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CORPORATE LIABILITY FOR HUMAN RIGHTS ABUSE: FOR CONGRESS, NOT COURTS

JESNER v Arab Bank plc 4 U.S. __ (2018) is the second time that the US Supreme Court has been asked to rule on whether corporations can be sued for violations of international norms under the Alien Tort Statute, 28 USC §1350 (“ATS”). Enacted in 1789, the Statute gives US federal courts jurisdiction over “any civil action by an alien for a tort only,

committed in violation of the law of nations". In *Sosa v Alvarez-Machain* 542 U.S. 692 (2004), the Supreme Court held that federal courts may recognise a right of action for contemporary ATS claims where the international norm alleged to have been violated is "specific, universal, and obligatory" provided that courts also exercise "judicial caution" (p. 725). In 2010, the Court of Appeal for the Second Circuit sparked an intense debate when it held that corporations cannot be sued under the ATS because international law does not recognise a specific, universal and obligatory norm of corporate liability (*Kiobel v Royal Dutch Petroleum* 621 F.3d 111 (2d Cir. 2010)). Other circuit courts disagreed, deciding that, although the conduct-governing norm is drawn from international law, it is federal common law that determines whether there is any liability for breaches of that norm. On appeal, the Supreme Court affirmed the Second Circuit decision but not by resolving the question of corporate liability. Instead, the Court held that the presumption against extraterritoriality applied to claims under the ATS and, as "all the relevant conduct" in *Kiobel* took place outside the US, the presumption was not displaced (*Kiobel v Royal Dutch Petroleum* 569 U.S. 108 (2013), 124; noted [2013] C.L.J. 487). It added that, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption" (pp. 124–25).

In *Jesner v Arab Bank plc.*, victims and the surviving relatives of victims of terrorist acts committed abroad claimed that Arab Bank facilitated those acts in violation of international law. It was alleged that the Jordanian financial institution had maintained accounts for terrorists and their families, used its New York branch to clear dollar-denominated transactions for the benefit of terrorists, and laundered money for a Texas-based charity allegedly affiliated to Hamas. The Second Circuit dismissed the claims following the circuit precedent (i.e. *Kiobel v Royal Dutch Petroleum* 621 F.3d 111 (2d Cir. 2010)). In a sharply divided and diffuse majority judgment given by Justice Kennedy, the Supreme Court ruled that foreign corporations may not be defendants in ATS claims, leaving open the question whether claims can be brought against US companies. Justice Kennedy emphasised that Congress is better positioned to consider whether a right of action is in the public interest and that "political branches, not the Judiciary, have the responsibility and institutional capacity to weigh [the] foreign-policy concerns" that arise in ATS cases (pp. 18–19, per Kennedy, J.). In his view, the ATS was enacted to "promote harmony by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable" (p. 25, *ibid.*), but claims involving foreign corporations have achieved the opposite result. Jordan considered the present case to be a "grave affront" to its sovereignty that "threatens to destabilize Jordan's economy and undermines its cooperation with the United States" (p. 26, *ibid.*).

On the question of corporate liability under the ATS, Justice Kennedy (joined only by Chief Justice Roberts and Justice Thomas) expressed support for the majority of the Second Circuit in *Kiobel*, albeit without reaching a firm conclusion. He considered that the decision of states to limit the jurisdiction of international criminal tribunals to natural persons “counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law” and that “it is far from obvious why the question whether corporations may be held liable for international crimes of their employees is a mere question of remedy” (pp. 15–17, per Kennedy J.). In a remarkable passage, Justice Kennedy also expressed concern that allowing plaintiffs to sue foreign corporations under the ATS would imply that other states “could hale our [corporations] into their courts for alleged violations of the law of nations”, which in turn “could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts” (p. 24, *ibid.*). The threat of liability might discourage American corporations from investing abroad and “deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights” (*ibid.*).

Although the question whether ATS cases can be brought against US corporations was left open, the majority expressed deep reservations about the judicial power to recognise a private right of action. Justice Kennedy suggested that “there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS” (p. 19, per Kennedy J.), even though this would appear to contradict the position he took as part of the majority in *Sosa*. In concurring opinions, Justices Alito, Gorsuch and Thomas made plain their aversion to judicial recognition of causes of action under the ATS (p. 1, per Thomas J.; p. 13, per Gorsuch J.; p. 3, per Alito J.), with Justice Gorsuch excoriating in his criticism: “there are degrees of institutional incompetence and constitutional evil. It is one thing for courts to assume the risk of creating new causes of action to ensure *our* citizens abide by the law of nations and *avoid* reprisals against this country. It is altogether another thing for courts to punish *foreign* parties for conduct that should be attributed to the United States and thereby *risk* reprisals against this country” (p. 13, per Gorsuch J.). In his view, “[t]o the extent *Sosa* continued to claim for federal judges the discretionary power to create new forms of liability on their own, it invaded terrain that belongs to the people’s representatives and should be promptly returned to them” (p. 3, *ibid.*).

It is true that ATS cases give rise to real foreign-policy and separation-of-power issues, but the majority are also selective in their deference to the political branches. As pointed out by Justice Sotomayor in a powerful

dissenting opinion (joined by Justices Ginsburg, Breyer and Kagan), the Solicitor General – and some Members of Congress – have implored the Court not to reject corporate liability. During oral argument, counsel for the US told the Court that “the way to deal with international friction is by carefully defining . . . the types of violations that are remediable” and that beyond this, he “[did not] see a sound reason to categorically exclude corporate liability” (*Jesner v Arab Bank plc.*, No. 16-499, Transcript of Oral Argument, 11 October 2017, 29). In his view, foreclosing corporate liability might actually give rise to “the possibility of [international] friction” (pp. 33–34). In addition, Congress has “never seen it necessary to immunize corporations from ATS liability even though corporations have been named as defendants in ATS suits for years” (p. 24, per Sotomayor J.). It is also relevant that objections by foreign states have been to the exercise of extraterritorial jurisdiction and not to corporate liability in principle. As the facts in *Jesner* have a relatively minor connection to US territory, the case could arguably have been dismissed on the basis that it did not “touch and concern the territory of the United States . . . with sufficient force” to displace the presumption against extraterritoriality (*Kiobel v Royal Dutch Petroleum* 569 U.S. 108 (2013), 124–25). In other words, foreign-policy concerns could be addressed “with a tool more tailored to the source of the problem than a blanket ban on corporate liability” (p. 19, per Sotomayor J.).

Justice Kennedy’s support of the Second Circuit decision in *Kiobel* mischaracterises international law and its relationship with domestic law and elides the distinction between substantive norms and international responsibility. International law does not impose civil liability on either natural or juridical persons, and while it is true corporations cannot be defendants before international criminal tribunals, it only follows from this that states have not decided to enforce international criminal responsibility at the interstate level. Not only are states generally free to decide how to enforce international norms within their domestic legal systems (subject to jurisdictional rules and human rights law) but international law actually *requires* states to impose domestic liability on corporations for certain conduct, including the financing of terrorist acts (International Convention for the Suppression of the Financing of Terrorism 1999, 2178 U.N.T.S. 197, Art. 5). Finally, Justice Kennedy’s marked deference to corporations and to a liberal world view of free trade stands in stark contrast to that of some other domestic courts. For example, in a case where a corporation was alleged to have been involved in torture, the Court of Appeal of British Columbia stated that “it is not necessarily the case . . . that the recognition of a [customary international law] norm against torture as the basis of some type of private law remedy in this instance would bring the entire system of international law crashing down” (*Araya v Nevsun Resources Ltd.* 2017 BCCA 401, at [189]).

In *Citizens United v Federal Election Commission* 558 U.S. 310 (2010), the Supreme Court famously upheld the right of US corporations to free speech. Although ATS cases raise very different issues – the exercise of extraterritorial jurisdiction, the constitutional separation of powers, and the role of Congress and the executive in the area of foreign policy – the overarching picture is nevertheless striking: fundamental corporate rights are protected but corporate liability for human rights abuses remains elusive.

ANDREW SANGER Q1

Address for Correspondence: Corpus Christi College, Cambridge, CB2 1RH, UK. Email: as662@cam.ac.uk

A “PRINCIPLE” OF CONSISTENCY? THE DOCTRINAL CONFIGURATION OF
THE LAW OF JUDICIAL REVIEW

EXAMINATION candidates sitting mathematics papers may earn credit for their working, as well as for arriving at the correct answer. If the same were true of judges deciding cases, then the Supreme Court would be awarded less than full marks for its decision in *R. (Gallagher Group Ltd.) v Competition and Markets Authority* [2018] UKSC 25, [2018] 2 W.L.R. 1583. While it arrived at a defensible conclusion, its reasoning leaves something to be desired.

Following an investigation by the defendant’s predecessor, the Office of Fair Trading (OFT), into alleged price-fixing in the tobacco market, several parties entered into “early resolution agreements” (ERAs) acknowledging (without prejudice to the possibility of subsequent appeal) infractions of competition law in return for lighter penalties. One such party, TM Retail Group Ltd. (TMR), had been assured that, even if it did not itself appeal, it would receive the benefit of any other party’s successful appeal that undermined the OFT’s decision in its case. Its financial penalty was duly repaid following a relevant appellate decision. However, the OFT decided not to extend similar lenience to the claimant: like TMR, it had entered into an ERA and had declined to launch its own appeal; but, in contrast to TMR, the claimant had received no assurance from the OFT about benefitting from others’ successful appeals.

Challenging the OFT’s decision by way of judicial review, the claimant failed at first instance but succeeded in the Court of Appeal ([2016] EWCA Civ 719, [2016] Bus. L.R. 1200), where it was held that the OFT’s decision engaged (inter alia) the principle of equal treatment at common law and lacked objective justification. The Supreme Court disagreed. Rationality, it said, was the acid test of legality in these circumstances – and the defendant’s decision was not irrational. That conclusion is perfectly tenable, there being an intelligible basis for treating the claimant differently from a party who was in receipt of an assurance. However, it is incumbent

upon apex courts not only to arrive at sound conclusions but to do so in a way that safeguards the coherence of the law. Judged thus, the Supreme Court fell short in *Gallagher* as it sought to grapple with important questions about the configuration of administrative law doctrine – and, in particular, the level of abstraction at which it can most usefully be conceived.

In falling back on the *Wednesbury* reasonableness, or rationality, test, Lord Carnwath (with whom the other four Justices agreed) and Lord Sumption manifested a strong preference for utilising a limited range of well-established doctrinal tools. For instance, Lord Sumption (by way of agreement with Lord Carnwath) said that “it is important not unnecessarily to multiply categories” because doing so would tend to “undermine the coherence of the law by generating a mass of disparate special rules” (at [50]). That the unnecessary multiplication of categories is to be avoided is self-evident. But the hard questions, as always, lie at the margin. When is the creation or acknowledgement of a new category helpful – because, for instance, it bolsters legal transparency or predictability? And when does it render the law undesirably Byzantine? In seeking to tread that difficult line, the Court enjoyed some, but only limited, success.

The success lies in the bucket of cold water that Lord Carnwath poured over notions such as “abuse of power” and “conspicuous unfairness” (in the substantive, as distinct from the procedural, sense of unfairness), the sloppy deployment of which has muddied the doctrinal waters of administrative law. A prime example is *R. (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744, [2005] Imm. A.R. 608, in which the legitimate expectation doctrine was contorted so as to apply even though the claimant was unaware of the administrative policy upon which the expectation was purportedly founded. It was plain that no legitimate expectation could really have arisen in such circumstances – it being impossible to expect that of which one is ignorant – yet such problems were papered over by the court, on the ground that an “abuse of power” had occurred.

A similar approach might have been adopted in *Gallagher*. The case did not fit the legitimate expectation mould, given that the claimant had received no assurance and knew nothing of that made to another party. Yet a court minded to assist might have brushed such doctrinal inconveniences away on the ground that the differential treatment represented an “abuse of power” or was “conspicuously unfair”, so malleable are those notions. The Supreme Court, however, wisely chose not to go down that path. “Abuse of power” and “conspicuous unfairness”, said Lord Carnwath, cannot properly be regarded as free-standing principles of administrative law – and such language “adds nothing to the ordinary principles of judicial review” (at [42]). He is surely correct. The concepts are simply too diffuse to serve as heads of review, and are so manipulable as to render the true reasons for judicial intervention (or forbearance) unacceptably opaque.

Meanwhile, the use of such notions to stretch – and, as in *Rashid*, distort – established heads of review is to be deprecated.


The defensibility of Lord Carnwath’s rejection of “abuse of power” and “conspicuous unfairness” as administrative law principles might appear to demonstrate the wisdom of Lord Sumption’s less-is-more philosophy, according to which the multiplication of categories of unlawfulness is to be avoided, and well-established heads of review stuck to. There is doubtless something to be said for that view. But it can be taken too far, as it was in *Gallagher*. The central issue at stake in such cases turns upon the values of consistency and equal treatment, whereby like cases ought to be treated alike, absent a good reason for differential treatment. Those values have recently secured increasing judicial recognition, including at Supreme Court level. For instance, in *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 W.L.R. 4546, at [29], Lord Wilson referred to “a principle, no doubt related to the doctrine of legitimate expectation but free-standing”, according to which (and here Lord Wilson quoted Laws L.J. in *R. (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, at [68]) “public bodies ought to deal straightforwardly and consistently with the public”.

Against this background, it is perhaps surprising that in *Gallagher* Lord Carnwath concluded – without referring to *Mandalia* – that “equal treatment” is not “a distinct principle of administrative law” (at [24]) and that, when issues of consistency (which, he allowed, is a generally desirable objective) arise, they are best thought of only “as aspects of rationality” (at [26]). It was thus by reference to such “ordinary principles of judicial review” as rationality that the case fell to be decided (at [41]). Unlike Lord Carnwath, Lord Sumption was prepared to acknowledge that there is “a common law principle of equality”, but went on to qualify this, saying – in line with Lord Carnwath – that the principle is “usually no more than a particular application of the ordinary requirement of rationality imposed on public authorities” (at [50]).

Such dicta lead us to some fundamental questions about administrative law’s doctrinal configuration. In particular, what, if anything, turns on whether there is an administrative law “principle” of consistent, or equal, treatment? That Lords Carnwath and Sumption were able to disagree about whether such a principle exists but were unanimous that consistent/equal treatment is relevant to questions of rationality suggests that there are conceptual difficulties in play here. So do the internal inconsistencies within the administrative law worldview found in the leading judgment of Lord Carnwath, for whom legitimate expectation is an “ordinary principle of judicial review”, but for whom consistent/equal treatment occupies some lesser status as a factor that is merely pertinent to the application of a true “principle” of review (namely, rationality). The implication is that courts must confront issues of equality/consistency through the prism of

rationality, whereas legitimate expectation amounts to a doctrinal lens in its own right.

This view does not, however, withstand scrutiny. The existence of an assurance that gives rise to a legitimate expectation does not in and of itself establish the unlawfulness of administrative conduct that cuts across the assurance. Rather, it triggers judicial evaluation – by reference to the *Wednesbury* rationality or proportionality doctrine, as appropriate – of the quality of any justification offered for the expectation's frustration. No one is suggesting that the value of consistency ought to receive more judicial protection than that afforded to a legitimate expectation, it being a given that inconsistent treatment should be regarded as lawful provided that it is adequately justified. And, to be fair, Lord Carnwath does not appear to think that consistency should receive any less protection, given his acknowledgement that it can feed into rationality review. It might therefore be retorted that any criticism of *Gallagher* amounts to little more than taxonomical fetishism: does it really matter whether, like legitimate expectation, consistent/equal treatment is regarded as an administrative law “principle” in its own right (in the sense of being a separate ground of review)?

For three reasons, it does matter. First, recognising consistent/equal treatment as a free-standing principle would be fitting recognition of its normative importance. Second, it would facilitate the development of a suitable doctrinal superstructure, as  rred with legitimate expectation. This would enable courts to approach in a more systematic and predictable manner such issues as the circumstances in which a policy or practice should be regarded as sufficiently clear and settled as to render deviations from it prima facie “inconsistent”. Third, carving out a principle of consistent/equal treatment from the generality of rationality review would place less weight on the latter and, as a result, would aid legal transparency. It is now more than 30 years since Jowell and Lester [1987] P.L. 368, 372, highlighted the dangers of allowing the normative reasons for judicial intervention to remain obscured within the folds of the *Wednesbury* doctrine's “ample cloak”. It is high time that the principle of consistency stopped lurking therein.

MARK ELLIOTT Q1

Address for Correspondence: St. Catharine's College, Cambridge, CB2 1RL, UK. Email: mce1000@cam.ac.uk

NORTHERN IRELAND'S ABORTION LEGISLATION: PROCEDURAL AND SUBSTANTIVE CONFUSION OVER DECLARATIONS OF INCOMPATIBILITY

NORTHERN Ireland's abortion legislation has survived a challenge to its compatibility with the European Convention on Human Rights (ECHR), but it has not emerged unscathed. By majority, a Supreme Court panel of seven in *Re Northern Ireland Human Rights Commission's Application*

for *Judicial Review* [2018] UKSC 27, [2018] H.R.L.R. 14, held that the Northern Ireland Human Rights Commission (NIHRC) did not have standing to challenge the legislation. A different majority would, however, have made a declaration of incompatibility under the Human Rights Act 1998 (HRA), s. 4, but for the lack of standing, and the abortion legislation was condemned by several of the Justices.

A case on this subject would always provoke controversy, but the timing of this judgment was particularly striking. It followed in the wake of the Republic of Ireland's referendum vote to repeal the Eighth Amendment of its Constitution, which recognises the equal right to life of the unborn child. Earlier in 2018, Northern Ireland abortion law was found to breach the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by the CEDAW Committee. Calls for legal reform were inevitable, but prospects for change are limited because the Northern Ireland Assembly has been suspended since January 2017. Reform by the Westminster Parliament would be highly controversial, and is further complicated by the Conservative Party's Confidence and Supply Agreement with the traditionally pro-life Democratic Unionist Party (DUP) (although the DUP were instrumental in establishing a working group to investigate reform possibilities in 2016).

Northern Ireland law makes it a criminal offence to receive or perform an abortion (Offences Against the Person Act 1861, ss. 58–59, and the Criminal Justice (Northern Ireland) Act 1945, s. 25(1)). Exceptions are limited to cases where the abortion is carried out in good faith to preserve the woman's life, or where continuing the pregnancy would make her a "physical or mental wreck" (*R. v Bourne* [1939] 1 K.B. 687, 694). The NIHRC sought to challenge the compatibility of the legislation with ECHR Articles 3, 8 and 14 because it does not permit abortions in the case of serious foetal abnormality, or where the pregnancy results from rape or incest.

By majority (Lords Mance, Reed, Lloyd-Jones and Lady Black), the court held that the NIHRC did not have standing (Lady Hale and Lords Kerr and Wilson dissenting). The Northern Ireland Act 1998 (NIA), s. 69 (5)(b), empowers the NIHRC to bring human rights proceedings. The NIHRC need not itself be a victim of a human rights breach (NIA, s. 71 (2A)), but the majority emphasised that actual or potential victims of an "unlawful act" must be identified (NIA, s. 71(2B)(c)). Under the HRA, ss. 6–9, victims can challenge the unlawful acts of public authorities. This case, however, concerned a challenge under HRA, s. 4, which requires neither an unlawful act nor a victim. As Lord Kerr noted, and as I have noted elsewhere ("Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998" (2017) 133 L.Q.R. 631), the HRA regime in sections 3–5 is completely "distinct" from that in sections 6–9 (at [183]). Comparisons with Strasbourg's approach to individual applications under ECHR Art. 34, ~~he stated~~ (e.g. at [68]), are not pertinent because HRA,

ss. 3–5, concern legislation, not specific acts with specific victims. Indeed, if primary legislation (such as the 1861 Act) is incompatible with Convention rights, there is no unlawful act (HRA, ss. 6(1) and 6(2)). Thus the court should have held that NIA, s. 71(2B)(c), was not engaged. Lord Mance’s acknowledgement that his conclusion on the procedural point was “inconvenient” (at [70]) is an understatement. The majority’s approach denies the NIHRC its statutory purpose, which includes raising cases in its own name to prevent individuals from having to do so (Lord Kerr, at [197]). As even Lord Mance noted, “the usual rules regarding standing in public law proceedings” apply to HRA, s. 4 (at [62]). It seems clear that the NIHRC would have “sufficient interest” to bring a case (Senior Courts Act 1981, s. 31(3)). The instant case runs counter to a trend for a more permissive approach to standing for individuals, let alone bodies set up for the very purpose (e.g. *Walton v Scottish Ministers* [2012] UKSC 44, [2013] P.T.S.R. 51).

Had standing been established, a majority would have made a declaration of incompatibility with Article 8 because the legislation prohibits abortion in cases of *fatal* (but not in cases of *serious*) foetal abnormality or pregnancies resulting from rape or incest (Lady Hale, Lords Mance, Kerr and Wilson; Lady Black would only have made the declaration in respect of fatal foetal abnormality). Article 14 did not need to be considered in the light of the majority’s conclusions on Article 8. The majority was satisfied that the legislation could not be operated compatibly with Article 8 for any woman falling into one of the three categories (where the foetus cannot survive, or where the pregnancy results from rape or incest) (see e.g. Lady Hale, at [34]). Lord Mance went even further, suggesting that legislation need only “inevitably” operate incompatibly “in a legally significant number of cases” (at [82]). This suggestion is difficult to reconcile with Lord Mance’s conclusion as to standing. If legislation cannot be operated compatibly, there is no unlawful act and thus no role for NIA, s. 71(2B)(c).

A minority (Lords Kerr and Wilson) would also have made a declaration of incompatibility with Article 3. The majority was not convinced that the high threshold required to breach Article 3, in contrast to Article 8, would be crossed in all cases, or even in Lord Mance’s “legally significant” number of cases. Lady Hale reserved judgment on incompatibility with Article 3, but her analysis lends support to the minority. In her view, Article 3 might not be breached in every individual case, but the public authority could not always act to prevent a breach. Certain women falling into one or more of the three categories would necessarily suffer as a result of being denied an abortion, or having to travel to access one, because of their personal characteristics and the situation in which they found themselves (at [34]). ~~Thus~~ the legislation, rather than the public authority’s action, ~~appeared~~ to be deficient and a declaration would ~~have been~~ more appropriate than a claim under HRA, ss. 6–9. Lord Kerr’s reminder that

Article 3 covers “degrading” treatment in addition to torture is compelling (at [237]). Furthermore, he focused on the instant challenge being limited to women carrying foetuses which could not survive, or women who have suffered sexual abuse (at [231]). Not all women in Northern Ireland seeking an abortion would suffer an Article 3 breach, but the case would be stronger for a “legally significant” number of women falling into one or more of those categories. Lord Reed, by contrast, held that it would be “impossible” to find an Article 3 breach in the light of the “manifestly ill-founded” Article 3 challenge in *A, B and C v Ireland* (Application no. 25579/05) (2011) 53 EHRR 13 (at [353]). None of the women in that case, however, carried unviable foetuses or had suffered sexual abuse.

Lord Reed (with whom Lord Lloyd-Jones agreed) would not have made any declaration. That he would refuse to do so was based on uncertainty about whether the legislation systematically breached Convention rights, or whether it could be operated compatibly such that individual claims under HRA, s. 6, would be more appropriate (Lady Black’s modest Article 8 conclusion was based on the same reasoning). Lord Reed’s reluctance was due to the case’s not being based on one factual matrix. An alternative conclusion could have been that the various case studies advanced by the NIHR bolstered, rather than hampered, the claim that the legislation was systematically problematic.

Lord Kerr (a former Lord Chief Justice of Northern Ireland) gave a characteristically robust critique of the legislation. But one of the boldest statements was Lord Mance’s condemnation of the “untenable” legislation, which he thought to be in need of “radical reconsideration” (at [135]). Despite not making a declaration of incompatibility, he pleaded for policy-makers to “recognise and take account of these conclusions, at as early a time as possible” (ibid.). Time will tell what the political reaction to this “non-declaration” will be.

The substantive issue turned on the unsettled question of how systematically a piece of legislation must breach rights for a declaration of incompatibility to be made. For Lord Kerr, it would have been enough that there was a “likelihood” of suffering to “at least some members of the vulnerable group” (at [257], emphasis in original). For Lord Reed, the legislation would have to breach Convention rights in “all or almost all cases” (at [355]). And Lord Mance’s “legally significant number of cases” test lay somewhere in-between, bringing little clarity to the area. Treatment of both the procedural and the substantive issues shows the courts’ continued confusion about their novel role of reviewing legislation under HRA, s. 4, rather than their traditional role of judicially reviewing unlawful acts.

SHONA WILSON **STARK** Q1

Address for Correspondence: Girton College, Cambridge, CB3 0JG, UK. Email: sw590@cam.ac.uk

CONSENT TO BODY MODIFICATION IN CRIMINAL LAW

The appellant in *R. v BM* [2018] EWCA Crim 560, [2018] 2 Cr. App. R. 1, was a tattoo and piercing artist, who also offered “body modification services”. He was charged with three counts of wounding with intent to do grievous bodily harm (GBH), contrary to Offences Against the Person Act 1861 (OAPA), s. 18, in relation to the removal of a customer’s ear, the removal of a customer’s nipple, and the division of a customer’s tongue such that it appeared forked, like that of a lizard. Whilst the appellant and his premises were registered under the regulatory framework that governs tattooing and piercing, and whilst he had attended courses on body-modification procedures, the court noted that anyone can advertise as a body-modification artist, without regulatory oversight or appropriate training to ensure the safety of customers. Nevertheless, all three customers consented, and so the question for the Court of Appeal was whether that consent could provide a defence to the charges. In a decision delivered by the Lord Chief Justice, the court ruled that it could not.

Any analysis of consent to harm under the OAPA must begin with *R. v Brown* [1994] 1 A.C. 212. The facts of *Brown*, involving injuries inflicted during the course of sadomasochistic activity, are well-known, as is the general rule laid down by the House of Lords in that case. Whilst consent will provide a defence to a charge of assault or battery, consent will not provide a defence to charges of assault occasioning actual bodily harm (ABH), unlawful wounding or inflicting GBH, or wounding or causing GBH with intent (contrary to OAPA, ss. 47, 20 and 18, respectively), unless the activity falls within a category of exceptionally lawful activity. These exceptions exist in relation to ritual circumcision, tattooing, ear piercing, bravado and rough horseplay, religious mortification, surgery, and sports (including boxing). In *Brown*, the House held that it was not in the public interest to extend these categories to include sadomasochism. That the list of exceptions might be extended to admit new categories of lawful activity is implicit within the refusal to do so in *Brown*. This was made explicit by the Court of Appeal in *Dica* [2004] EWCA Crim 1103, [2004] Q.B. 1257, when Judge L.J. noted (at [41]) that the categories are neither closed nor immutable. Within this framework, the body-modification procedures at issue in *BM* could have been analysed in one of three ways: (1) as analogous to tattooing and piercing, and therefore lawful; (2) as analogous to cosmetic surgery, and therefore lawful; or (3) as a new category of activity, to be added to, or remain excluded from, the list of exceptions. The court identified body modification as a distinct category, and refused to extend the list of exceptions to include it.

When rejecting the analogy between tattooing and piercing on the one hand, and body modification on the other, the court was clearly influenced

by the fact that body-modification procedures fall outside of the regulatory framework for tattooing and piercing. The court also distinguished body modification from tattooing and piercing on the basis that the former “involves the removal of parts of the body or mutilation” (at [42]). The court viewed the procedures as more like surgery than tattooing, but dissimilar to surgery in ways that preclude the extension of the surgical category to capture body-modification procedures. Drawing upon the evidence of a consultant plastic surgeon and a consultant ear, nose and throat specialist, the court emphasised the lack of medical justification for the procedures and the serious health risks involved, and noted that body modification falls outside of the professional and regulatory regime that governs medical practice.

The court’s analysis left body modification as a wholly separate, entirely unregulated, category of activity. Counsel for the appellant argued that such modifications should be lawful, to protect the autonomy of individual customers. The court (at [39]–[40]) conceded that the existing categories of lawful activity “represent a balance” of various interests, rather than one coherent principle. According to the court, two features “underpin almost all of them”: they produce a social benefit, and it would be “unreasonable for the common law to criminalise the activity” (at [40]). When considering the possibility of extending the exceptions to cover body modification, the court, no doubt influenced by the evidence of the medical practitioners, noted the very serious health risks involved in the procedures and expressed concern about the possibility that individual customers might be motivated by Body Dysmorphic Disorder. Unlike qualified medical practitioners, body-modification artists are not trained, alert and able to refer customers for mental health support. The argument from personal autonomy was insufficient to overcome the need to protect the public from serious medical risks and from their own (perhaps less than fully autonomous) decision-making. The tension on display here between paternalism, public safety and autonomy is familiar in this area. But significantly, whilst the court took the view that it was not in the public interest to recognise body modification as lawful, the refusal to extend the list of exceptions was taken on a more general principle. The court held that new exceptions “should not be recognised on a case by case basis” because to do so would “involve a value judgement which is policy laden, and on which there may be powerful conflicting views in society” (at [41]). Such decisions are best left for Parliament.

This signals a shift in approach from *Brown* and *Dica*. New forms of activity may only be recognised as a lawful activity if there is a “close analogy” to an existing category (at [41]). This being the case, we might now expect to see increased pressure on the Law Commission to re-review the ad hoc collection of existing categories of lawful conduct, and increased

pressure on their external boundaries (see the Law Commission's various, unimplemented, proposed reforms to the law in this area, Law Comm. CP no. 139, *Consent in the Criminal Law* (1995)).

With the outer boundaries of the existing categories in mind, it is unfortunate that the court dispensed so briefly, and misleadingly, with *R. v Wilson* [1997] Q.B. 47. In that case, the defendant was charged with ABH after he branded his initials into his wife's buttocks with a hot knife, at her request and with her consent. In *BM*, Lord Burnett C.J. bracketed the decision in *Wilson* to one side, noting that the Court of Appeal in that case had concluded that "consensual activity between a husband and wife in the matrimonial home was not a matter for criminal investigation" (*BM*, at [33]). Yet the proper ratio of *Wilson* is that the wife's consent was valid because the activity was analogous to piercing and tattooing. Branding (either with hot instruments or using electricity to cauterise the skin) and scarification (where incisions are made in the skin so that scar tissue develops in a pattern) are offered as services in tattoo parlours across England and Wales. Are these procedures analogous to tattooing, and therefore lawful, or do they constitute "body modification", which is unlawful?

Certainly, branding and scarification are more akin to tattoos than the procedures performed by the appellant in *BM*; they do not involve "removal of parts of the body", and are unlikely to constitute "mutilation". This might suggest a "close analogy" to tattooing. However, the regulatory background to surgery and tattooing, and the inapplicability of those regimes to the body-modification procedures in *BM*, played a central role in the determination of the court that the procedures were analogous to neither of those categories. Does it follow, then, that branding and scarification, being just as unregulated as the more extreme procedures involved in *BM*, fall into the "body modification" category? Were that to be the case, on the court in *BM*'s reading of *Wilson*, branding, at least, is lawful when it is performed between a married couple in the privacy of their own home, but not when performed by a registered tattoo or piercing artist in studio. Clearly this is not correct: if branding and, arguably, scarification is lawful in private, it must be so in the studio. Indeed, one might argue that such procedures should *only* be lawful in the studio, given the increased risk inherent in "amateur" bedroom branding. In failing to recognise the proper ratio of *Wilson*, the court missed the opportunity to clarify the outer boundaries of the tattooing and piercing category.

Looking beyond the tattooing and piercing category to the law on consent to harm in general, whilst the court was right to recognise that the jurisprudence in this area is based on policy, the consequent decision to disclaim any institutional competence to add further exceptions to the list of lawful activities comes at a cost. The law will remain ill-principled, inconsistent and illiberal, until Parliament intervenes. Unfortunately for legitimate body-modification artists and aficionados, and for those who

enjoy sadomasochistic sexual activities, parliamentary intervention in the criminal law rarely comes in the form of decriminalisation.

RACHEL CLEMENT Q1

Address for Correspondence: Trinity Hall, Cambridge, CB2 1TJ, UK. Email: rc764@cam.ac.uk

DUTY OF CARE IN NEGLIGENCE: A RETURN TO ORTHODOXY?

ROBINSON v Chief Constable of West Yorkshire Police [2018] UKSC 4, [2018] 2 W.L.R. 595, is a landmark in the tort of negligence. Unlike many of its predecessors, its status as such is not based on breaking new ground, but on charting the existing one with sufficient clarity. While *Robinson* does not bring about a significant change in the law, it provides an authoritative guide to the landscape of determining the foundational question within the tort of negligence: when does a duty of care arise?

The facts in *Robinson* were simple. Two police officers attempted to arrest a suspected drug dealer in a busy street in the centre of Huddersfield. The suspect resisted and a struggle broke out, during which the three men knocked into Robinson, a relatively frail 76-year-old woman who was passing by. Having suffered injuries, she sued the police in negligence. Her claim failed at first instance and in the Court of Appeal, but it succeeded in the Supreme Court. Although the Supreme Court's decision was unanimous, the judges' reasoning was not. The majority approach is found in Lord Reed's judgment, with which Lady Hale and Lord Hodge agreed. The judgment clarifies a number of important issues regarding the correct approach to determining when a duty of care exists.

The first concerns the establishment of a duty of care in general. Lord Reed held, at [21], that "the proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence ... is mistaken". In Lord Reed's view, the whole point of *Caparo Industries plc v Dickman* [1990] 2 A.C. 605 was to retreat from the idea in *Anns v Merton London Borough Council* [1978] A.C. 728 that there is a single universally applicable test. Properly understood, *Caparo* advocated an incremental approach, which is based on the use of established categories as guides into the existence and scope of a duty of care in a novel situation (at [25]). In Lord Reed's analysis, the correct approach today is as follows: (1) where there is a line of authority establishing that a duty of care is owed or not owed, the courts must follow that authority. In such a case, it is "unnecessary and inappropriate" to consider whether the existence or non-existence of a duty of care is "fair, just and reasonable", because the decision to recognise or not a duty is already based on considerations of justice and reasonableness (at [26]); (2) where the Supreme Court is invited to depart from an established line of authority, it can appropriately examine what is "fair,

just and reasonable” (at [26]); (3) where there is a novel case in which the existing authorities do not provide an answer on whether a duty of care exists, the courts must develop the law “incrementally and by analogy with established authority” (at [27]). This includes considering what is “fair, just and reasonable”. Overall, the relevance of the *Caparo* factors (reasonable foreseeability, proximity and fairness, justice and reasonableness) lies in providing a framework of inquiry into whether the law ought to take an incremental step by analogy with established authority.

Lord Reed’s analysis was not original, nor was it meant to be. Yet the fact that it proved necessary to undertake shows the level of confusion which persisted after *Caparo* and the importance of removing it. It is nonetheless still not entirely clear when a type of case is novel, as illustrated by the disagreement between Lord Reed, at [28], and Lord Mance, at [86]–[87], over whether or why *Smith v Ministry of Defence* [2013] UKSC 41, [2014] A.C. 52, was such a case. *Robinson* suggests that a novel situation is one which falls outside an established category of liability, or which cannot be resolved by reference to established principles in the existing case law. In this respect, Lord Reed treated physical loss resulting foreseeably from positive conduct as constituting axiomatically an established category, irrespective of the precise factual circumstances.

Lord Reed’s analysis also affirmed the legitimacy of examining policy arguments when deciding whether a duty of care exists, albeit only in the situations outlined above (at [42] and [69(2)]). Similarly, at [84], Lord Mance regarded the view that the courts should not be influenced by policy considerations in this context as “unrealistic” and contrary to the way that the common law has traditionally developed. Few judges, if any, would nowadays subscribe to such a view (cf. Lord Scarman in *McLoughlin v O’Brian* [1983] A.C. 410, 430–31), but it finds some support in academic literature (e.g. R. Stevens, *Torts and Rights* (Oxford 2007)). *Robinson* is a reminder that judges occupy a world in which theoretical concerns co-exist with pragmatic ones.

The second issue relates to the establishment of a duty of care in cases involving public authorities. Building upon Lord Toulson’s judgment in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] A.C. 1732, Lord Reed held, at [32], that “at common law, public authorities are generally subject to the same liability in tort as private individuals and bodies”. This can be traced to A.V. Dicey, *Lectures Introductory to the Study of the Constitution* (London, 1885), 177–78, and is sometimes known as the “equality principle”. Public authorities are generally treated like private individuals and ordinary negligence principles apply to them. Several consequences follow. First, a public authority owes a duty of care for positive acts which, if done by a private individual, would give rise to a duty of care. Second, the omissions principle applies to a public authority; therefore, as a general rule, it does not owe a duty of care

to protect a person from harm by another. Third, a public authority does not come under a positive duty to act just because it has a statutory duty or power which, if exercised, might have prevented the harm. Fourth, recourse to policy considerations in cases involving public authorities takes place only in a novel situation or where established authority is challenged.

For all the clarity and simplicity of the analytical framework put forward, questions remain about its foundations. According to Lord Reed, at [31], it represents “a return to orthodoxy”, echoing Lord Hoffmann’s reasoning in *Stovin v Wise* [1996] A.C. 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 W.L.R. 1057, and restoring the position in *East Suffolk Rivers Catchment Board v Kent* [1941] A.C. 74. However, the claim to orthodoxy was challenged by Lord Mance and Lord Hughes on the basis of a long line of cases which justified the non-liability of public authorities in various situations by reference to policy arguments, most notably in *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53. Approving those cases, Lord Hughes held that although the omissions principle may provide another reason why the police do not owe a duty of care to victims when investigating crime, it cannot be the only or a sufficient reason (at [117]); instead, the ultimate reason lies in policy (at [118]). Lord Reed’s answer, at [69(3)], was to explain that the relevant cases, such as *Hill*, involve the application of the omissions principle, with policy discussed because they also raised novel legal issues or a challenge to established authority. In any case, Lord Reed acknowledged, at [31] and [40], that the reasoning in some of those cases has now been superseded. In truth, the relevant cases were not decided as omissions cases, and, to that extent, Lord Reed’s judgment involves an element of re-interpretation of their juridical basis. All in all, Lord Reed’s analysis amounts to choosing one line of conflicting authority over another, which is entirely legitimate. In so choosing, he avoided the use of the policy arguments in *Hill* which are problematic.

More fundamentally, the application of the omissions principle to public authorities has been questioned, first, on the basis that its justifications do not apply with equal force to public authorities, and, second, on the basis that there are normatively important differences between public authorities and private individuals which validate treating them, in this context, differently to a degree (S. Tofaris and S. Steel, “Negligence Liability for Omissions and the Police” [2016] C.L.J. 128). Even so, a majority of the Supreme Court has recently applied the omissions principle to public authorities twice in *Michael* and *Robinson*. In the interests of certainty, the law should now be regarded as settled.

The third issue concerns the negligence liability of the police. Having rejected a special treatment of the police when investigating or suppressing crime on the basis of the policy arguments endorsed in *Hill* (at [69(1)]), Lord Reed applied the general framework of negligence liability outlined

above. This made the resolution of the case easy. As this was a case of a positive act, under the application of ordinary principles the police owed a duty of care to the claimant not to cause her foreseeable physical injury. The only remaining issue was whether the police had breached their duty. It was held, at [77]–[78], that they had done so, because, intending to arrest the suspect in a way that would minimise the risk of harm to passers-by and thus to cancel the arrest if someone was in harm's way, they failed to notice Robinson who had just walked by.

Lord Reed's judgment in *Robinson* has sought to revert to a position that he regarded as orthodox. Notwithstanding questions about the prevalence of that position in the pre-existing case law and its general desirability, the judgment has resolved several ambiguities in the law of negligence and has provided a blueprint for its future development.

STELIOS TOFARIS Q1

Address for Correspondence: Girton College, Cambridge, CB3 0JG, UK. Email: st277@cam.ac.uk

VICARIOUS LIABILITY FOR INDEPENDENT CONTRACTORS

THE common law has long recognised that people who engage independent contractors will not ordinarily be liable for the wrongdoing of those contractors, outside a closely guarded class of exceptional relationships in which the principal bears a personal liability for their negligent conduct. Selection of a properly qualified and competent contractor will ordinarily suffice to discharge any primary duty of care to victims of the contractor's torts imposed on the principal. Vicarious liability traditionally required finding an employment relationship between the principal and the wrongdoer. However the scope of vicarious liability has recently been expanded. In a quartet of cases (*Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56, [2003] 2 A.C. 1 (noted J. Bell [2013] C.L.J. 17)); *Cox v Ministry of Justice* [2016] UKSC 10, [2016] A.C. 660; *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] A.C. 677; *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] A.C. 355 (noted S. Deakin [2018] C.L.J. 15)), the Supreme Court recognised that vicarious liability may also be imposed in respect of the acts of persons who are in a position "akin to employment".

The "akin to employment" test was first recognised in what may be described as atypical working relationships, such as those of religious personnel, and prison workers, who were neither employees nor independent contractors as traditionally understood. But the test has come to be applied as a general test for the imposition of vicarious liability outside relationships of employment, and uncertainty has emerged as to the reach of the test to traditionally understood independent contractors. The issue of the test's reach has

emerged starkly from the decision of the Court of Appeal in *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670, in which the bank was held vicariously liable for the wrongdoing of a doctor who, by any traditional test, was as independent a contractor as one might find. The implications of the application of the “akin to employment” test in this way to ordinary commercial arrangements with contractors now require scrutiny.

In *Barclays Bank*, 126 claimants sought damages from the bank, alleging that between 1968 and 1984 they had each been sexually assaulted by a medical practitioner to whom they had been sent by the bank for the purposes of a pre-employment medical examination. The doctor performed the examinations at his home, in a room alone with him. The doctor completed pro forma a medical examination form headed with the bank’s logo. The doctor was paid a set fee per examination for which he invoiced the bank. The bank paid these invoices and provided no other wage or benefit to the doctor, who also worked for other organisations, as well as for two local hospitals.

At first instance, Mrs. Justice Nicola Davies considered that the relevant approach was to ask (1) whether the case was one of employment or “akin to employment” and if so, (2) was the tort sufficiently connected to the employment or quasi-employment. The judge applied Lord Phillips’s five criteria from *Catholic Child Welfare* to determining whether the doctor was in a position that was akin to employment, and then found that the alleged abuse was relevantly closely connected with the engagement as to satisfy the stage (2) inquiry. The bank was found vicariously liable.

In the Court of Appeal, Irwin L.J. (with whom McCombe L.J. and Sir Brian Leveson P. agreed) noted that the bank had denied that the doctor was an employee or akin to an employee, and argued that he was self-employed and engaged as an independent contractor. He observed further that none of the previous Supreme Court cases had considered circumstances where the alleged tortfeasor was “an obvious ‘independent contractor’” and accepted at [43] that none of those cases had been “a decision which squarely addresses facts such as these”. However, at [44] Irwin L.J. accepted the submission for the respondents on the appeal that “the law now requires answers to the specified questions laid down in *Cox* and *Mohamud*, and affirmed in *Armes*, rather than an answer to the question was the alleged tortfeasor an independent contractor”. Furthermore, he observed at [45] that, in “adopting the approach of the Supreme Court, there will indeed be cases of independent contractors where vicarious liability will be established”.

Irwin L.J. found no error in the trial judge’s approach. It is telling that in the Court of Appeal, as at trial, the satisfaction of Lord Phillips’ criteria sealed the answer to the stage (1) inquiry. It did not address as a separate, or limiting, factor whether the doctor was engaged in an independent business activity as an independent contractor. Indeed, Irwin L.J. held expressly

at [44] that the “question of definition appears to me no longer to be the test. If the Supreme Court had intended it to survive as such, it seems unlikely, given that formerly this was a decisive test, that the Court would have failed to say so”.

The decision in *Barclays Bank* serves as a warning of the risk of the “akin to employment” test being applied as if “they were the words of statute, setting the rules in stone”, as Lady Hale cautioned against in *Woodland v Essex County Council* [2013] UKSC 66, [2014] 1 A.C. 537, at [28] (in the context of the non-delegable duty of care). This is important because the substance of the three criteria which Lord [redacted] identified as the most critical – that the tort will have been committed as a result of activity being undertaken by the employee on behalf of the employer; that the employee’s activity is likely to be part of the business activity of the employer; and that the employer, by employing the employee to carry on the activity, will have created the risk of the tort committed by the employee – ~~has been acknowledged as~~ capable of describing work performed by independent contractors. In the High Court of Australia in *Sweeney v Boylan* [2006] HCA 19, (2006) 226 C.L.R. 161, the majority said at [13]:

[T]he bare fact that the second person’s actions were intended to benefit the first or were undertaken to advance some purpose of the first person does not suffice The whole of the law that has developed on the distinction between employees and independent contractors denies that benefit or advantage to the one will suffice to establish vicarious liability for the conduct of the second.

Yet in *Cox*, Lord Reed expressly noted at [29] that the criteria were not to be applied “to the extent of imposing such liability where a tortfeasor’s activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party”. This appears to exclude vicarious liability for a traditionally determined independent contractor (see e.g. *Market Investigations Limited v Minister of Social Security* [1969] 2 Q.B. 173). Accordingly, the question to which *Barclays Bank* gives rise is whether Lord Phillips’ five criteria ~~should be~~ applied as a self-sufficient test, ~~or as a framework~~ in which Lord Reed’s limitation in *Cox* is recognised so as to exclude vicarious liability for contractors doing a recognisably independent business activity. If the criteria are applied as a rigid test, there is the risk of losing sight of important qualifications recognised by the courts in other cases.

An examination of the cases in which the “akin to employment” test was developed – *English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] Q.B. 722, applied by Lord Phillips in *Catholic Child Welfare, Cox and Armes* – reveals two matters of relevance to this question. First, the tortfeasors for whose acts vicarious liability was imposed in those cases were neither employees nor traditionally understood independent

contractors; they defied the conventional binary classification. However, the relationships were characterised by an intensity and depth of interaction rendering them markedly closer in integration and dependency than most standard employment relationships, warranting the imposition of vicarious liability. Second, these cases did not jettison the “exclusion zone” of independent contractors operating a recognisably independent business. Indeed, in *E, Ward L.J.* noted at [69] that it was necessary to see whether the priest in that case was an independent contractor, “for if he is, the law is clear: the employer is not vicariously liable for the torts of his independent contractor”.

As Lord Reed noted at [29] in *Cox*, the complexity of modern workplace relationships gives rise to the fact that there may be working relationships in which workers “may in reality be part of the workforce of an organisation without having a contract of employment with it”. There is no bright line distinction between the status of an employer and that of an independent contractor in all cases. However, *Barclays Bank* highlights the question whether the “akin to employment” criteria should be applied so as to capture the independent contractor who is not in a situation comparable to those in atypical working relationships considered in recent case law, but operating a recognisably independent business on traditional tests.

~~When the case comes before the Supreme Court, it is likely that front and centre will be the same question recently considered by the Singapore Court of Appeal in *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58, namely whether Lord Phillips’ criteria were intended to effect such a radical change in the law of vicarious liability, or whether the criteria merely represent a recognition that vicarious liability may be imposed outside the class of traditional employment relationships in certain circumstances. *Barclays Bank* demonstrates the urgent need for clarification on this fundamental question.~~

ALLISON SILINK AND DESMOND RYAN Q1

Address for Correspondence: Faculty of Law, University of Technology Sydney, PO Box 123 Broadway, NSW 2007, Australia. Email: allison.silink@uts.edu.au; School of Law, Trinity College Dublin, House 39, Trinity College, Dublin 2, Ireland. Email: desmond.ryan@ted.ie

THE OUTER LIMITS OF “PERSONAL INJURY”

EARTHA Kitt really needed “the deed to a platinum mine” in her smash hit of Christmas 1953, *Santa Baby*. But platinum can be dangerous. Those who work with its salts are tested regularly for platinum sensitisation. Should they develop it, they can no longer work with platinum salts for fear of allergic reactions. Workers at Johnson Matthey’s factory developed platinum sensitisation (as a result, they alleged, of the company’s negligence and breach of statutory duty). Unable to continue in their jobs they were either dismissed or moved to other (less well paid) posts within the

company. The workers sued for damages. But is platinum sensitisation “personal injury” (in which case the claims would be legally straightforward)? Jay J. and a unanimous Court of Appeal had all held that sensitisation was *not* “personal injury”; that the claims therefore concerned pure economic loss; but that the employer had no duty to protect against such loss (whether in tort or contract). The Supreme Court unanimously allowed the claimants’ appeal, classifying platinum sensitisation as “personal injury”: *Dryden v Johnson Matthey plc*. [2018] UKSC 18, [2018] 2 W.L.R. 1109.

Whether something counts as “personal injury” is usually clear beyond argument, but at the margins proves troublesome. As with so many legal categories the core is indubitable but the penumbra hazy. Ultimately the question turns on the facts of the case (at [48]). Yet two House of Lords decisions were directly on point: *Cartledge v E. Jopling & Sons Ltd.* [1963] A.C. 758 and *Rothwell v Chemical & Insulating Co. Ltd.* [2007] UKHL 39, [2008] A.C. 281. These cases were the twin stars by which Lady Black navigated, delivering the judgment of the Supreme Court; other decisions concerning the boundaries of physical damage *to property* were thought unhelpful (at [46]: cf. *The Orjula* [1995] 2 Lloyd’s Rep. 395, *Blue Circle Industries plc v Ministry of Defence* [1999] Ch. 289 and (not cited to the court) *Pride & Partners v Institute for Animal Health* [2009] EWHC 685 (QB)).

In *Cartledge v Jopling* miniscule scarring to the lungs (through inhalation of particles) was held to be “personal injury” because it affected lung function and so reduced life expectancy – even though sufferers were unaware of the invisible changes in their everyday lives (indeed, by the time the plaintiff became aware of it in *Cartledge*, the limitation period had expired). But *Rothwell* shows that not every bodily change amounts to “damage”. The claimants developed plaques on their pleura (lung membranes) from asbestos inhalation. These plaques were entirely benign (asbestos-related diseases including cancer do not develop from the plaques). They were entirely asymptomatic. They were held non-actionable in *Rothwell*. The plaques could not be viewed as a *damaging* bodily change (Lord Hoffmann, at [7]). Since the policy of the law is to ignore negligible harm, such “harmless injuries” are not actionable (Lord Hope, at [47]) – *de minimis non curat lex*.

In *Dryden v Johnson Matthey* the claimants succeeded in distinguishing *Rothwell*. Platinum sensitisation is, in itself, asymptomatic – like the *Rothwell* plaques. But it is not benign: sensitisation brings a significant risk that further exposure to platinum will result in allergic reactions (it being common ground that allergies, with their unpleasant symptoms, surely are “personal injury”: at [37]). Since further exposure to platinum salts had to be avoided to prevent allergic reaction, the *Johnson Matthey* claimants’ “bodily capacity to work ha[d] been impaired and they [were]

therefore significantly worse off" (at [40]). Unlike the *Rothwell* pleural plaques, sensitisation was held to be a bodily change *with significant negative effects*.

The defendants submitted that aggravation of the claimants' sensitisation into bodily injury (i.e. platinum allergy) was an entirely theoretical risk. Any chance of this actually happening had been removed when the claimants' work with platinum salts was terminated. In ordinary daily life there was no prospect of encountering such salts and developing the allergy. (The defendants accepted in argument that sensitisation to everyday things such as sunlight would have been actionable: at [38].) On this Lady Black observed at [39]: "Ordinary everyday life is infinitely variable. For these claimants, their ordinary everyday life involved doing jobs of a type which, by virtue of their sensitisation, they can no longer do." Her Ladyship suggested that had a specialist coffee-taster or perfumist lost their sense of smell (and their job), there would be little difficulty in accepting that this was actionable personal injury (at [41]). Indeed not – but since impaired smell has an obvious effect on anybody's ability to enjoy the ordinary amenities of life (e.g. food and drink), the analogy with a *recherche* inability to handle platinum salts seems, with respect, distant. Still, the core point was that the bodily changes were not "harmless" ones when they obliged the claimants to avoid contact with platinum.

Would this amount to bodily injury for someone like a lecturer in law, whose life does not routinely involve contact with precious metals (and upon whose freedom the restriction would be purely theoretical)? Or does the rationale apply only to workers with platinum salts, whose livelihoods would be impaired thereby? If the latter, what of Sales L.J.'s point [2016] EWCA Civ 408, [2016] 1 W.L.R. 4487, at [31]: "The presence of such economic loss does not convert a physiological change which does not in itself qualify as an actionable injury into such an injury"? Lady Black addressed a variant: what about platinum workers about to retire when they became sensitised? In the Supreme Court's opinion, imminent retirement might reduce the quantum of damages but would not mean that personal injury had not been suffered (at [45]). Yet not everyone will be convinced that the hypothetical lecturer, in his base-metal career, would suffer ~~far from negligible~~ negative effects from platinum sensitisation.

Sales L.J.'s argument was therefore not directly considered. Is it persuasive? There is authority that costs incurred to avert physical harm should not be viewed as pure economic loss. For example the (dissenting) judgment of Laskin J. in *Rivtow Marine Ltd. v Washington Iron Works* [1974] S.C.R. 1189, adopted by Lord Wilberforce in *Anns v Merton L.B.C.* [1978] A.C. 728, 759–60, before its rejection in *D&F Estates Ltd. v Church Commissioners* [1989] A.C. 177. Notwithstanding its chequered career in England, Laskin J.'s approach ultimately prevailed in Canada: *Winnipeg Condominium Corp. v Bird Construction Co.* [1995] 1 S.C.R.

85. These were all cases involving expenditure to repair defective buildings, but the argument seems applicable to personal injury situations. Sales L.J. disposed of the point summarily, saying “A right to claim damages covering the expenses of mitigation only arises where there is a right to sue for a wrong in the first place”, which was not the case in his view since sensitisation was essentially benign ([2016] EWCA Civ 408 at [32]). Is this further restriction well founded? Donal Nolan has recently explored the previously neglected question of “preventive damages”: (2016) 132 L.Q.R. 68. It is regrettable that it received no consideration in the Supreme Court, despite its potential to buttress the main decision.

Given that sensitisation was classified as “personal injury”, the court declined to consider whether a claim for pure economic loss would have succeeded. This was entirely proper, although again a pity for eager students of the law. Considerably more attention had been paid to economic loss by the Court of Appeal. Accepting that there is no general overarching duty for employers to secure their employees’ financial well-being (e.g. *Crossley v Faithful & Gould Holdings Ltd.* [2004] EWCA Civ 293, [2004] I.C.R. 1615), should that preclude a specific duty (e.g. implied contract term) not to positively *incapacitate* workers (whether physically or otherwise)? Must the court’s conclusion about implied terms always and necessarily determine the “voluntary assumption of responsibility” question too (*qua* foundation of a tortious duty)? A careful distinction must be made between “terms implied by law” (i.e. imposed as a matter of legal policy) and those “implied in fact” (i.e. present, even though unspoken, in a particular employment contract). The precise juridical nature of the “voluntary assumption” doctrine is also now in doubt. The rich policy reasoning running through *Commissioners of Customs and Excise v Barclays Bank plc*: [2006] UKHL 28, [2007] 1 A.C. 181, was conspicuously absent in *NRAM Ltd. v Steel* [2018] UKSC 13, [2018] 1 W.L.R. 1190 – but then *NRAM* was a more straightforward case. The criteria for recovering pure economic loss in tort, and the relationship between “voluntary assumption” and the implication of contract terms, will continue to be difficult issues.

Dryden v Johnson Matthey indicates that any bodily change which affects freedom of action has a negative effect and thereby amounts to “personal injury”. That the effect on the freedom of these particular claimants was significant (i.e. affected their employability) meant it was no “harmless injury”. It was irrelevant that others might not have been significantly affected by platinum sensitisation. Irrelevant also that the negative effects were essentially financial not physical ones. It is a decision at the very limit of “personal injury”.

JONATHAN MORGAN Q1

Address for Correspondence: Corpus Christi College, Cambridge, CB2 1RH, UK. Email: jem44@cam.ac.uk

VARYING CONTRACTS IN THE SUPREME COURT

ROCK Advertising Ltd. v MWB Business Exchange Centres Ltd. [2018] UKSC 24 raised two fundamental issues in the law of contract. First, can an oral variation be effective in the face of a no-oral modification (NOM) clause? Second, is part payment of a debt good consideration for satisfaction of the debt? The majority of the Supreme Court answered “No” to the first question, overturning the Court of Appeal (noted [2016] C.L.J. 455). None of the Justices felt it necessary or appropriate to answer the second question. It is suggested that both questions should have been dealt with differently.

Rock occupied as licensee premises managed by MWB. Rock decided to expand, and entered into a written agreement with MWB for larger premises for 12 months beginning 1 November 2011. The agreed licence fee was £3,500 per month for the first three months, and £4,433.34 subsequently. Rock’s business was not successful, and by February 2012 it had incurred arrears of over £12,000. The parties orally agreed to re-schedule the licence fee payments due from February to October 2012: Rock would pay less for the first few months, and more subsequently, so the arrears would be cleared by the end of the year. However, MWB later sought to enforce the original terms of the agreement and sued for the arrears.

Clause 7.6 in the original contract stated: “All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.” Lord Sumption, with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed, held that this clause was legally effective. Therefore the purported oral variation of the contract could not be enforced. Lord Sumption observed that NOM clauses prevent attempts to undermine written agreements by informal means; avoid disputes about whether a variation was intended and what its terms were; and make it easier for corporations to police internal rules restricting individuals’ authority to agree to contractual variations. These are pragmatic justifications that may reflect parties’ legitimate commercial reasons for inserting NOM clauses (see Morgan [2017] C.L.J. 589).

However, the approach of the Supreme Court towards NOM clauses represents a significant departure from that of other common law jurisdictions. Such a departure might be contrasted with other statements from the Supreme Court favouring harmonisation throughout the common law world (see e.g. *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] A.C. 250, at [45]). The traditional approach of the common law has been encapsulated in the observation of Cardozo J. in *Alfred C. Beatty v Guggenheim Exploration Company* (1919) 225 N.Y. 380, 387: “Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. . . . Whenever two men contract, no limitation self-imposed can destroy their power to contract again.”¹

Lord Sumption thought objections to his preferred approach to be “entirely conceptual” (at [13]). But that does not render them any less persuasive. Conceptual clarity is important. Parties are free to enter into contracts, without (generally) any requirements of form. If the parties intend to be bound, and consideration is provided to support the promises made, then a contract arises. The same should be true of variation. Just as Parliament cannot bind its successors, nor should a contract prevent future contracts. The conceptual point can be reinforced by querying where the limits of *MWB* lie: can a clause prevent any variation at all? Or novation? Or waiver? If so, the restriction an earlier term puts on the parties’ later freedom of contract is stark and, it is suggested, unfortunate. It may be that the decision is restricted to NOM clauses for pragmatic reasons, but in the face of conceptual difficulties the limits of the decision in *MWB* are likely to come under sustained pressure.

Lord Sumption bolstered his decision by drawing an analogy with entire agreement clauses. But those clauses preclude reliance upon *earlier* understandings or agreements between the parties, such that the latest agreement (containing the entire agreement clause) prevails. NOM clauses have the opposite effect: the most recent agreement of the parties is *not* enforced, but the earlier agreement (containing the NOM clause) is preferred. It is suggested that the most recent agreement of the parties should be enforced. Lord Sumption’s assertion that enforcing the most recent agreement “override[s] the parties’ intentions” (at [11]) is therefore contestable: viewed from the perspective of what the parties intended at the date of the variation (rather than the original contract date), the opposite is true.

Lord Briggs’ approach was more nuanced than that of the majority. He thought that an oral variation may be effective, provided the parties agree expressly or by necessary implication to dispense with the NOM clause. This is preferable to the bold approach of the majority, but still unnecessarily restrictive. Where parties have reached an agreement that is supported by consideration, courts should give effect to that agreement. If it varies an earlier contract, so be it. The last in time should prevail.

In following the Supreme Court’s approach, it is likely that increased attention will be given to doctrines such as estoppel, which provide some protection against the strict enforcement of NOM clauses. But Lord Sumption was keen to stress (at [16]) that “the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty” sought from NOM clauses. Nevertheless, it is to be expected that many disputes will focus upon estoppel: what will need to be established for the defence of estoppel to succeed? Will an estoppel have only suspensory effect?

On the facts of *MWB* all the Justices agreed that the oral variation was ineffective. This made it unnecessary to discuss the doctrine of consideration. Yet the law in this area is riddled with difficulties. In *Foakes v Beer* (1884) 9 App. Cas. 605 the House of Lords held that part payment

of a debt was not good consideration for the extinguishment of the debt. But, as Lord Sumption recognised, the more recent approach of the Court of Appeal in *Williams v Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1 is difficult to reconcile with *Foakes*. In *Roffey*, the court found that a promise to pay more might be supported by consideration if the promisor “obtains in practice a benefit or obviates a disbenefit” (16). In *In re Selectmove Ltd.* [1995] 1 W.L.R. 474 the Court of Appeal did not extend such reasoning to part payment of a debt. But the Court of Appeal in *MWB* appeared to differ from *Selectmove* and apply *Roffey* instead of *Foakes* in the context of part payment.

The reluctance of the Supreme Court to grapple with the issue of consideration is understandable. If the court had split in obiter dicta, additional confusion may have resulted. But as Lord Sumption acknowledged at the start of his judgment, “[m]odern litigation rarely raises truly fundamental issues in the law of contract” (at [1]). It is perhaps unlikely that the Supreme Court will soon be presented with the opportunity to revisit this issue. Lord Sumption’s unsurprising recognition (at [18]) that *Foakes* “is probably ripe for re-examination” may provide some encouragement to parties to take the point to the Supreme Court, but that is an expensive process with an uncertain outcome; both *Roffey* and *Selectmove* settled before being heard by the House of Lords.

It is suggested that it is unfortunate that their Lordships side-stepped consideration, especially because the issue had been fully argued. The Supreme Court often deals with points not necessary for the outcome of the case (e.g. *Re Northern Ireland Human Rights Commission’s Application for Judicial Review* [2018] UKSC 27, [2018] H.R.L.R. 14; noted above), and sometimes even signals a departure from earlier House of Lords’ authority in obiter dicta (e.g. *Ivey v Genting Casinos UK Ltd.* [2017] UKSC 67, [2017] 3 W.L.R. 1212). Lord Sumption thought “an enlarged panel of the court” would be needed, but this may not have been any more helpful (see e.g. Burrows (2013) 127 L.Q.R. 305, 307–09) and is not invariably necessary to depart from earlier decisions of the House of Lords (e.g. *Ivey*; *R. v Jogee* [2016] UKSC 8, [2017] A.C. 387). Moreover, the size of the panel is determined by the Supreme Court itself; it is odd that it did not decide to sit in an enlarged panel if this would have been important had the issue of NOM clauses been decided differently.

In the wake of the Supreme Court decision in *MWB*, Kerr J. has reiterated, albeit with some reluctance, the orthodox view that a “practical benefit” does not constitute good consideration for payment of part of an existing debt, since *Selectmove* remains binding (*Simantob v Shavleyan (t/a Yacob’s Gallery)* [2018] EWHC 2005 (QB), at [119]–[138]). That approach is most consistent with *Foakes*. Yet in *MWB* the Court of Appeal held that *MWB* did receive consideration for accepting a less advantageous schedule of payments: *MWB* would ultimately be likely to

recover a greater sum through the rescheduling of payments, and, importantly, MWB would avoid the property standing empty for some time, causing further loss. Lord Sumption recognised that “[t]hese were both expectations of practical value, but neither was a contractual entitlement” (at [18]). In *Simantob*, Kerr J. did not consider the tension between the decisions of the Court of Appeal in *Selectmove* and *MWB*. But since the Supreme Court in *MWB* did not overturn the Court of Appeal on the issue of consideration, the decision of the latter is likely to continue to prove troublesome. The law on consideration in the context of variation remains in a mess.

PAUL S. DAVIES Q1

Address for Correspondence: UCL Faculty of Laws, Bentham House, 4–8 Endsleigh Gardens, London, WC1H 0EG, UK. Email: paul.s.davies@ucl.ac.uk

COMPOUND INTEREST ON RESTITUTION OF OVERPAID TAX: AN INEVITABLE ANSWER TO THE WRONG QUESTION

LITTLEWOODS Retail Ltd. and others v Revenue and Customs Commissioners [2017] UKSC 70, 2017 (3) W.L.R. 1401, is the latest instalment in the long-running saga of restitution of overpaid tax.

The claimants paid VAT contrary to EU law. HMRC repaid the principal sums under section 80 of the Value Added Tax Act (VATA) 1994, plus simple interest under section 78(1). The claimants argued that the repayment was insufficient and only compound interest would fully restore the use value of the overpaid sums. Vos J. sent a preliminary reference to the Court of Justice of the European Union (CJEU) (see *Littlewoods Retail Ltd. and others v Revenue and Customs Commissioners* [2010] EWHC 2771 (Ch), [2011] S.T.C. 171) seeking a ruling on various questions including whether reimbursement plus simple interest was compatible with EU law (question 1), or whether compound interest was required (question 2).

The CJEU in Case C-591/10 (ECLI:EU:C:2012:478), *Littlewoods Retail Ltd. and others v Revenue and Customs Commissioners* [2012] S.T.C. 1714, ruled that EU law required a right to reimbursement of the tax and to the payment of interest, but that it was for national law (at [27]) to determine whether simple interest or compound interest, or indeed something else, would be required, in compliance with the well-known principles of equivalence (requiring a remedy equivalent to that available for comparable domestic claims) and effectiveness (requiring the Member State to avoid rendering exercise of EU rights practically impossible). The only further guidance offered by the Court (at [29]) was that the principle of effectiveness “requires that the national rules referring ... to the calculation of

interest . . . should not lead to depriving the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of VAT”.

High Court proceedings then resumed before Henderson J. who held that Littlewoods’ claim would succeed in full. In particular he held that only compound interest would satisfy Littlewoods’ rights under EU law, that the exclusion of the claims by sections 78 and 80 of the 1994 Act was therefore incompatible with EU law. Those provisions had therefore to be disapplied (*Littlewoods Retail Ltd. and others v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch), [2014] S.T.C. 1761). Both parties then appealed. The Court of Appeal (*Littlewoods Retail Ltd. and others v Revenue and Customs Commissioners* [2015] EWCA Civ 515, [2016] Ch. 373, per Arden, Patten and Floyd L.JJ.) upheld Henderson J’s conclusions on all issues.

The case was then appealed to the Supreme Court (SC), which identified two issues for decision: (1) whether Vos J. and the Court of Appeal were correct in holding that Littlewoods’ claims were excluded by sections 78 and 80 of VATA, and (2) whether, if sections 78 and 80 did exclude Littlewoods’ claim for compound interest, that exclusion was contrary to EU law.

On the first issue the SC held unanimously that sections 78 and 80 were indeed exclusive of other remedies. Section 80 “created a specific remedy for taxpayers who have overpaid VAT” (at [22]). Parliament could not “have intended the special regime in s. 80 to be capable of circumvention” as suggested by the claimants, given s. 80’s statement that HMRC is not liable to repay VAT “except as provided by this section” (at [22]–[23]).

Section 78 was more difficult. Littlewoods had argued that, since section 78(1) refers to HMRC’s liability to pay interest “if and to the extent that they would not be liable to do so apart from this section”, section 78 would only apply where there was no free-standing right to interest, but that there had been such a right since the decision in *Sempre Metals Ltd. (formerly Metallgesellschaft Ltd.) v Inland Revenue Commissioners and another* [2007] UKHL 34, [2008] 1 A.C. 561. The SC replied that, if a claim based on *Sempre* (which post-dated the enactment of sections 78 and 80) were allowed to succeed, “section 78 would effectively become a dead letter” which would “fatally compromise . . . the statutory scheme created by Parliament” (at [37]). This could not have been what Parliament intended or the correct interpretation of section 78(1) (at [36]). Instead, those words could only refer to any other statutory liabilities to pay interest (at [39]).

This left the second issue, namely whether any exclusion of compound interest would be contrary to EU law, in the sense that the CJEU had ruled that HMRC must reimburse in full the use value of the money. The crucial words of the CJEU’s judgment were certainly (at [29]) that “national rules should provide *an adequate indemnity*” (emphasis added).

The SC concluded that this had a narrower meaning than that adopted by the lower courts. In the SC's view, "the CJEU has given member state courts a discretion to provide reasonable redress" (at [51]). There were three reasons for taking this approach.

First, the SC attached less weight to the CJEU's word "reimbursement" than had the lower courts. Advocate General Trstenjak had explicitly stated that simple interest would be sufficient, and the SC thought the difference between her approach and that of the CJEU should not be overstated, especially since (at [30]) the CJEU had pointed out that Littlewoods had already received interest amounting to more than 125% of the principal sum, a fact that Henderson J. had admitted was difficult to reconcile with his ultimate conclusion (at [57]–[58]).

Second, the UK had pointed out that of 13 other Member States all but one paid simple interest on the recovery of unduly paid taxes. "In this context", concluded the SC, "if the CJEU were seeking to outlaw this practice, we would have expected clear words to that effect. They are absent" (at [60]).

And third, the approach was consistent with the CJEU's other case law (see C-271/91, *Marshall v Southampton and South West Hampshire Health Authority (Teaching)* (no. 2) [1994] Q.B. 126), being distinguishable on the calculation of the principal sum which would compensate the discriminatory treatment suffered by the claimant and make good her loss.

The SC's decision was perhaps inevitable given the extensive retroactivity of the claim. However, if the history of the case had been different, as it could have been, this retroactivity and thus the path-dependent choice in this case need not have arisen.

First, regarding the relationship between the CJEU and domestic courts, it would be helpful if the CJEU were to be clearer and more principled in its rulings (R. Williams, "The ECJ's 'Remedies Jurisprudence' and the Role of Domestic Courts: How to Transfer Principle alongside Competence", 2018 *Restitution Law Review*, forthcoming). If its failure to do so arises from any concerns about being too interventionist, it is worth reflecting that the intervention is already taking place. The lack of clarity is therefore simply unhelpful to national courts that have to follow the resultant rulings, as evidenced by the litigation over "adequate indemnity" in this case.

Second, given first that the CJEU is not yet so principled and *second* that, when given complete carte blanche by national courts, the CJEU may take an unnecessarily exacting approach to what EU law requires (such as the unreasoned ruling-out of any defences to unjust enrichment claims other than passing on in Case C-398/09 (ECLI:EU:C:2011:540), *Lady & Kid A/S v Skattenministeriet*, and Case C-310/09 (ECLI:EU:C:2011:581), *Ministre du Budget des Comptes Publics et de la Fonction Publique v Accor SA*, or the relatively unreasoned decision in Case C-362/12 (ECLI:EU:C:2013:834), *FII (No. 3)*, that every remedy made generally available by the Member State must *individually* fulfil the principle of effectiveness

(rather than it being sufficient for there to be a national remedy which did so; see Williams, “ECJ’s ‘Remedies Jurisprudence’”), national courts should not be too quick to over-comply with what they believe EU law requires. The SC’s more robust approach in *Littlewoods* is therefore welcome.

Third, however, there may well be circumstances in which it is necessary to provide compound interest in order to provide full restitution (R. Williams, *Unjust Enrichment and Public Law* (Oxford 2010), 49) and English law should not now move too far in the opposite direction. Yet the optimum level of interest in this case could not be considered on its own terms, because it was too interlinked with the long time period over which *Littlewoods* were claiming. The real problem giving rise to all such cases was the decision of the House of Lords in *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 A.C. 558, which held that claimants should be allowed to bring actions against public authorities based on the mistake ground established in *Kleinwort Benson v Lincoln City Council* [1999] 2 A.C. 349, thereby allowing time to run for 6 years from the point at which the mistake was discovered (long after the money had been paid). Instead, the House of Lords should have confined such applicants to the cause of action established in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] A.C. 70, under which enrichments can be reclaimed because they were received ultra vires, with a maximum time limit of 6 years total (see Williams, *Unjust Enrichment and Public Law*, ch. 4). The evident influence of the retroactivity of the claim on the availability or not of compound interest is clearly illustrated by the fact that the SC in *Littlewoods* asked (at [42]) “whether the CJEU has ruled that HMRC must reimburse in full the use value of the money which over an exceptionally long period of time *Littlewoods* has paid by mistake” (emphasis added). And in its conclusion (at [73]) the SC pointed out again that “*Littlewoods* have already recovered overpaid tax, and interest on that amount, going back several decades. The size of that recovery reflects a combination of circumstances which could not have occurred in most of the other EU member states”.

Nor, in view of the preferable interrelationship between the mistake and *Woolwich* grounds, should such a situation have occurred in this Member State. Not only did the law take a wrong turning in *Deutsche Morgan Grenfell*, a further chance to take the right path was missed in *Littlewoods* itself. At first instance in *Littlewoods*, Vos J. had held that, even if sections 78 and 80 were in breach of EU law, breach would only require the disapplication of those sections in relation to the *Woolwich*-based claim (with a time limit of six years) not the mistake claim (see *Littlewoods Retail Ltd. and others v Revenue and Customs Commissioners* [2010] EWHC 1071, at [88] and [90]). The Grand Chamber of the CJEU and its Advocate General had then both confirmed in Case C-591/10 that a *Woolwich*-based claim

would be sufficient on its own to fulfil the EU requirement of effectiveness. To recognise its sufficiency would also best allow a balancing of the public and private concerns at issue in such cases, since the “unjust factor” or “reason for restitution” in *Woolwich*-based claims arises wholly out of public law (*ultra vires*) while the other requirements for the unjust enrichment claim are dealt with by private law, allowing both spheres of law to play a role in the claim. And yet Henderson J. and then the Court of Appeal in *Littlewoods* held that the domestic restrictions had to be removed in relation to *both* the *Woolwich* ground *and* the mistake ground, thereby generating the huge retroactivity of *Littlewoods*’ claim. The ground of claim issue was not revisited by the SC, which simply allowed the assumed availability of the mistake claim to colour its conclusions on compound interest. While the law remains as it is at present, therefore, it is inevitable both that litigation such as *Littlewoods* will continue and that the courts will be constrained from responding to the questions raised in an optimal manner. The longer-term and more satisfactory solution would be to rethink the underlying structure of the law.

REBECCA WILLIAMS Q1

Address for Correspondence: Pembroke College, Oxford, OX1 1DW, UK. Email: Rebecca.Williams@law.ox.ac.uk

ORALLY AGREED JURISDICTION AGREEMENTS UNDER THE BRUSSELS I REGULATION RECAST

IN 2016/17, British litigants accounted for only 28% of the Commercial Court’s cases. Many disputes involving non-British litigants have no connections at all with England other than an English jurisdiction agreement. The way in which English courts give effect to jurisdiction agreements is accordingly of considerable commercial importance. In relation to a jurisdiction agreement in favour of the courts of a Member State, the approach is governed by Article 25(1) of the Brussels I Regulation recast (1215/2012) (BIR recast).

In *Saey Home & Garden NV/SA v Lusavouga-Maquinas e Acessorios Industriais SA*, Case C-64/17 (EU:-C:-2018:173), the CJEU considered the application of Article 25 when a jurisdiction agreement is contained in standard terms and conditions which follow oral negotiation. The CJEU took a strict view, holding that the requirements of Article 25 were not satisfied and the jurisdiction clause did not apply.

Saey, a Belgian company, specialised in the manufacture and sale of kitchen equipment with the “Barbecook” trademark. Saey entered into a commercial concession agreement with Lusavouga, a Portuguese company, under which Lusavouga agreed to become the (nearly) exclusive promotor and distributor of Barbecook products in Spain. In July 2014, Saey

terminated the arrangement. Lusavouga brought an action against Saey in Portugal seeking compensation for the termination of the agreement. Saey challenged the jurisdiction of the Portuguese court.

The BIR recast rules on jurisdiction apply in civil and commercial cases (Art. 1) where the defendant is domiciled in a Member State (Art. 4). The defendant, Saey, was a company domiciled in Belgium and accordingly the BIR recast rules engaged. The general rule of jurisdiction under the Regulation requires a defendant to be sued in the courts of its domicile (Art. 2), here Belgium. However, special grounds of jurisdiction may apply to give additional courts jurisdiction. In this case, Lusavouga relied on Article 7(1) arguing that this was a matter relating to contract and that the place of performance of the obligation in question was Portugal (where the goods were delivered). Saey disputed the application of Article 7(1) and sought to rely on Article 25, arguing that the contract was subject to an exclusive jurisdiction agreement in favour of the courts of Belgium.

There was no written contract between the parties, but the referring court considered that a concession agreement had been established (presumably orally and/or through conduct). The jurisdiction clause was contained in written general terms and conditions of sale which were mentioned in invoices issued by Lusavouga.

In English domestic contract law, whether a term is incorporated (if it is not a contract in writing signed by both parties) depends on whether reasonable notice has been given. It is possible that a clause in standard terms and conditions can be accepted by conduct, but the courts adopt a flexible multi-factorial approach, considering, for example, how onerous the term is, the nature of the document containing the term and the timing of the contract and the alleged notice.

In a case governed by Article 25 of the BIR recast, a different approach is required in two main respects. First, the CJEU has consistently held that the provisions of Article 25 must be interpreted strictly in so far as they exclude both the jurisdiction of the defendant's domicile and the special jurisdiction provided for in Articles 7 to 9. Second, the validity of a jurisdiction agreement for the purposes of Article 25 is not a matter for any individual national law, but rather is an independent and autonomous concept. In particular, Article 25 lays down three alternative formality requirements which must be satisfied to ensure that consensus between the parties is established.

In *Saey*, it was argued that the jurisdiction clause was "evidenced in writing" (pursuant to Article 25(1)(a)) by the standard terms and conditions mentioned in invoices sent by one of the parties. Adopting a strict approach, the CJEU (having dispensed with the need for an Advocate General's Opinion) noted (at [27]–[28]):

[W] here a jurisdiction clause is stipulated in the general conditions, the Court has already held that such a clause is lawful where the text of the contract

signed by both parties itself contains an express reference to the general conditions which include a jurisdiction clause . . .

In the present case, it is clear from the documents before the Court that the commercial concession agreement at issue in the main proceedings was concluded verbally and was not evidenced in writing, and the general terms containing the jurisdiction clause concerned were mentioned only in the invoices issued by [Lusavouga].

Having regard to the case law, and given those facts, the requirements of Article 25 were not satisfied.

Agreements conferring jurisdiction are of immense importance in international litigation. In order to expedite trade, it must be possible to conclude jurisdiction agreements orally, even if they must be confirmed in writing. In *Berghoefer GmbH & Co. KG v ASA*, Case C-221/84 (EU:-C: 1985:337), the CJEU held that where there was an oral agreement on jurisdiction, written confirmation was sent and received and the recipient raised no objection, it would be contrary to good faith for the party which raised no objection to dispute the application of the oral jurisdiction agreement. The CJEU in *Saey* reasserted a stricter approach: for Article 25 to be satisfied there must be an express reference to the general terms and conditions at the time of the oral negotiations. Since that had not happened in *Saey*, the court did not need to consider whether that would have been enough or whether the jurisdiction agreement itself would have needed to be explicitly referred to.

To require an express reference to the general terms and conditions (which contain the jurisdiction clause) is a more rigid approach than in English contract law. A balance must be drawn. The formality requirements in Article 25 are intended to ensure that there is real consensus between the parties and reflect the need for certainty and the protection of the weaker party. But failing to give effect to jurisdiction agreements could undermine party autonomy and predictability of venue. Furthermore, there are already special rules in place in the BIR recast which protect consumers, employees and insured parties who are identified as being particularly vulnerable. The strict approach taken in *Saey* is a return to the original conception in the Brussels regime of explicit consent to the jurisdiction agreement itself. However, the fact that the CJEU adopted a relatively rigid approach should not be surprising. In applying the uniform provisions in the BIR recast, the CJEU favours a certain and predictable rule over a more flexible test which might be able to do justice in individual cases. The result is that it will be less easy to agree jurisdiction clauses under the BIR recast in the many cases of orally made contracts.

Having ruled that there was no exclusive jurisdiction agreement in favour of Belgium, the CJEU considered whether the Portuguese court had jurisdiction under Article 7 of the BIR recast. Under Article 7(1), special rules apply to contracts for the sale of goods and contracts for the provision of services

(Art. 7(1)(b)). The first question was accordingly whether the commercial concession agreement was a sale of goods, a provision of services or neither.

The characterisation of this sort of mixed or hybrid contract can cause difficulty in private international law. Part of the arrangement between the parties concerned the sale of the products to the distributor. But it was not simply a sale; the goods were supplied under an arrangement whereby the distributor would then market and sell the goods in Spain.

The CJEU held (at [36]) that the national court must identify the obligation which “characterises” the contract. In concession or distribution agreements, the characteristic obligation is the service provided by the concessionaire which, by distributing the products, is involved through marketing etc.; in increasing their distribution (*Corman-Collins SA*, Case C-9/12 (EU: C: 2013:860)). The remuneration received by the concessionaire includes the competitive advantage of having an exclusive right to sell and the assistance provided by the supplier in communicating knowhow, training etc.

In a contract for the supply of services, the next question, under Article 7(1)(b), is where, under the contract, the services were provided. Where there are several places of performance, the court must identify the place of the main provision of services, or if that place cannot be determined, the place where the agent is domiciled (*Wood Floor Solutions*, Case C-19/09 (EU: C: 2010:137)). That determination was for the national court. Lusavouga argued that the obligations were to be performed in Portugal, where the goods were delivered. However, given the emphasis on the importance of the marketing services provided, there must be a strong argument that the place of the main provision of services was Spain where the marketing took place and the goods were eventually sold.

Exclusive distribution agreements, which are often performed in a number of different countries, can be difficult to fit into the BIR recast rules on jurisdiction, and this decision provides welcome guidance on how they might. However, parties will need to have in mind that the restrictive approach taken to orally agreed jurisdiction agreements may require more explicit drafting and/or written reference to standard terms and conditions.

LOUISE MERRETT Q1

Address for Correspondence: Trinity College, Cambridge, CB2 1TQ, UK. Email: lm324@cam.ac.uk

FOREIGN LAW ILLEGALITY: WHERE ARE WE NOW?

HOW should an English court react when an English law contract produces a result which is illegal under foreign law?

There is a well-established rule of English public policy that the courts will not enforce a contract if the object and intention of the parties is an

endeavour “to perform in a foreign and friendly country some act which is illegal by the law of such country” (*Foster v Driscoll* [1929] 1 K.B. 470, 521, per Sankey L.J.) It has been held to be “an essential and necessary element” that the arrangement should involve the carrying out of prohibited acts *within the territory* of a foreign state (*Ispahani v Bank Melli Iran* [1998] Lloyd’s L.R. (Banking) 133, 140).

One might say there is good reason for limiting the rule in that way: it should be an exceptional case in which a contract which is legal under its governing law is refused enforcement on the basis of illegality under some other law. Ideally, the circumstances in which the exception is engaged should be predictable.

Similar considerations arise in cases involving illegality under *domestic* law, but the majority in *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467, rejected the idea of a rule-based approach in favour of a flexible analysis, which requires the balancing of policy factors to determine whether “it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system” (per Lord Toulson, at [120]). Should issues of *foreign law* illegality be subject to a similarly open-textured approach?

The practical context is illustrated by two recent decisions by Leggatt J. in *Dana Gas PJSC v Dana Gas Sukuk Limited & Ors*: [2017] EWHC 2928 (Comm) and [2018] EWHC 278 (Comm) (in the first decision, Leggatt J. gave judgment against the claimant in its absence; the second judgment was his ruling on the claimant’s application to set the first judgment aside). The case concerned an Islamic financing arrangement, under which “Certificateholders” provided finance to a UAE company, Dana Gas. Because *Shari’a* law (and therefore UAE law) prohibits the payment of interest, funds were paid to a trustee, who invested in a UAE law joint venture or *mudarabah*, under which Dana Gas agreed to generate profits (not interest) for distribution to the Certificateholders.

An English law agreement, the “Purchase Undertaking”, provided that in certain events, the trustee could serve notice requiring payment by Dana Gas of an “Exercise Price” (the amount invested by the Certificateholders plus unpaid distributions). In substance, the Purchase Undertaking was a back-up, designed to give the Certificateholders a claim for the full amount of their investment, whatever the position as regards the *mudarabah*.

Dana Gas argued that the *mudarabah* structure was not *Shari’a* compliant. It said that the Purchase Undertaking was therefore also unenforceable, because it had the effect of guaranteeing to the Certificateholders the return from their investment by removing the risk of a loss of capital, in a manner inconsistent with (and illegal under) *Shari’a* law. Dana Gas relied initially on Rome I, Article 9(3) (illegality under the law of the place of performance), but that point was abandoned, and the argument was instead that

enforcement of the Undertaking would infringe the public policy of the forum (Rome I, Art. 21).

The Judge held that the *Foster v Driscoll* rule was not engaged, because it was impossible to say that the object and intention of the parties in entering into the Purchase Undertaking was to carry out prohibited acts *within the territory* of the UAE ([2017] EWHC 2928 (Comm), at [80]–[83]). Neither did it make a difference to characterise the Purchase Undertaking as ancillary to the *mudarabah* and infected by the same illegality, because ([2018] EWHC 278 (Comm), at [30]–[37]) the Undertaking was separate, and the illegality in question was not one proscribed by English public policy.

What does this tell us about the adequacy of the current approach? The Purchase Undertaking did not involve performance of prohibited acts within the UAE, but it did affect the position of a UAE company, and did produce (and was designed to produce) a result which was unlawful under UAE law.

The traditional rigid approach supports the policy that parties should be held to their contracts. This was key in persuading the Court in *Ispahani* to tie the rule to the carrying out of acts within the territory of the foreign state. A wider rule, it was thought, could lead to “preposterous results”, as in the example given by MacKinnon L.J. in *Kleinwort, Sons & Co. v Ungarische Baumwolle Industrie AG* [1939] 2 K.B. 678, 694–95, of the Ruritanian who runs up hotel bill in England and then relies in his defence on a later Ruritanian law which says that no Ruritanian should pay a hotel bill which he has incurred in England.

But to say that the risk of preposterous results requires an inflexible rule may be going further than is necessary. The countervailing factor is international comity. That is what led the court in *Foster v Driscoll* to refuse to uphold a partnership for the importation of whisky into the US during the Prohibition Era. In *Regazzoni v KC Sethia (1944) Ltd.* [1958] A.C. 301, 319, Viscount Simonds said: “Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State, and it will do so because public policy demands that deference to international comity.”

Comity is a notoriously elusive concept, but it seems implausible that it would require the English court to give effect to Ruritanian law, in MacKinnon L.J.’s hypothetical. If anything, it would require the opposite, because in the example the Ruritanian legislation seems designed to evade liability for a validly incurred English debt. But comity might be relevant to the enforceability of a contract which has been designed to circumvent possible illegality under a foreign law, even if it does not require acts in the territory of the foreign State.

There is some support for a more flexible approach. In *Euro-Diam Ltd. v Bathurst* [1990] 1 Q.B. 1, diamond dealers made a consignment of

diamonds available on a sale or return basis to a German company, but misrepresented the value of the diamonds in order to reduce the amount of tax payable by the consignee (a criminal offence in Germany). The diamonds were stolen, and the dealers made a claim on an English contract of insurance. Kerr L.J. in the Court of Appeal (35C) applied a discretionary “public conscience” test to determine the relevance of the dealers’ unlawful acts to the enforceability of the insurance contract, holding that it was enforceable because the illegality was incidental only, had involved no deception of the insurers, and the offending invoice was not relied upon as part of the claim.

More recently in a Hong Kong case, *Ryder Industries Ltd. v Chan Shui Woo* [2015] HKCFA 85, [2016] 1 H.K.C. 323, Lord Collins of Mapesbury N.P.J. rejected the idea of a wide rule that a contract might be refused enforcement if it has been performed in such a way as to involve one (or both) of the parties in commission of a legal wrong under foreign law (at [56]). But he went on to say (at [57]) that “[t]here may nevertheless be cases in which a sufficiently serious breach of foreign law which reflects important policies of the foreign state . . . may be such that it would be contrary to public policy to enforce a contract”.

In the US the Second Restatement §187(2)(b) provides that a choice of law clause will not be enforced if the chosen law “would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state”. In *Lehman Bros. v Minmetals Int’l*, 179 F. Supp. 2d 118 (S.D.N.Y. 2000), that provision led to the conclusion that a guarantee of liabilities under certain FX trades was unenforceable, because it sought to avoid the effect of Chinese exchange control regulations.

In his second judgment upholding the Purchase Undertaking, Leggatt J. (at [32]) justified his conclusion on the basis that there was “no English public policy which the Purchase Undertaking contravenes”. By this he meant in particular that English law contains no policy equivalent to that in UAE law which makes the payment of interest illegal. That is true, but it is really the cause of the problem rather than the answer. The issue in such cases arises because the foreign law prohibits something which English law does not, and that requires a determination of whether the policy in favour of upholding contracts on the one hand should give way to the demands of comity on the other. In almost all cases, one would expect the former to win out; but it would seem better to arrive at that conclusion by conducting an appropriately calibrated balancing exercise, rather than by applying rigid rules which may not always reflect what comity requires.

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