversation was inevitable: and how one step involved all the others. It was like politics… But it was after dinner and I let it go.”

MALCOLM CLARKE

FOR LOVE OR MONEY? DEPENDENT CARERS AND FAMILY PROVISION

Louise Rose, born with serious physical and mental disabilities as a result of medical negligence at delivery, obtained £250,000 by way of settlement of her claim against the defendant health authority. This sum, administered by the Court of Protection, was used to enable her mother, Mrs. Bouette, to purchase a house in which they could both live. Its price was met as to three-quarters by the damages fund and as to one-quarter by her mother, and beneficial interests were declared in the property to represent their respective contributions. Mrs. Bouette received regular payments from the Court of Protection to cover Louise’s living expenses and to purchase equipment for Louise, as well as social security benefits.
from the State in respect of her care for Louise. On Louise’s death, at the age of fourteen, the rules of intestacy dictated that her estate, comprising her 75% share in the house and the residual fund, was to be divided in equal shares between her parents. Although Louise’s father had separated from her mother when Louise was eight months old, he had an equal entitlement to the daughter’s property, and realisation of his share would inevitably involve sale of the house. Mrs. Bouette accordingly brought a claim under the Inheritance (Provision for Family and Dependants) Act 1975, arguing that she was dependent on her daughter immediately before her death, and that she had not obtained reasonable financial provision as a result of the operation of the intestacy rules. The father applied to strike out the mother’s claim, and the question of her dependency was tried as a preliminary issue: Bouette v. Rose, sub nom. Re B (deceased) [2000] 1 All E.R. 665.

The facts highlight a deficiency in the jurisdiction of the Court of Protection to make a “statutory will” for patients who are not capable of making a valid will themselves (Mental Health Act 1983, s.96). The only relevant ground of incapacity is mental disorder, and the jurisdiction cannot be exercised where the patient is a minor. Although the Law Commission has proposed an enlargement of the court’s powers in this regard (see Law Com. No. 231, Mental Incapacity, para. 8.32, and draft Bill, Clause 27(3)), the only relief available to Mrs. Bouette was to make a claim for family provision, on the basis that immediately before Louise’s death she was being wholly or partly maintained by her child (1975 Act, s.1(1)(e)). This required the court to be satisfied that Louise, “otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth” towards her mother’s needs (see 1975 Act, s.1(3), as interpreted in Re Beaumont [1980] Ch. 444, 450). The Court of Appeal rejected the view of the trial judge that as the purpose of the payments made by the Court of Protection was to maintain Louise, not her mother, they should be disregarded. It was their effect, not their intention, which mattered. This approach is laudably consistent with a principled approach to the statute. In determining dependency, objectivity rules the day.

Much more difficult was the issue of assumption of responsibility. In Re Beaumont [1980] Ch. 444, one of the earliest decisions under the 1975 Act, Megarry V.-C. held that as the court was obliged, by section 3(4) of the Act, to have regard to the extent to which and the basis upon which the deceased assumed responsibility for the applicant’s maintenance and to the length of time for which the deceased discharged that responsibility, it
followed that an assumption of responsibility was essential in every case. If it could not be proved by a “positive act”, the applicant’s claim must be struck out. At first instance in Bouette v. Rose (see [1999] Ch. 206), Jonathan Parker J. considered that the absence of an assumption of responsibility by Louise for her mother was decisive, and that the claim was doomed to fail.

This judicially asserted requirement of assumption of responsibility is notoriously difficult to describe and identify. Less prescriptive than Megarry V.-C., the Court of Appeal in Jelley v. Iliffe [1981] Fam. 128 insisted that an assumption of responsibility could be inferred from the simple fact of maintenance and doubted that an overt act was necessary. Although Robert Walker L.J., giving the single reasoned judgment in the Court of Appeal in Bouette v. Rose, was not prepared to reject totally the requirement of assumption of responsibility, he clearly doubted Megarry V.-C.’s interpretation of the statute. Following Jelley v. Iliffe, he held that such an assumption could be inferred from one person making a substantial contribution to another’s needs. Here Louise’s fund was being used by the Court of Protection so as to meet the financial and material needs of her mother as well as Louise’s own. Thus Mrs. Bouette was living in a house of which her daughter had a share three times larger than her own, and was making no significant monetary contribution to the household expenses. These arrangements, necessary to ensure that Mrs. Bouette could meet her daughter’s physical and emotional needs, resulted in an assumption of responsibility by Louise for her mother, and her mother was therefore a dependant for the purposes of the 1975 Act.

Even on these terms, assumption of responsibility is not only difficult to apply, but also of dubious authenticity. First, it would surely not have been expecting too much of the legislation to make such an essential requirement explicit (see Naresh (1980) 96 L.Q.R. 534, 549). Secondly, it is extremely unlikely that a threshold condition would appear in a provision dealing not with jurisdiction but with how discretion is to be exercised (see Tyler’s Family Provision, 3rd ed., pp. 96 ff.). Thirdly, insufficient weight is given to the opening words of section 3(4) (“Without prejudice to the generality of [section 3(1)(g)]”) emphasising that all the circumstances of each case must be examined. The acceptance of an implied assumption of responsibility on facts such as Bouette v. Rose is good news for voluntary carers of disabled people of whatever age (professional nurses providing care for full valuable consideration being of course statutorily excluded). However, the notion of dependency as currently interpreted remains deeply unsatisfactory, and it is somewhat surprising how keen the Law
Commission is to propose its wholesale export into the Fatal Accidents Act as a qualifying status (see Law Com. No. 263, Claims for Wrongful Death, paras. 3.35–3.46). In this context, the reference of Bouette v. Rose to the House of Lords for further definitive consideration may have had the desirable effect of clarifying its underlying principles, but leave to appeal was refused.

Ironically, Bouette v. Rose might also hold out a hope for another, somewhat wider, class of claimant. A single mother cares for her children, and receives child support payments from the absent father. Those payments are calculated by reference to a statutory formula which incorporates an element “with respect to the person with care” (Child Support Act 1991, Sched. 1, para. 1(3)(b); Child Support (Maintenance Assessments etc.) Regulations 1992, S.I. 1992/1815, reg. 3(1)(b)). Can it now be argued that, in making payments for the children, the father is also assuming responsibility for the mother, such that she, as well as the children, can bring a family provision claim against his estate in the event of his death?

STUART BRIDGE

TANTAMOUNT TO GOOD SENSE

A LANDLORD’S service of a notice to quit by prior arrangement with the tenant is no longer tantamount to a surrender, according to the House of Lords in Barrett v. Morgan [2000] 2 W.L.R. 284. Lord Millett’s sensible judgment draws a clear distinction between the termination of a periodic tenancy by a notice to quit and the termination of a tenancy by surrender. It emphasises that the two processes are quite different, in origin and effect. The innocent reader may wonder why the House of Lords was called upon to affirm such an apparently unexceptional principle, but in the curious looking-glass world of leases, nothing can be taken for granted.

It is well established at common law that a subtenancy granted by a tenant holding under a periodic tenancy determines with the tenancy on the expiry of a notice to quit. The very nature of a periodic tenancy dictates the possibility of termination at the end of any period, inevitably involving the “root and branch” destruction of any derivative interest. The termination of a subtenancy in such circumstances may seem unfair, but the inherent insecurity of a periodic tenant’s subtenant has long been recognised and understood. It is equally well established that if a tenant surrenders
his tenancy to the landlord, it will terminate his tenancy, but it will not bring to an end any subtenancies that the tenant had previously granted. A third party, such as a subtenant, cannot be adversely affected by a subsequent agreement to which he is a stranger. Thus the landlord and tenant cannot, between themselves, decide to alter the terms of the tenancy (by surrender), and thereby terminate a subtenancy. The difference in result for a subtenant has been explained (rather misleadingly) as deriving from the consensual nature of a surrender, as opposed to the unilateral nature of a notice to quit.

Such an abbreviated explanation led to the confusion of clear distinctions when Barrett v. Morgan first came to court. Agricultural land was held in a family trust, and subject to an annual tenancy in favour of two brothers who were members of the family. The brothers in turn sublet the land to Mr. Morgan, a farmer. When the family wanted to sell the land, they discussed with the trustees how to obtain vacant possession. It was arranged that the trustees would serve a notice to quit on the brothers, who would refrain from serving a counter-notice under the Agricultural Holdings Act 1986. Sherwood v. Moody [1952] 1 All E.R. 389 was clear authority that if a tenant of agricultural land failed to serve such counter-notice, then the 1986 Act (and its 1948 predecessor) did not protect any subtenant—his subtenancy would be destroyed under normal common law principles, and he would have to vacate. So the family proceeded with confidence, and when Mr. Morgan then refused to go, the plaintiff trustees brought proceedings for possession.

All did not go according to plan. The judge refused to make an order for possession, and the Court of Appeal ([1999] 1 W.L.R. 1109) then dismissed an appeal by the plaintiffs. The Court of Appeal explained that surrender did not terminate a subtenancy because it was consensual, and that when a notice to quit was served by agreement, it too was “consensual”, and tantamount to surrender; thus it too was ineffective to determine a subtenancy.

In the House of Lords, Lord Millett, with whom all their Lordships agreed, subjected the reasoning of the Court of Appeal to incisive analysis. He examined the assertion by Sir Richard Scott V.-C. that only “unilateral” notices to quit destroyed subtenancies and that consensual acts done by arrangement between landlord and tenant, such as the notice to quit in question, did not. Lord Millett found this doctrine very curious—it meant that a person could not achieve with consent what he could achieve without. His Lordship identified the essential confusion in the Court of Appeal judgments, caused by the different senses of “consensual”. He
clarified that a surrender is essentially “consensual” because it requires the agreement of both parties; it involves a new contract—an agreed alteration in the leases’s terms. A notice to quit, whether or not pursuant to an agreement with the other party, is not “consensual” in this meaning of the term, because it can equally be effective if served without agreement—it is essentially a unilateral means of bringing a periodic tenancy to an end in accordance with the pre-existing terms of the lease. The House of Lords returned the common law to a narrow but principled path, reversed the Court of Appeal and granted possession to the plaintiffs.

The House of Lords’ decision can be interpreted as yet another judgment in which the contractual nature of a lease is emphasised, but a more interesting issue is not why the House of Lords came to its conclusion, but why the Court of Appeal had ever thought otherwise, in this case and also in the earlier Sparkes v. Smart [1990] 2 E.G.L.R. 245. The authorities upon which the Court of Appeal had relied were weak and seem insufficient to explain the ratios. The answer probably lies in a judicial attempt to prevent landlords from escaping the net of statutory protection. Such attempts have skewed the common law jurisprudence of leases, both agricultural (consider also Gisborne v. Burton [1989] Q.B. 390) and residential. Cases such as Street v. Mountford [1985] A.C. 809 and Antoniades v. Villiers [1990] 1 A.C. 417, with their convenient but conceptually ill-digested doctrine that a lease has an objective identity distinct from the intention of the parties, have caused continuing confusion, resulting in the latest startling discovery that the proprietary nature of a lease is an optional extra—see Bruton v. London & Quadrant Housing Association [1999] 3 W.L.R. 150.

Indeed, in the curious looking-glass world of leases at common law, as mediated by the mirror of statutory protection, one finds it increasingly difficult to identify a coherent jurisprudence, and Barrett v. Morgan is therefore to be particularly welcomed for its orthodox stand. One should also note, of course, that its practical impact upon agricultural tenants will be minimal, in view of the Agricultural Tenancies Act 1995.

Louise Tee

COLLECTIVE DOMINANCE: A MECHANISM FOR THE CONTROL OF Oligopolistic MARKETS?

In Gencor v. Commission (Case T-102/96, judgment of 25 March 1999, not yet reported) the Court of First Instance of the European
Communities favoured a bold construction of the jurisdiction of the Commission and of the concept of joint dominance in merger cases. The judgment is also likely to have implications beyond the context of mergers for the use of Article 82 EC to control oligopolies. The case concerned the proposed merger of the platinum and rhodium operations of Gencor, a South African company, and of Lonrho, a company incorporated under English law. In particular, Gencor and Lonrho sought to acquire joint control of Implats, the South African company that brought together Gencor’s activities in the platinum and rhodium sector, and through Implats, of the two South African companies that brought together Lonrho’s activities in the same sector. The arrangements were notified to the South African competition authorities and to the EC Commission. The South African authorities did not oppose the merger. The Commission, however, issued a decision (Commission Decision 97/26/EC (O.J. 1997 L 11/30)) pursuant to the EC Merger Regulation (Council Regulation 4064/89 (O.J. [1989] L 395/1)) declaring that the proposed concentration was incompatible with the Common Market because it would lead to the creation of a collective dominant position between the entity arising from the concentration and Amplats, the leading world-wide supplier of platinum metal. Gencor challenged the decision of the Commission before the Court of First Instance.

Two legal issues dominated the case: first, the alleged lack of jurisdiction of the Commission over the concentration, and second, the departure of the Commission from established case law of the Community judicature in its application of the concept of joint dominance. These issues will be considered in turn.

Gencor claimed that since the concentration had been originated and implemented in South Africa, the Commission did not have jurisdiction to examine its compatibility with EC law. It supported this argument by relying on the principle of territoriality and, by analogy, on the decision of the European Court of Justice in Ahlström and others v. Commission (Woodpulp) (Joined Cases 89/85, 104/85, 114/85, 116–117/85, 125–129/85) [1988] E.C.R. 5193. In Woodpulp, the European Court used the place of implementation of an agreement as the test for establishing the jurisdiction of the Commission to apply Article 81 EC, despite the invitation of its Advocate General to adopt a qualified form of the doctrine of effects. In Gencor, the Court of First Instance dealt with the jurisdiction of the Commission in two stages. In the first stage, the Court examined literally the wording of Article 1 of the EC Merger Regulation. That provision defines mergers having a Community dimension as those where the undertakings concerned meet the
specified world and EC turnover thresholds. The relevant criterion is therefore an objective one, i.e., the volume of sales of the parties to the concentration. On the facts, both Gencor and Lonhro aggregate sales in the world and in the EC markets were well in excess of the turnover thresholds set out in the Regulation. The Court emphasised that this approach was compatible with the decision in Woodpulp (above), as the criterion of implementation was satisfied “by mere sale within the Community” (at paragraph 87).

In the second stage, the Court considered whether the application of the Regulation to the facts was compatible with public international law. It held that the application of the Regulation to a concentration would be justified when it was foreseeable that a proposed concentration would have an immediate and substantial effect in the Community. In doing so, the Court embraced almost verbatim the qualified doctrine of effects propounded by Advocates General Mayrás and Darmon in ICI v. Commission (Dyestuffs) (Case 48/69 [1972] E.C.R. 619) and in Woodpulp (above) respectively. This approach mirrors the policy adopted by United States courts in the assertion of extraterritorial jurisdiction in anti-trust cases.

The Court turned next to decide whether the Commission had wrongly found that the merger would create a joint dominant position. The case law definition of collective dominance under Article 82 EC (Joined Cases T-68/89, T-77/89 and 78/89 Italian Flat Glass [1992] E.C.R. II-1403) requires that two or more independent undertakings are united by such economic links that they form a collective entity capable of behaving independently of its competitors, customers and consumers. But what constitutes an “economic link”? The answer to that question remained unclear and the examples given by the Court referred to contractual links, such as technological agreements (Italian Flat Glass (above)) or shipping conferences (Joined Cases T-24-26 and 28/93 Compagnie Maritime Belge v. Commission [1996] E.C.R. II-1201). In merger cases, the concept of collective dominance is similar to that under Article 82 EC, although the primary emphasis is placed on the ability of the undertakings to adopt a common economic policy rather than on the links between them (Case C-68/94 France v. Commission [1998] E.C.R. I-1375). In Gencor, the Commission took the view that the proposed concentration would generate a duopoly, in the form of a highly transparent structure, where the entity arising from the merger and Amplat would hold a very large combined market share and would be interdependent. Gencor’s main criticism of the Commission’s approach was that it
had failed to show the presence of “economic links” between the potential duopolists within the meaning of the case law. The Court interpreted its ruling in *Italian Flat Glass* (above) and explained that “economic links” could not be restricted to links of a structural nature (at paragraph 273 of the judgment). It then held that the relationship of interdependence existing between the parties to a tight oligopoly could also be classified as an “economic link” (at paragraph 276).

The judgment in *Gencor* has a profound teleological streak and the potential to make a significant impact on general EC competition law. The express use of the jurisdictional test of foreseeable, immediate and substantial effects within the Common Market could be easily transposed to Articles 81 and 82 EC cases and outdate the post-*Woodpulp* debate over whether or not the implementation test has a narrower meaning than the former. The Court’s approach to collective dominance has already been endorsed by the European Court in *Compagnie Maritime Belge* (Joined Cases C-395/96P and C-396/96P, judgment of 16 March 2000, not yet reported), a case under Article 82 EC. Although *Gencor* was not invoked, the Court held that “the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question” (at paragraph 45). This decision confirms that the wider interpretation of the notion of “economic links” followed in *Gencor* is not confined to merger cases. It also paves the way for the Commission to use Article 82 EC as a powerful tool for the control of non-colluding oligopolists, a grey area in the Treaty, and one that the Commission was always keen to bring within its purview, despite the original reluctance of the European Court (Case 85/76 *Hoffmann-La Roche v. Commission* [1979] E.C.R. 461, at paragraph 39).

The problems surrounding the control of oligopolies are not easy to solve. In oligopolistic markets parallel behaviour results from market structure rather than from collusion; it is the norm rather than the exception. Participants in those markets are naturally interdependent, can predict one another’s reaction and are intensely aware of their common interests without the need of any agreement between them. On the one hand, the application of a broad test of joint dominance under Article 82 EC to those undertakings could result in rational conduct being deemed abusive. On the other, non-collusive collective action that leads to anti-competitive results (i.e. restriction of output with a view to
increasing prices) should be controlled. The judgment of the Court in *Gencor*, although given in the framework of a merger case, has begun to tip the balance in favour of a more interventionist approach to oligopolies.

**FUNDING “SEX-CHANGE” OPERATIONS**

A case which will be of interest to students of medical law, public law and human rights, *North West Lancashire Health Authority v. A, D, & G* [1999] Lloyd’s Rep. Med. 399, concerned three transsexuals who wanted “sex-change” operations. The health authority’s policy was to give low funding priority to procedures it considered of little or no clinical benefit; the authority would not fund “gender reassignment” except in cases of “overriding clinical need” or other exceptional circumstances, though it would fund psychotherapy.

Applying this policy, the authority refused requests by A, D and G for funding to pay for referral to a specialist clinic for diagnosis and gender reassignment, despite the fact that psychiatrists supported their suitability. A, D and G sought judicial review. Hidden J. quashed the authority’s refusal as *Wednesbury* unreasonable. His decision was affirmed by the Court of Appeal.

The starting point, said Auld L.J., was that a health authority, in discharging its duty under section 1 of the National Health Service Act 1977 “to continue the promotion...of a comprehensive health service”, had a discretion how to allocate its budget. It was natural that each authority, in establishing its own priorities, would give greater priority to life-threatening and other grave illnesses. A policy of giving lower priority to gender reassignment and to deny it save in exceptional circumstances was not irrational, provided that the policy genuinely recognised the possibility of there being overriding clinical need and required each request to be considered on its merits.

In establishing priorities, he added, it was vital for an authority accurately to assess the nature and seriousness of each type of illness and the effectiveness of various treatments; and to give proper consideration to that assessment in the formulation and application of its policy.

For the purposes of the proceedings, the authority admitted that transsexualism was an illness. Other evidence, however, including policy statements which bracketed treatment for it with cosmetic
surgery, was in conflict with that admission. Consequently, its policy conflicted with its admitted medical judgment.

That “basic error” was not mitigated by the exception for “overriding clinical need” or other exceptional circumstances. Indeed, added Auld L.J., given the authority’s reluctance to accept gender reassignment as an effective treatment for transsexualism, the exception was in practice meaningless. If an authority devised a policy not to provide treatment save in cases of overriding clinical need, it made a nonsense of the policy if, as a matter of its medical judgment, there was no effective treatment.

In short, Auld L.J. held that, given the authority’s admission that transsexualism was an illness, its policy was flawed in two important respects. First, it did not really regard transsexualism as an illness, but rather as an attitude or state of mind which did not warrant medical treatment. Secondly, the ostensible provision it made for exceptions and its manner of considering them amounted to the operation of a “blanket policy” against funding such treatment because it did not believe in such treatment. The authority should reformulate its policy to give proper weight to its admission that transsexualism was an illness, apply that weighting when setting its level of priority for treatment, and make proper provision for exceptions in individual cases.

Buxton L.J. pointed out that a health authority could still decide not to fund any treatment for a particular condition even if it were recognised as an illness requiring medical rather than cosmetic intervention. There would, he added, be many factors that the authority could properly take into account in reconsidering its refusal, such as the cost of the procedure, the small number of patients needing the treatment, and the costs and demands of other treatments.

Having dismissed the appeal on the basis of the common law, the court did not find it necessary to consider the respondents’ submissions that the authority’s refusal breached Articles 3 and 8 of the E.C.H.R. and amounted to sexual discrimination in breach of Council Directive 79/7/E.E.C. and section 29 of the Sex Discrimination Act 1975. Indeed, the court regarded these “unfocused” submissions as “positively unhelpful, cluttering up its consideration of adequate and more precise domestic principles and authorities …” (at p. 410 per Auld L.J.). Buxton L.J. observed that with the implementation of the Human Rights Act it would be even more important that Convention rights were not inappropriately asserted. The respondents were awarded only two-thirds of their costs.

The case therefore sounds a cautionary note about the
inappropriate invocation of Convention and Community law. Moreover, following earlier cases like *R. v. Cambridge Health Authority, ex p. B.* [1995] 1 W.L.R. 898, it reaffirms that, subject to the supervisory jurisdiction of the courts, the discretion to allocate resources lies with health authorities, and it provides those authorities with some useful guidance. The case is, however, an unusual example of a successful challenge to the exercise of that discretion, reflecting a greater, and welcome, judicial willingness to scrutinise than has been evident in cases such as *R. v. Central Birmingham Health Authority, ex p. Collier* (1988, unreported), where the court declined even to seek the authority’s reasons why a life-saving heart operation on a baby had been postponed several times.

Not least in view of the inexorably rising demands on limited resources, the courts are likely to face a growing number of difficult questions about resource allocation. What if the authority in this case had argued, supported by a body of medical opinion, that transsexualism is a mental illness but one for which the only appropriate treatment is psychotherapy to bring the mental illness into line with the physical reality rather than surgery to bring the physical reality into line with the mental illness? What if an authority declines to fund gender reassignment, and/or heart transplants, and/or drugs for HIV, so as to increase expenditure on health education and/or chiropody and/or health visitors? What procedures, if any, would it be unreasonable to fund? What about the (recently reported) amputation of healthy limbs as a treatment for “body dysmorphic disorder”? Would this procedure pass the criminal law test of “reasonable surgical interference”?

The wide room for disagreement surrounding questions of resource allocation makes it all the more likely that patients will be tempted to seek their resolution judicially. The courts ain’t seen nothin’ yet.

JOHN KEOWN

BETWEEN THE BABY AND THE BREAST

In *Re C (A Child) (HIV Test)* [1999] 2 F.L.R. 1004, a local authority applied for a specific issue order to test a four-month-old baby girl for HIV. The mother of the child first tested positive for HIV in 1990, but adopted a highly sceptical stance towards generally accepted theories about HIV and AIDS, and refused conventional therapy for herself, preferring to rely on a healthy
lifestyle as a prophylactic. The case arose when the baby’s physician became aware not only that the mother was breast-feeding the child (despite the risk of transmission of HIV), but that the parents refused even to have their daughter tested for the virus in the belief that a healthy lifestyle was the optimal treatment even if she were HIV-positive.

In answering the question whether the court could or should require a course of treatment for a child which was in accordance with conventional medical practice, but which was opposed by the parents, the court adopted the conventional view about the transmission and treatment of HIV. In addition, the court noted the parents’ unequivocal testimony that they would not alter their care of their baby no matter what the test results showed.

Despite these facts, Wilson J. in the Family Division refused to do more than order the single HIV test requested by the local authority, expressing a perhaps over-optimistic belief that disclosure of the baby’s true status would inspire the parents to embrace conventional medicine. Admittedly, there was little else the court could do, since its ability to impose a treatment plan different from the plans suggested by the parties is severely limited: Re S and D (Children: Powers of Court) [1995] 2 F.L.R. 456, 463–464 (Balcombe L.J.). The Court of Appeal refused permission to appeal: [1999] 2 F.L.R. 1017.

However, and more problematically, Wilson J. did not stop with the single order at issue. He strongly suggested that if the child tested positive for HIV and went into decline, the court would order conventional drug therapy if the parents did not initiate such treatment voluntarily. He was less inclined to propose prophylactic drug therapy, but expressly left the issue open for later debate. These conclusions appear proper. However, a problem would arise if the child were to test negative for HIV. In that event, the court would in all likelihood not order the mother to cease breast-feeding, since Wilson J. stated that if she “cannot be persuaded by rational argument that she must curb her instinct to feed, I doubt she would comply with a court order” to do so. The Court of Appeal accepted Wilson J.’s position regarding breast-feeding, noting that a prohibitory order “would be ineffective”.

Although these statements are technically obiter, it is absurd to suggest that the court may act to prolong an infected child’s life but not to save him or her from contracting HIV in the first place. In making his order, Wilson J. recognised that the Children Act 1989 required the court to give paramount consideration to the baby’s welfare and cited two cases in support of his decision. In Re T (A Minor) (Wardship: Medical Treatment) [1997] 1 All E.R. 906,
the Court of Appeal refused to order a child to return from a Commonwealth country and undergo a liver transplant in England that would, in all likelihood, save his life, focusing largely on the mother’s refusal of consent. The mother’s wishes were persuasive because there was room for disagreement as to what was in the best interest of the child. Wilson J. also cited Re B (A Minor) (Wardship: Medical Treatment) [1981] 1 W.L.R. 1421, in which the Court of Appeal overruled parental wishes and required a Down’s syndrome baby to have a life-saving operation to remove an intestinal blockage. The court in Re T distinguished Re B on the grounds that the Down’s syndrome baby needed only a single operation, whereas the child in Re T would have needed long-term care after the liver transplant.

The highly individualistic analysis required under the Children Act 1989’s welfare principle means that earlier cases cannot be considered as binding precedents, but they are persuasive. Therefore, to the extent that Re C is about a single blood test, it is analogous to Re B rather than Re T. Even if Re C is interpreted as dealing with a child requiring long-term care, however, Wilson J. did not adopt the approach used in Re T. This result suggests either that he believed the long-term burden of care to be less than the burden in Re T or that C’s parents had not demonstrated that there was room for disagreement about what was in the best interest of the child. However, neither of these grounds explains his view of the position should the baby be found to be HIV-negative. To support his conclusion on this point, Wilson J. referred to the mother’s “instinct to feed”. However, such language is patently out of place when the parents have undertaken a long-standing, considered course of treatment. It is not “instinct” that is at issue; it is the parents’ belief about conventional medicine, the same belief that the court was prepared to overrule in the event that the child tested positive for HIV.

Although one cannot draw direct comparisons between the criminal and civil law, there are times when it is, or should be, appropriate to analogise. For example, the court in Re C should, perhaps, have taken into account the fact that parental beliefs about medical treatment cannot be used as a defence to charges of child neglect or harm. In R. v. Senor [1899] I Q.B. 283, a father was convicted of manslaughter for refusing to provide his child with medical treatment. There, as in Re C, the father believed that his method of care (prayer) was superior to conventional medicine. Although the father acted out of religious scruples, the court looked only at whether he had refrained from taking “such steps as a reasonable parent would take, such as are usually taken in the
ordinary experience of mankind”. Although the “reasonable parent” standard was rejected in Re T, R. v. Senior still illustrates the “clear case” for judicial intervention identified by Waite L.J. in Re T, and adopted by Wilson J. in Re C, wherein “parental opposition to medical intervention is prompted by scruple or dogma of a kind which is patently irreconcilable with principles of child health and welfare widely accepted by the generality of mankind”.

Although the parents in Re C were not claiming to act out of religious belief, they did argue that their beliefs about the nature and treatment of HIV and AIDS should prevail. However, if religious beliefs (which are greatly respected in law and society) cannot negate a charge of manslaughter, why should controversial beliefs about medical treatment be allowed to prevail here? Must one wait until the child dies to demonstrate that the parents’ beliefs were not sufficient as a matter of law to justify their actions? Surely not.

A more recent case, R. v. Sheppard [1981] A.C. 394, construes Senior as not creating an absolute offence. Instead, the question is whether the parent’s “failure to provide medical care is due to inability, through stupidity or ignorance, to appreciate the need for it”. “[A] parent who knows that his child needs medical care and deliberately, that is by conscious decision, refrains from calling a doctor, is guilty” of neglect.

Were the parents in Re C acting improperly under Sheppard? They knew of the possible need for medical care, since they had researched conventional medical practices extensively. One could say that they had “wilfully shut [their] eyes to the need for medical care”, not only with respect to the need for an HIV test but with respect to continued breast-feeding as well.

Not every principle of criminal law is transferable to the civil law. However, when courts contemplate the possibility of the future death of a child due to the beliefs of the parents, they should at least consider analogous criminal cases. Both Senior and Sheppard provide useful information about what types of parental beliefs can and “cannot stand against the right of the child to be properly cared for in every sense”, to quote Butler-Sloss L.J. in Re C. Belief patterns that are “patently irreconcilable with principles of child health and welfare” cannot be allowed to prevail under either the criminal or civil law, particularly when such beliefs are overruled in one instance (such as when a child is HIV-positive) but not in another (such as when a child is HIV-negative). In suggesting that “the law cannot come between the baby and the breast”, Wilson J. effectively conceded the law’s inability to protect this child in the
event that she was HIV-negative, a concession that need not and should not have been made.

S.I. Strong

A DUTY TO GIVE REASONS?

In Flannery v. Halifax Estate Agencies Ltd. [2000] 1 W.L.R. 377, the purchasers of a flat in Manchester sued a valuer, on whose report they had relied, for negligence. At the trial there was a conflict of expert evidence. The judge preferred the evidence of the defendant’s experts and dismissed the claim. It was accepted that the judge’s conclusion was one that was open to him on the evidence. The Court of Appeal set aside the judgment and ordered a new trial.

The trouble, according to Henry L.J., giving the judgment of the court, was that the trial judge had not given his reasons for preferring the defendant’s evidence. All he had said on that was that he had heard the witnesses and seen the way in which they reacted to the questions they were asked; this was not enough to satisfy his duty to give reasons. It was by now too late to call upon the judge to reconstitute his reasons and there were no transcripts of the experts’ oral evidence. A new trial was necessary.

In the past, the reasons given by judges for their decisions were often short and unhelpful. Goodhart, in his famous essay on the ratio decidendi of a case, clearly contemplated that a case might be a precedent even if no reasons at all were given (Essays in Jurisprudence and the Common Law (Cambridge 1931), p. 1, at p. 6). Things are different now, and Henry L.J. thought it clear that “today’s professional judge owes a general duty to give reasons”, but the case on which he principally relied (R. v. Crown Ct., ex p. International Club [1982] 2 Q.B. 304) was an application for judicial review of a decision of the Crown Court on appeal from a licensing committee, and reasons have been required of licensing justices since at least 1892: R. v. Thomas [1892] 1 Q.B. 426 (mandamus). Flannery, on the other hand, was an ordinary civil appeal, and in such cases the appeal is “by way of rehearing”, which means that it is not restricted to questions of law alone: in principle, an appellate court makes its own finding of facts.

It has, of course, frequently been stressed that appellate judges, when considering questions of fact, must bear in mind that the trial judge does, and they do not, have the advantage of seeing and hearing the witnesses. This is rarely of importance, however, in
relation to expert witnesses whose evidence, in written form, is often meticulously examined on appeal: in *Whitehouse v. Jordan* [1981] 1 W.L.R. 246, for example, five separate speeches were delivered in the House of Lords, each dealing at length with complex medical evidence. This may have been in the mind of Bingham L.J. when he said, in a passage cited by Henry L.J., that a coherent reasoned opinion from a qualified expert merits a coherent reasoned rebuttal (*Eckersley v. Binnie* (1988) 18 Con.L.R. 1, 77–78), but Bingham L.J.’s was a dissenting judgment; if and in so far as his remarks were directed to the duties of a trial judge, Russell L.J., speaking for the majority, seems to have taken a different view (*ibid.*, at pp. 54–55). Noting that the judge in *Eckersley* had “rarely” indicated in his judgment why he preferred the evidence of one expert to another, Russell L.J. pointed out that the judge had to make up his mind and “I do not think this court should interfere with his approach unless convinced that it was wrong”. The real trouble in *Flannery* was less the inadequacy of the judge’s reasoning than the absence of a transcript of the oral evidence, without which the Court of Appeal could not do what it otherwise should have done.

It may seem mean and ungracious to cavil at Henry L.J.’s technical justification for so apparently desirable a proposition as that judges are under a duty to give adequate reasons for their decisions, especially when he supported it with the substantive justifications that fairness and due process require that the parties should know why they have won or lost, and that the losing party should know whether he may have an available appeal. The fact is, however, that the idea that judges owe a general duty to give reasons is in itself troublesome, both conceptually and in practice—and especially when applied to ordinary civil cases subject to appeal by way of rehearing. What kind of a duty is it and to whom is it owed? In *Flannery* itself, the claimant’s appeal was allowed with costs, but could anyone suggest that the unfortunate defendant, who succeeded below and may well succeed again at the new trial, should be able to recoup his losses from the judge? No doubt, if a judge regularly failed to give reasons for his decisions, he might eventually be spoken to by the Lord Chancellor, but is that enough to make a duty? And what of appellate judges who give no reasons of their own? If they say, “for the reasons given by my noble and learned friend Lord Carrot, I agree”, they have given reasons, but are they in breach of a duty if they say no more than the two words “I agree”?

In *Flannery* itself, the Court of Appeal set aside a judgment which no one could say was clearly wrong, and it did so because
the failure of the trial judge to elaborate the reasons for his
decision, coupled with the absence of a transcript of the evidence,
meant that it was unable to say that the judgment was clearly right.
The Court of Appeal’s decision was no doubt well meaning and, as
an exhortation to judges to give adequate reasons wherever
possible, it may be useful; but it is respectfully suggested that the
outcome was neither proportionate to the matter at issue nor just
in its result.

J.A. JOLOWICZ

COMMON LAW INVALIDITY OF CONDITIONAL FEE AGREEMENTS FOR
LITIGATION: “U TURN” IN THE COURT OF APPEAL

The Court of Appeal in Awwad v. Geraghty & Co. (a firm) [2000] 1
All E.R. 608 has confirmed that conditional fee agreements are
invalid at common law. The court rejected the contrary decision in

Mr. Awwad engaged Miss Geraghty, a solicitor, to act for him
in a libel action. She wrote saying that her hourly rate for this
work would be £90. But that letter was a half-truth. Rougier J.
found that the parties had further orally agreed that she would
charge him more, her normal profit rate, if she won the case. The
oral agreement imported an element of reward for success. This
proved decisive.

After Mr. Awwad had settled the libel claim, Miss Geraghty
sent him her bill calculated at the £90 rate, but he refused to pay,
contending that the fee agreement was unenforceable because it
infringed public policy. Both Rougier J. and the Court of Appeal
agreed, and so Miss Geraghty did not receive a penny for her
work.

Public policy intrudes here because the common law abhors fee
agreements which give lawyers a financial stake in the outcome of
litigation. Such a stake can consist of (i) a percentage of the value
of any eventual judgment (or settlement) won by the client; or (ii)
some other success fee, such as normal fees plus a specified
percentage of those fees; or (iii) it might be agreed that the normal
fee will be reduced or waived if the client loses; or (iv) the fee
agreement might combine the elements in (ii) and (iii).

Fee agreements falling within categories (ii), (iii) or (iv) are valid
if they satisfy sections 58 and 58A of the Courts and Legal Services
Act 1990 (substituted by section 27 of the Access to Justice Act
1999 and effective from 1 April 2000) (hereafter “the 1990 Act (as amended)”). But category (i) remains contrary to English law; it is the American “contingency fee”. However, a success fee calculated as a percentage increase upon the normal fee, and so falling within category (ii), can be “capped” by reference to a percentage of the damages awarded (Civil Procedure Rules (1998) Part 48, Practice Direction para. 2.16(c)).

This statutory scheme was not in force when Miss Geraghty contracted with her client and in any event the scheme requires the fee agreement to be in writing and signed by the lawyer and client (Conditional Fee Agreements Regulations 2000 (S.I. 2000/692), reg. 5). The court in Awwad held that at common law such a conditional fee agreement is unlawful and unenforceable. The court considered the decision in the Thai case was wrong on one definite count and, possibly, on a second.

The first and possible ground of error concerns the effect of prohibitions contained in the Solicitors’ Practice Rules 1987 (now the 1990 Rules). Rule 8 of the 1987 edition of these Rules prohibited conditional fee agreements except where statute permitted them. In a different context the House of Lords in Swain v. The Law Society [1983] 1 A.C. 598 held that these Rules, which are subordinate legislation made under the Solicitors Act 1974, have legal force (applied in Mohamed v. Alaga & Co. (a firm) [1999] 3 All E.R. 699, 706 D, C.A.). However, Millett L.J. in the Thai case, without the benefit of the Swain decision, took the opposite view, that the Rules cannot affect questions of public policy. The Court of Appeal in Awwad suggested that “the court in the Thai Trading case may have been in error in asserting that breach of a professional rule did not involve any illegality”. On this point the Thai decision had already been twice doubted by the Divisional Court, in Hughes v. Kingston upon Hull C.C. [1999] Q.B. 1193 and Leeds C.C. v. Carr, The Times, 12 November 1999. Meanwhile, in the wake of the Thai case, rule 8 was amended in January 1999 to create a further exception validating agreements “permitted ... by the common law”: see The Guide to the Professional Conduct of Solicitors (8th edn., 1999), p. 278. The Awwad decision shows that there is no such further exception based upon the common law. The 1999 amendment can now be deleted!

The court in the Thai case, having (wrongly) regarded the Solicitors’ Practice Rules as not decisive, went on to decide that a “no win, no fee” agreement was no longer against public policy. On this second point, the court in Awwad unequivocally rejected the Thai decision. May L.J. said bluntly, at p. 635: “there is no present room for the court, by an application of what is perceived to be
public policy, to go beyond that which Parliament has provided". May L.J.'s view is now vindicated by section 58(1) of the 1990 Act (as amended) which states that conditional fee agreements are unenforceable unless validated by that statute (briefly noted in Awwad at p. 622).

Therefore, Miss Geraghty's contractual claim failed. But the court further decided that she could not obtain remuneration for her services by a restitutionary claim. It distinguished Mohamed v. Alaga & Co. (a firm) [1999] 3 All E.R. 699, where the Court of Appeal awarded a quantum meruit in favour of an interpreter who had performed work for a firm of solicitors under an unlawful contract. The contract included an illegal arrangement for payments to the claimant for introducing new clients to solicitors, a matter prohibited by professional rules. Schiemann L.J. in Awwad at p. 631 distinguished Mohamed's case: "The interpreter was blameless and no public policy was infringed by allowing him to recover a fair fee for interpreting: the public policy element in the case only affected fees for the introduction of clients". In the present case, Miss Geraghty's restitutionary claim would directly infringe public policy.

The position is now clear, strict and perhaps not unsatisfactory. A conditional fee agreement is unenforceable at common law. A lawyer cannot recover even the "reasonable value" of her litigation services performed under such an unenforceable agreement. Conditional fee agreements must comply with the statutory scheme.

NEIL ANDREWS

THE INADMISSIBILITY OF EVIDENCE RELATING TO INTERCEPTED COMMUNICATIONS

The White Queen, probably parodying Tertullian, boasted to Alice that she could sometimes believe as many as six impossible things before breakfast. Students of the law of evidence must occasionally perform similar feats.

In general, English law holds logically probative evidence admissible. If obtained illegally or if its admission would otherwise reflect adversely on the fairness of the proceedings, however, the court has discretion to exclude such evidence under section 78 of PACE (see also Sang [1980] A.C. 402). Along with the law governing confessions (which, regardless of their probative force, may be excluded under section 76 of PACE if the Crown cannot establish that they were obtained lawfully), the Interception of Communications Act 1985 affords a notable exception to the
general principle of admissibility. The Act was passed hot upon the heels of *Malone v. U.K.* (1984) 7 E.H.R.R. 14, a case in which the European Court of Human Rights was critical of the inaccessibility, imprecision and lack of formal safeguards in the area of communications intercepts in the U.K. Although the White Paper which preceded it (*The Interception of Communications in the United Kingdom* (1985) Cmnd. 9438) stated its objects clearly enough, interpretation of the statute's evidential requirements has proven highly problematical. Thankfully, however, the House of Lords in *Morgans v. D.P.P.* [2000] 2 W.L.R. 386 has authoritatively settled matters.

Briefly, section 1(1) of the 1985 Act declares that anyone “who intentionally intercepts a communication in the course of its transmission by post or by means of a public telecommunications system” commits an offence. Section 1(2), however, then states that an offence is not committed *either* if the interception was effected under warrant from the Home Secretary *or* if the interceptor had reasonable grounds to believe that the recipient or the sender of the communication consented to the interception of the communication. Section 2 enumerates the circumstances in which a warrant may issue, in particular permitting the Home Secretary to do so “for the purpose of preventing or detecting serious crime” (s.2(2)(b)). There are further exemptions from criminal liability, not relevant for present purposes. Section 9, however, provides:

No evidence shall be adduced and no question in cross-examination shall be asked which (in either case) tends to suggest—

(a) that an offence under s.1 ... has been or is to be committed by any of the persons mentioned in subs.(2) below; or

(b) that a warrant has been or is to be issued to any of those persons.

The persons mentioned in subs.(2) include anyone holding office under the Crown, the Post Office and anyone engaged in the running of a public telecommunications system.

Lord Mustill explained section 9’s purpose in *Preston* [1994] 2 A.C. 130, 167:

The purpose of section 9 can be seen as the protection, not of the fruits of the intercepts, but of information as to the manner in which they were authorised and carried out. ... [T]he defendant was not to have the opportunity to muddy the waters at a trial by cross-examination designed to elicit the Secretary of State’s sources of knowledge or the surveillance authorities’ confidential methods of work. Evidently, the
proscription of questioning on the existence of warrants was seen as an economical means of achieving this result.

In Preston P and others had been convicted of conspiring to import drugs. During the investigation, police had intercepted telephone calls under a warrant issued under section 2(2)(b) of the Act. The House of Lords held that the Crown had wrongly been allowed at trial to rely upon schedules of calls made between the co-accused on mobile telephones and, to some small extent, upon the contents of some of the calls. For a while the Court of Appeal was prepared to assume that Preston only applied to warranted intercepts (Rasool [1997] 1 W.L.R. 1092; Owen [1999] 1 W.L.R. 949). This analysis, however, produces the ludicrous position that if an intercept is made unlawfully or without warrant, it will not infringe section 9 and evidence from it will be admissible. This state of affairs was made possible because, whilst section 1(2) provides for an exception where the interceptor has reasonable grounds for believing that the person to or by whom the communication was sent had consented to the intercept, the Court of Appeal has held that it is not open to the defence to inquire whether the interceptor actually had a reasonable belief that the intercept was consensual in either sense (e.g., Owen [1999] 1 W.L.R. at p. 960 per Buxton L.J.). Not surprisingly, Kennedy L.J. in Morgans v. D.P.P. [1999] 1 W.L.R. 968 considered this “a somewhat astonishing state of affairs”, whilst in the House of Lords Lord Hope of Craighead dubbed it “a remarkable and … unacceptable anomaly” (p. 401). Certainly, in Preston the House of Lords had not mentioned that the Act draws any such bizarre distinction—which could have been expected, had the House recognised its existence.

There are three good reasons for concluding that section 9 ought to be given a wide interpretation, embracing intercepts both with and without warrant. First, it is significant that section 9 employs the words “no evidence shall be adduced”, suggesting that no evidence concerning any intercept whatever may be admitted in evidence. Secondly, as a practical matter, to prepare the terrain for the admission of evidence deriving from an intercept, the Crown invariably has to give some indication of how it was obtained. Thus, evidence that there was an intercept may necessarily leach out, suggesting either that an offence has occurred under section 2 or that a warrant has issued. Thirdly, even before the 1985 Act was passed, it was not the practice for the Crown to introduce evidence deriving from telephone intercepts. Had Parliament intended to alter this practice, the Act would have signalled more clearly this radical shift in policy.
The distinction between lawful and unlawful intercepts can be criticised on two further grounds. As Lord Hope explained in Morgans, if unlawful intercepts fell outside the prohibition in section 9, “therein would lie the seeds of temptation for the unscrupulous” (p. 407). Finally, there is a critical human rights argument which militates against drawing this distinction. Even if the prosecution can introduce its evidence without alluding to the intercept, the defendant will almost certainly wish to explore this forbidden territory. By preventing him from testing the evidence, section 9 deprives the defendant of proper safeguards and, owing to an inequality of arms, infringes his right to fair trial under Article 6 of the Convention. Therefore, the unsurprising conclusion drawn by Lord Hope was that “evidence of material obtained by the interception by the persons mentioned in section 9(2) of the Act of 1985 of communications of the kind described in section 1(1) of that Act . . . will always be inadmissible. It is not possible to say that section 9(1) of the Act provides for this in express language. But, in the context of the Act as a whole, the prohibitions which it contains lead inexorably to that result” (p. 407).

At the time of writing, a Regulation of Investigatory Powers Bill has just passed through its committee stage. This Bill, which will repeal the 1985 Act, is intended to subject investigatory powers involving the interception of communications to the requirements of human rights law. Clause 16 contains a broadly similar prohibition to section 9, but expresses more pointedly Parliament’s determination to exclude any evidence, questioning, assertion or disclosure in legal proceedings which might suggest the existence or absence of an intercept warrant. The unholy muddle, ultimately unravelled in Morgans v. D.P.P., is at least unlikely to recur.

RODERICK MUNDAY

PROTECTING THE MENTALLY DISTURBED DEFENDANT AGAINST HIMSELF

A PARTICULAR problem for English criminal procedure is the defendant on a murder charge who is (to put it crudely) so mad that he believes that he is sane—and instead of running the obvious defences of insanity or diminished responsibility, runs some other defence that seems plausible to him but no one else. In Weekes [1999] 2 Cr.App.R. 520 the Court of Appeal departed from its earlier case law on the subject and pointed the law in what this commentator feels to be a sounder direction.

In the earlier cases—notably Kookén (1982) 74 Cr.App.R. 30
and Straw (1985) [1995] 1 All E.R. 187 (noted at [1995] C.L.J. 232)—the Court of Appeal took a hard and uncompromising line. Provided the defendant is found fit to plead, it said, he (or she) must live with the consequences of the decisions he has made. The trial judge is under no obligation to pull the defendant’s legal chestnuts out of the fire by producing psychiatric evidence under his discretionary power to call witnesses, and his failure to do so gives the defendant no arguable grounds for appeal. Nor, it said, does it help the defendant to approach his appeal a different way by asking the Court of Appeal to exercise its own discretionary power to hear fresh evidence under section 23 of the Criminal Appeal Act 1968, with a view to getting it to substitute a different finding for the murder verdict that the jury reached without it. Thus the defendant stays convicted—and though mad, in jail, unless the governor can persuade the Home Secretary to transfer him to a mental hospital.

In Weekes the Court of Appeal, having examined these authorities and a number of more recent ones, took a softer line on the question of its power to hear “fresh evidence” from the psychiatrists under section 23. The fact that the defendant had been properly found fit to plead, it said, did not conclude the matter, and despite such a finding, it was still proper for the Court of Appeal to hear from the psychiatrists where his decision not to call them was significantly affected by his mental illness. On this basis it admitted the evidence, and then substituted for the murder verdict a conviction of manslaughter on grounds of diminished responsibility.

So far so good: but it would surely be much better if this particular problem never reached the Court of Appeal and the psychiatrists were always heard at trial. As things stand, however, it is often difficult to ensure the psychiatric evidence is heard at trial, because at trial it often suits neither the prosecution nor the defence to call it. The prosecution claims the defendant is a murderer and does not see it as its job to rebut the case that it has come to court to make. And the defence feels unable to call it, either because defence counsel fears that it will undermine some other plausible and preferable defence, like self-defence or provocation, or (as in the present case) because the defendant has expressly told his counsel that he will not allow it.

The answer, surely, is that the trial judge should be required to call the psychiatrists under his general power to call additional evidence: and that the Court of Appeal needs to rethink what was said in Straw and Kookcn not only in relation to the point about hearing fresh evidence on appeal, but also on the judge’s duty (if any) to call such evidence on his own initiative at trial.
It is true that English criminal procedure is basically adversarial, and leaves the parties free to call what evidence they choose with minimum intervention from the court. But it only does so, surely, because it traditionally believes that this is the soundest way of establishing the truth, which is an essential ingredient for doing justice. As Denning L.J. once said, citing Lord Eldon, “truth is best discovered by powerful statements on both sides of the question”: Jones v. National Coal Board [1957] 2 Q.B. 55.

Thus as the law now stands the judge (or magistrates) are already permitted—and sometimes expected—to intervene on their own initiative when this is necessary to prevent normal adversarial practices resulting in inaccurate fact-finding and consequent injustice. So if the defendant tries to plead guilty whilst still protesting his innocence, they must reject his “equivocal plea” and proceed to hear the evidence against him. Where after a guilty plea the prosecution and defence present an “agreed version” of the facts for the judge to sentence on, he can reject it if he thinks it is implausible and have his own investigations made. When directing the jury, the judge is bound to put before them any possible defence that is suggested by the evidence, even if defence counsel—whether for tactical reasons or incompetence—does not expressly rely on it.

Lastly, there are already situations where it seems to be recognised that the court must call witnesses whom neither side has called. In two decisions (R. v. Wellingborough JJ., ex p. Francois (1994) 158 J.P. 813 and R. v. Haringey Justices, ex p. D.P.P. [1996] Q.B. 351) the Divisional Court has indicated that the court should intervene to call a witness where the prosecution first says that it will call him, and then at trial tells the defence “We’ve changed our mind, you call him”—so forcing them, if they want the court to hear him, to call him as their own witness: which means they cannot cross-examine him, although he is probably favourable to the other side.

What lies behind these cases seems to be the principle that the court must intervene to call a witness where his evidence might realistically help to establish a defendant’s innocence of the offence of which he stands accused. And it is hard to think of a clearer case for the application of this principle than where a mentally disturbed defendant on a murder charge perversely refuses to call evidence relating to his mental state.

J.R. SPENCER