NOTES OF CASES

DERIVATIVE ACTIONS AND FOSS *v.* HARBOTTLE

SIXTY-NINE days of argument preceded the judgment of Vinelott J. in *Prudential Assurance Ltd.* v. *Newman Industries Ltd.* (No. 2) [1] which touches the most delicate areas of company law and is a special feast for devotees of the Rule in *Foss* v. *Harbottle*.[2]

The very facts of the case argue the need for a Companies Commission.[3] Deceptive malpractices were organised by B and L, both senior directors of two companies, TPG and N. B and TPG held shares (though not a majority) in N. Another company S (of which B and L owned all the shares) held a substantial shareholding in TPG—the company "at the centre of the spider's web"—which was in financial difficulties. B and L arranged to sell its main assets to N at a gross over-valuation. In accordance with Stock Exchange requirements, the consent of the shareholders of N was obtained, but by a "misleading and tricky" circular. The plaintiff company, P, a minority shareholder in N, suing in "representative" form [*i.e.* "on behalf of itself and all the other shareholders" of N, except the defendants] claimed damages or compensation against B, L, and TPG. B, L and TPG [4] were found to be liable to N and its shareholders by reason of this deceitful conspiracy to injure them.

Personal and Derivative Actions

For decades company law has suffered the ambiguity of the shareholder's "representative action." It may be a "true representative" claim—a direct, personal claim by the shareholder to enforce his rights and those of others of his class. But it may denote the very different "*derivative*" action where the company is joined as a nominal defendant and the member sues to enforce not his rights but the company's rights, and holds the fruits of success not for himself but for his company.[5] The derivative action is clarified perceptively by Vinelott J. in this case; but it remains in sore need of further clarification by those who control the Rules of the Supreme Court.[6]

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[1] [1980] 2 All E.R. 841; also in [1980] 3 W.L.R. 543.

[2] (1843) 2 Hare 461.

[3] See [1980] 2 All E.R. pp. 846–855; 878–880, where Vinelott J. himself made proposals for changes in the Stock Exchange "Yellow Book." *Cf.* T. Hadden, "Fraud in the City: Enforcing the Rules" (1980) 1 *Company Lawyer* 9.

[4] Counsel conceded that the knowledge of the fraud of B and L, its directors, must be "imputed" to TPG: [1980] 2 All E.R. 878; compare *Belmont Finance Corpn.* v. *Williams* [1979] 1 Ch. 250, and *ibid.* (No. 2) [1980] 1 All E.R. 393.

[5] Gower *Modern Company Law* (4th ed., 1979), pp. 647–652 for the general requirements for a derivative action; and *Wallersteiner* v. *Moir* (No. 2) [1975] Q.B. 373, when the Court of Appeal adopted the essential characteristics as described by Gower *op. cit.* (3rd ed., 1979). For confusion concerning the nature of a plaintiff's claims, see *Pennell* v. *Venida Investments Ltd.* (unreported 1974) discussed by S. Burridge "Wrongful Rights Issues" (1980) 44 M.L.R. 40, 54–57.

[6] A "derivative action" should be denoted by a special description as such on the writ. It should not be "representative" of the members under R.S.C., Ord. 15,

Vinelott J. rejected at a previous stage of the litigation the defendants' argument that a truly representative action could not be joined to a derivative action, as P. here wished to do. He took a liberal view as to whether shareholders had or might have separate interests, rather than the "same" interest in the action, as Ord. 15, r. 12 requires.[7] This liberalisation in procedure concerning representative plaintiffs matches an expansion in actions in tort of the role of representative defendants.[8]

But the liberalisation gave rise to problems. The defendants were liable to P. in both its capacities (as and for the shareholders; and as the "derivative" of N). But the shareholders at the date of the action might not be the same as those at the date of the commission of the fraud; and here the plaintiff shareholders also had a direct action exceptionally against B and L in tort for the conspiracy.[9] If compensation were awarded to P *both* derivatively for N's loss *and* directly for the loss by it as shareholder, an element of double-compensation might creep in. Vinelott J., therefore, gave judgment for the plaintiff (as derivative) for the loss suffered by N (difference between the price paid and the value of the assets if there had been no fraud); assessed the "personal" damage of the shareholders (by reference to the values of N's shares); but directed that no further proceedings in the personal or truly representative claims be taken without leave of the court,[10]—altogether a skilful solution.

Double-compensation, however, is only one of the problems posed by permitting a plaintiff to sue in two, or even three capacities (a personal; a "truly representative"; and a "derivative" action). It was once thought that such duplication would not be permitted[11]; but the more modern view is to the contrary, provided the claims "arise out of the same transaction."[12] This is a sensible development, especially now that the minority shareholder may hope to

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r. 12 (a hangover from partnership); and it should be subject to clear rules concerning costs, compromises, control of the action, and the exercise of judicial discretion, etc. Since our company law has known of "derivative" actions since at least *Atwool* v. *Merryweather* (1867) L.R. 5 Eq. 464n. (although they were given the American name by the judges only in the *Wallersteiner* case) this reform is hardly premature.

[7] *Prudential Assurance Co. Ltd.* v. *Newman Industries Ltd.* [1979] 3 All E.R. 507. Contrast the formalism of *EETPU* v. *Times Newspapers* [1980] Q.B. 585.

[8] See *Winder* v. *Ward, The Times*, February 27, 1957 (C.A.).

[9] Directors of course are normally liable for breach of fiduciary duties only to the company. But the judge suggested that there was here a duty in tort to shareholders to "act honestly and with due care" in giving advice: [1980] 2 All E.R. 853 (*cf. Gething* v. *Kilner* [1972] 1 All E.R. 1166; *Allen* v. *Hyatt* (1914) 30 T.L.R. 444), an additional ground to that of conspiracy.

[10] This bald account of the result does scant justice to the ingenuity of the judgment at pp. 855–860, and pp. 877–878.

[11] *Stroud* v. *Lawson* [1898] 2 Q.B. 44; Wedderburn [1957] C.L.J. p. 206; Gore Browne, *Companies* (43rd ed.), para. 28.6.

[12] [1980] 2 All E.R. p. 860; A. L. Smith L.J. [1898] 2 Q.B. p. 49; S. Beck (1974) 52 Can.B.R. p. 182; *Hogg* v *Cramphorn* [1967] Ch. 254; Gower, *op. cit.* p. 655, note 99.

recover costs from the coffers of the company.[13] For the derivative action is certainly not rendered unnecessary by the new section 75 of the Companies Act 1980. It offers the minority shareholder more scope than that section.[14] Joining a "personal" to a "derivative" action, however, adds new importance to difficulties attendant upon the Rule in *Foss* v. *Harbottle* (especially if a shareholder's "personal" rights do include the right to have the company's constitution and procedures observed).[15] For example, if (as is usual) the company has articles delegating management of the business to the directors (such as Art. 80 of Table A), which is the appropriate organ of the company to decide about litigation by the company. The directors or the general meeting? The clash of the old principle that the members are "proprietors" with the modern principle that they have contracted away their powers to the board, is in this area of law unresolved.[16] Vinelott J. gave no answer to the problem; but its importance is accentuated, as he acknowledged, by his liberalisation of company law procedure.[17]

Fraudulent Controllers

Having cleared the ground procedurally, he faced, in a legal sense, a simple case. The conspiracy to use "tricky and misleading" circulars and devices was abundantly proved—a category of malfeasance well recognised by equity as within its broad concept of "fraud" which allows the minority shareholder to bring a derivative action,[18] *so long as* the wrongdoers were in "control" of the company. *Con-*

[13] *Wallersteiner* v. *Moir* (No. 2) [1975] Q.B. 373 (C.A.); A. Boyle [1976] J.B.L. 18.

[14] There must be an "act" or "omission" by or on behalf of the company, or conduct of its "affairs" which is "prejudicial" to members including the applicant. Only in those circumstances may the court authorise civil proceedings in the name of the company: s. 75 (4) (*c*). Moreover, he must apparently be a member at the time of the prejudicial act; contrast the derivative action: *Seaton* v. *Grant* (1867) 2 Ch.App. 459; *Bloxam* v. *Metro. Ry.* (1868) 3 Ch.App. 337. See too S. Burridge "Wrongful Rights Issues" (1980) 44 M.L.R. 40, 54–67.

[15] A much debated issue: see Gower, *op. cit.* pp. 315–320; Wedderburn "Shareholders Rights and the Rule in *Foss* v. *Harbottle*" [1957] C.L.J. 194 and [1958] C.L.J. 93; G. Prentice "The Enforcement of Outsider Rights" (1980) 1 *Company Lawyer* 179; D. Goldberg "The Enforcement of Outsider-Rights" (1972) 35 M.L.R. 362; R. Smith "Minority Shareholders and Corporate Irregularities" (1978) 41 M.L.R. 147; N. Bastin "Enforcing a Member's Rights" [1977] J.B.L. 17; R. Gregory (1981) 44 M.L.R. (forthcoming).

[16] See Megarry J.'s refusal to decide the point: *Re Argentum* [1975] 1 All E.R. 608, 610; *Alexander Ward Ltd.* v. *Samyang Navigation* [1975] 2 All E.R. 424 (H.L.); and Wedderburn (1976) 39 M.L.R. 327; Gower, *op. cit.* pp. 147–148, on the conflict of authority.

[17] See [1980] 2 All E.R. at 875; see also pp. 877–878, where (expressing no conclusion) he raised the question of what happens if the majority *members* of N, after full disclosure, resolve not to take advantage of the judgment for the company; and speaks of the *general meeting* releasing the company's cause of action in a compromise. Suppose by that time N had acqured a new majority of honest directors who took a different view. Who would in law prevail? When would P's "direct" action come into its own for execution?

[18] See in addition to the cases referred to by Vinelott J., the "tricky circular" cases: *Baillie* v. *Oriental Telephone Co.* [1915] 1 Ch. 503; *Tiessen* v. *Hendersen* [1899] 1 Ch. 861; and *Spokes* v. *Grosvenor Hotel Co.* [1897] 2 Q.B. 124.

trol must be alleged and proved.[19] English courts have been very conservative in their approach to " control," usually requiring proof that the defendants control a majority of the voting shares,[20] an absurdly narrow view in times when *de facto* control can often be achieved with a much smaller shareholding.

Here—in the *ratio decidendi*; the " central issue " [21]—Vinelott J. advanced boldly on to new ground. The defendants did not have voting control. But a close analysis of the authorities [22] disclosed that " control " did not after all demand such a majority.[23] " Control " exists if it would be " futile " to call a general meeting because the wrongdoers would " directly or indirectly " exercise a decisive influence over the result. It is today " uncommon " for large numbers of shareholders to attend the meeting of a large public company. Control of voting can be achieved in many ways (the most obvious, proxies). The exception to *Foss* v. *Harbottle* applies, Vinelott J. insisted, wherever the defendants are shown to be able " by any *means of manipulation* of their position in the company to ensure that the action is not brought by the company." (Echoes can surely be heard here of the famous American Rule 10 (*b*) (5).) [24] To this recognition of corporate realities, Vinelott J. added the force of a thin stream of legal authority (as old as the Rule itself) that the Rule in *Foss* v. *Harbottle* should not be allowed to defeat " the claims of justice." [25] It would be unjust not to interpret " control " in a modern way. For that breakthrough, Vinelott J. must be respectfully congratulated. It was enough to decide the action.

" *Fraud* "

Unhappily he also embarked upon an unnecessary excursion into the wide concept of equitable " fraud " in derivative actions. It is quite clear that mere " negligence " by directors is not included [26] but direct misappropriation of corporate assets clearly is.[27] The

[19] *Birch* v. *Sullivan* [1958] 1 All E.R. 56.

[20] See Gower, *op. cit.* pp. 649–651. See especially Danckwerts J. in *Pavlides* v. *Jensen* [1956] Ch. 565, 577.

[21] [1980] 2 All E.R. p. 869. On what follows concerning " control," see pp. 870–878.

[22] Especially *Atwool* v. *Merryweather* (1867) L.R. 5 Eq. 464; *East Point Du Lead Mine* v. *Merryweather* (1864) 2 Hem. & M. 254.

[23] He also decided that " control " was not an issue going to jurisdiction. *Cf. Heyting* v. *Dupont* [1964] 2 All E.R. 273; Boyle (1964) 27 M.L.R. 603.

[24] See the discussion of r. 10 (*b*) (5) (forbidding any " manipulative or deceptive device or contrivance," etc.) by L. Loss (1970) 33 M.L.R. 34.

[25] Wigram V.-C., *Foss* v. *Harbottle* (1843) 2 Hare at 492; *Edwards* v. *Halliwell* [1950] 2 All E.R. at 1067; *Russell* v. *Wakefield Waterworks* (1875) L.R. 20 Eq. at pp. 480 and 482. See too *Heyting* v. *Dupont*, *supra*, and *Hodgson* v. *NALGO* [1972] 1 All E.R. 15 (where the principle was one of the *rationes decidendi*).

[26] [1980] 2 All E.R. at 866; *Turquand* v. *Marshall* (1869) L.R. 4 Ch.App. 376, 386; *Pavlides* v. *Jensen*, *supra*.

[27] *Menier* v. *Hoopers Telegraph* (1874) L.R. 9 Ch.App. 350; *Steen* v. *Law* [1964] A.C. 287. Both *Daniels* v. *Daniels* [1978] Ch. 406 and *Wallersteiner* v. *Moir* [1974] 1 W.L.R. 991, and (No. 2) [1975] Q.B. 737, fall under this heading of benefits obtained by misappropriation of corporate assets (see Wedderburn (1976) 39 M.L.R. 330; (1978) 41 M.L.R. 569). Contrast the interpretations of D. Prentice (1976) 41

problem arises because (a) not all breaches of fiduciary duty by directors in between these two points are "fraud"; and (b) some such breaches can be ratified by the shareholders in general meeting and some cannot.

Precedent suggests that the line should be drawn for *both* (a) *and* (b) where the directors act *mala fide* or where some "property" (legal or equitable) of the company has been misappropriated directly or indirectly. In such cases, ratification is disallowed. Actions to recover corporate property are more than an action to account brought *in personam* against the director (as in the case of a breach of an ordinary fiduciary duty, for which, it is "trite law," he can gain "absolution" by ratification).[28] But corporate property includes "money, property or *advantages* which belong to the company or in which the other shareholders are entitled to participate."[29] In *Cook* v. *Deeks*[30] directors who diverted contractual *opportunities* into their private business, were held to possess the resulting benefits "on behalf of the company," notwithstanding a resolution to the contrary passed in a general meeting. The basis of the decision was the nature of the misappropriation, *not* the fact that the directors voted as shareholders in the fruitless attempt to ratify the wrong. The derivative action lies where the directors act *mala fide* (as in the "tricky circular" cases) or misappropriate corporate "property" or "opportunities"; and in neither case is the transaction in its nature ratifiable.

Adherents—some reluctant—to this "traditional" line for defining "fraud"[31] have had to face the difficulty of explaining "advantages," "opportunities" or "information" as the company's "property." The directors in the *Regal* case used corporate "information" in one sense to make their secret profit, albeit bona fide; but their breach *could* have been validated by ratification.[32] Other writers, therefore, have sought a different boundary line; for example, a test resting largely on "bona fides" or "reasonable-

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Conv.(N.S.) 51; D. Sugarman (1975) 91 L.Q.R. 482. This liability for misappropriation of corporate assets has never been limited to "conscious and *deliberate* wrongdoing," as Vinelott J. seemed to think: [1980] 2 All E.R. 866, 869.

[28] *Bamford* v. *Bamford* [1970] Ch. 212, 328, *per* Harman L.J.; *cf. New Zealand Netherlands Soc. Oranje* v. *Kuys* [1973] 1 W.L.R. 1126, P.C. This explains why recovery of a "bribe" is *not* recovery of corporate "property": *Metropolitan Bank* v. *Heiron* (1880) 5 Ex.D. 319. *Lister* v. *Stubbs* (1895) 45 Ch.D. 1, C.A.

[29] Lord Davey, *Burland* v. *Earle* [1902] A.C. 83, 93 (P.C.) (emphasis supplied).

[30] [1916] 1 A.C. 554 (P.C.).

[31] See Wedderburn "Shareholders Rights and the Rule in *Foss* v. *Harbottle*" [1957] C.L.J. 194 and [1958] C.L.J. 93; A Boyle "Minority Shareholders' Suits" [1980] 1 *Company Lawyer* 3; B. Rider "*Amiable Lunatics and the Rule in Foss* v. *Harbottle*" [1978] C.L.J. 270. See too Gower, *op. cit.* pp. 616–620; 647–649.

[32] See *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378; 382; 388–389; 393–394. It is clear that "information" *can* be an "asset" owned by the company: *Bell Houses Ltd.* v. *City Wall Properties Ltd.* [1966] 2 Q.B. 656. On corporate "information" and "opportunities" see Gower *op. cit.* pp. 593–599; especially *Phipps* v. *Boardman* [1967] 2 A.C. 46 (H.L.); but for a critical approach, see S. Beck Chap. 5 in *Studies in Canadian Company Law*, Vol. 2 (ed. J. Ziegel 1973).

ness" on the part of the controllers.[33] The view has also been advanced that refusal by the directors to call a general meeting might by itself be such "bad faith" as to permit a derivative action [34] but the court might then grant a remedy only to ensure the meeting is held, not against the alleged underlying malfeasance.[35] Proponents of the traditional test have perhaps failed to insist recently upon both the historical and the logical bases of it; and to the very language of the courts which upholds it; for example, in *Cook* v. *Deeks*.[36]

Vinelott J. would have none of all this. For him, a derivative action lies whenever directors (albeit bona fide) "are guilty of a breach of duty to the company (including their duty to exercise proper care) and as a result of that breach obtain some benefit." [37] But that would include each and every breach of fiduciary duty, including those open to ratification by shareholders' general meeting. Is there no limit?

Vinelott J. takes up the position that all "fraud" by directors can be ratified; but it is "unconscionable" for the majority to "use their voting power in general meeting to prevent an action being brought against them. The fraud lies in their *use of their voting power not in the character of the act or transaction* giving rise to the cause of action." [38] Later in his judgment, he does say that fraud can be judged by reference to the character of the act; but insists there must be included not only misappropriation cases but "more generally" cases where directors benefit, however bona fide, from *any* breach of duty.[39] This of course again raises the issue of ratification. On that: "...there is no obvious limit to the power of the majority to authorise or ratify any act or transaction whatever its character, *provided* that it is not *ultra vires* or unlawful and *that the majority does not have an interest which conflicts with that of the company.*" [40] This last phrase lets the first of two difficult cats out of the bag. Whereas a majority decision not to pursue proceedings might normally be acceptable, he insists: "in ascertaining the view

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[33] See especially S. Beck, whose fascinating contributions to the debate, in the light of Canadian legislation, are mainly: Chap. 18 in Vol. 1 *Studies in Canadian Company Law* (ed. J. Ziegel 1967); and Vol. 2, *ibid.* (1973) Chap. 5 (where on pp. 237–238 he advances a view not dissimilar to that of Vinelott J. though more cautious); "The Shareholders' Derivative Action" (1974) 52 Can.B.R. 159; "The Quickening of the Fiduciary Obligation" (1975) 53 Can.B.R. 771; see too D. Prentice (1972) 50 Can.B.R. 623; (1976) 41 Conv.(N.S.) 51; *cf. Clarkson* v. *White* (1980) 102 D.L.R. (3d) 403.

[34] Gower, *op. cit.* pp. 650–651.

[35] Pennington *Company Law* (4th ed., 1979), p. 597.

[36] [1916] 1 A.C. at p. 564; the contracts *belonged in equity to the company.*

[37] [1980] 2 All E.R. at p. 869.

[38] *Ibid.* at p. 862 (emphasis supplied).

[39] *Ibid.* p. 869 (emphasis supplied).

[40] *Ibid.* p. 862 (emphasis supplied). There is surely no previous judgment which asserts that (apart from illegality and *ultra vires*) shareholders can ratify *any* wrongful act by directors. Ratification is available to release them from normal fiduciary duties or to excuse a breach: *Grant* v. *U.K. Switchback Ry.* (1888) 40 Ch.D. 135; *Boulting* v. *ACTT* [1963] 2 Q.B. 606; but it has never been available for a "fraud" or *mala fides*: *Re Roith* [1967] 1 W.L.R. 432; *Mason* v. *Harris* (1879) 11 Ch.D. 97.

of the majority whether it is in the *interests of the company* that the claim be pursued, *the court will disregard votes cast or capable of being cast by shareholders who have an interest which conflicts with the interests of the company.*" [41] In practice, this would mean doing what a century ago James L.J. concluded English courts could *not* do: submit the issue to a meeting at which only independent or "disinterested" shareholders may vote.[42] Such a course would not only be contrary to basic principles; it would be impracticable. How is a court to know which of the thousands of shareholders in ICI Ltd. sent in a proxy vote because they had a particular "interest"? What are votes "capable of being cast"? Most important of all, how is the "conflict" to be judged? Because of a failure to confront the definition of "the interests of the company," the new principles are, in truth, internally inconsistent. The "interests of the company" *are* those of the "present and future members" (plus, now, employees and possibly creditors).[43] It is not unknown for the majority and the "company" to benefit, where the minority lose out. If majority shareholders are to benefit from a transaction to be approved in general meeting, when are they forbidden to vote? Are they hamstrung if the minority rejects the deal? How does one judge a "conflict" between the interests of the majority and the interests of "the company," setting aside "the character of the transaction" (for *that*, Vinelott J. insists, is *not* the test to use)?

The second difficulty goes even deeper. A vote attached to a share is the property of the holder and can be voted at general meetings [44] as he wishes.[45] Except for special situations (such as altering the

[41] *Ibid.* p. 874 (emphasis supplied), where he appears to state the "principle which underlies the exception" to *Foss* v. *Harbottle* on both aspects, "fraud" and "control."

[42] *Mason* v. *Harris* (1879) 11 Ch.D. 97, 109. This did not happen in *Hogg* v. *Cramphorn* [1967] Ch. 254, or *Bamford* v. *Bamford* [1970] Ch. 212 because the shares not voted were only those of which the issue was disputed. See now s. 14 Companies Act 1980, which supplements the policy of those cases, shareholder control of new issues, especially s. 14 (6).

[43] See *Gower*, *op. cit.* pp. 577–578; and now s. 46, Companies Act 1980. The alternative formulation by R. Instone [1979] J.B.L. 221 (even if correct) would not solve this problem. If majority shareholders cannot "benefit" at the expense of a minority how can *Greenhalgh* v. *Arderne Cinemas* [1951] Ch. 286 (C.A.) be correct? And there, the received wisdom is that there was an exceptional duty not to commit a "fraud on the minority" in changing articles. (Such cases do not, of course, involve derivative actions; the plaintiff sues to protect his own rights. They should not be classified with other "fraud" cases: *contra* Gower, *op. cit.* Chap. 25.)

[44] Class meetings involve different considerations: *British America Nickel Corpn.* v. *O'Brien* [1927] A.C. 369 (P.C.); *Re Holder Investment Trust* [1971] 1 W.L.R. 583; Pennington *Company Law* (4th ed.), p. 580.

[45] *Pender* v. *Lushington* (1877) 6 Ch.D. 70; *Carruth* v. *ICI* [1937] A.C. 707, 765; *Rights and Issues Investment Ltd.* v. *Style Shoes* [1965] Ch. 250; and *Phillips* v. *Manufacturers Securities* (1917) 116 L.T. 290, 296. *Kerry* v. *Maori Dream Gold* Mines (1898) 14 T.L.R. 402 does not detract from that principle. *Cf. Wotherspoon* v. *C.P.R.* (1979) 92 D.L.R. (3d) 595, 697–714 (ratification of transfer of assets to subsidiary of dominant shareholder); and *Clemens* v. *Clemens* [1976] 2 All E.R. 268, rightly criticised by V. Joffe (1977) 40 M.L.R. 71. Even the principle suggested by Gower, *op. cit.* p. 629 based on that decision, does not go as far as Vinelott J. The complexities of introducing fiduciary duties for majority towards minority shareholders are much greater, as was seen in 1887 (see: 12 App.Cas. at p. 600), and as

articles of association), the majority shareholders owe no fiduciary duties to other members; they can even vote deliberately to place their company in contempt of court [46]; they can trade their votes and arrange to vote entirely in their own interests.[47] Such principles are paralleled in the common law of Commonwealth jurisdictions.[48] The shareholder may vote to ratify a wrong which he committed in another capacity (*e.g.* a breach of duty as director); and he may so vote even if he is the controlling shareholder.[49]

Vinelott J. swept all this aside, asserting that the *fons et origo* of this line of authority, the *Beatty* case (where the director used controlling votes to confirm a sale by him to the company), is *not* authority (as had been thought for nine decades) for the proposition that " a controlling shareholder who is also a director can by using his votes in general meeting confirm or ratify an act or transaction (not being of a fraudulent character or ultra vires) which was a breach of his duty as a director and thereby prevent the minority from bringing a derivative action." [50] Between 1887 and 1980 the *Beatty* case has been universally thought to decide just that.[51] Moreover, in delivering the judgment of the Judicial Committee, Sir Richard Baggallay overruled the declaration by the Canadian Supreme Court: " if the transaction and act of the director are to be confirmed, it should be *by the impartial, independent and intelligent judgment of the disinterested shareholders and not by the interested director* who should never have departed from his duty." [52] No doubt

can be judged by *Perlman* v. *Feldman* 219 F.2d. 173 (1955) and *Jones* v. *Ahmanson* 460 P.2d. 464 (1969). On the special facts of *Pennell* v. *Venida Investments* (unreported 1974) see S. Burridge (1980) 44 M.L.R. 40.

[46] *Northern Counties Securities Ltd.* v. *Jackson and Steeple Ltd.* [1974] 2 All E.R. 625.

[47] *Greenwell* v. *Porter* [1902] 1 Ch. 530; *Puddephatt* v. *Leith* [1916] 1 Ch. 200; *Dominion Cotton Mills Ltd.* v. *Amyot* [1912] A.C. 546; *Ving* v. *Robertson and Woodcock* (1912) 56 S.J. 412; *Burland* v. *Earle* [1902] A.C. 83 (P.C.); *Musselwhite* v. *Musselwhite Ltd.* [1962] Ch. 964.

[48] See on Canada, S. Beck, Chap. 15, Vol. 1, *Studies in Canadian Company Law* (1967); and Vol. 2 *ibid.* (1973) Chap. 5; on Australia and other jurisdictions, A. Afterman *Company Directors and Controllers* (1970), especially Chap. III; *cf. Queensland Mines* v. *Hudson* (1978) 52 A.L.J.R. 399. They were accepted with various limitations in some jurisdictions in the Unted States: see *Smith* v. *Brown Borhek* 414 Pa. 325 (1964); *Boss* v. *Boss* 200 A. 2d. 231 (1964); and generally Ballantine on *Corporations* (1946) pp. 176–179, 401–402.

[49] *North West Transportation Co.* v. *Beatty* (1887) 12 App.Cas. 589 (P.C.); *Harris* v. *Harris*, 1936 S.C. 183; *Baird* v. *Baird*, 1949 S.L.T. 368. See too *Mason* v. *Harris*, *supra*; note 42.

[50] [1980] 2 All E.R. at 864.

[51] See *e.g.* in England, in various decades, *Lindley on Companies* (1902 ed.), Vol. 1, p. 428 (stating the principle in this relatively new decision " as a matter of law as distinguished from conscience "); Stiebel's *Company Law and Precedents* (1929), Vol. 1, p. 242; Gower, *op. cit.* p. 615; Gore Browne on *Companies* (42nd ed.), p. 312; Pennington, *op. cit.* p. 580.

[52] *Beatty* v. *North West Transportation Co.* (1887) 12 S.C.R. 598, 604 (Ritchie C.J.; emphasis supplied). When Sir Richard Baggallay said it " *may* be quite right " that a minority member " *should* be able " to challenge such a transaction as " improper " (1887) 12 App.Cas. 589, 600, he clearly spoke *de lege ferenda*; not, as Vinelott J. suggests (p. 864), adding a new doctrine of law. He clearly rejected the principle of the Supreme Court (pp. 599–601), and unequivocally, at p. 593, stated the principle in the text (emphasis supplied).

Vinelott J. would agree with that. But the Privy Council overruled it, because: " every shareholder has a *perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from the general or particular interests of the company.*"

Consequences of the New Principles?

Once he had weakened the very foundation stone, Vinelott J. was forced to rebuild much of the rest of the law. He cannot be criticised for not rewriting a textbook on company law; but the impact of his new principles, if adopted, on various areas must be considered. When, for example, can a director vote at a general meeting on a resolution under section 184 of the 1948 Act to remove him from the board? Do the new principles have any effect upon articles giving to such a director " weighted votes "? [53] As for earlier cases, the detailed reconsideration of *Burland* v. *Earle* [54]—apart from a repudiation of one of Lord Davey's three propositions—is a relatively minor matter. But the " secret profit " case of *Regal (Hastings) Ltd.* v. *Gulliver* [55] is crucial. Had not the Law Lords there held that the directors' breach of fiduciary duty could have been set right by ratification? And had not everyone assumed that the directors probably had voting control? Or if they had not, that they would not have been debarred from voting on a motion to ratify their " secret profits " made bona fide but in breach of duty?

The escape route chosen by Vinelott J. is ingenious but astonishing. When Lord Russell of Killowen said that the directors could " have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting," [56] Vinelott J. asserts that he " contemplated " this might be done " precisely because they had *not* control of the majority of the votes." The decision would " otherwise conflict " with *Cook* v. *Deeks.* [57] But, whoever held voting control in the *Regal* case, are we now being asked to believe that Viscount Sankey, Lord Wright, and Lord Russell (with whom Lords Porter and MacMillan agreed) in making it clear that the directors would have been absolved by a shareholders' resolution, actually forgot to add the rider: " provided, of course, none of you votes as a shareholder "? Or: " but not if your shares control the outcome of the vote "? The action was, it is true,

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[53] See *Bushell* v. *Faith* [1970] A.C. 1099 (H.L.).

[54] The revision ([1980] 2 All E.R. pp. 862–864) of Lord Davey's famous three tests [1902] A.C. 83, 93, is unconvincing. The " minor claims " in *Burland* v. *Earle* do not, it is suggested, support Vinelott J. (at pp. 864–865); they were orders that he should account for funds and moneys owned by or owed to the company, within the " corporate property " heading.

[55] [1942] 1 All E.R. 378; [1967] 2 A.C. 134n (H.L.). See *supra*, note 32. The Editor of the law report stated that the directors doubtless controlled the majority of voting shares: p. 379.

[56] *Ibid.* p. 389; p. 150.

[57] [1980] 2 All E.R. 862: (emphasis supplied).

concerned with a secret profit of only £7,010 8s. 4d.; but the point of principle was of critical importance; and the eminent Law Lords did not approach their task in a slip-shod manner. If Lord Russell had meant to add the "Vinelott-rider," he would have done so explicitly.

Finally, what would be the practical effects of the new principles? In large companies with hundreds of shareholders all with conflicting interests, their application would demand intellectual gymnastics of Olympic quality. But take a simple family company: H and W (the directors) own 1,000 voting shares each; and S and D 100 each. H inadvertently makes a secret profit in the course of his directorship and buys W a present with part of the proceeds. In general meeting, a resolution to ratify H's peccadillo is objected to by S and D, who claim neither he nor W can vote as they are "interested" parties. S and D also move a resolution that the company should bring suit against H and W. Who can vote on what? Vinelott J. himself accepted that it would not be "easy," on his view of the law, to see where the lines should be drawn. Should an action proceed against a director "liable for negligence" which resulted in a benefit to "his wife or a friend"? [58] He also left unanswered more fundamental questions. When *do* shareholders' interests "conflict" with those of the company? If H had used his secret profit on a present for his mistress, would W be entitled to vote even though she cared little for the commercial interests of the company but found it a useful vehicle of vengeance against H? Would we *always* need to inquire into the subjective motives of each of the shareholders voting? Moreover, can the articles of association still adjust the scope of directors' and shareholders' duties so as to displace, in whole or part, the new principles? Vinelott J. was obviously concerned about this, as shown in his adverse reaction to the notorious Article 84 of Table A.[59]

Conclusion

It is true that for decades attempts to carve a path through the thickets of *Foss* v. *Harbottle* have met with obstacles.[60] One reason

[58] *Ibid.* p. 869. See too B. Rider, *op. cit.* [1978] C.L.J. at p. 286.

[59] *Ibid.* pp. 879–880. Compare heterodox concern about Table A by C. Baker [1975] J.B.L. 181, and J. Birds (1976) 39 M.L.R. 394, with the orthodox presentation in Gower, *op. cit.* pp. 584–591. If the new principles were to sweep aside "authorisation" in the very articles of the company, what is left of the existing law? Consider *e.g. Costa Rica Ry.* v. *Forwood* [1901] 1 Ch. 746; *Imperial Mercantile Credit Assoc.* v. *Coleman* (1873) L.R. 6 H.L. 189.

[60] For instance, cases like *Alexander* v. *Automatic Telephone Co.* [1900] 2 Ch. 56. Otherwise, the major stumbling block is whether the *Regal* case did not entail use by the directors of corporate "property," *i.e.* "*information.*" This problem, posed in Wedderburn, *op. cit.* [1957] C.L.J. 194, [1958] *ibid.* 93, is still not settled: see Gower, *op. cit.* pp. 591–599, 616–619; Prentice, *op. cit.* and especially Beck, *op. cit.* (*supra*, note 33). The present writer now leans towards the view that more stress should be laid upon a business "opportunity" than on "information" as corporate property. The *Cook* case involved the former; *Regal* the latter. But the standard of the fiduciary's obligation to account must surely, in times when the machinery for malpractice is extending, be sustained: see S. Beck, Vol 2

is that this is not just an obscure Rule with a Dickensian name (as was once thought); its tentacles creep into every part of company law. Surely it is better for judges to develop existing principles, especially (in the case of derivative actions) the " corporate opportunity " principle, rather than take on the task of legislative reconstruction of the whole edifice. Laskin J. (as he then was) in the *O'Malley* case illustrated the way in which such developments can combine reasonable certainty with progressive evolution, in the best tradition of the common law.[61]

By contrast, the new principles advanced by Vinelott J. are replete with uncertainty; an invitation to costly litigation; and *not* necessarily more likely to bring rogue directors to book. We must hope that *Prudential* (No. 2) will be remembered for its skilful development of procedure; for its *ratio decidendi*; but not for its *obiter dicta* which seem, with respect, to be wrong in law and in policy.

But at the end of the day, that is all rather technical. The litigation in *Prudential* (No. 1) and (No. 2), with four silks and seven juniors engaged in court for 80 days, must have incurred costs of at least £500,000. That money would surely have been better spent on a small Companies Commission dedicated (in co-operation with the " voluntary " bodies in the City) to exposing and stamping out company fraud.[62]

W.

INJUNCTIONS AND THE PUBLIC INTEREST

THE recent decision of the Court of Appeal in *Kennaway* v. *Thompson* [1] raises a number of points of interest concerning the award of injunctions in cases of nuisance. The defendants, representatives of the Cotswold Motor Boat Racing Club, had been held liable in nuisance, by Mais J. at first instance, for noise emanating from motor-boat race meetings which had been held on a man-made lake situated close to the plaintiff's house near Fairford in Gloucestershire.

Studies in Canadian Company Law (1973), Chap. 5, replying to G. Jones (1968) 84 L.Q.R. 472. See too *supra*, notes 31 to 33.

[61] *Canadian Aero Services Ltd.* v. *O'Malley* (1973) 40 D.L.R. 3d. 371, especially 391; an element of reasonableness in use of such " opportunity " by the director is introduced by Laskin J. See too *Consul Development Property Ltd.* v. *DPC Ltd.* (1975) 49 A.L.J.R. 74; *Industrial Development Consultants Ltd.* v. *Cooley* [1972] 2 *All* E.R. 162 (Roskill J. blending " opportunity " concepts with the rule about conflict of interest and duty); *Abbey Glen Property Corpn.* v. *Stumborg* (1978) 85 D.L.R. 3d. 35 (W. Braithwaite (1978) Can.Bus.L.J. 210), and S. Beck (1975) 52 Can.B.R 771 (who probes incisively into the relationship of the *O'Malley* decision to various earlier authorities).

[62] Contrast the " Wilson " Committee's failure to appreciate the need for such a body: *Report* (Cmnd. 7937) Chap. 22, with the compelling case made by T. Hadden, *op. cit. supra*, note 3. The Government's Companies Bill, 1981, will provide inspectors with powers (to demand assistance, documents, bank accounts, etc.: clause 44) which arguably should be in the hands of persons for whom some public accountability exists or even, of a company quango.

[1] [1980] 3 W.L.R. 361.

Mais J. had described the nuisance as " quite intolerable and wholly unreasonable " [2] and awarded the plaintiff £15,000 damages for future interference. But his lordship had refused to grant an injunction actually to restrain the holding of the races, largely because of the " considerable public interest " which existed in the Club and the fact that members of the public attended its meetings " in large numbers." The defendants accepted the finding of liability against them but the plaintiff appealed against refusal of an injunction. The Court of Appeal, in a single judgment of the court,[3] allowed the appeal and granted an injunction, albeit one which was carefully limited in its terms.

In the earlier case of *Miller* v. *Jackson*,[4] which concerned the escape of balls from a village cricket pitch to the detriment of householders living nearby, Lord Denning M.R. had suggested that the court should attach greater weight than formerly to the public interest, as against the private interest of the plaintiff, in resolving nuisance cases.[5] In the case itself the Court of Appeal, by a majority, refused an injunction to close the cricket club, because of the interest in it of the inhabitants of the village, and confined the plaintiffs to damages for the nuisance which they would continue to suffer. In *Kennaway* v. *Thompson*, however, the Court of Appeal treated Lord Denning's observations in the earlier case about the priority of the public interest as *obiter* and decided not to follow them. It is respectfully submitted that they were right to do so. Although the public interest has always been a relevant factor in injunction cases,[6] the traditional approach seems to have been to regard it as one which could only very rarely be allowed to deprive the plaintiff of an effective remedy.[7] The balancing of public and private interests on a broad basis involves the making of policy decisions for which the courts are not equipped. Legislative protection should be sought where essential activities are involved.[8]

The precise reasoning of the Court of Appeal in *Kennaway* v. *Thompson* is not, however, free from difficulty. In awarding damages at first instance Mais J. had exercised the jurisdiction originally con-

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[2] Quoted in the judgment of the Court of Appeal: [1980] 3 W.L.R. at p. 364D.

[3] Lawton and Waller L.JJ. and Sir David Cairns.

[4] [1977] Q.B. 966. Noted by the present writer in (1978) 41 M.L.R. 334.

[5] See [1977] Q.B. at pp. 981G–982B.

[6] See Spry, *Equitable Remedies* (1971) at pp. 364–365.

[7] See *Att.-Gen.* v. *Birmingham Corporation* (1858) 4 K. & J. 528. See also *Bellew* v. *Cement Ltd.* [1948] I.R. 61. *Cf. Raphael* v. *Thames Valley Railway Co.* (1867) L.R. 2 Ch.App. 147 (specific performance). Injunctions against proven nuisances were refused, largely on grounds of public interest, in *Lillywhite* v. *Trimmer* (1867) 36 L.J.Ch. 525 and *Wandsworth Board of Works* v. *London & South Western Ry.* (1862) 31 L.J.Ch. 854, but in both cases the degree of interference was relatively trivial. It is possible that more weight is given to the public interest in Canada: see *Bottom* v. *Ontario Leaf Tobacco Co.* [1935] 2 D.L.R. 699 (injunction refused against a factory on the ground that its closure would increase unemployment).

[8] See *Att.-Gen.* v. *Birmingham Corporation* (1858) 4 K. & J. at p. 541, *per* Page-Wood V.-C.

ferred upon the court by the Chancery Amendment Act 1858 (popularly known as Lord Cairns' Act) to award damages in lieu of an injunction. In the well-known case of *Shelfer* v. *City of London Electric Lighting Co.*,[9] however, the Court of Appeal emphasised that the jurisdiction conferred by the Act was to be invoked sparingly and should not be used lightly to deprive plaintiffs of effective vindication of their legal rights by way of injunction. The restrictive principles laid down in *Shelfer's* case, which appeared to confine the jurisdiction largely to " trivial and occasional nuisances," [10] had not been satisfied in the instant case and the Court of Appeal held that it necessarily followed that the plaintiff was entitled to an injunction.[11] It is submitted that this was a *non sequitur*. It is wrong to suppose that, wherever the *Shelfer* conditions are not satisfied, the plaintiff may expect to be awarded an injunction virtually as of right. A plaintiff may still be deprived of an injunction in such a case on general equitable principles [12] under which factors such as the public interest may, in an appropriate case, be relevant. It is of interest to note, in this connection, that it has not always been regarded as altogether beyond doubt whether a plaintiff who does thus fail to substantiate a claim for equitable relief could be awarded damages under Lord Cairns' Act " in lieu " of an injunction for which he would not have qualified.[13] But it now seems to be clear that proof of a mere cause of action (or, in *quia timet* cases, potential cause of action) at common law for nuisance will be sufficient to bring the powers of the court under the Act into play.[14] If this is correct, the limiting conditions laid down in the *Shelfer* case must be confined to situations in which, but for the statutory jurisdiction, the plaintiff would have enjoyed a clear and legitimate expectation that equitable relief would be granted to him. The conditions are not a comprehensive statement of the situations in which the jurisdiction to award damages under the Act can be exercised.[15] Mais J. must have assumed that this was the position and, on this point, the reasoning underlying his judgment is to be welcomed.

The final point upon which *Kennaway* v. *Thompson* is of interest concerns the form of the order itself. Although in granting an injunction the court is free to make its order in whatever form it considers appropriate it is usual in nuisance cases for fairly general language to be used, and for the order to conclude with a phrase

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[9] [1895] 1 Ch. 287.

[10] [1895] 1 Ch. at pp. 316–317, *per* Lindley L.J. See also *per* A. L. Smith L.J. at pp. 322–323.

[11] See [1980] 3 W.L.R. at 366B.

[12] See *Redland Bricks* v. *Morris* [1970] A.C. 652.

[13] See *Proctor* v. *Bayley* (1889) 42 Ch.D. 390, 401, *per* Fry L.J. See also *Lavery* v. *Pursell* (1888) 39 Ch.D. 508, 519, *per* Chitty J. (specific performance).

[14] *Cf.* dicta *per* Goff and Buckley L.JJ., dealing with the analagous case of specific performance, in *Price* v. *Strange* [1978] Ch. 337. See also Spry, *Equitable Remedies* (1971) at p. 534; Jolowicz, " Damages in Equity—A Study of Lord Cairns' Act " (1975) 34 C.L.J. 224, 241 *et seq.*

[15] See *per* Romer L.J. in *Fishenden* v. *Higgs and Hill* (1935) 153 L.T. 128, 141.

simply enjoining the defendant " not to cause a nuisance " or with similar words to the same effect.[16] In part this apparent vagueness is to avoid oppression against the defendant, but an injunction in specific terms could also be inconvenient to the plaintiff if it enabled a scheming defendant, acting in bad faith, to claim that he had complied with the letter of such an order while ignoring its spirit.[17] In *Kennaway* v. *Thompson*, however, one of the factors which induced Mais J. to refuse an injunction was that the vagueness of an order in the usual form " would only lead to further litigation." [18] Cases of this kind invariably raise difficult questions of degree, and it was assumed that a certain level of activity could be permitted to the Club which would not interfere with the plaintiff to such an extent as to constitute an actionable nuisance. In formulating the injunction the Court of Appeal attempted to lay down the permissible level in specific terms. The number of events which could be held, the number of weekends per season that could be used, the noise level in decibels of the boats employed and, for water-skiing, the number of boats which could be used at any one time, were all carefully regulated.[19] The case therefore provides an unusual illustration of the wide scope and utility of the injunction as a remedy in nuisance cases.

R. A. BUCKLEY

DAMAGES FOR FAILED ABORTION

CAN the birth of a healthy, normal child ever give rise to a successful claim for damages at the instance of its mother against a medical practitioner? The recent decision in *Sciuriaga* v. *Powell* [1] gives an unequivocally affirmative answer to this novel question, and in so doing is the first case in this country in which a court has awarded damages in respect of a negligent act giving rise to the birth of a child.[2]

In 1972 the plaintiff, a young unmarried girl, became pregnant and was referred to the defendant, a general practitioner with particular experience in gynaecology, with a view to having the pregnancy

[16] See *per* Lord Evershed M.R. in *Thompson-Schwab* v. *Costaki* [1956] 1 W.L.R. 355, 340 (interlocutory injunction). See also *per* Donaldson J. in *Shoreham-By-Sea U.D.C.* v. *Dolphin Canadian Proteins* (1972) 71 L.G.R. 261, 268.

[17] *Cf. Soltau* v. *De Held* (1851) 2 Sim.N.S. 133, 152–153, *per* Kindersley V.-C.

[18] See [1980] 3 W.L.R. at p. 364E.

[19] See [1980] 3 W.L.R. at p. 367.

[1] Queen's Bench Division, May 18, 1979, Transcript No. 1978/NJ/262; (1979) 76 L.S.Gaz. 567. The defendant's appeal, confined to the issue of *quantum*, was upheld in part by the Court of Appeal on July 24, 1980, damages being reduced to £14,000—see Court of Appeal Transcript No. 1980/597.

[2] At least two other cases involving a claim for damages for causing the birth of the plaintiff's child have reached the courts, but in each case the plaintiff failed to establish liability—see *Waters* v. *Park*, *The Times*, July 15, 1961. Annual Report for 1977 of the Medical Protection Society, at p. 34. The Medical Defence Union reports having dealt with 40 claims involving pregnancy following unsuccessful sterilisation operations, many of which were settled out of court—see 1980 Annual Report, at p. 17.

terminated. The defendant agreed to perform a legal abortion for a fee of £150 and the operation was subsequently carried out, at which time the plaintiff was approximately seven weeks pregnant. Unfortunately the abortion operation proved to be unsuccessful, pregnancy continued, and the plaintiff eventually gave birth to a healthy child. Nearly four years after the operation, the plaintiff raised an action against the defendant for breach of contract, claiming damages for the alleged breach of an implied term to exercise reasonable skill and care in the performance of the operation and of post-operative procedures. The plaintiff's claim was successful and she was awarded damages totalling £18,750, representing loss of earnings (actual and prospective), pain and suffering, mental anxiety and distress,[3] and impairment of marriage prospects. The defendant's appeal, which was confined to the issue of quantum, was partially successful, the Court of Appeal reducing the award of damages to £14,000.[4]

The trial court held that the failure of the operation was due to the defendant's failure to exercise reasonable care; instead of performing a proper abortion, the defendant had negligently perforated tissues surrounding the womb or passages outside the womb and had removed non-foetal material. The court also held that the defendant had failed to exercise reasonable care in that, on realising that the tissue which had been aspirated was non-foetal, he failed to inform the plaintiff of this fact and to perform, or even recommend, further examination of the plaintiff for the possibility of a continuing pregnancy.

It was argued on behalf of the defendant that, since the plaintiff had become aware of her continuing pregnancy by the end of June 1972 at the latest, her claim was time barred as proceedings had not been initiated until February 1976.[5] The court resolved this issue in the plaintiff's favour, concluding that, under section 2A (6) (*b*) of the Limitation Act 1939, the limitation period had begun when the plaintiff acquired knowledge, not merely of the failure of the operation, but also of the specific negligent acts of the defendant which had resulted in the continuance of the pregnancy.[6] Since the plaintiff had not acquired such knowledge until 1975, her action was not time barred. Watkins J. also observed that, even if the plaintiff's action had been time barred under section 2A of the Act, he would

[3] Although it is not expressly stated in the judgment of the court, it seems from the facts of the case that the legal ground on which the abortion was performed was that continuation of the pregnancy involved a risk to the mental health of the plaintiff (Abortion Act 1967, s. 1 (1) (*a*)). In view of this it is perhaps surprising that the plaintiff was awarded only £750 in damages for mental anxiety and distress. The court's observation that " in the later stages of pregnancy [the plaintiff] found contentment, if not more—ease of mind " (Official Transcript, p. 37) indicates that it was satisfied that the perceived risk to the plaintiff's mental health had not materialised by the date of the trial.

[4] Court of Appeal, July 24, 1980, Transcript No. 1980/597.

[5] Limitation Act 1939, s. 2A, as substituted by the Limitation Act 1975, s. 1.

[6] See Official Transcript at p. 17.

have " without hesitation " exercised his discretion under section 2D of the Act [7] and allowed the action to proceed. This decision was based, in part, on the fact that the defendant had wilfully deceived the plaintiff in his explanation for the failure of the operation.

One further argument advanced on behalf of the defendant was that the effective cause of the plaintiff's continuing pregnancy was, not the failure of the abortion operation, but rather her own decision not to undergo a repeat operation. Watkins J., in dismissing this submission, concluded that the plaintiff had remained willing to submit to a second operation up until the fourteenth week of pregnancy. However, the court did not then go on to consider the fact that the plaintiff had refused the offer of a repeat abortion during the twenty-second week of pregnancy. It seems to be implied, however, in an earlier part of the judgment that, since an abortion operation at that later stage of pregnancy would have involved a much greater risk to the plaintiff's health, she had not acted unreasonably in declining a second operation.[8] It is regrettable that the court did not discuss this issue in greater detail since it has a direct bearing on the question of mitigation of loss. The judgment provides no indication of the degree of risk to maternal health involved in an abortion operation performed during the twenty-second week of pregnancy, nor does it mention the fact that such an operation would be legal under the Abortion Act 1967.

One point which was not raised relates to the plaintiff's decision not to offer the child for adoption. Could this decision be regarded as constituting a failure on the plaintiff's part to mitigate her loss, in particular her loss of earnings and impairment of marriage prospects? This argument has been canvassed by defence counsel in several cases in the United States but has been firmly rejected by the courts.[9] The basis for such rejection has been the view that the plaintiff is only required to take *reasonable* steps to mitigate her loss and that to oblige her, under threat of reduction of damages, to offer the child for adoption would not be reasonable. It is thought that, had the point been raised in the instant case, Watkins J. would have reached the same conclusion.

The most interesting aspect of the case lies in the court's treatment of the question of public policy. It was argued by defence counsel that it was " repugnant to people's sensibilities and wholly wrong " for damages to be awarded in such a case. The court dismissed this argument on the grounds that, although public policy could in some cases be used to deny recovery of damages, no authority existed for the proposition that this could be done in a

[7] As substituted by the Limitation Act 1975, s. 1.

[8] See Official Transcript at p. 9.

[9] See *Troppi* v. *Scarf*, 31 Mich.App. 240, 187 N.W. 2d 511 (1972); *Martineau* v. *Nelson*, 247 N.W. 2d 409 (Minn. 1976); *Sherlock* v. *Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977); *Ziemba* v. *Sternberg*, 45 App.Div. 2d 230, 357 N.Y.S. 2d 265 (1974).

case of breach of contract in which the contract itself was not contrary to public policy.[10] Once again it is regretable that the court did not discuss this issue in greater detail and give more consideration to the policy issues involved. One has only to consider the plight of a plaintiff suing a solicitor/advocate for breach of an implied contractual term to conduct litigation with reasonable care, to realise that contractual damages can in fact be denied on grounds of public policy notwithstanding that the contract itself is unimpeachable.[11]

The issue of public policy has frequently been at the centre of discussion in the cases which have arisen in other common law jurisdictions, involving this type of claim for damages. Such cases have originated almost exclusively in the United States. Although there have been relatively few American cases dealing with unsuccessful abortion operations,[12] damages have been claimed in over 100 cases involving analagous situations. Most frequently, these cases have stemmed from unsuccessful sterilisation operations, although failure of other forms of contraception due to the alleged negligence of the defendant have occasionally given rise to litigation.[13]

The one feature that forms a marked contrast between the instant case and many of its American counterparts is the relative ease with which the court dismissed the public policy argument. The action for "wrongful birth"—as it is termed in the United States—has had to contend with many public policy barriers erected by courts convinced of the "overriding benefits of parenthood." This attitude is epitomised in the majority judgment in *Terrell* v. *Garcia* in 1973 [14]:

> "[T]he satisfaction, joy, and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents, are undoubtedly the things that make life worthwhile. Who can place a price tag on a child's smile or the parental pride in a child's achievement? ... Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss. ..."

It is submitted that at least two reasons can be advanced to explain this contrast. First, although the American courts were at first reluctant to hold that damages could be recovered in this context, this attitude has gradually changed and now it is widely accepted that such claims do not contravene public policy. This change in

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[10] See Official Transcript at p. 33.

[11] See the *obiter dicta* of the House of Lords in *Saif Ali* v. *Sidney Mitchell & Co.* [1980] A.C. 198 and in *Rondel* v. *Worsley* [1969] 1 A.C. 191.

[12] See *e.g. Stills* v. *Gratton*, 55 Cal.App. 2d 698 (1976); *Wilczynski* v. *Goodman*, 391 N.E. 2d 479 (Ill. App.Ct. 1979); *Koehler* v. *Schwartz*, 413 N.Y.S. 2d 462 (Sup.Ct.App.Div. 1979); *Olson* v. *Molzen*, 558 S.W. 2d 429 (Tenn. 1977).

[13] See generally Annot., "Tort Liability for Wrongfully Causing One to be Born," 83 A.L.R. 3d 15 (1978); Mark, "Liability for Failure of Birth Control Methods" (1976) 76 Colum.L.Rev. 1187.

[14] 496 S.W. 2d 124 at p. 128 (Tex.Ct.Civ.App. 1973).

attitude is undoubtedly attributable in part to a growing acceptance of contraception and abortion and to an awareness that the birth of a child is not necessarily a "blessing" for the parents. Thus, although the instant case is one of the few of its kind to have reached the courts in this country, the climate of public policy has changed considerably since the days when such cases were first beginning to appear in the American courts.[15]

Secondly, many of the public policy arguments that have been raised in this context by courts in other jurisdictions have related to one particular item in the plaintiff's claim for damages, namely, a claim for the economic cost of raising the child to the age of majority. Once again, although American courts were at first reluctant to admit such a claim, substantial sums are now being awarded under this head of damages.

The plaintiff in the instant case did not claim damages for the economic cost of raising the child, notwithstanding that such cost is, of course, considerable. One can only speculate as to the court's reaction had such a claim been submitted. There is, however, an indication in the Court of Appeal's consideration of the case that public policy may well have a role to play in determining the outcome of future "wrongful birth" cases. In the course of his judgment Waller L.J. observed that[16]:

> "[counsel] for the plaintiff (respondent) concluded her submission by reminding the court that it should ignore policy considerations when dealing with this case, and in agreeing the figures proposed by my Lord I have ignored those considerations. In doing so I must not be taken as assenting to the view that they would be irrelevant in every case."

In the present writer's view, it is likely that courts in this country will be attracted to the conclusion, at least in the foreseeable future, that public policy considerations prevent a plaintiff in the present context from recovering damages for the economic cost of raising the child. In all probability we shall not have long to wait before discovering the judicial attitude to such a claim, since the decision in the instant case may well generate further litigation in this novel area of the law.

GERALD ROBERTSON

THE CHECK-OFF AND THE PROBLEM OF THE POLITICAL LEVY

MANY trade unions now collect dues by means of the check-off; in other words employers agree to deduct the dues from their employees'

[15] See, however, *Doiron* v. *Orr* (1978) 86 D.L.R. (3d) 718 (Ont. High Ct.), one of the few Canadian cases to have considered a claim for damages arising from the birth of a child. The court described the plaintiff's claim for the economic cost of raising the child as "grotesque." *Cf. Cataford* v. *Moreau*, discussed in (1979) 57 Can. Bar. Rev. 88.

[16] Court of Appeal Transcript No. 1980/597, at p. 21.

wages and transfer the money to the union of which these employees are members. As the Donovan Commission recognised, this method of collection has obvious advantages for trade unions, providing them with "a steady and assured income" and eliminating "the need for personal collection of subscriptions, which is often a time-consuming task, unpopular among the voluntary workers who do it. . . ." [1] However, many employers are only willing to extend check-off facilities where the dues of union members are fixed and regular. In most unions the political and general contributions are compounded in a single levy, and in many cases the political element is not a fixed weekly or monthly sum; rather, it may be a portion of the first or the last contribution in each quarter.

Because employers are generally unwilling to programme their computers so that, in the weeks when the political contribution is due, a smaller sum may be deducted from the wages of an employee who is exempt from paying the political levy of his union,[2] many unions have responded by requiring contracted out members to have the political levy deducted from their wages; the unions then arrange for the money to be refunded to the members concerned. In *Reeves* v. *TGWU*,[3] in an appeal from the Certification Officer, the EAT was faced with the argument that this practice of rebates was in breach of the union's political fund rules, first because the exempt member was not thereby relieved from payment within terms of the rules, and secondly because the exempt member was placed at a disadvantage contrary to the rules. By the union's rule 24.7, an exempt member is relieved from payment of 8p of the first weekly contribution in each quarter; the rule also provides that "such relief shall be given as far as possible to all members who are exempt on the occasion of the same periodical payment." Rule 24.8 provides, so far as relevant, that exempt members shall not be excluded from any benefits of the union, "or placed in any respect either directly or indirectly under any disability or disadvantage as compared with other members of the union." [4]

In his decision the C.O. distinguished between rebates paid in arrears and those paid in advance, and held that only the latter were lawful.[5] The EAT went further than this and not only rejected Reeves' appeal that rebates in advance were unlawful, but upheld a cross-appeal by the union that rebates in arrears might also be permitted

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[1] Report of the Royal Commission on Trade Unions and Employers' Associations 1965–68, Cmnd. 3623, para. 719 .

[2] The right to contract out of paying the political levy is provided by the Trade Union Act 1913. A union which adopts the political objects regulated by that Act (see s. 3 (3)) must also adopt political fund rules which comply with the terms of the Act. The Certification Officer maintains model rules for this purpose which are generally adopted by unions with political funds.

[3] [1980] I.R.L.R. 307.

[4] Similar provisions are to be found in the political fund rules of all other unions which have such rules. These two rules comply with the terms of ss. 6 and 3 (1) (*b*) respectively of the T.U.A. 1913.

[5] [1979] I.R.L.R. 290. See also *McCarthy* v. *APEX* [1979] I.R.L.R. 255, and *Cleminson* v. *POEU* [1980] I.R.L.R. 1.

under the rules.[6] The EAT construed rule 24.7 to mean that for each periodical payment to the union, relief must be given as far as possible in respect of the political contribution when the periodical payment is made. But in cases where this is not possible, for example because of the operation of the check-off, it was held that the rule did not preclude the use of rebates, although the tribunal expressed the view that these should only be paid in arrears if for some reason it was not possible to do so in advance. The EAT also held that neither method of rebating placed exempt members at a disadvantage in breach of rule 24.8., concluding that a disadvantage must be " material " to be in breach of the rule. It was held that money paid in advance would not be regarded by the ordinary man as a material or substantial disadvantage; it was also held that rebates in arrears involve no disadvantage if the money is repaid to the exempt member as soon as reasonably possible, even though such practice requires the exempt member to pay over money to the union contrary to his wishes.[7]

The flexibility which the decision of the EAT brings to this question, in allowing the rebate to be paid in arrears in some circumstances, is a welcome development. Although it is generally true that there seems no reason why rebates should not be paid in advance, there are several circumstances in which this would be difficult. The political fund rules of most unions provide:

> " On giving [notice of exemption], a member shall be exempt, so long as his notice is not withdrawn, from contributing to the political fund as from the first day of January next after the notice is given, or, in the case of a notice given within one month after the date on which a new member is admitted to the organisation is supplied with a copy of those rules under Rule 12 hereof, as from the date on which the member's notice is given." [8]

One difficulty which arises here relates to the member who gives notice towards the end of the fourth week of his membership of the union. He may already have given his consent to the check-off which, moreover, may already be operating in his case. Yet he will be entitled to be relieved from payment of the political levy immediately even though, depending on its administrative practices, the union

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[6] It should also be noted that another, much different point was raised before the EAT which had not arisen before the C.O. This was the argument that the practice of rebates contravened the Truck Act 1831, ss. 2, 3. The EAT concluded that this was a matter for the courts, not for them. However, it is difficult to anticipate how any action on this ground would succeed. See *Hewlett* v. *Allen* [1894] A.C. 383, and *Williams* v. *Butlers Ltd.* [1975] I.C.R. 208.

[7] It should be noted that this decision was based on the assumption that the union would pay the rebate without the member having to claim the repayment. The EAT said that it was the duty of the union to relieve the member of payment and it was not right that the member should have to apply for a repayment. The EAT said that if this practice prevailed then this " might wholly change the position."

[8] This provision is contained in the Certification Officer's Model rule 6. See note 2 *supra*. Rule 12 provides that new members should be supplied with a copy of the rules " forthwith " following their admission to membership.

cannot possibly arrange for a rebate at such short notice. Another problem with rebates in advance relates to notices of exemption given after the four week period has elapsed. The rules of most unions provide that notices given after the first month of membership become operative from the following January. Yet, it may be difficult for a union to arrange for a rebate in time if the exemption notice is not given until the end of December; in some unions the rules provide that a portion of the first contribution of each quarter is a contribution to the political fund.[9]

It could be argued, of course, that these difficulties are not fatal to the effective operation of a system of rebates in advance. Unions could respond to the first problem by postponing the implementation of the check-off in the case of new members for a period of about six weeks from the commencement of employment.[10] In relation to the second problem, unions could change their rules so that the political contribution is deducted from the *last* rather than the first quarterly contribution.[11] But while the C.O.'s view could thus have been upheld without any substantial inconvenience to the unions, it is perhaps difficult to justify any requirement that unions should alter their existing arrangements. Thus, even if the exempt member insisted on paying his dues by means of the check-off, and even if he was required to receive a rebate in arrears, it is important to note that the practice of the union in this case, as with other unions, was to place all contributions into the general fund until the end of each quarter when money would then be allocated to the various funds for which it was collected. Thus, the exempt member would never make a contribution to the political fund and would never be in the position of financing his union's political activities; he would get his money back, and would have an effective remedy via the C.O. if the union was difficult or dilatory in the matter.

KEITH EWING

DEDUCTING BENEFITS FROM DAMAGES: THE ONLY CONSISTENTLY LOGICAL CONCLUSION

GUHULAM NABI was injured at work in an accident caused by a breach of statutory duty on the part of his employers. Smith J. assessed as £4,724 his loss of earnings up to the date of trial but deducted from that figure £1,062, the sum which Mr. Nabi had received by way of unemployment benefit. The issue for the Court of

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[9] See *e.g.* EETPU, r. 28 (8); TGWU, r. 24.7; TSSA, r. 45 (7).

[10] It may be noted that some check-off agreements provide that the check-off will not apply to a new employee until the beginning of the first quarter from the commencement of his employment. See *e.g.* AUEW (Engineering Section) Model Agreement on the Deduction of Trade Union Contributions.

[11] This is already provided for in some unions. See *e.g.* GMWU, r. 56 (7); NATSOPA, r. 40 (7); NUR, r. 16 (7). Another way of responding to both of these problems would be to enable local offices to pay the refund.

Appeal in *Nabi* v. *British Leyland (U.K.) Ltd.*[1] was whether that deduction was rightly made.

The relationship between the compensation for personal injuries [2] provided by the law of tort and that provided by the social security system has always been a far from happy one. Beveridge recognised the problem of overlap [3] and the Monckton Committee [4] was specifically established to offer suggestions for rationalisation. In the event [5] that Committee was split: a majority, following Beveridge, advocated the full deductibility of social security benefit from personal injuries awards; a minority advocated that such state benefits be ignored when the courts make their calculations. Parliament enacted by way of compromise section 2 (1) of the Law Reform (Personal Injuries) Act 1948 which requires that one half of certain benefits paid or payable over a period of five years be deducted. The benefits now covered by this provision [6] are sickness benefit, invalidity benefit, non-contributory invalidity benefit and injury and disablement benefits. All these are specifically designed to compensate a sick or injured person for loss of income and are commonly claimed by those who obtain an award of damages. But other benefits are also occasionally claimed by such persons: in particular a person may lose his job (perhaps on grounds of his lower efficiency) after suffering an injury while retaining or later regaining fitness for employment—in which case he may be entitled to unemployment benefit. Many, especially those who are the victims of long-term unemployment, must rely on supplementary benefit (though the introduction of benefits like non-contributory invalidity benefit has hopefully obviated this reliance in some cases of persons who are sick or have been injured). In addition mobility and attendance allowances have been especially designed to help the disabled of whom some at least are accident victims. No legislative provision has been made concerning the deductibility of these or other benefits.

In the present case the Court of Appeal was concerned with the problem only in so far as it relates to unemployment benefit, though many of the relevant arguments bear also on the position of other benefits. A number of points may be (and have been) made against the deductibility of unemployment benefit of which the following are among the more obvious. A first argument is that this benefit is essentially a proceed of insurance and forms part of the provision made by the injured person at his own expense for the sort

[1] [1980] 1 W.L.R. 529.

[2] This note is concerned only with cases of personal injury: s. 4 of the Fatal Accidents Act 1976 provides that no social security benefits are deductible from awards under that Act.

[3] Report on Social Insurance and Allied Services, 1942 (Cmd. 6404).

[4] Departmental Committee on Alternative Remedies.

[5] Final Report, 1946 (Cmd. 6860).

[6] The original provision has been amended by Sched. 5, para. 1, of the National Insurance Act 1971 and by Sched. 2, para. 8, of the Social Security (Consequential Provisions) Act 1975.

of mishap which has occurred: as such, it is argued, it should not go to reduce his award of damages. The proceeds of first party insurance are indeed not taken into account in the assessment of damages,[7] but surely national insurance contributions are incorrectly viewed as a form of personal insurance: employees' contributions (which in any case are only one source of the fund's income) are best seen as but one variety of general taxation. A second point made is that unemployment benefit is a form of State benevolence and that the non-deductibility of the proceeds of charity or benevolence was stressed by the House of Lords in *Parry* v. *Cleaver*.[8] But provided that one fulfils the entitlement conditions one has a right to State benefits: can they really be viewed as the proceeds of collective munificence? [9] A third argument asserts that a tortfeasor should not stand to benefit from the fact that social security benefits are paid to his victim. This ignores the very basic principle that the object of the law of tort is primarily compensatory and not punitive: moreover, few tortfeasors have to pay an award of damages personally. Fourthly it has been argued that Parliament may well have intended benefits to be payable in addition to any award of damages. Here the answer is surely that Parliament's intention (if it ever had one) is impossible to divine. A fifth (and extremely weak) proposition is that the payment of benefit and the tortious act are not causally connected: this view, which is based on the discredited distinction between a *causa causans* and *causa sine qua non* and bears no philosophical scrutiny is often advanced alongside the insurance and benevolence points. It is also claimed that the amount of deduction would prove difficult to assess, especially in times of inflation when future levels of benefit are unclear. In the case of unemployment benefit, however, since entitlement ceases after one year the amount paid is almost bound to be exactly available before the stage of settlement, let alone trial. This objection may, however, carry more weight in respect of certain other benefits. A further argument advanced (only to be countered) by the Pearson Commission [10] claims that deductibility would favour the single and childless as against the married parent: the Commission shows clearly that this effect is illusory rather than real.

In the present case only the first two arguments were discussed and no concluded opinion on them was expressed. Brightman L.J.

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[7] *Bradburn* v. *Great Western Railway Co.* (1874) L.R. 10 Ex. 1. The Pearson Commission (Royal Commission on Civil Liability and Compensation for Personal Injury 1978, Cmnd. 7054) recommended that this continue to be the law: see Vol. 1, paras. 513–516.

[8] [1970] A.C. 1, *e.g.* by Lord Reid at p. 14. The fact that benevolence is from a public rather than a private source does not militate against its non-deductibility: see *Daish* v. *Wauton* [1972] 2 Q.B. 262 (N.H.S. provision). The Pearson Commission advocated that the proceeds of private benevolence continue to be left out of account (Vol. 1, paras. 531–532) but favoured overruling *Daish* v. *Wauton* (para. 510).

[9] In *Parry* v. *Cleaver*, Lord Reid (at p. 19) expressed the view that national insurance benefits could be regarded as a combination of insurance and benevolence.

[10] Vol. 1, para. 280.

who gave the Court of Appeal judgment was content to observe that he recognised the force of the points but that the court had no grounds upon which to depart from the decision in *Parsons* v. *B.N.M. Laboratories Ltd.*[11] where unemployment benefit had been held deductible from damages awarded for wrongful dismissal. This decision had been applied to the personal injuries setting in *Foxley* v. *Olton*[12] and subsequently deductibility had been treated as the norm in a number of other personal injuries cases at first instance.[13]

Brightman L.J. did, however, feel that given the arguable inconsistency between the decision in *Parsons* and the spirit if not the *ratio* of the decision of the House of Lords in *Parry* v. *Cleaver* the *Parsons* case should be reviewed either by the Lords or the Legislature.[14] It is respectfully submitted that legislative review would be the better course of action since a full review of the law should include a reappraisal of section 2 (1) of the 1948 Act as well as a consideration of the full range of state benefits.

As regards unemployment benefit, the Court of Appeal would seem in *Nabi* to have stated correctly the legal position. In favour of deductibility is the simple argument that damages are awarded to cover the victim's loss. If a victim has received benefit to compensate him for being unemployed as the result of his injury then his loss is reduced to that extent. To allow double recovery places an unnecessary as well as an unjustified strain on the resources of society.

After the present decision, however, one must still wonder whether a more generalised solution to the problem of overlapping benefits might not have been attempted. In the case of mobility and attendance allowances, the Court of Appeal has decided against deductibility.[15] As to supplementary benefit, Latey J., following *Nabi*, has recently made a deduction[16]: earlier decisions, however, had gone both ways.[17] Many of the points made in respect of unemployment benefit apply here too, though there are some different and some additional considerations. Supplementary benefits are payable while need continues, though once made the award may often constitute resources at a level which will operate to disentitle the victim from benefit. Future payments of supplementary benefits

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[11] [1964] 1 Q.B. 95.

[12] [1965] 2 Q.B. 306 (John Stephenson J.).

[13] *e.g. Cackett* v. *Earl, The Times,* October 15, 1976 (Milmo J.); *Shaw* v. *Insulation Co. Ltd.* (unrep.) July 18, 1977 (Hollings J.). The Court of Appeal applied the deductibility rule in *Cheeseman* v. *Bowaters United Kingdom Paper Mills Ltd.* [1971] 1 W.L.R. 1773.

[14] Indeed leave was given for an appeal to the Lords though this was not subsequently pursued.

[15] *Bowker* v. *Rose, The Times,* February 2, 1978.

[16] *Plummer* v. *P. W. Wilkins and Son Ltd.* [1981] 1 All E.R. 91.

[17] In *Cackett* v. *Earl, supra cit.* Milmo J. deducted and this was the view taken (again by Milmo J.) in *Sanger* v. *Kent and Callow* [1978] C.L.Y. 788. In favour of non-deductibility are *Basnett* v. *Jackson* [1976] I.C.R. 63 (Crichton J.) and *Ruffley* v. *Frisby Jarvis Ltd.* (unrep.) May 18, 1972 (Willis J.) as well as *Foxley* v. *Olton, supra cit.*

could, therefore, probably be left out of account and the process of deductibility could be very similar to that applied in cases involving recipients of unemployment benefit.[18] Although mobility and attendance allowances are not income-replacement benefits they may still overlap with a tort award in that damages may be awarded for transport or nursing expenses. Surely, if such an item is included in the award of damages, full deduction of these benefits should be made.

Such is the view of the Pearson Commission,[19] which advocates full deductibility of benefits from the head of damages with which there is an overlap. The Law Commission, on the other hand, has advocated both the extension of section 2 (1) of the 1948 Act to cover all social security benefits [20] and leaving out of account all benefits not presently covered by the Act.[21] The Law Commission's view was that no acceptable solution would be entirely logical since " the only consistently logical solution would be to take into account all benefits which would not have been received but for the accident." [22] Such a solution is, in the present writer's view, perfectly acceptable as well as logical. Since it will involve the repeal of section 2 (1) of the 1948 Act [23] it is, however, a solution which can come only from the legislature.

P. J. DAVIES

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[18] Williams (1974) 37 M.L.R. 281 argues, at p. 298, that given deductibility delay by the plaintiff casts part of the burden on to the State. But if the rule is one of non-deductibility, surely an undue burden is placed on the State in any event?

[19] See Vol. 1, Chap. 13. The suggested solution in respect of mobility and attendance allowances is advocated by a majority of the Pearson Commission (Vol. 1, para. 490). On this point, however, a minority go further and suggest that in the absence of a specific provision for such expenses in the award the allowance receivable should be set against the award of non-pecuniary damages as going to ameliorate the victim's condition.

[20] Law Commission Working Paper on Personal Injury Litigation and Assessment of Damages, 1971 (W.P. No. 41).

[21] Law Commission Report on that subject, 1973 (Report No. 56).

[22] Working Paper, para. 128.

[23] There is nothing to be said in favour of the illogical compromise contained in this section: see Atiyah, *Accidents, Compensation and the Law* (3rd ed., 1980) pp. 462–466.