Mountbatten Journal of Legal Studies

VOL 23
NOS 1 AND 2

2020

MOUNTBATTEN JOURNAL OF LEGAL STUDIES
Incorporating the Solent University Law Review

Editor	Dr Benjamin Andoh	Solent University
Editorial Board	Emerita Prof Patricia Park	
	Phil Jones	Solent University
	Dr Rebecca Maina	Solent University
	Dr Daniel Reed	Solent University
Advisory Board	Prof Catherine Banet	Oslo University
	Dr Mike Biles	Former Housing Ombudsman for England
	Dr Richard Cadell	Cardiff University
	Dr Michael Coyle	Lawdit Solicitors
	Dr Howard Davis	Bournemouth University
	Dr Simon Fox	Solent University
	Dr Ewan Kirk	Birmingham City University
	Scott Styles	Aberdeen University
	Dr Thomas Schomerus	University of Luneburg

SOLENT
UNIVERSITY
SOUTHAMPTON

Faculty of Business, Law and Digital Technology,
Solent University,
East Park Terrace,
Southampton
SO14 0RG

ISSN 1369-1678

Contents

Editorial

Dr. Benjamin Andoh **2**

Tribute to Mark Wing (R.I.P.) **4**

Dr. Simon Fox

Compensation and Deterrence in Antitrust - How Realistic is the Achievement of an Optimal Level of Deterrence under a Private Enforcement Regime?

Dr. Daniel Reed **6**

Provisions against Conflicts of Interest in applications and recommendations for involuntary admission to hospital

Dr. Benjamin Andoh and Phil Jones **32**

Are Steven Chibnall's news values still relevant in an ever changing media landscape?

Shabazz Ullah **46**

Legal Opinion

Violation of Patients' Fundamental Rights by Mental HOSPITAL REGIME

Eleanor Plaistow-Trapaud **84**

Coping with Covid-19 in Higher Education: A crisis can be an opportunity

Dr. Patricia Park **113**

Why were the killers of PC Harper not convicted of murder?

Simon Parsons **120**

Editorial

This issue signals the end of my short stint as Editor because I am retiring from Solent University in February 2021. The next volume of the journal will have Dr. Daniel Reed as Editor and Dr. Rebecca Maina as Assistant Editor.

This Editorial is immediately followed by a tribute to our former and dear academic colleague and friend, Mark Wing (RIP), whose untimely death in June 2020, has left a dent not only in the Editorial Board of the *Mountbatten Journal of Legal Studies* and our Law School but also in several other areas.

The first article looks at Compensation and Deterrence in Antitrust Law. It starts by noting that enforcement of anti-trust law in the European Union for about 50 years has been done largely by way of public enforcement whereas private actions for damages have been underdeveloped and, so, are being promoted by the European Commission. It then goes on to examine the effectiveness of a system of private enforcement within the European Union antitrust proceedings framework, focusing on the deterrent effect which it could deliver as a by-product.

The second article considers the various provisions against conflicts of interest in applications and recommendations for compulsory admission to hospital. After observing that there is a paucity of studies on these provisions, the authors attempt to fill this gap by probing those provisions. They look at some reasons for the inclusion of the provisions in the law as well as trace their origins. They then evaluate the present statutory position and the accompanying Code of Practice before proceeding to offer some suggestions for reform.

In the third paper, which is about crime news, the author considers whether Steven Chibnall's news values are still relevant in an ever-changing media landscape as exists today. After noting that the news media creates moral panics and that the majority of news is crime news, the author examines the seminal work by Steven Chibnall, which created a list of values in a crime event that makes it more newsworthy than others. The paper also evaluates this work in the light post-Chibnall research and developments. It concludes that preliminary and subsequent research points to Chibnall’s work still being relevant today.

The fourth paper considers the effect, directly and indirectly, by the regime in mental hospitals on the human rights of patients. After noting that mental patients are among the most vulnerable and potentially violent persons in therapeutic institutions and, so, need effective care and control to ensure they do not pose a danger to themselves or others, the paper considers how hospital regime encroaches upon patients' human rights. The various justifications, common law and statutory are examined and suggestions aimed at improving the present legal position are offered by the author.

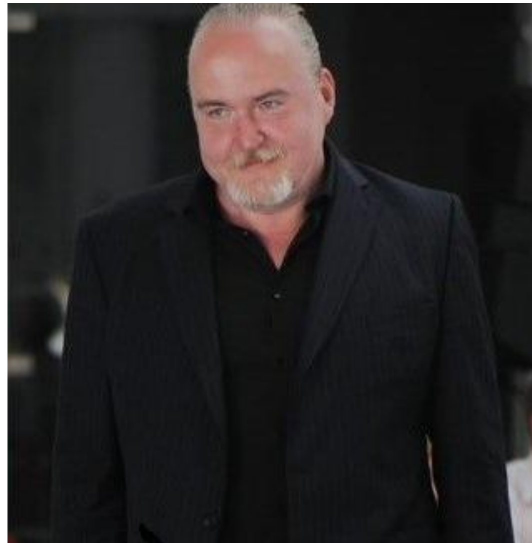
In the fifth paper, the author airs her view that, regarding coping with Covid-19 in higher education, a crisis can be an opportunity. She opines that, although for many people, particularly in the media, crises represent gloom and doom, for visionaries and risk-takers they are opportunities for real and meaningful change. She also notes that almost all university administrators and commentators are claiming that the present Covid-19 crisis presents a major threat to the system – disastrous shortfalls in university revenue leading to massive job losses and grave disruption to learning and research. In her view there is not much hope that Treasury will be willing to help the higher education sector to recover because of the heavy debt governments have had to pile up in response to Covid-19. Accordingly, it is up to vice chancellors and governance committees to make sure they adapt and embrace the new opportunities that are certain to come.

In the final article, the author looks at the definition of murder and intention and offers an explanation as to why the killers of PC Harper were not guilty of murder because they lacked the *mens rea* for that crime. In addition, the article asserts that the trial judge made an error of law and the direction that was given to the jury was to some extent over-generous to the prosecution. The author goes on to point out quite rightly that the sentences that were imposed on the killers were not unduly lenient. The article, lastly, considers whether the label of "murderers" instead of "manslaughterers" should have been put on those killers, and how the law could be amended for that result to be attained.

Dr. Benjamin Andoh, Editor

Tribute to **Mark Wing**

Senior Lecturer, Solent Law School



Waste no time arguing about what a good man should be. BE ONE!

(Marcus Aurelius)

Mark certainly did not waste time.

5 years in legal practice, working for Law firms in Blackpool and Southampton. Over 26 years lecturing at University, starting at Keele in 1993 and then moving to Solent University for the rest of his academic career.

Mark always encouraged people to learn. Challenging them, daring them to improve their lives through hard work and study. What stands out when we look back at Mark's career, Mark's life, is not just his excellence as an academic but that he cared and truly inspired those he taught and worked with.

The world is poorer now that Mark has left us, but when we think of all those he taught, helped and inspired we can smile because his legacy lives on.

Thank you, Mark, for being a great academic, teacher, colleague, friend and inspiration to us all.

Rest in peace our friend.

On-line book of condolences:

https://www.solent.ac.uk/about/condolences/book-of-condolence-mark-wing-messages

Dr. Simon Fox,

Head of Law and Criminology, Solent University

Compensation and Deterrence in Antitrust - How Realistic is the Achievement of an Optimal Level of Deterrence Under a Private Enforcement Regime?

Dr. Daniel Reed

Abstract

In the European Union (EU) over the last 50 years, the enforcement of antitrust rules law has been predominantly via public enforcement. Private actions for damages are deemed to be in a state of total underdevelopment lagging behind other jurisdictions. Consequently, the European Commission is promoting a system of private enforcement as a complement to public enforcement. This paper examines the effectiveness of such a system within the EU antitrust proceedings framework, with focus on the deterrent effect, which according to the Commission, such private enforcement regime (effectively, lawsuits for damages) could deliver as a by-product.

Key words: Antitrust, competition law, Art 101 TFEU, private enforcement, deterrence, compensation, antitrust litigation.

Compensation and Deterrence in Antitrust

1.1.1 Introduction

An effective system[1] of enforcement in the competition field[2] is necessary for two main reasons[3]. First, it provides corrective justice through compensation to victims, i.e., the 'compensation effect'[4]and, second, it ensures that prohibitions in the law are not violated, i.e., the 'deterrent effect'. Compensation to victims of antitrust[5] infringements appear to be the first and foremost guiding principle behind the European Commission (the Commission)'s proposals.[6] According to the Commission, as by-product deterrence is also increased by penalising infringements, an overall compliance with the rules could be achieved.[7] The question is whether it is possible to provide compensation to antitrust victims while achieving an optimal level of deterrence under a private enforcement regime. Under a public enforcement system, it is possible to set a level of punishment that could adequately compensate victims without incentivising a race to damages. As private enforcement is less coordinated, setting an ideal amount of punishment that would compensate victims while delivering an optimal level of deterrence appears to be impossible. This paper analyses these issues and concludes on the superiority of public enforcement over private enforcement.

---

[1]Private actions for damages are deemed to be in a state of total underdevelopment lagging behind other jurisdictions, see: Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014, 9;Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.2.

[2]I.e. the provisions of Art 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)

[3]Antitrust, 'Commission Presents Policy Paper on Compensating Consumer and Business Victims of Competition Breaches' (*IP/08/515*, 3 April 2008) <http://ec.europa.eu/competition/antitrust/IP/08/515/index.html> accessed 29 January 2014

[4] For a detailed analysis of issues surrounding compensation in antitrust litigation, see Daniel Reed, 'Compensation in Antitrust. Could it be Awarded by the European Commission Instead of Resorting to Civil Courts?' (2016) *Competition Law Review*, 10.

[5] The term 'antitrust' and 'competition' will be used interchangeably throughout this paper. Antitrust is an American term originating in the nineteenth century movement against 'trusts' or large companies. Competition, arguably, has a wider meaning in that it also encompasses all types of regulations that affect competition such as tax policies, intellectual property rights or sector specific regulations such as those related to energy and telecommunication. The European Commission defines competition as the act by 'Independent companies selling similar products or services compete with each other on, for example, price, quality and service to attract customers'. In the context, antitrust is 'Competition rules governing agreements and business practices which restrict competition and prohibiting abuses of dominant positions', see: European Commission, *EU Competition Policy and the Consumer* (Office for Official Publications of the European Communities 2004), 27

[6]Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

[7]Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 17

1.1.2 The Commission's Approach to Compensation

The Commission's approach to compensation and deterrence is that the main objective of damages actions is different from that of public enforcement, the former primarily pursuing compensation for a loss (even though it also increases deterrence), whereas the latter is primarily pursuing deterrence and overall compliance with the rules by penalising infringements of Articles 101 and 102.[8] Furthermore, according to the Commission, actions for damages and enforcement by public authorities necessarily interrelate to some extent. Greater enforcement by both public authorities and through private actions will increase deterrence and will increase the probability that infringers bear the costs for the harm caused. This will normally lead to a decrease, in the long run, of the number of infringements.[9] Specifically to the issue of compensation, the Commission contends that public enforcement is not there to serve this goal. It is there to punish and deter illegal behaviour. Even if public intervention mirrors the concerns of consumers and fines imposed punish and deter unlawful behaviour, the victims of breaches will still not be compensated for their losses. Consequently, consumers should be empowered to enforce their rights.[10]

According to the Commission, therefore, private enforcement is beneficial to both the goal of compensation and that of deterrence. The fallacy of this approach is that implementing such a policy objective does not come without costs. To be effective the punishment of violations must create a credible threat of penalties which weigh sufficiently in the balance of expected costs and benefits, so that calculating companies and individuals can be deterred from committing antitrust violations. Arguably, if reparation of antitrust harm is the goal, this should be done via public enforcements. Complexity of issues under scrutiny coupled with lengthy investigations can raise proceeding costs above reward costs. Unlike private enforcement, public enforcement financed by public resources is not necessarily tied to this equation and, thus, is better equipped to provide redress irrespective of the financial cost involved in achieving it. It should be noted that, as Becker and Stigler point out:

---

[8] Ibid

[9] Ibid, 20

[10] Neelie Kroes, 'Making Consumers' Right to Damages a Reality: The Case for Collective Redress Mechanisms in Antitrust Claims' (*Speech/07/698*, 9 November 2007) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/698&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 21 February 2014

> There is a powerful temptation in a society with established values to view any violation of a duly established law as a partial failure of that law …. Yet it surely follows from basic economic principle that when some people wish to behave in a certain way very much, as measured by amount they gain from it or would be willing to pay rather than forgo it, they will pursue that wish until it becomes too expensive for their purse and tastes.[11]

When examining the Commission's approach to compensation, it emerges that the United States (US)'s experience of excessive private enforcement could be replicated in the EU. In the EU the approach taken towards private enforcement seems to be similar to that taken in the US, in that private enforcement is employed to correct deficiencies in the enforcement system, although compensation (and deterrence) is a by-product in an effort to increase overall compliance with competition law. The US private antitrust enforcement system, in particular the treble damages award, was created to overcome ineffectiveness in the public antitrust enforcement.[12] However, treble damages have induced US courts to design and apply liability standards in a manner that limits private actions.[13]

An evaluation of two EU cases, that concerning Microsoft[14] and the case involving 11 air cargo carriers[15] in the light of the US experience of private enforcement, shows the danger posed by private enforcement when it is used as a tool to correct ineffectiveness in the public enforcement.

The Microsoft case originated with a complaint in December 1998 from Sun Microsystems, which alleged that Microsoft, with its Windows product, enjoyed a dominant position in PC operating systems, and that it had abused this dominant position by reserving to itself information that certain software products for network computing, called work group server

---

[11]Gary S Beker and George J Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 Journal of Legal Studies 1, 2

[12]John H Beisner and Charles E Borden, 'Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience' (*Washington D.C. Office of O'Melveny & Myers LLP*) <www.litigationfairness.com/get_ilr_doc.php?fn=Expanding%20priva> accessed 18 January 2014, 2

[13]William E Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' (*British Institution of International & Comparative Law*, 15 May 2003) <http://www.ftc.gov/speeches/other/030514biicl.shtm> accessed 3 April 2014; Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] Global Competition Litigation Review 107

[14]*Microsoft Corporation* (Case COMP/C-3/37792) Commission Decision 2007/53/EC [2007] OJ L 32/23

[15]*Airfreight* (Case COMP/39258) Commission Decision of 9/11/2010 (unpublished); Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

operating systems, needed to interoperate fully with Windows.[16] Following a series of investigations the Commission concluded that Microsoft's abuse, essentially, originated from its overwhelmingly dominant position in personal computers' operating systems. Microsoft's market share in this market, with its Windows product, was between 90 and 95%, and it has enjoyed the same high market shares for many years. Such a position infringed the then Art 82 EC in that according to the Commission:

> Due to the ubiquity that Microsoft has achieved on the PC operating system market, virtually all commercial applications are written first and foremost to the Windows platform. There is therefore a very strong network effect which protects Microsoft's position. This is called the 'applications barrier to entry'.[17]

In view of this abuse (or the abuses of dominance, refusal to supply and tying) the Commission imposed a fine of €497.196 million.[18] The way in which this final figure was calculated is of significance in assessing the impact of private actions in addition to the fine imposed by the Commission. The initial starting amount of the fine was set at €165.732 million. However, because of Microsoft's size and resources and, in order to ensure a sufficient deterrent effect, this was multiplied by a factor of two which therefore became €331.464 million. Microsoft's infringement was considered very serious on the grounds of the nature of the infringement, its impact on the market, and the size of the relevant geographic market. Consequently, the amount initially set was increased by 50% in order to take into account the five years and five months duration of the infringement. The final amount of the fine was, therefore, €497.196 million.[19]

It is worth recalling that although the Commission's decision was essentially upheld by the then Court of First Instance (CFI),[20] Microsoft's exposure to financial penalties, like other companies found in breach of antitrust rules, does not end with the action by the antitrust authorities. There is still the possibility of additional compensation claims made by private

---

[16]Nicholas Banasevic and others, 'Commission Adopts Decision in the Microsoft Case' (*Directorate-General Competition, Competition Policy Newsletter n. 2, Summer 2004*) <http://europa.eu.int/comm/competition/publications/cpn/> accessed 6 February 2014, 44

[17]Ibid

[18]*Microsoft Corporation* (Case COMP/C-3/37792) Commission Decision 2007/53/EC [2007] OJ L 32/23

[19]Nicholas Banasevic and others, 'Commission Adopts Decision in the Microsoft Case' (*Directorate-General Competition, Competition Policy Newsletter n. 2, Summer 2004*) <http://europa.eu.int/comm/competition/publications/cpn/> accessed 6 February 2014, 48

[20] Now General Court

bodies. Potentially, Microsoft is still exposed to 65,125 million claims for damages as these are the estimated computer users in the EU.[21]

In 2010, the Commission fined 11 air cargo carriers a total of €799.445.000 for cartel behaviour.[22] The cartel arrangements consisted of numerous contacts between airlines, at both bilateral and multilateral level, covering flights from, to and within the European Economic Area.[23] The contacts on prices between the airlines initially started with a view to discuss fuel surcharges. The carriers contacted each other so as to ensure that worldwide airfreight carriers imposed a flat rate surcharge per kilo for all shipments. The cartel members extended their cooperation by introducing a security surcharge and refusing to pay a commission on surcharges to their clients (freight forwarders). The aim of these contacts was to ensure that these surcharges were introduced by all the carriers involved and that increases (or decreases) of the surcharge levels were applied in full without exception.[24] By refusing to pay a commission, the airlines ensured that surcharges did not become subject to competition through the granting of discounts to customers. Such practices are deemed in breach of competition rules and in particularly in breach of Art 101 of the Treaty on the Functioning of the European Union (TFEU).[25] The Commission took the opportunity to emphasise its support to compensation via private actions. The Commission stated that it considers that claims for damages should be aimed at compensating the victims of an infringement for the harm suffered and eloquently invited anyone to seek damages:

> Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision is binding proof that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may

[21]'World Map - Top Ten Countries with Highest number of PCs' (*Computer Industry Almanac Inc.*) <http://www.mapsofworld.com/world-top-ten/world-top-ten-personal-computers-users> accessed 12 April 2014

[22]Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

[23] The European Economic Area comprises the countries of the European Union, plus Iceland, Liechtenstein and Norway. Those States are allowed to participate in the EU's Internal Market without being members of the EU.

[24]Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

[25]*Airfreight* (Case COMP/39258) Commission Decision of 9/11/2010 (unpublished). For additional information see: Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

> be awarded without these being reduced on account of the Commission fine.[26]

In this case the cartel spread over six years period, from 1999 to 2006. Consequently, like in the Microsoft's case above, these airfreight carriers are exposed to thousands if not millions of private actions for damages from, or on behalf of, private entities. Considering that in both examples the breach of competition rule is already established at EU level, a claim for damages in a national court has a very good prospect of success. The concern is what would be the effect of such claims to both the computers and the air cargo industry and in turn for the EU economy. Despite the fines imposed by the Commission, the defendants' liability is not extinguished. This uncoordinated compensatory feature of the enforcement process could be lethal to businesses by exposing them to millions of claims worth an unlimited amount. Arguably, in order to punish violators without destroying them, compensation in antitrust should be awarded by public officials as part of the same process in imposing the fines.[27]

Considering the US experience, in which private enforcement and treble damages were implemented to overcome deficiencies in the enforcement system but resulted in over-enforcement, it is submitted, that private enforcement in the EU should not be used to ensure compensation. Rather, victims of competition infringements should be compensated via public enforcement.

1.1.3 Compensation and Corrective Justice

An important goal of antitrust enforcement is considered to be that of preventing wealthy transfers from victims of violation to firms with market power. A concept considered consistent with and complementary to the goal of compensating victims of antitrust violations, for instance of overcharges.[28] It must be stressed, though, that whether antitrust contributes

[26]Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014.
[27]For a detailed discussion of those issues, see Daniel S Reed, 'Compensation in Antitrust. Could it be Awarded by the European Commission Instead of Resorting to Civil Courts?' (2016) *Competition Law Review*, 10; Daniel Reed, 'Collective Redress in Antitrust Proceedings: Pro-competitive or Anti-competitive? (2018) *Mountbatten Journal of Legal Studies* 21, 31.
[28]Robert H Lande and Joshua P Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 University of San Francisco Law Review *879, 8*82. See also: Robert H Lande and Joshua P Davis, 'An Evaluation of Private Antitrust Enforcement: 29 Case Studies' (*Interim Report*, 8 November 2006) <http://newaai.com/files/550b.pdf> accessed 31 March 2014, 1-2.

to social welfare is debatable in the first place,[29] let alone whether it should be used for corrective justice via private enforcement.

Compensation, in the competition law field, has two main applications. First, victims of antitrust violations can be reimbursed, for example, for overcharging suffered. Second, by creating a credible threat of penalties which weigh sufficiently in the balance of expected costs and benefits, calculating companies and individuals can be deterred from committing antitrust violations.[30] The need for compensation in the context of antitrust enforcement arises because, while an injunction can stop future anti-competitive behaviour, it puts violators in a no-lose situation. Even if defendants lose their case and have to stop the practice in question, an injunction alone would permit them to keep the fruits of their past anti-competitive behaviour.[31]

A Report for the Commission evaluates the potential for private enforcement to contribute to social welfare by improving the detection and deterrence of anti-competitive conducts.[32] However, findings are underpinned by taking 'as reference a theoretically effective system of private enforcement, regardless of the means through which such effective system has been reached'.[33]Undeniably the assessment of a system of private enforcement in the EU appears almost entirely based on simulations and potential scenarios.

Unlike in the EU, in the US an empirical study conducted by Crandall and Winston in three main areas of antitrust enforcement, monopolisation, collusion and mergers, showed little support for the proposition that competition enforcement has provided direct benefits to consumers or deterred anti-competitive conduct.[34] In each area, it was concluded that the empirical evidence does not demonstrate that enforcement has benefited consumers by lowering prices or increasing output, most often because of

---

[29]Lista argues that in some sectors, such as the financial service, whether antitrust is beneficial at all, it is questionable: Andrea Lista, *EU Competition Law and the Financial Services Sector* (Informa Law from Routledge 2013), 17.See also: Andrea Lista, 'Stairway to Competition Heaven or Highway to Hell: What Next for Insurance Competition Regulation' (2011) 1 The Journal of Business Law 1

[30]Wouter P J Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 (1) World Competition 3, 9

[31]Robert H Lande and Joshua P Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 University of San Francisco Law Review 879, 907

[32]Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014

[33]Ibid, 65

[34]Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) Journal of Economic Perspectives 3

the length of the investigation and litigation, during which whatever monopoly power may have existed was dissipated by marketplace evolution.[35]

With respect to monopoly, Crandall and Winston observed that a major problem occurs when a monopolisation case simply fails to benefit consumers because the remedy turns out to have a negligible practical impact. For instance a monopoly case, or a number of monopoly cases, can be brought in an attempt to stop the replacement of small grocery stores by large national food chains, but these cases have little effect on market concentration because they could not prevent more efficient chains from replacing less efficient small retailers.[36]

In relation to collusion the authors concluded that researchers have not shown that government prosecution of alleged collusion has systematically led to significant non-transitory declines in consumer prices.[37] With respect to Mergers they observed:

> We can only conclude that efforts by antitrust authorities to block particular mergers or affect a merger's outcome by allowing it only if certain conditions are met under a consent decree have not been found to increase consumer welfare in any systematic way, and in some instances the intervention may even have reduced consumer welfare.[38]

From an economic perspective Crandall and Winston correctly stressed:

> In the US, antitrust law spread over centuries, from the Sherman Act in 1890 to the present day.[39] During this time amendments have been made to suit both the society and markets, including the suspension of antitrust provisions. Triggered by the stock-market crash that occurred on 'Black Tuesday' (29 October 1929) the US entered what is known as the 'Great Depression', a combination of domestic and worldwide conditions that led to

---

[35]Comments on Crandall and Winston findings also can be found in the Report for the Commission, see: Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014, 53 -54

[36]Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) Journal of Economic Perspectives 3, 13-14

[37]Ibid, 15

[38]Ibid, 20

[39]Sherman Act (1890) An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, ch. 647, 26 Stat. 209

> the worst economic depression in US history.[40] During that time antitrust laws were suspended for designated industries for a time as a by-product of the 1933 National Industrial Recovery Act. Studies conducted on the phenomenon revealed an intriguing finding: prices did not rise.[41] Of course in this instance it can be argued that such phenomenon is dated and perhaps only relevant to the anomalous conditions experienced by the affected industries at the time. However, it can also be argued that challenging large firms in courts is often politically popular, but neither policymakers nor economists are required to offer compelling evidence of marked consumer gain from antitrust policy.[42]

As to whether antitrust is an appropriate instrument for corrective justice, a principled explanation is offered by Schwartz:

> I will say that I know of no widely espoused ground for redistributing wealth that is effectively served by providing compensation to persons injured by antitrust violations.
>
> One must begin with the realisation that disparities in outcome among individuals will inevitably occur. People are born more or less wealthy, with more or less intelligence, and prove to be more or less lucky. Which of the many causes of the disparity in outcome justify compensation? When is the outcome so unfortunate, whatever its cause, that compensation should be paid?
>
> From neither of these perspectives do antitrust violations seem to provide a good case for compensation. The losses from antitrust violations are widely dispersed, do not represent the disappointment of strongly held expectations, and can in many cases be adapted to without severe dislocation in the lives of the persons affected. Moreover, existing welfare laws,

---

[40]For additional information see: Martin Kelly, 'Great Depression - Top Five Causes of the Great Depression' (*American History*) <http://americanhistory.about.com/od/greatdepression/tp/greatdepression.htm> accessed 16 March 2014

[41]George Bittlingmayer, 'The Output and Stock Price Effects of Loose Antitrust: Experience Under the NRA' (1993) Centre for the Study of the Economy and the State, The University of Chicago Working Paper 87 <http://research.chicagobooth.edu/economy/research/articles/87.pdf> accessed 1 May 2014, 29-30.See also: Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf> accessed 10 May 2014, 23

[42]Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) Journal of Economic Perspectives 3, 14

> unemployment compensation, bankruptcy laws, and a number of provisions in the tax laws provide relief from any catastrophic losses, including those that might result from an antitrust violation.
>
> Of course, the issue is not whether compensation would be justified if it could be provided without cost. If compensation is incorporated as a goal of a private system of antitrust enforcement, the efficacy of the system is greatly impaired. There are, moreover, substantial costs, which will impede the process of providing compensation even if the goal is accepted in principle. The payment of compensation in antitrust proceedings seems both an ineffective way to achieve justice and an unjustifiable impairment of the effort to enforce the law.[43]

Schwartz is taking compensation in antitrust cases to an extreme by objecting to it altogether. However, he is not the only one questioning the compensation component in antitrust enforcement.[44] Specifically in relation to the EU, Wils points out: 'I am not aware of any evidence that the citizens of Europe, outside the narrow circle of antitrust professionals, are seriously disturbed by the current absence of compensation for antitrust offences'.[45]

Arguably compensation does contribute to both deterrence and, by reimbursing victims of antitrust violations, the public good, but there are difficulties and hence costs in truly achieving these aims. To keep these costs under control compensation, whether used for corrective justice or not, should be dealt with by public authorities so as to be free from private interest in financial gain. Otherwise, it is submitted, the efficacy of the enforcement system would be significantly impaired.

As far as the pursuit of corrective justice through compensation is concerned, private actions for damages in principle appear a useful tool and, to some extent, superior to public enforcement. In terms of comparative competence, there is no reason to think that competition authorities are particularly well suited to decide on the relevant issues, at least not on the assessment of causality and on the amount of the harm. The technical

[43]Warren F Schwartz, *Private Enforcement of the Antitrust Laws: An Economic Critique* (American Enterprise Institute for Public Policy Research 1981), 32

[44]For the costs of compensation in general, see: Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7 edn, Cambridge University Press 2006); Patrick S Atiyah, *The Damages Lottery* (Hart Publishing 1997)

[45]Wouter P J Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26 (3) World Competition 473, 19

knowledge of an undertaking/victim operating in the same industry may be superior to those of a public authority. As Stelzer argues:

> [W]ho better to argue that to be the case than a competitor, injured by illegal anti-competitive practices, conversant in the technical jargon, on the sharp edge of customer relations, well informed of the details and consequences of the dominant firm's practices.[46]

Private parties should generally enjoy an inherent advantage in knowledge because they are the ones who are engaging in and deriving benefits from their activities.

However, the compensation umbrella must not obfuscate the principle that antitrust laws are not designed to protect competitors, but rather to protect competition. Such an approach, which originated in the US when the US' Supreme Court first said it in *Brown Shoe,*[47]appears to be endorsed by the Commission in the EU.[48] Consequently, as Areeda emphasises, as long as there is no anti-competitive activity, the fact of injury to a competitor is not, or should not be, a concern of the antitrust laws. To argue otherwise is to stand the public interest on its head and to suggest that the public would be better off if the plaintiff found itself without competition.[49] The risk is that damages awarded to an inefficient competitor warn other firms that it should avoid vigorous competition that will reduce rivals' profits and thereby increase the damages it may eventually have to pay if those rivals challenge the firm in court.

1.1.4 The Insurance Alternative

The immediate consequences for a company, stemming from private enforcement of competition law, are the need to defend the lawsuits and the potential liability for damages. In principle, both elements can be of no concern if a company/defendant is covered by an appropriate insurance

---

[46]Irwin Stelzer, 'Implications for Productivity Growth in the Economy (Notes for Talk at Workshop on Private Enforcement of Competition Law, sponsored by Office of Fair Trading)' (*Hudson Institute*, 19 October 2006) <http://www.stelzerassoc.com/Speeches/Implications%20for%20Productivity%20Growth%20in%20the%20Economy%20OFT%20Oct%2019,%2006.pdf> accessed 8 January 2014, 5-6

[47]*Brown Shoe Co. v. United States* 370 US 294, 332-33, 320

[48]Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82' (*SPEECH/05/537, Speech at the Fordham Corporate Law Institute*, 23 Septemeber 2005) <http://ec.europa.eu/competition/antitrust/art82/index.html> accessed 23 January 2014.See also: Commission, 'Delivering for Consumers, What is Competition Policy?' (*European Commission Competition*) <http://ec.europa.eu/competition/consumers/what_en.html> accessed 9 April 2014

[49]Philip Areeda, 'Antitrust Violations Without Damage Recoveries' (1976) 89 Harvard Law Review 1127, 1134

policy. A comprehensive or commercial general liability insurance policy may provide full coverage not only for the costs and fees incurred in defending claims, including antitrust, but also for settlements and judgments. Hence, from a pure theoretical prospective an insurance policy could offset any unwanted side effect of private enforcement.[50] This paper, however, argues that such an approach does not represent an appropriate option and as such the insurance argument should not be used to justify pitfall in antitrust enforcement policy for two main reasons. First, the costs incurred by a company in obtaining the insurance policy increase the company's production costs which in turn increase the cost of the product or service. Hence, in the end such costs will be borne by the society as a whole. Second, considering that, apart from injunctive reliefs, under EU competition provisions the penalties for antitrust violations are financial penalties (i.e. fines), if the threat of such penalties is effectively nullified, then it becomes questionable the level of deterrence that antitrust law can achieve.

A key aspect of the Commission's proposal for a private enforcement regime in the EU is the compensation to victims of antitrust violations. Compensation to victims of antitrust infringements appears to be the first and foremost guiding principle behind the Commission proposals.[51] The question is who pays these damages. As Atiyah put it:

> Although it is often difficult to say who exactly does (in the last analysis) pay for awards of damages, it is at any rate clear who does 'not' pay them. The damages are hardly 'ever' paid by the actual wrongdoer.[52]

In situations where the wrongdoer is insured, damages are usually paid in the first instance by insurance companies. Atiyah argues that, contrary to general believe, insurance companies do not just pay these sums out of profits. They pay them out of premiums paid by the public, directly or indirectly.[53] Consequently, in the last analysis, most damages awards are borne by the public.[54] This general principle also applies to commercial insurance policies covering antitrust liability, considering the staggering

[50]A full appraisal of the costs of compensation is beyond the scope of this paper. For a further discussion see: Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7 edn, Cambridge University Press 2006); Patrick S Atiyah, *The Damages Lottery* (Hart Publishing 1997)

[51]Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

[52]Patrick S Atiyah, *The Damages Lottery* (Hart Publishing 1997), 21

[53]Ibid, 113

[54]Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7 edn, Cambridge University Press 2006), ch 16

fines that antitrust infringements can attract, such as that of €497 million imposed on Microsoft,[55]that of €799 million imposed on airfreight carriers,[56] and that of €1.47 billion related to computer monitor cartels.[57] If it is considered also that, although the Commission has fined these companies, private parties can claim damages without these being reduced on account of the Commission's fine,[58]then it is easy to see how high the stake is. Any such insurance cover would significantly increase the business operating costs and, inevitably, such costs will be passed to customers who, beforehand, and regardless of the occurrence of antitrust litigation, will have to bear the costs.

While the aim of compensating antitrust victims could be seen a laudable one, thoughts should also be given to the costs of operating such a system. Under the private enforcement regime envisaged in the EU, compensation would be awarded by civil courts. The court system also has running costs which are borne by EU tax payers. Commenting on the cost of tort compensation, Cane contends that 'The total costs of the system are nearly double the amounts paid out in compensation because the tort liability insurance system is so staggeringly expensive to operate'.[59] Although this conclusion refers to industrial injury cases and road accident cases in the UK, considering the length and complexities of antitrust cases, courts' costs in antitrust proceedings are also worth noting.

According to the Commission, a system of private enforcement created in the EU should deliver overall better compliance with competition rules while creating and sustaining a competitive economy.[60] Regarding liability insurance, it should be noted that it is unlikely that a party's purchase coverage substantially exceeds his assets. This results from the fact that purchase of such cover is in effect purchase of protection against losses which the party would otherwise have to bear only in part.[61] As Shavell

[55]Case T-201/04 *Microsoft Corp v Commission of the European Communities* [2007] ECR II-3601, 46.Antitrust, 'Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine' (*IP/04/382*, 24 March 2014) <http://europa.eu/rapid/press-release_IP-04-382_en.htm> accessed 5 January 2014See also:

[56]Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

[57]Antitrust, 'Commission Fines Producers of TV and Computer Monitor Tubes € 1.47 Billion for Two Decade Long Cartels' (*IP/12/1317*, 5 December 2012) <http://europa.eu/rapid/press-release_IP-12-1317_en.htm> accessed 11 March 2014

[58]Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014, 3;Antitrust, 'Commission Fines Producers of TV and Computer Monitor Tubes € 1.47 Billion for Two Decade Long Cartels' (*IP/12/1317*, 5 December 2012) <http://europa.eu/rapid/press-release_IP-12-1317_en.htm> accessed 11 March 2014, 4

[59]Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7 edn, Cambridge University Press 2006), 396

[60]Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

[61]Steven Shavell, 'Liability for Harm Versus Regulation of Safety' (1984) 13 The Journal of Legal Studies 358

explains, a party with assets of $20,000 may not wish to buy insurance coverage for a potential liability of $100,000. Purchasing such cover means that his premium would be much higher (might be five times) for risks which he would not otherwise bear. Hence, it may be rational for the party not to insure against the $100,000 potential risk. However, if the party does choose to buy insurance coverage for losses exceeding his assets, or it is necessary due to a foreseeable threat of damages actions, 'what then is the incentive to take care?'[62] Or, in the antitrust field, what is the incentive for a company to abide by competition rules if all it has to do is to forward the claim to the insurers who will instruct a lawyer and pay out damages? With regards to automobile accidents, Shavell emphasises that individuals have several good reasons not to cause automobile accidents.[63] Apart from wanting to avoid liability, they may be injured themselves, and they face fines for traffic violations and also serious criminal penalties for grossly irresponsible behaviour. Therefore:

> Given the existence of these incentives toward automobile accident avoidance, and given that the deterrent due to liability is dulled by ownership of liability insurance, one wonders how much the threat of tort liability adds to deterrence.[64]

Considering that in the US many businesses do have insurance coverage against antitrust and non-antitrust violations of law,[65] and considering that a similar form of coverage, insuring either the claimant against losing the case it has brought or the defendant against such actions, is already available in many EU Member States,[66]as Shavell points out, one wonders how much the insurance approach undermines the deterrent aims of competition law.

A further point to note is that, although the violation of antitrust rules can be seen as an intentional offence, this does not appear to affect the insurance coverage, hence the protection for antitrust defendants. In *California Shoppers* the defendants had infringed antitrust law by selling below-cost

---

[62]Ibid, 361

[63]Steven Shavell, 'The Fundamental Divergence Between the Private and the Social Motive to Use The Legal System' (1997) 26 The Journal of Legal Studies 575

[64]Ibid, 589

[65]Kirk A Pasich, 'Insurance Coverage for Lawsuits Involving Antitrust and Other Anticompetitive Practice Claims' (*DicksteinShapiro LLP*, 2007) <http://www.dicksteinshapiro.com/sites/default/files/IC_Antitrust_Anticompetitive_Claims.pdf> accessed 6 April 2014; Amar Gande and Craig M Lewis, 'Shareholder Initiated Class Action Lawsuits: Shareholder Wealth Effects and Industry Spillovers' (*Owen Graduate School of Management*, October 2005) <http://apps.olin.wustl.edu/jfi/pdf/ShareholderICAL.pdf> accessed 5 March 2014

[66]Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (*Ashurst, Comparative Report* 31 August 2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html> accessed 15 April 2014, 95 - 96

advertising with the intent to injure a competitor.[67] The insurance company argued that the cover did not apply 'to personal injury or advertising offense arising out of the wilful violation of a penal statute'.[68] In dismissing the argument as unmeritorious the US court of Appeal held that the action was in the nature of a civil antitrust action, and the judgment imposed was in the nature of a civil remedy, i.e. damages.[69] Indeed, the court concluded that as neither the insurance policy itself nor the statutes and public policy of that state precluded coverage for the treble damages, it necessarily followed that the insurer had and continues to have a duty to indemnify the defendants for the full amount of the judgment.[70] Despite arguments raised by insurer, the US courts seem to have ruled in favour of defendants even in cases of doubts regarding the coverage. In *U.S. Fidelity* the District court held that:

> [T]he policy protects against poorly or incompletely pleaded cases as well as those artfully drafted … If the allegations of the complaint are ambiguous or incomplete, the insurer is nevertheless obligated to defend if the case is potentially within the coverage of the policy. Any doubt as to whether the allegations of the complaint state a claim that falls within the policy must be resolved in favour of the insured and against the insurer.[71]

Likewise in *CNA Cas* the US Court of Appeal held that it is not the form or title of a cause of action that determines the insurer's duty to defend, but the potential liability suggested by the alleged or otherwise available facts.[72]

Accordingly, as an insurance coverage could result in nullifying the deterrent effect of antitrust enforcement policy at the expense of society as whole, such a strategy should not be used to balance detrimental side effects of private enforcement.

The next part of the paper focusses on the link between private enforcement and deterrence.

---

[67] *California Shoppers, Inc. v. Royal Globe Insurance Co.* 175 Cal App 3d 1, 221 Cal Rptr 171 (1985)
[68] Ibid, 16
[69] Ibid, 32
[70] Ibid, 34
[71] *U.S. Fid. & Guar. Co. v. Executive Ins. Co.* 893 F2d 517, (2d Cir 1990), 519
[72] *CNA Cas. v. Seaboard Sur. Co.* 176 Cal App 3d 598, 222 Cal Rptr 276 (1986), 609

1.2 Deterrence

1.2.1 Deterrence and Private Enforcement

The deterrence effect of antitrust damages actions should be analysed with reference to the ex-ante perspective of the would-be infringer. In this respect, effective deterrence requires that the infringer compares the expected penalty with the expected benefit of engaging in an illegal conduct. The concern is whether private enforcement helps the deterrent effect, despite the fact that it is motivated by pursuit of a more personal interest and is at times lucrative when compared with public enforcement.

In the US, although private enforcement accounts for 90% of all the antitrust enforcement,[73] anti-competitive conducts, including those breaches giving rise to criminal antitrust violations, currently appear to occur far too frequently and to be considered significantly under-deterred, even after taking into consideration the effects of the present system of private litigation.[74]According to Lande and Davis, private enforcement does more to deter antitrust violations than all the fines and incarceration imposed as a result of criminal enforcement by the Department of Justice. Although admittedly 'it is extremely difficult to measure the deterrence effects of private actions', by at least one measure the effects are considered significant.[75] As one of the goals of the antitrust system is optimal deterrence of anti-competitive behaviour, Lande and Davis compared the $18.006 billion paid in private litigation to the $4.232 billion paid in criminal fines for the same period (1990-2006) in which $50 million or more was paid to victims of antitrust violations.[76] Measured this way private litigation, at least in theory, provides more than four times the deterrence of the criminal fines. In other words an undertaking, before engaging in illegal conduct, would/should give more thought to potential private action for damages than to a case brought by public antitrust authority. The former could attract far larger payments and, therefore, it would have a greater deterrent effect.

This anecdote, about the superior deterrent effect of private enforcement above any other form of antitrust enforcement, is claimed to be so even in respect of criminal prosecution that result in a criminal fine and/or jail

---

[73]Private actions from 1992 to 2012 range from 84.9% to 96.6%: 'Sourcebook of Criminal Justice Statistics Online' (*Antitrust Cases Filed in U.S. District Courts*, 2012) <http://www.albany.edu/sourcebook/tost_5.html> accessed 16 September 2014, table 5.41

[74]Robert H Lande and Joshua P Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 University of San Francisco Law Review 879, 907

[75]Ibid, 893

[76]Ibid, 893 - 894

sentence.[77] Although the authors plainly acknowledge that there is no objective way to compare the deterrence effect of time spent in prison to the deterrence effect of a criminal fine, that different people would trade off jail and fines in different ways and that any 'average' figure used to equate the two necessarily is speculative and arbitrary, nevertheless, it is argued that a year of incarceration has the same deterrent effect as a $5 million fine.[78] In the US for the period 1990-2006 there were imposed collectively 428.6 years of jail sentences which are then considered equivalent to $2.143 billion in criminal fines. Criminal antitrust fines during the same period were approximately $4.232 billion. Therefore, the combined deterrence effect of criminal fines and prison sentence together has been in the region of $6.4 billion. Considering that private enforcement for the same period had attracted $18 million in damages paid out to private parties, private enforcement is considered to be significantly more effective at deterring illegal behaviour than criminal antitrust prosecutions.[79]

The main criticism to the approach taken by Lande and Davis is that the effectiveness of antitrust enforcement and in this instance the deterrent effect is measured in monetary terms without taking into account the potential, or indeed actual, consequence for the undertaking/s affected, for the industry concerned and in turn for the wider economy. This approach has also made its way into the EU as a more effective system of private antitrust enforcement is found 'to potentially lead to damage recoveries of €25.7 billion yearly'.[80] Even if it is accepted that, by creating a credible threat of penalties, undertakings can be deterred from committing antitrust violations, why cannot a substantial fine be imposed by the public antitrust authority? Or to look at the issue from another angle, what is the aim of an antitrust punishment, compliance with the law or revenue?

The arguments about the quantification of deterrence appear to be based on assumptions and anecdotes of those in clear support of private enforcement. Lande and Davis acknowledge[81] that to equate fines with imprisonment is a 'speculative and arbitrary' exercise.[82] Nevertheless, the argument is used in an attempt to promote private enforcement. It is worth noting that the same

[77]Ibid, 896
[78]Ibid, 895 - 896
[79]Ibid, 897
[80]Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014, 26
[81]Robert H Lande and Joshua P Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 University of San Francisco Law Review 879, fn 61 to 65
[82]Ibid, 895

study (ironically titled 'Benefits from Private Antitrust Enforcement') that concludes that private enforcement provides better deterrent effect when compared to public enforcement also reports that in a suit stemming purely by private action, 'To avoid industry-wide bankruptcy, the plaintiffs settled with the buyers' cartel for roughly $5 million'.[83] Although not reported by supporters of private enforcement such as Lande and Davis, it is not uncommon in the US that private enforcement brings to the verge of bankruptcy an otherwise viable business.[84] Consequently, the argument that private enforcement could provide better deterrence than public enforcement based on the amount paid out to private parties is rather misleading. Indeed, it does not take into consideration the devastating effect, such as 'industry-wide bankruptcy' and undue settlements that private enforcement could have on market actors and in turn to the nation's economy.

In the EU the system of competition law enforcement has been traditionally less geared towards achieving deterrence through the initiative of private claimants[85], as opposed to the US system, where private enforcement is way more developed, and public enforcement was added only at a later stage. In the EU the impact of private enforcement on deterrence is considered 'significant' at the edge and prospective infringers may face an expected liability of up to €29.4 billion yearly (including the opponents' legal fees), which could bring about yearly social benefits as high as 1% of the EU Gross domestic product (GDP), or €113 billion in 2006.[86] In 2012, the cost of ineffective private enforcement of competition law is estimated at up to € 23 billion or 0.18 % of the EU's 2012 GDP, in terms of compensation that is foregone by victims each year across the EU.[87] Again, as in the US, deterrence is measured by estimating the amount that undertakings found in breach of competition rules could be required to pay to private parties. There appears to be the assumption that the greater the amount to be paid out the greater is the deterrent effect, and presumably it should be beneficial for competition. Admittedly, achieving greater victim compensation does not

---

[83]Ibid, fn 41; *Pease v. Jasper Wyman &_Son* Reporter of Decisions Docket Kno-04-19, 13 February 2004 Maine Supreme Judicial Court

[84]For instance: *AT&T Mobility LLC v Concepcion* 131 SCt 1740; *Szabo v. Bridgeport Machines* 249 F3d 672, 49 FedRServ3d 716; *In re Rhone - Poulenc Rorer Incorporated* 1995, 51 F3d 1293, 63 USLW 2579;

[85]Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014, 28

[86]Ibid, 11

[87]Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the_Council' (Executive Summary of the Impact Assessment Report) SWD(2013) 204 final, 8

necessarily imply achieving optimal deterrence.[88] The concern is that if effective and not damaging deterrence is to be achieved, any penalty should be imposed in a controlled manner via public enforcement, and not be linked to the interests of private parties. Indeed, there is no reason whatsoever why they would care about optimal deterrence.

1.2.2 Optimal Deterrence and Private Enforcement

The optimal use of private enforcement of public laws, and the relative merits and potential complementarity between public and private enforcement, is particularly relevant when it comes to set an optimal level of deterrence.

Beker notes that obedience to the law is not taken for granted, and public and private resources are generally spent in order to both prevent offences and to apprehend offenders.[89] The optimal amount of enforcement depends on, among other things, the cost of catching and convicting offenders, the nature of punishments (for example, whether they are fines or prison terms) and the responses of offenders to changes in enforcement. Beker stressed the need for high penalties to compensate for low probabilities of detection.[90] Beker and Stigler argued that deterrence could be effectively achieved if private individuals enforced the law by competing for the high damages that would follow from demonstrating that a defendant was liable. In addition, private parties and their lawyers, generally motivated by their self-interest, could enjoy an implicit advantage over public officials, rewarded by a fixed salary, and could hence be a remedy to the government's failure leading to inaction in a number of antitrust cases.[91] However, such an approach, it is submitted, could lead to over-enforcement due to the resulting race to damages.

When viewed in context, the conclusion that private enforcement can prove as efficient as public enforcement rests on the high damages awards required to motivate private parties. Landes and Posner argued that, if fines or damages higher than the social costs of the illegal activity were required to achieve an optimal level of deterrence, this would attract higher than optimal

---

[88] Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014, 33

[89] Gary S Beker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169

[90] Ibid, 170

[91] Gary S Beker and George J Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 Journal of Legal Studies 1

numbers of individuals seeking to collect such damages by being private enforcers of the law and devoting their own private resources to detection and prosecution. This would encourage an excessive number of claimants to start competing for the damages award, hence leading to excessive litigation, a consequent waste of resources resulting in over-enforcement and deterrence above socially optimal levels.[92] Although Roach and Trebilcock suggested that this insight about the potential for over-deterrence does not justify a total abandonment of private enforcement but a need for carefully controlled rewards,[93] these observations show light on the inherent limits of private enforcement through optimal (or high) sanctions, and on the potential over-deterring effect of private damages actions.[94]

Public enforcers not driven by profit maximization could make better decisions about what resources to devote to prosecution than the uncoordinated activities of private parties competing for high damages awards. Private enforcement is particularly efficient when the rewards available are greater than their enforcement costs. In all other cases, public enforcement is most needed in those cases where the fine or damages that can be extracted from a wrongdoer is significantly less than the costs of enforcement.[95] Under public enforcement, the fine should be set equal to the external damage caused by the activity. By raising the fine and lowering the probability of enforcement, the same level of deterrence can be achieved at less cost. Under private enforcement, however, raising the fine would lead to a higher probability since profit-maximizing enforcers would be induced to invest more in enforcement.[96]

Polinsky argues that the risk of over-enforcement is not as significant as it might first appear since rational private enforcers would only act in cases where the reward available was greater than the costs of enforcement.[97] Stated differently, if the latter cost significantly increases as a result of growing competition for damages, some plaintiffs would drop the action as not worth the cost of litigation.

---

[92]William M Landes and Richard A Posner, 'The Private Enforcement of Law' (1975) 4 Journal of Legal Studies 1

[93]Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) Osgoode Hall Law Journal 461, 476

[94]Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014, 57

[95]Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) Osgoode Hall Law Journal 461, 477

[96]William M Landes and Richard A Posner, 'The Private Enforcement of Law' (1975) 4 Journal of Legal Studies 1

[97]Mitchell A Polinsky, 'Private Versus Public Enforcement of Fines' (1980) 9 Journal of Legal Studies 105, 108

Enforcement has a significant administrative cost, which includes both the cost borne by the public sector (operational costs of competition authorities and courts) and the cost borne by the businesses and individuals concerned (cost of lawyers and experts, management time). Moreover, in addition to administrative costs, the pursuit of deterrence could have undesirable side effects. For instance, errors or the risk of errors in the imposition of sanctions could lead to lawful and economically desirable conduct being deterred. Consequently, as Wils stresses, 'given the existence of these costs, it is unlikely to be optimal to pursue full prevention of antitrust violations … the optimum will be to pursue a certain degree of prevention, which in all likelihood will be less than 100%'.[98] Melamed argues that compensation for antitrust victims is not always optimal because even a simple, single-damages remedy could create excessive incentives to avoid harm and could, thus, over-deter socially desirable conduct.[99] Indeed, as Stigler emphasises, one special aspect of the costs limitation upon enforcement is the need to avoid over-enforcement.[100]

In giving preference to private or public enforcement, there is a need to evaluate the deterrent effect of the overall antitrust proceedings. The benefits or detriments of antitrust enforcement are not limited to the competitive conditions in the particular market in which the case is brought, but include significant effects in other markets. The existence of a redress for antitrust violation is an opportunity for small firms to bring damages actions against other small firms, even if most cases are brought against large firms.[101] Encouraging private enforcement presents the risk that litigation costs would significantly increase as would increase the risk of over-deterrence, which could jeopardise the sustainability of the enforcement system, resulting in a misallocation of resources and a net loss to society. Arguably, public enforcement should be used to achieve a social optimal to the enforcement of public standards.

1.2.3 Optimal Deterrence and Public Enforcement

Arguably, a possible way to maximise the effectiveness of antitrust enforcement and at the same time minimise the use of resources is to achieve, or at least make an effort to achieve, an optimal level of deterrence

[98] Wouter P J Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 (1) World Competition 3, 13

[99] Douglas A Melamed, 'Damages, Deterrence, and Antitrust - A Comment on Cooter' (1997) 60 (3) Law and Contemporary Problems 93, 93 - 94

[100] George J Stigler, 'The Optimum Enforcement of Laws' (1970) 78 (3) Journal of Political Economy 526, 528

[101] William M Landes and Richard A Posner, 'Market Power in Antitrust Cases' (1981) 94 (5) Harvard Law Review 937, 953

via public enforcement. A Report for the Commission argues that optimal deterrence:

> [R]equires that the expected sanction faced by undertakings wishing to adopt an anti-competitive conduct is just sufficient to deter that conduct without deterring also purely legal actions. If this is possible, then all illegal actions will be deterred, and there would not be any need for private enforcement'.[102]

Certainly, setting a perfect level of deterrence in antitrust is a very difficult task if at all possible. However, it is hard to see, how private enforcement is the answer to this requirement.

In respect of the deterrence rationale for both public and private enforcement, the optimal sanction is a product of the probability of successful action and the sanction in that event, resulting in an appropriate expected cost of that violation. With private enforcement (unlike public enforcement), these two variables cannot easily be established independently. If a high sanction is set on a low probability of enforcement, this sanction will result in encouraging excessive enforcement activity by private parties motivated by the incentive to obtain the high sanction/compensation. With public enforcement, sanctions can be altered without in any way affecting the resources going into detection and conviction of violators.[103] But, with a mixed and uncoordinated system of public and private enforcement, it is impossible to set the sanction and probability of enforcement in a systematic way.[104]

A follow-on action for damages can have some additional deterrence as damages clearly are additional costs to the fine or other penalties imposed as result of public enforcement. However, if additional monetary sanctions were required to increase deterrence, as stresses by Wils, 'these could be provided for in a much cheaper and more reliable way by increasing the fines imposed in the public enforcement proceeding'.[105] Moreover, if effective deterrence is to be achieved by monetary sanctions (fines and/or damages), in private enforcement who is setting the optimal amount of the

---

[102]Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> accessed 19 January 2014, 59

[103]William Breit and Kenneth G Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 (2) Journal of Law and Economics 405, 440

[104]Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) Osgoode Hall Law Journal 461, 492

[105]Wouter P J Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26 (3) World Competition 473, 16

sanctions? Violators of competition rules may well deserve a punishment in the form of monetary sanction and/or injunction when appropriate, but it is hard to see how private enforcement could create and sustain a competitive EU economy,[106]and stimulating economic growth and innovation[107] by exposing businesses to unlimited private claims worth an unlimited amount. For this very reason 'Elzinga and Breit would replace the entire damage-induced private actions approach with a system of fines (well in excess of current levels)'.[108] Such a system would eliminate the perverse incentives of private parties and the effects of reparation costs. While public enforcement has the advantage of separating incentive for enforcement from the penalty itself, the same goal is unachievable under private enforcement.

The task of calculating the optimal amount of the penalties is no doubt a difficult one in practice because it does not appear feasible to measure economically the theoretically optimal fine for a given antitrust violation.[109] With public enforcement, however, at least there can be an attempt to target the optimal amount, proportionate to the effect of the anti-competitive conduct in the related market, administratively. Public authorities are subjected to public scrutiny of their behaviour and are free from private lucrative motivation to file lawsuits. When the sanction consists of damages awarded as a result of private litigation, it becomes virtually impossible to target the optimal amount because damages will be calculated not by reference to the offender's gain, but by reference to the losses which those claimants who happen to bring claims manage to prove.[110] Seeking the right balance between punishment and deterrence is, therefore, essential for the effectiveness and efficiency of a system of antitrust enforcement. Private enforcement appears to be unfit to further these objectives.

The US's approach to antitrust, in the areas of monopolisation, collusion and mergers, suggests that antitrust actions have not promoted competition and benefitted consumers. Therefore, as Crandall and Winston emphasise, 'supporters of an interventionist antitrust policy are left with the argument that such policy deters businesses from anti-competitive behaviour'[111]. In

[106]Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

[107]Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

[108]William Breit and Kenneth G Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 (2) Journal of Law and Economics 405, 440

[109]Wouter P J Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 (2) World Competition 1, 30

[110]Wouter P J Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 (1) World Competition 3, 11

[111]Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) Journal of Economic Perspectives 3, 20

the EU (like in any other jurisdiction) the question is what violation would have occurred if the Commission had not prosecuted, for instance, Microsoft.[112] Obviously, providing evidence on what has been deterred, and, therefore, did not happen, is a difficult task. As matter of fact, however, in the US was 'not found any evidence that antitrust enforcement has deterred businesses from engaging in actions that would have seriously harmed consumers'.[113] Indeed, contrary to the historical belief, the view that government victories in cases against large industry such as oil and tobacco have deterred others, such as steel companies, from pursuing similar paths to monopoly power, is misleading. For instance, the US Steel's failure to maintain its large share of the country's steel output in the first half of the twentieth century was due to its high costs, not to a concerted effort to avoid antitrust prosecution.[114]

Arguably, antitrust enforcement does have some beneficial deterrent effect. However, any deterrent effect of the antitrust laws must be assessed against the well demonstrated ability of competitive markets to deter anti-competitive practice.[115] The US experience shows that concerns about over-deterrence has led scholars to propose various approaches that would restrict the operation and reduce the power of private antitrust suits.[116] This need to restrict and reduce the power of private parties, it is submitted, is strictly linked to the compensation factor as under a private enforcement regime it is impossible to control and, thus, to obtain an optimal level of deterrence, even after setting an adequate level of compensation.

1.2.4 Conclusion

Viewed in isolation, the issue of victims' compensation coupled with the derived deterrent effect seems to tilt the scale in favour of a system of private enforcement. Indeed the Commission contends that public enforcement is not there to serve the compensation goal while private enforcement could ensure victims' compensation, and as a by-product also deliver deterrence. However, such an approach appears to be grounded on the theoretical

[112]Case T-201/04 *Microsoft Corp v Commission of the European Communities* [2007] ECR II-3601

[113]Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) Journal of Economic Perspectives 3, 20

[114]Ibid, 20.For a detailed analysis of the US steel failure see: Thomas K McCraw and Forest Reinhardt, 'Losing to Win: U.S. Steel's Pricing, Investment Decisions, and Market Share, 1901-1938' (1989) 49 (3) The Journal of Economic History 593

[115]Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) Journal of Economic Perspectives 3, 21

[116]William E Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law For Dominant Firm Conduct: The Chicago/Harvard Double Helix' [2007] Columbia Business Law Review, 53

effectiveness of a system of private enforcement. Indeed, empirical studies and antitrust scholars are calling into question whether antitrust should be used for corrective justice, hence whether private enforcement is suitable to achieve the goals of compensation and deterrence.

Arguably, the Commission's approach to the issues of compensation and deterrence does not take into consideration the impossibility of knowing the amount that an antitrust defendant would be required to pay out in damages as result of private actions. The impossibility of coordinating litigations stemming from private actions, arguably, results in over or under-enforcement. This paper shows that, whereas under public proceedings it is possible to adjust the punishment of antitrust violators according to the severity of the breach, such as in the *Microsoft* case,[117]under a private regime it appears impossible to set an ideal amount that will compensate victims while bringing an optimal level of deterrence. Consequently, in this respect, public enforcement appears to be a superior instrument when compared with private enforcement.

Dr. Daniel Reed, Solent University

[117]Nicholas Banasevic and others, 'Commission Adopts Decision in the Microsoft Case' (*Directorate-General Competition, Competition Policy Newsletter n. 2, Summer 2004*) <http://europa.eu.int/comm/competition/publications/cpn/> accessed 6 February 2014, 48

Provisions against Conflicts of Interest in applications and recommendations for involuntary admission to hospital

Dr. Benjamin Andoh and Phil Jones

ABSTRACT

Before voluntary admissions were introduced in 1930, involuntary admission to hospital was generally odious. This often resulted in complaints by some patients and their relatives and in suits against hospital staff, etc., so that there was the need to protect hospital staff and persons acting in pursuance of the statutory provisions governing involuntary admissions. There was also the need to curb collusion by some relatives with medical practitioners to have their mentally disordered relatives admitted to a hospital and also to avoid conflicts of interest. The present provisions on this matter are contained in the Mental Health (Conflicts of Interest) Regulations (England) 2008. It is unfortunate that this topic has been largely ignored in the literature. This present paper fills this hiatus. It traces and comments on the origins of the provisions against conflicts of interest in the involuntary hospital admission process. It also actually looks at some reasons for their inclusion in the law, examines critically the present position and then offers reform suggestions.

Keywords: Mental Health (Conflicts of Interest) Regulations 2008 - Application for compulsory admission to hospital – medical recommendations – Mental Health Act 1959 - Mental Health Act 1983 – Mental Health Act 2007 – Mental Health Act Code of Practice 2008 – Mental Health Act code of Practice 2015

1. INTRODUCTION

Before the Mental Treatment Act 1930 (which introduced terminological changes and voluntary admissions) the terms used in relation to mental disorder were crude; for example, mental hospitals were known as "asylums", and patients as "lunatics" Also, admission to a hospital was scarcely without certification. Thus, involuntary admission to hospital was generally odious. Unsurprisingly, therefore, there were complaints galore by patients and sometimes their relatives. As a result, suits against hospital staff etc. were very likely. Thus, there was the need to protect hospital staff and persons acting in pursuance of the provisions of the legislation governing involuntary admissions.

However, some relatives often colluded with doctors (medical practitioners) in having their mentally disordered relatives admitted to an asylum or mental hospital. This type of collusion could not be placed under negligence or bad faith, that was required before any action could be taken against hospital staff. Therefore, it became desirable and necessary for provisions against (or aimed at reducing) such collusion and/or conflicts of interest. The present provisions are contained in the Mental Health (Conflicts of Interest) Regulations (England) 2008.[1]

It is unfortunate that, apart from their inclusion in the textbooks,[2] these provisions have been largely ignored in the literature.[3] The present paper fills this hiatus by not just stating those provisions but also, actually, looking at some reasons for their inclusion in the law, their origins, analysing the present position and then offering reform suggestions.

2. REASONS FOR THE PROVISIONS

In the past, although the vast majority of involuntary patients were not rich (as is the position today), there were some patients who were of considerable means – they had assets and businesses. Some relatives of

[1] These are similar to the Welsh Provisions (the Mental Health (Conflicts of Interest) Regulations (Wales) 2008.

[2] See, e.g., B. Hale (with P. Gorman, R. Barrett and J. Jones), *Mental Health Law*, 6th edition (London: Sweet and Maxwell, 2017) and P. Bartlett and R. Sandland, *Mental Health Law, Policy and Practice* (Oxford: Oxford University Press, 2014).

[3] It is also unfortunate that there has been no decided case on the anti-conflicts of interest provisions regarding compulsory/involuntary admissions to hospital in this jurisdiction or in the U.K., to widen the net. There is a Scottish case, *KM v Mental Health Tribunal for Scotland* (2009 G.W.D. 40-694), Sheriff Court (Grampian, Highland and Islands) (Aberdeen), but it concerns only conflicts of interest in compulsory treatment in the community of a patient rather than in compulsory admission of a mental patient to hospital for treatment.

those patients, whose only desire was to secure control of those assets/businesses belonging to the patients,[4] often colluded with medical practitioners to have their sick (or mentally ill) relatives be committed to asylums (No wonder applications for *habeas corpus* by such patients rarely succeeded.[5]A sceptic may well ask why the anti-collusion provisions are still needed if we have today the Court of Protection, the facility of power of attorney and deputies. The answer is that some wealthy patients or would-be patients are close to their relatives and may trust them to the extent of giving them a power of attorney without knowing the extent to which those relatives have their eyes on controlling their businesses/assets while they are compulsory patients in hospital. The anti-collusion provisions are, therefore, likely to reduce incidents of collusion although they may not totally prevent or eradicate them. Any level of protecting patients' rights is desirable because mental patients are generally vulnerable.

A further reason for the provisions can be said to be the second rule of natural justice requiring that no one can be a judge in their own cause.[6]Thus, the owner or part-owner of a private hospital/clinic ought not to be one of the medical practitioners providing a medical recommendation for the compulsory admission of a patient to that hospital/clinic. Conflicts of interest must be avoided so far as possible and practicable.

3. ORIGINS OF THE PROVISIONS

The exact origins of the anti-conflicts-of-interest provisions may be traced to the pre-1890 period. First, s.30 of the Madhouses Act 1828[7] provided that a physician, surgeon or apothecary could not sign a certificate of admission to any house/institution, for which he was the wholly or partly the proprietor or the regular professional attendant. This provision was later in 1853 preserved by the two Lunatic Asylums Amendment Acts of that year.[8] However, s.12 of the Lunatic Asylums Amendment Act 1853[9] went further by disallowing a medical practitioner to make an order for admission as well as sign a medical certificate and also providing that a medical

[4]See,e.g, DHSS and Home Office, *Report of the Committee on Mentally Abnormal Offenders*(1975), Cmnd. 6244 (HMSO: London, 1975), para. 14.15.
[5]*R v William Clarke*, Court of King's Bench,(1762) 3 Burrow 1362; 97 English Reports 875. One exception was *R v Turlington*,(1761) 2 Burrow1115; 97 English Reports 741, where the writ was issued.

[6] The first rule requires that an accused person or a person charged must be given notice of the charge/s against him and then the opportunity to be heard.Quote here one or two leading Admin law cases on Natural Justice.
[7]9 Geo. IV cap. 41.
[8] 16 and 17 Vict. cap. 96, and 16 and 17 Vict. cap. 97.
[9]16 and 17 Vict. cap. 96.

practitioner signing a medical certificate should not be the father, brother, son partner or assistant of the person making the order for admission/reception. These earlier statutory provisions were important because they prevented some conflicts of interest alright. Nevertheless, there were some gaps that they did not fill. Some of those gaps were later filled by the Act of 1890.

The Lunacy Act 1890[10] made detailed provisions disqualifying certain persons from signing a medical certificate, etc. (Under that Act, which consolidated previous Acts relating to the care and treatment of lunatics, nearly all admissions to hospital required certification by a justice. There was then a distinction between pauper lunatics (i.e., lunatics who were wholly or partly chargeable to a union, county or borough) and non-pauper lunatics. Because non-pauper lunatics and/or their families had the means, non-pauper lunatics were usually admitted to private madhouses, which were like private clinics run for profit.[11]

It was this Act (the Lunacy Act 1890) that first brought in provisions aimed at reducing the probability of collusion between patients' relatives and medical practitioners.

Section 4(1) of the Act barred any person related to the applicant the lunatic or the spouse of the lunatic from making a reception order.[12] So, such a person could not be the person with judicial authority to make the reception order.

Moreover, section 30 disqualified the following persons from signing medical certificates accompanying or supporting a petition for a reception order or an urgency order: (a) the petitioner, (b) the person signing (making) the order and (c) the spouse, father or father-in-law, mother or mother-in-law, son or son-in-law, daughter or daughter-in-law, brother or brother-in-

[10] 53-54 Vic. cap. 5.

[11] Four modes of reception of a patient into an asylum (public or private) were prescribed by the Act. These were admissions by a reception order, an urgency order, a summary reception order and by inquisition. A reception order applied to only non-pauper patients. It was an order signed by a Justice of the Peace and supported by two medical certificates upon petition by a near relative of a patient or by some other person. The order lasted for one year but could be renewed (s.38(4)). Where the lengthy procedure for a reception order could not be followed owing to pressure of time, an urgency order was prescribed. This required a petition by a patient's spouse or other relative backed by just one medical certificate, and was valid for up to 7 days unless a reception order was obtained within that period (s.11). A summary reception order was the mode of reception in the case of pauper patients. It was an order by a Justice, supported by one medical certificate, which was made upon a constable or relieving officer notifying the Justice (ss.13-22). It lasted for one year but could be renewed (s.38(4)). Admission by inquisition (ss.12 and 90-107) applied to only `Chancery Lunatics', persons so declared by the Court of Chancery.

[12] S.341 defined relative as including linear relatives up to grandparents.

law, sister or sister-in -law, partner or assistant of such petitioner or person signing the order.

Section 32(1) also barred certain persons from signing a medical certificate supporting a reception order. Those persons were:

(a) the manager of the institution or the person who was to have charge of a single patient;
(b) any person interested in the payments for the patient's care/treatment;
(c) any "regular medical attendant in the institution" (i.e., a medical practitioner who regularly attended the institution to treat patients);
(d) the spouse, father or father-in-law, mother or mother-in-law, son or son-in-law, daughter or daughter-in-law, sister or sister-in-law, brother or brother-in-law, or the partner or assistant of any of the persons in (a), (b) and (c) above.

According s.32(2), none of the persons signing a medical certificate in support of a reception order should be the father or father-in-law, mother or mother-in-law, son or son-in-law, daughter or daughter-in-law, sister or sister-in-law, brother or brother-in-law, or the partner or assistant of the other of them (i.e., the two doctors must not be related to each other).

Next, s.32(3) provided that no (reception) order should be made if the application was completed by, or a medical certificate was signed by, a member of the managing committee of the hospital.

Lastly, according to s.33, a medical practitioner who was a Commissioner or a visitor (define "commissioner" and "visitor") could not sign a certificate for the reception of a patient into a hospital or licensed house (private madhouse) unless he was directed by judicial authority under the 1890 Act to visit the patient, or directed by the Lord Chancellor, Secretary of State, or a Committee appointed the judge in lunacy.

Comment

Therefore, during the pre-1890 period first, a medical practitioner or an apothecary could not sign a certificate of admission if he was fully or partly a proprietor or regular professional attendant of the admitting institution or house Secondly, he could not sign a medical certificate if he was also the maker of the order for admission. Thirdly a medical practitioner signing a medical certificate must not be related as father, brother son, partner or assistant of the maker of the order for admission.

However, the Lunacy Act 1890 went much further by (a) prohibiting a person related to the applicant, lunatic /patient or spouse of the patient from making a reception order as well as (b) barring the following persons from signing a medical certificate: (i) the applicant/petitioner, the maker of the order, the spouse, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister or sister-in-law or a partner or assistant of the petitioner or the maker of the order, (ii) the manager of the institution or person in charge of a single lunatic, a person with interest in the payments for the care of the patient, a medical practitioner of the admitting institution, (iii) and the spouse, father or father-in-law, mother or mother-in-law, son or son-in-law, daughter or daughter-in-law, sister or sister-in-law, brother or brother-in-law of the manager of the institution or person in charge of a single lunatic, a person with interest in the payments for the care of the patient, a medical practitioner of the admitting institution, and (iv) a medical practitioner related to the other medical practitioner signing the other medical certificate. From the expansion of the persons barred from making an order for admission and from signing a medical certificate, one can say that the Lunacy Act 1890, at the time it was passed, was the leading statute with far-reaching provisions for reducing, if not eliminating, the likelihood of collusion between patients' relatives and medical practitioners and/or conflicts of interest in the admission process.

Following the terminological changes introduced by the Mental Treatment Act 1930, the Mental Health Act 1959 re-shaped the earlier anti-conflicts-of-interest provisions. Section 28 of the Act of 1959 provided as follows:

(4) A medical recommendation for the purposes of an application for the admission of a patient under this Part of this Act shall not be given by

any of the following persons, that is to say -

(a) the applicant,

(b) a partner of the applicant or of a practitioner by whom another medical recommendation is given for the purposes of the same application,

(c) a person employed as an assistant by the applicant or by any such practitioner as aforesaid,

(d) a person who receives or has an interest in the receipt of any payments made on account of the maintenance of the patient; or

(e) except as provided by subsection (3) of this section, a practitioner on the staff of the hospital to which the patient is to be admitted,

or by the husband, wife, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother in-law, sister or sister-in-law of the patient, or of any such person as aforesaid, or of a practitioner by whom another medical recommendation is given for the purposes of the same application.

Comment

So, paragraph 4 (e) of section 28 of the Mental Health Act 1959 may be said to have been aimed at cutting down the incidence of relatives, with an eye on a patient’s property, actively being involved in the compulsory hospitalisation of their mentally disordered relatives. As involuntary (compulsory) hospitalisation was, from 1959 onwards, dominated by the medical profession rather than by the legal profession during the pre-1959 period, first the signing/making of an order was replaced an application supported by the required medical certificates which had the effect of authorising the hospital concerned to detain the patient, etc. Also, the Mental Health Act 1959 proscribed medical practitioners, related to the applicant or patient from making a medical recommendation. Furthermore, an applicant (unless a nearest relative) must not be related to the patient, and no applicant should be related to any of the doctors making the medical recommendation.

The relevant provisions of the Mental Health Act 1959 were improved by the Mental Health Act 1983, as amended by the Mental Health Act 2007, under which the Mental Health (Conflicts of Interest) Regulations were made in 2008.

The main anti-conflict-of-interest provisions of the MHA 1983 are contained in section 12(3) – (6) of that Act. According to s.12(3) one of the medical recommendations supporting an application for admission can be made by a practitioner on the staff of the admitting hospital but only where that hospital is not a mental nursing home and is not a provider of accommodation for private patients. However, under s.12(4) both medical recommendations may be made by two medical practitioners on the staff of the admitting hospital if three conditions are satisfied, namely: (a) attempts to get a second recommendation from an outside doctor would result in in

severe risk to the patient's health/safety, (b) one of the doctors works less than half of the contractual full-time hours of a National Health Service doctor (c) and where one of the two doctors is a consultant, the other does not work in a grade under that consultant's direction.

Section 12(5) contains the more specific bars by providing that a medical recommendation for compulsory admission of a patient, not concerned in criminal proceedings, cannot be given by: (a) the person making the application for admission, (b) a partner of the applicant or of a practitioner who gives another medical recommendation to support the same the same application, (c) a person the applicant or any such medical practitioner has employed as an assistant, (d) a person with an interest in receiving any payments for the patient's maintenance, or(e) a practitioner on the staff of the admitting hospital, except as provided by s12(3) and s12(4). Section 12(5) also bars the following persons from providing a medical recommendation: the spouse, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law of the patient, or of any of the persons mentioned in s.12(5)(a), (b), (C), (d) and (e).

Lastly, s.12(6) specifies that a general practitioner employed on a part-time basis in a hospital is not to be considered as a practitioner on the staff of that hospital.

Comment

Therefore, section 12(5) of the Mental Health Act 1983 prohibits a medical practitioner from wearing two hats, i.e., being a provider of a medical recommendation as well as being the maker of an application of admission. Secondly, s.12(b) and (c), in today's terminology,[13] do not allow a conflict of interest for professional or business reasons as s.12(5)(b) bars a partner of the applicant or of the other provider of a medical recommendation from making a supporting medical recommendation while s.12(5)(c) bars an assistant of the applicant or of one provider of a medical recommendation from providing a medical recommendation. Next, s.12(5)(d) disallows a conflict of interest for financial reasons in that anyone linked with receiving any payments for the maintenance of the patient concerned cannot make a medical recommendation to support the admission. Lastly, s.12(5)(c) is significant for aiming at preventing a

[13] See the Mental Health (Conflicts of Interest) Regulations of 2008.

conflict of interest on the basis of a personal relationship because it does not allow a relative in the first degree as well as other specified relatives (by affinity) of the patient to make a medical recommendation.

Having said that we must, however, note that s.12(5) of the Mental Health Act 1983 is quite brief in comparison with the Mental Health (Conflicts of Interest) Regulations (England) 2008.[14]

4. PRESENT POSITION

The Mental Health (Conflicts of Interest) Regulations 2008 (hereafter referred to the "Regulations of 2008"), which contain the present provisions directed at addressing the issue of conflicts of interest, have now generally reset the provisions of the 1983 Act, s.12(5), very nicely under numbered paragraphs. They have also added further details about the four potential conflicts of interest.

Regulation 4 addresses potential conflict of interest for financial reasons. It provides:

(1) An assessor shall have a potential conflict of interest for financial reasons if the assessor has a financial interest in the outcome of a decision whether or not to make an application or give a medical recommendation.

(2) Where an application for the admission of the patient to a hospital which is a registered establishment is being considered, a registered medical practitioner who is on the staff of that hospital shall have a potential conflict of interest for financial reasons where the other medical recommendation is given by a registered medical practitioner who is also on the staff of that hospital.

Para. 1 of this This Regulation, therefore, preserves, although it uses different words to do so, the provisions of s.12(5)(d) of the Mental Health Act 1983, already stated above. But it may be said to go further because, whereas s.12(5)(d) of the Act of 1983 prohibits a person from making a medical recommendation if they have interest in receiving any payments for the patient's maintenance, para. 1 of the Regulations of 2008 makes that prohibition (states a potential conflict of interest arises) where an assessor (assessor here refers to the applicant and the maker of the medical

[14]Section 12 of the MHA 1983 was amended by s.22 of the MHA 2007 which inter alia, gave the Secretary of State power to make Regulations governing the circumstances in which there would be a conflict of interest.

recommendation) has a “financial interest” in the result of a decision to make or not to make an application or provide a medical recommendation – loosely put, whether or not arrangements for the admission of the patient concerned go ahead or not. Para. 2 of Regulation 4 also restates the provisions of s.12(3): in short, where the admitting hospital is a registered establishment (i.e., an independent hospital[15]or a nursing home[16]) but not a conventional NHS hospital, there will be a conflict of interest for financial reasons if the two medical recommendations come from medical practitioners on the staff of that hospital.

Secondly, Regulation 5 covers conflict of interest for business reasons (as done by s.12(5)(a),(b),(c) and (e), and s.12(6) of the Act of 1983) except that Regulation 5 does so simply under one paragraph, and gives more details than the provisions of s.12(5) and (6) of the Act of 1983. According to Regulation 5 a conflict of interest for business reasons arises regarding the making of an application or giving a medical recommendation where an assessor and another assessor or the patient are directly involved in the same business enterprise (para. 1) or where, if the patient’s nearest relative[17] is the applicant, both the recommending doctor and that nearest relative are directly involved in the same business enterprise (para. 2).

Next, Regulation 6 is about conflict of interest for professional reasons. This Regulation provides that there will be a conflict of interest for professional reasons where an assessor employs or manages the patient or any of the other assessors, or he/she is a member of the same team as the patient[18] or as the other two assessors. Furthermore, where the applicant is the nearest relative, a conflict of interest will arise if one of the persons providing a medical recommendation employs or manages the nearest relative or is employed or manages by the nearest relative.

However, where an assessor belongs to the same team as the patient or the other two assessors, that assessor can still provide a medical recommendation or make an application if, in their opinion, it is urgently necessary that an application be made, and a delay in doing so would cause serious risk to the patient’s health/safety or that of other persons.

[15]See Code of Practice 2015, chapter 39.
[16] See Care Standards Act 2000, sch.4, para. 9(4).
[17]S.26(1) of the MHA 1983 defines “nearest relative” as the person first described in the following list and who is surviving for the time being: (a) husband or wife or partner (within the meaning of the Civil Partnership Act 2004), (b) son or daughter, (c) father or mother, (d) brother or sister, (e) grandparent, (f) grandchild, (g) uncle or aunt, and (h) nephew or niece. Also, according to s.26(6), a person who has been cohabiting with the patient for six months (or, if he is an in-patient, for six months until his admission) may be treated as his nearest relative.
[18]A group of professionals working together for clinical purposes routinely.

Comment

This Regulation is really a significant one - it is quite an improvement of the provisions of previous years because, at least, now (unlike the provisions of s.12 of the Mental Health Act 1983) a conflict of interest for professional reasons will arise if an assessor is a line manager or an employer of the patient or one of the other assessors or, where the nearest relative is the applicant, if the assessor employs or manages the work of the nearest relative or he/she is employed by (or works under the direction of) that nearest relative. Therefore, it cannot be overemphasised that never before has there been such a far-reaching provision on conflict of interest on professional grounds. There is still room for improvement, however.

Regulation 7 concerns conflict of interest on the basis of a personal relationship. According to it, there is such a conflict if an assessor who is a provider of a medical recommendation, the applicant or the nearest relative of the patient (where that nearest relative is the applicant) is related to:

(a) a "relevant person"[19] not just in the first degree (namely, a parent, son, daughter, brother and sister, including step relationships), but also in the second degree (namely, an uncle, aunt, grandparent, grandchild, first cousin, nephew, niece, parent-in-law, grandparent-in-law, grandchild-in-law, sister-in-law, brother-in-law, son-in-law and daughter-in-law, including step relationships, or
(b) a relevant person as a half-brother or half-sister.

Such a conflict of interest will also exist where the assessor happens to be the spouse, ex-spouse, civil partner or ex-civil partner of a relevant person or is cohabiting with a relevant person (i.e., living together with the relevant person as if they are spouses or civil partners).[20]

Comment

Regulation 7, therefore, generally preserves s.12(5) of the MHA 1983 but then, goes much further than that subsection by adding that an assessor ought not to be (i) the half-brother or half-sister of a relevant person or (ii)

[19] That is, in accordance with Regulation 7(2), another assessor, the patient or the patient's nearest relative (if the nearest relative is the applicant). In other words, as regards the nearest relative who is the applicant, he/she must not be related to an assessor.
[20] As the Civil Partnership Act was passed in 2004, this addition to the list by the 2008 Regulations was then necessary and is today understandable.

the ex-spouse, civil partner of ex-civil partner of a relevant person or (iii) cohabiting with a relevant person, or (iv) related to a relevant person in the second degree (as named above). Accordingly, the net cast by Regulation 7 may be said to be very wide indeed.

However, one strong critique of the Regulations is that they spell out no sanctions apart from the implied non-effectiveness of an application or medical recommendation where there is a conflict of interests.

Having said all this, should the ambit of the 2008 Regulations be further widened? This question will be considered after a brief look at the Mental Health Act Code of Practice 2015.

The Code of Practice

Following the Mental Health Act 2007, the Mental Health Act Code of Practice 2008 and also the Mental Health Act Code of Practice 2015 both explained the circumstances in which applications for admission under the MHA 1983, as amended, or the provision of medical recommendations to support such applications ought not to be made where there is a conflict of interests. Both Codes, creditably, explicate potential conflict of interests for financial reasons (Regulation 4), for business reasons (Regulation 5), and for professional reasons (Regulation 6). But, they, lamentably, failed to elucidate potential conflict of interests on the basis of a personal relationship (Regulation 7).

The Code of 2015 was supposed to have revised or improved the Code of 2008, but it did not do so as regards Regulation 7. Rather, just like its predecessor (the Code of 2008), it only mentioned "conflicts of interest for … reasons".[21] Moreover (and this is implicit in their omission to explain Regulation 7), although the Civil Partnerships Act was passed in 2005, both Codes (of 2008 and 2015) contained nothing on civil partners, etc.

Suggestions for improvement of the present position will now be considered.

[21] See chapter 7, para.3 of the Code of 2008, and chapter 39, para. 3 of the Code of 2015.

5. REFORM SUGGESTIONS

So far it has been noted that the present paper aims to fill a gap in the literature by not just analysing the anti-conflicts of interest provisions concerning compulsory admissions to hospital under the Mental Health Act 1983, as amended, and actually looking at some reasons for the inclusion of those provisions in the law but also by tracing their origins and examining the present position. Some suggestions for improving the current provisions will now be presented.

Under the present Regulations there is no specified sanction for violating any of the Regulations, apart from the implied one that a medical recommendation or an application for compulsory admission in circumstances where a conflict of interest arises will be of no effect. On this matter is recommended that a specific sanction like a fine (the amount of which could be left for the court to decide) would be a suitable deterrent as it would encourage applicants for involuntary admission of a patient as well as providers of medical recommendations to think twice and consider all the circumstances to avoid any conflict of interest when performing their functions as applicants or makers of medical recommendations.

Secondly, civil partnerships ought to be expressly mentioned in the Code of Practice although lawyers and some laypersons already know that spouses and civil partners now have virtually the same right and responsibilities.

Thirdly, it is recommended that the present Code of Practice should elucidate potential conflict of interest on the basis of a personal relationship. That, regrettably, is missing from the Code.

Lastly, given that, as already shown, Regulation 6 contains far-reaching provisions on conflict of interest on professional grounds and Regulation 7 casts a very wide net, should the list of persons affected be further widened? It is recommended that widening the list would be desirable in that it would make the Regulations more effective where there is evidence of the relationship in question. So, it is suggested that the list of affected persons should include:

(i) close friends and business partners of the siblings of assessors,

(ii) a civil partner, business partner, spouse, cohabitee and close friend of assessors (e.g., a recommending doctor who is a business partner of the applicant (NR)'s spouse or close friend), who has knowledge of a patient's wealth/assets in circumstances where:

(a) they stand to gain financially or otherwise from the compulsory admission of that patient and/or

(b) where they are likely to coerce, control or otherwise influence the assessor to act to their advantage – individually or jointly.

Dr Benjamin Andoh, Solent University
Phil Jones, Solent University

Are Steven Chibnall's news values still relevant in an ever changing media landscape?

Shabazz Ullah

Abstract

Countless academics have agreed that news media creates moral panic, raising issues in the political world and creating panic policy. More than 60% of news is crime news, contrary to actual crime rates. In the past decade, social media has become a news delivering platform, 58.95% of the UK's population use social media, during elections 26% of the population are swayed by it. Decades of research is dedicated to answering why and how crime events are selected for reporting by the UK media. This study aims to see if Steven Chibnall's research is fit for purpose in the changing media landscape, and may act as a segue to further questions, such as regulation for the media. The seminal work by Steven Chibnall in 1977 created a list of values in a crime event that makes it more newsworthy than others. Following researchers have aimed to update this with their own work, to keep up with the media landscape, with varying ideas. One idea is the heavy influence of the demographic and the media influence over the voting public as the deciding factor on selecting events to report. Applying and contrasting research will allow us to understand how crime news events are selected in the current media landscape and if Chibnall's work is still relevant. Preliminary research indicates that Chibnall's work has been adapted into the works of researchers, keeping it relevant.

Keywords: Crime news – Steven Chibnall – dramatization of news – personalization of news – simplification – titillation as a value – conventional context – structured access – novelty of events – selection of crime news

1 Introduction

Crime news. How does crime become news?

The one thing we know about crime news is that it creates moral panic[1]. Moral panic is not to be taken lightly. As Stanley Cohen states, moral panic is the perception of threats to societal values and interests[2]. These threats are not necessarily personalised and can be generic. Things such as food scares, climate change, unsustainable meat consumption or even the outbreak of Covid-19 in China at the beginning of 2020[3].

This is often done by way of deviance amplification. Deviance amplification refers to an increase in the number of reports on antisocial behaviour or any event that does not fall within the norms of society[4]. Simply, it is when the media over-report an event, making it seem far worse than it is. This is a reason why understanding how news stories are selected is important.

If we look through history, moral panic can have a detrimental effect on the legal system. The Anti-Terrorism Crime and Security Act[5] was introduced two months after the 9/11 attacks in the United States, resulting from the moral panic caused by the attack on foreign soil[6]. This was dubbed as the most draconian piece of legislation British Parliament has passed in peacetime in over a century[7]. It was deemed incompatible with the European Convention on Human Rights,[8] as illustrated by *A and Others v Secretary of State*, where innocent people were held in detention without trial indefinitely under the Act[9].

Furthermore, there was the widespread coverage of the 9/11 attacks and the way media giants such as The Sun, Daily Mail, The Independent and The Guardian racialised Muslims, and painted them as deviants and or those who do not fit the norms of societies standards. There was a creation of moral

---

[1]Erich Goode, Nachman Ben-Yehuda, *Moral Panic: The Social Construction of Deviance* (2[nd]edn, Wiley-Blackwell 2009).
[2] Stanley Cohen, *Folk Devils and Moral Panics: The creation of Mods and Rockers* (3[rd]edn, Routledge 2002).
[3] Kelly- Leigh Cooper, 'China coronavirus: The lessons learned from the Sars outbreak', *BBC* (24 January 2020) <https://www.bbc.co.uk/news/world-asia-china-51221394> accessed 25 January 2020.
[4] For further discussion on moral panic, see-Erich Goode, Nachman Ben-Yehuda, *Moral Panic: The Social Construction of Deviance* (2[nd]edn, Wiley-Blackwell 2009).
[5] The Anti-terrorism Crime ad Security Act 2001.
[6] Helen Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?' (2002) 65 (5) The Modern Law Review <https://www.jstor.org/stable/1097614?seq=1> accessed 25 January 2020.
[7] Adam, Tomkins 'Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001' [2002] PL 205-20.
[8] European Convention on Human Rights.
[9]A and others v Secretary of State for the Home Department [2004] UKHL 56.

panic that these people did not fit and/or belong, which then led to a surge in racially charged crime against Muslim minorities in the following years[10].

With the more recent outbreak of the Chinese coronavirus, there has been an upsurge of violence against the Asian community[11]. So, clearly, moral panic exists and may be even more so in our current media landscape which has changed hand in hand with technology,[12] reiterating the need to understand how crime news is selected.

So how does crime become news? Fifty years of research has gone into understanding this, and there is a variety of answers that are arguably rudimentary. Answers such as journalists simply know in their gut,[13] whatever sells,[14] sex and violence,[15] if pondered upon, may lead to more questions like how do journalists know, what sells and what do we mean by sex and violence?

The most notable answer to this came from Steven Chibnall. Steven Chibnall conducted the seminal study in the selection of news in 1977, which is the focus of this paper. Chibnall proposed eight factors as part of his news selection model: factors that are present in a story or crime event that make it more likely to be reported on, otherwise known as being newsworthy. These factors have become known as news values, and their presence is perceived to influence the selection of the story.

However, 1977 was a long time ago and things have changed. Now we have more television, little interactive computers that sit in our pockets and social media. Society and technology have changed beyond belief over the past fifty years[16], as has the media landscape. The modern media landscape has more platforms for news. Headlines are delivered over the internet, being

[10] Katy Sian, Ian Law, Salman Sayyid, 'The Media and Muslims in the UK' (2012) University of Leeds <https://www.ces.uc.pt/projectos/tolerace/media/Working%20paper%205/The%20Media%20and%20Muslims%20in%20the%20UK.pdf> accessed 20 January 2020.

[11] Jamie Grierson, 'Anti-Asian hate crimes up 21% in UK during coronavirus crisis' *The Guardian* (13 May 2020) <https://www.theguardian.com/world/2020/may/13/anti-asian-hate-crimes-up-21-in-uk-during-coronavirus-crisis> accessed 26 May 2020.

[12] Emily Bell, Taylor Owen, 'The Platform Press: How Silicon Valley reengineered journalism' (2017) Columbia Journalism Review <https://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php> accessed 1 April 2020.

[13] Ida Schultz, 'The Journalistic Gut Feeling' (2007) 1 (2) Journalism Practice 190-207.

[14] FolkerHanusch, Sandra Banjac, Phoebe Maares, 'The Power of Commercial Influences: How Lifestyle Journalists Experience Pressure from Advertising and Public Relations' (2019) Journalism Practice <https://www.tandfonline.com/doi/full/10.1080/17512786.2019.1682942?scroll=top&needAccess=true> accessed 20 January 2020.

[15] Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke, Brian Roberts, *'Policing the crisis: mugging, the state and law & order'* (2ndedn, Red Globe Press 2013).

[16] Emily Bell, Taylor Owen, 'The Platform Press: How Silicon Valley reengineered journalism' (2017) Columbia Journalism Review <https://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php> accessed 1 April 2020.

the most used medium for news for 16 to 24-year-olds[17]; 75% of adults say they use television for news[18]; it appears UK adults are consuming more and more news through social media with 45% saying they use it for news[19]. So, Chibnall gave us an answer. But, is it still relevant in the current media landscape? It is the key aim of this paper to find out.

For answers we can look in the 2001 study of Jewkes, which aimed to update Chibnall's work.

But, these are not the only news selection models that exist. Therefore, we will discuss more recent studies, such as Harcup and O'Neil from 2017. Furthermore, the use of a set of values is not the only method that has been used to measure newsworthiness, as will be seen below. To assess Chibnall's relevance in a practical manner, we will reference crime events and stories where relevant.

2 Methodology

It is near impossible to create an all-encompassing piece of work. There are decades of research on how news is selected.

In the context of answering Steven Chibnall's relevance in the modern media landscape, we have selected the research we will analyse on the following basis. We have selected specific works, such as that of Yvonne Jewkes[20], to update Chibnall's work. We have included the work of Galtung and Ruge[21], Hall et all[22] and Chris Greer[23] as these are the most cited pieces of work in any academic text on the discourse regarding crime and media, as evident from the works of Stephen Jones[24], Yvonne Jewkes[25], Paul Brighton[26] and Sheila Brown[27]. Consequently, we have also included the

[17] Jigsaw Research, 'News Consumption in the UK: 2019' (Ofcom, 24 July 2019) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/157914/uk-news-consumption-2019-report.pdf> accessed 1 January 2020.

[18] Jigsaw Research, 'News Consumption in the UK: 2019' (Ofcom, 24 July 2019) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/157914/uk-news-consumption-2019-report.pdf> accessed 1 January 2020.

[19] Jigsaw Research, 'News Consumption in the UK: 2019' (Ofcom, 24 July 2019) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/157914/uk-news-consumption-2019-report.pdf> accessed 1 January 2020.

[20] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).

[21] Johan Galtung, Mari HolmboeRuge, 'The Structure of Foreign News. The Presentation of the Congo, Cuba, and Cyprus Crises in Four Norwegian Newspapers' [1965] Journal of Peace Research.

[22] Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke, Brian Roberts, *'Policing the crisis: mugging, the state and law & order'* (2ndedn, Red Globe Press 2013).

[23] Chris Greer, *Sex Crime, and the Media: Sex Offending and the Press in a Divided Society*(Routledge 2003).

[24]Stephen Jones, *Criminology* (5thedn, OUP 2013).

[25] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).

[26]Paul Brighton, Dennis Foy, *News values,* (Sage Publications Ltd 2007).

[27]Sheila Brown, *Crime and Law in Media Culture* (OUP 2003).

works of Harcup and O'Neil[28], being a direct attempt at updating Galtung and Ruge.

Furthermore, we have included other works such as those of Nils Christie[29], Dennis MacShane,[30] Jack Katz,[31] Greer and Jewkes[32] and Naylor[33] because of their relevance.

Throughout this paper we have selected news stories from varying platforms. Whilst many have been selected to illustrate a point, others have been selected randomly. There is no reference to a time over which these were selected. Whilst this may seem problematic, due to a lack of consistency in the selection of news, for the purpose of this paper, this did not present any issues and the approach was deemed satisfactory.

It is notable that this article is entirely the product of desk-based research. Primary research by way of interviewing journalists could not be done because of time constraints.

It is also worth noting that certain research discussed within this paper may hold views that can be considered sexist and or controversial; however, this is due to the state of society in the moment the study was conducted, and they have been included on the basis that they provide useful insight into the change of news selection.

3 Steven Chibnall's News Values

3.1 Introduction

So, the big question is how crime events are selected for reporting. The first study in the selection of crime events for news was conducted by Galtung and Ruge, in 1965[34]. They theorised that there are factors that affect the likelihood of reporting of an event, which became known as news values. This was then developed into a set of values that can be seen across crime events that are reported, the values listed were as follows: Frequency, Threshold, Absolute Intensity, Intensity Increase, Unambiguity, Meaningfulness, Cultural Proximity, Relevance, Consonance; Predictability, Demand, Unexpectedness, Unpredictability, Scarcity,

[28] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited.' (2001) Journalism Studies 2 (2).
[29]Nils Christie, 'The Ideal Victim' in Ezzat Fattah, *From Crime Policy to Victim Policy* (Macmillan 1986).
[30] Dennis MacShane, *Using the Media* (Pluto Press 1979).
[31]Jack Katz, 'What makes crime ''News''?' (1987) University of California.
[32] Chris Greer, Yvonne Jewkes, 'Images and processes of social exclusion' (2005) Social Justice 32 (1).
[33] Bronwyn Naylor, 'Reporting violence in the British print media: gendered stories' (2001) Howard Journal 40 (2), 25-8.
[34] Johan Galtung, Mari HolmboeRuge, 'The Structure of Foreign News. The Presentation of the Congo, Cuba, and Cyprus Crises in Four Norwegian Newspapers' [1965] Journal of Peace Research.

Composition, Reference to Elite Nations, Reference to Elite People, Reference to Persons, and Reference to Something Negative. They are known as the grandfathers of this academic area and have been influential on many academic studies since[35]. Although the work itself is well known and the first of its kind, it had its shortcomings.

To test their hypothesis in practice, Galtung and Ruge selected news presented in four different Norwegian newspapers about the Congo and Cuba crisis of July 1960 and the Cyprus crisis of March–April 1964[36]. This small selection was considered too niche to make any generalisation on, even if it remained consistent with their hypothesis and with other studies. Due to this underlying reason, although the study was the first of its kind and yielded results that shaped this area of study, it was not given the same level of importance on its own as Steven Chibnall's work.

Aside from any critique, there are some important and noteworthy observations Galtung and Ruge made in their work. They are: (a) the more values/factors present in an event the higher the chance that it will become news, (b) values/factors will likely exclude each other since, if one factor is present, it is less necessary for the other factors to be present for the event to be picked up by the media and (c) the less values/factors present the less likely it is for them to become news[37].

The observation that more values led to a higher chance of reporting was furthered by Jack Katz[38]. It is worth noting that the third observation is the simple reasoning that can be deduced from their first observation. However, with regards to the second observation, many of the studies that followed suggest that news values in any news selection model may overlap with each other, rather than being present as their own individual value. This means they will not necessarily exclude each other as Galtung and Ruge thought[39]. This will become evident below.

The seminal work for criminologists came from Steven Chibnall in 1977.[40] Chibnall devised eight imperatives/news values as part of his news selection model in a study of the printed press in the UK. This is the modern starting point in academic discourse relating to crime and media. The eight values

---

[35]Paul Brighton, Dennis Foy, *News values,* (Sage Publications Ltd 2007).

[36]Johan Galtung, Mari HolmboeRuge, 'The Structure of Foreign News. The Presentation of the Congo, Cuba, and Cyprus Crises in Four Norwegian Newspapers' [1965] Journal of Peace Research.

[37]Johan Galtung, Mari HolmboeRuge, 'The Structure of Foreign News. The Presentation of the Congo, Cuba, and Cyprus Crises in Four Norwegian Newspapers' [1965] Journal of Peace Research.

[38] Jack Katz, 'What makes crime ''News'''?' (1987) University of California.

[39] Jack Katz, 'What makes crime ''News'''?' (1987) University of California.

[40] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).

Chibnall listed are Immediacy, Dramatization, Personalisation, Simplification, Titillation, Conventionalism, Structured Access and Novelty of Events.

Although this study took place in 1977, the values themselves have been adapted into other studies. Therefore, it is important for us to understand these news values.

However, going into our breakdown of the values, we must acknowledge that the study took place over four decades ago. Technological and social advancements that exist today, and which have fundamentally altered the media landscape, did not exist at the time of the study[41].

3.2 Immediacy

Chibnall states that "news is about what is new, what has just happened. This means that it is generally concerned with the present rather than the past, change rather than inertia, and current events rather than long-term process"[42].

At first glance, this news value holds true to this day. If we look at newspapers across the globe, the headlines will be for what is happening right now. At the time of writing this report the world was facing a pandemic which flooded headlines, being what was immediately happening. If we look at the headlines from three separate newspapers from March 2020 this can be seen in practice: the Daily Telegraph had the headline '*Visit elderly relatives before they must isolate*[43]'; the South China Morning Post had the headline *'Hopes of turning point rise*[44]'; The Financial Times had the headline '*Sunak budget takes aim at coronavirus*'[45]. All three stories revolving around the pandemic, which was what was happening immediately. Although this is not crime news, it still demonstrates how this news value operates around the globe and demonstrates that immediate news is what is relevant news.

At this juncture, it is worth noting that many of the news selection models that exist were influenced by Chibnall or adapted from Chibnall's work. Immediacy inspired Jewkes' proximity in 2004[46], which we will discuss

---

[41]For an interesting discussion on the changes in technology and society see- Peter J Richerson, Morten H Christians, *Cultural Evolution: Society, Technology, Language, and Religion* (The MIT Press 2013).

[42] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).

[43]Christopher Hope, 'Visit elderly relatives before they must isolate' *The Daily Telegraph* (Hong Kong, 7 March 2020).

[44] Linda Lew, Gigi Choy, 'Hopes of turning Point Rise' *South China Morning Post* (7 March 2020).

[45]Chris Giles, George Parker, 'Sunak Budget takes aim at coronavirus' *Financial Times* (12 March 2020).

[46] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).

below. More evidence of this can be seen in Harcup and O'Neil's 2001 study of the printed press (not just the study of crime in the printed press), where the model included the value of relevance. The value of relevance itself is described as stories about issues, groups and nations perceived to be relevant to the audience[47].

A clear observation made by Harcup and O'Neill in 2001 is that what happens in the present is usually that which is most relevant to people[48]. They also retained this news value in their 2017 study of news in the media, that considered the technological advancements that have changed the media landscape[49]. This value can also be seen adapted into various other studies discussed below.

If we have made the observation that Chibnall's news values have influenced studies and/or have been adapted into further studies, this indicates that the values are not yet antiquated and they do bear relevance to the current media landscape. Analysis over the course of this report will show that Chibnall's values or retooled versions of these values still dominate discourse on news values. Therefore, it would be inaccurate to undermine the relevance of Steven Chibnall.

Whilst we understand how this news value works and how it may be present in academic theories four decades on, it is important to delve a little deeper into Chibnall's study to understand how relevant it still is. In Chibnall's book, he emphasises the words of Paul Rock: 'developments which unfold very gradually tend to be unreportable by the daily press unless some distinctive stage has been reached'[50].

But, is this observation still true? It is understandable that during the time of Chibnall's study news delivery did not have the same technological complexities as we do now, and there were not as many outlets for the printed press as there are today.[51] At the core of this value is the belief that news is only the manifestation of events of the times in which we live, and not historical relevance.

[47]Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited.' (2001) Journalism Studies 2 (2).
[48] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited.' (2001) Journalism Studies 2 (2).
[49] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[50] Paul Rock in Stanley Cohen, Jock Young (eds), *'The Manufacture of News: Social Problems, Deviance and Mass Media'* (Constable 1973).
[51] Jigsaw Research, 'News Consumption in the UK: 2019' (Ofcom, 24 July 2019) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/157914/uk-news-consumption-2019-report.pdf> accessed 1 January 2020.

An example is the supposed abduction of Madeline McCann which is an 'event' that has been reported on for the better part of a decade.

For those unfamiliar with the event, Madeline McCann disappeared during the evening of the 3rd May 2007, whilst on holiday with her parents in Portugal.

At the time it happened, it was widespread in the media covered by a wide range of papers, tabloids, and magazines with headlines such as "You Killed Maddie"[52], "Both Madeline parents now declared suspects"[53] and "Scapegoats"[54].

This occurrence easily demonstrates the relevance of this news value, to a more modern news landscape. However, if we pick apart some of the elements discussed in Chibnall's study then the value may seem to lose its weight, but not become entirely redundant.

The disappearance of Madeline resurfaced in the news in 2014 with an arrest being made, a headline from The Daily Star read: 'MADDIE new arrests within weeks'[55]. Whilst a headline from The Daily Mirror read "Maddie cops to make first arrests"[56]. These stories are seven years from when the event occurred. This gradual unfolding is not something that Chibnall believed would be reported on, as he explains in his book[57]. In hindsight, although this is the event gradually unfolding, it is arguable that this new revelation in the supposed crime has given it a new sense of immediacy. But at the core of it, this is a gradual unfolding event, which Chibnall argued would not be supported by immediacy in his book[58].

As already mentioned, we acknowledge the technological advancements since this study was published. For example, this supposed crime event surrounding Madeleine McCann has its own page on news websites such as the Independent[59] and even the BBC[60]. This is a platform that has dedicated a part of itself to the gradual unfolding of one event.

---

[52] 'You Killed Maddie' *Daily Record* (Glasgow, 8 September 2007).
[53] Giles Tremlett, 'Both Madeline parents now declared suspects' *The Guardian* (London, 8 September 2007).
[54] 'Scapegoats' *The Independent on Sunday* (London, 9 September 2007).
[55] Marc Walker, 'MADDIE new arrests within weeks' *The Daily Star* (24 April 2014).
[56] David Collins, 'Maddie cops to make first arrests' *Daily Mirror* (13 January 2014) 5.
[57] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[58] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[59] 'Madeleine McCann' (The Independent) <https://www.independent.co.uk/topic/madeleine-mccann> accessed 20 March 2020.
[60] 'Madeleine McCann disappearance' (The BBC) <https://www.bbc.co.uk/news/topics/c8255n4mp88t/madeleine-mccann-disappearance> accessed 20 March 2020.

Jewkes (2004) looked at updating Chibnall's work by creating values for the 'new millennium'. Many of her values are direct adaptations of Chibnall's work with a few additions[61]. By way of completion, Jewkes's set of values lists: Threshold; Violence; Simplification; Celebrity; Individualism; Children; Spectacle or Graphic Imagery; Proximity; Predictability; Risk; Sex; Conservative Ideology or Political Diversion (deterrence, distraction).

Jewkes's value of proximity concerns both spatial and cultural proximity. Both spatial and cultural proximity have similarities with immediacy. Jewkes describes cultural proximity as the relevance of an event to its audience[62]. Whilst both proximity and immediacy look at what the press deem relevant for storytelling. Chibnall argued it is what is new, Jewkes argues it is what is relevant. The familiarity between the two lies in the fact that what is culturally relevant is what is new and current, which is also supported by Harcup and O'Neil, as we saw above.

By saying "new" is what is culturally relevant we mean the happenings of now. If we look again at the newspaper articles from the Daily Telegraph with the headline 'Visit elderly relatives before they must self-isolate[63]', the South China Morning Post with the headline 'Hopes of turning point rise'[64] and the Financial Times with the headline 'Sunak budget takes aim at coronavirus'[65], we can see the news is reporting what is happening now, as that is what is relevant culturally and even spatially. It is worth noting that Jewkes states spatial and cultural relevance often intertwine.

Whilst it may seem like this is just one story that fits both news values if we look at the variety of news articles with reference to the supposed crime event of Madeline McCann (mentioned above), these stories demonstrate that, owing to new findings in an old event, it again became culturally relevant - much like how the new findings gave the event a new sense of immediacy. This shows us the link between the two values and that "new" news is what is immediately relevant to current culture.

Although Jewkes' value of proximity has taken inspiration from Chibnall's immediacy, proximity does consider factors which were not explicit in Chibnall's work on immediacy. Jewkes states that "proximity obviously

[61] Stephen Jones, *Criminology* (5thedn, OUP 2013).
[62] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).
[63] Christopher Hope, 'Visit elderly relatives before they must isolate' *The Daily Telegraph* (Hong Kong, 7 March 2020).
[64] Linda Lew, Gigi Choy, 'Hopes of turning Point Rise' *South China Morning Post* (7 March 2020).
[65] Chris Giles, George Parker, 'Sunak Budget takes aim at coronavirus' *Financial Times* (12 March 2020).

varies between local and national news,"[66] explaining that, whilst local media may report on muggings, national news may not unless there is overlap with other factors. This is the values spatial relevance.

Proximity has a two-fold nature, spatial and cultural. We can see cultural proximity amounts to cultural immediacy, meaning events that are happening immediately is what is culturally relevant. Spatial proximity amounts to spatial immediacy, events that are happening within the immediate space. A local news source would report on the immediate happenings in its surroundings as that is the relevant news, whilst a national news source would look at a wider geographical region (therefore, spatial immediacy).

Chibnall's immediacy can also be seen in other news selection models. Much like how Jewkes' adapted immediacy into proximity in 2003, her predecessor Chris Greer developed a selection model that had heavy emphasis on proximity. This included proximity in terms of what is relevance, much like Jewkes[67].

It is understandable how Chibnall's immediacy has inspired Jewkes' proximity. Whilst Proximity does become a two-fold version of immediacy and considers demographics in its application which justifies it being a value that can stand on its own, it is still an updated version of Chibnall's immediacy. Therefore, it makes Chibnall's immediacy still relevant today in its real-world application and in academic discourse.

To summarise, this news value does have relevance to the modern media landscape, but an element of the study may no longer apply: specifically, Chibnall's findings that gradually unfolding events do not fit well with immediacy. This may be an indication that certain notions of this value have become antiquated and, therefore, it no longer holds the same weight it did forty years ago though it is still relevant to the current media landscape.

3.3 Dramatization

This value is one that most people may agree with, regardless of the level of knowledge they may have in the subject area. Chibnall characterises this value as reinforcement through emphasis on the dramatic[68]. To reiterate,

[66] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).
[67] Chris Greer, *Sex Crime and the Media: Sex Offending and the Press in a Divided Society*(Routledge 2003).
[68] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).

news must emphasise action and drama so as to capture the audience's attention[69].

This may lead to banner headlines such as "*I Killed Maddie You're Next*"[70] (it is worth noting for observation that the headline has been placed directly next to an image of Kate Middleton[71]). The headline related to an attack on a woman in Portugal, where a woman claimed her attacker said those words. She remembered no other details, and the attacker was not identified as an individual with any connection to the disappearance of Madeleine McCann. There is no accounting in the story of credibility of the victims' story.

This value accepts that news is commercial knowledge in a competitive environment that considers profit[72]. Furthermore, he stresses that the purveyors want to grab the attention of the audience through impact.

Chibnall argued this is a particularly important value for reporting on political dissent (protests) and or things such as white-collar crimes[73]. Chibnall goes further to say that dramatization has the effect of trivializing dissent and makes audiences focus on the symptoms instead of the cause of social problems. He eloquently describes this by saying that the antics of protesters form the basis for the evaluation of the general worth of the protest. If any violence is associated with the protest, then this is taken and isolated from the underlying political convictions of the protest and transformed into spectacles for passive consumers of news. This was first suggested by Graham Murdock in 1969[74].

At the time of his study Chibnall points out that the mainstream media do not provide much coverage to domestic abuse, breaches of health and safety or pollution as these events lacked the dramatic impact journalists were after even though they occur much more frequently than stories of murder or prison escapes, which are heavily covered[75].

At this juncture, we should acknowledge that, apart from technical changes, there have been some social changes since the time of this study. Social

---

[69]For an interesting discussion on the impacts of dramatization of crime in the media see- Sheila Brown, *Crime and Law in Media Culture* (OUP 2003).
[70]James Murray, 'I Killed Maddie You're Next' *Sunday Express* (15 June 2014) 5.
[71]Note the juxtaposition of the headline with Kate Middleton. For an interesting study on placement of pictures see – Hedwig de Smaele, Eline Geenen, Rozane De Cock, 'Visual Gatekeeping- selection of News Photographs as a Flemish Newspaper' [2017] De Gruyter.
[72] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[73] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[74]for an interesting discussion on the press coverage of the London demonstration against the Vietnam war see- Graham Murdock, 'Political Deviance: the press presentation of a militant man demonstration' inStanley Cohen, Jock Young (eds), *The Manufacture of News: Social Problems, Deviance and Mass Media* (Constable 1973).
[75] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).

issues such as the MeToo movement, racial equality movements and LGBTQ+ rights have come into light[76]. We can observe that, what we care about and what events we associate with the element of drama has shifted since Chibnall's study, but drama still exists. Therefore, if we look at this value without the context of what Chibnall thought had an element of drama, we can see that this value still applies, with headlines such as '*I killed Maddie You're Next'*[77] or '*Did Your Country Kill My Girlfriend?'*[78].

To reiterate the standing relevance of Chibnall's dramatization, we can look at Jewkes value of threshold,[79] which appears to be a supplemented version of dramatization.

Jewkes describes threshold as a level of perceived importance or drama that must be achieved by an event for it to be considered newsworthy[80]. Its immediate relation to Chibnall's dramatization is clear. However, much like before, Jewkes supplements this value by saying that the threshold varies between local and national newspapers but, nonetheless, the threshold or level of drama is still a factor.

However, a notable differentiation between the two is that Jewkes' threshold acknowledges that the media try to keep a crime event fresh and alive by creating new threshold, i.e., new forms or an escalation of drama within the event. As already mentioned, when looking at immediacy, Chibnall's study did not account for gradual unfolding events. Whilst we surmised that new changes may have given the event a new sense of immediacy, new changes would also deliver a new sense of drama, which can be seen in effect if we look at the various stories from the past decade upon the supposed crime events surrounding Madeline McCann (stories mentioned above). Jewkes mentions this explicitly, thereby providing important supplementary observations to immediacy and dramatization.

Threshold is not the only value in Jewkes' model that has been inspired by dramatization. Dramatization also inspired Jewkes' value risk. Jewkes mentions that modern life is characterised by risks and that the media will exaggerate potential risks through adding drama and that messages about

[76] Mark Abadi, '11 dramatic ways the world has changed in the last 20 years alone' *Business Insider* (29 March 2018) <https://www.businessinsider.com/progress-innovation-since-1998-2018-3?r=US&IR=T#and-numerous-social-issues-are-finding-their-way-into-the-spotlight-11> accessed 21 March 2020.
[77] James Murray, 'I Killed Maddie You're Next' *Sunday Express* (15 June 2014) 5.
[78] Patrick Hill, 'Did Your Country Kill My Girlfriend' *Sunday Mirror* (7 April 2019) 465.
[79] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).
[80] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).

prevention will only be incorporated into a story that is infused with drama[81].

If we look further into Jewkes' model and at the model's value of violence or conflict, this value is described as the media's desire to present dramatic events in the most graphic possible fashion[82]. This value pulls from various other influences throughout the study of news selection models. One such example is the work of Hall (in 1978), who observed that any crime can be lifted into news visibility if violence becomes associated with it[83]. This observation shows how important the element of drama is as it shows up in threshold, risk, violence and even sex (discussed further below).

Jewkes' model is not the only one to have benefited from Chibnall's dramatization. Dennis MacShane's study in 1979 named scandal as one of its values[84], which involved drama that becomes associated with an event once it is attached to a notable or elite person or nation. Whilst Dennis MacShane's value is influenced by a mix of dramatization and personalization (discussed further below) it certainly considers drama[85]. If we travel forward to 2017 and look at Harcup and O'Neil's' study, their news selection model accepts that drama in all its forms is a factor that makes news more newsworthy[86].

Whilst there are notable supplementary comments given by Jewkes, dramatization has inspired many of the values that can be found in Jewkes' model and is weaved throughout Jewkes' news selection model. Furthermore, dramatization has a presence in many studies as we have mentioned above and is weaved through decades of research, reiterating the continued relevance of Chibnall's value of dramatization in its entirety.

3.4 Personalization

"News is not simply about instantly packaging drama; it is about personalities"[87]. Individuals involved in the story will receive more attention than the actual issues. Chibnall, refers to this as the cultural fetishism of modern society[88]. If it is a celebrity, then it is even better. With

---

[81] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).
[82] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).
[83] Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke, Brian Roberts, *'Policing the crisis: mugging, the state and law & order'* (2ndedn, Red Globe Press 2013).
[84] Dennis MacShane, *Using the Media* (Pluto Press 1979).
[85] Dennis MacShane, *Using the Media* (Pluto Press 1979).
[86] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[87] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[88] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).

modernization came the proliferation of celebrities and with the development of mass entertainment media these celebrities were thrown to the forefront of society[89]. Celebrities and their lives and social relationships became an object of interest, identification, and collective evaluation. A projection of what society may think is ideal. This interest of society was exploited and became a commercial interest. We can see that, if the story revolves around a celebrity, the personalization value is tenfold and is a clear method of attracting the audience.

We can see this value in practice if we observe three news articles from the same week, regarding the same event, the event being the false accusations of rape on the JLS star Ortis Williams, and ultimately the courts holding he is innocent. The Telegraph released an article titled '*Former JLS singer cleared of raping fan after court sees CCTV footage of pair "acting like couple" outside club*'[90]; the BBC released an article titled '*JLS star Oritse Williams not guilty of rape*'[91]; and The Sun released an article titled '*'I JUST COLLAPSED' Just like JLS star Oritse I was falsely accused of rape – his nightmare is just beginning*'[92].

Whilst all three are a clear example of how this value works, the story by The Sun illustrates a further point. The story by The Sun is not actually about Ortis Williams; it is to do with Liam Allan who was also falsely accused of rape in 2017. It shows that a link with a celebrity, no matter how disparate, brings a new sense of excitement to the story. Also, that an event can receive an extra value after it has unfolded much like here with the addition of a celebrity at a later stage.

Whilst celebrities provide a clear look into how personalization works, they are not the beginning and end of the value. As personalization places an emphasis on the person as opposed to the events itself, ideally there will be an innocent victim,[93] one that may be considered ideal. A victimless crime is far less likely to garner the attention of the consumer[94]. Personalization provides an object of identification for the audience so that they can read

---

[89] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[90] Gareth Davies, 'Former JLS singer cleared of raping fan after court sees CCTV footage of pair 'acting like couple' outside club'*The Telegraph* (28 May 2019) <https://www.telegraph.co.uk/news/2019/05/28/former-jls-singer-cleared-raping-fan-court-sees-cctv-footage/> accessed 12 April 2020.
[91] BBC, 'JLS star Oritse Williams not guilty of rape' *BBC* (Birmingham, 28 May 2019) <https://www.bbc.co.uk/news/uk-england-birmingham-48380382> accessed 12 April 2020.
[92] Liam Allan, ''I JUST COLLAPSED' Just like JLS star Oritse I was falsely accused of rape – his nightmare is just beginning' *The Sun* (30 May 2019) <https://www.thesun.co.uk/news/9185590/oritse-williams-rape-liam-allan/> accessed 12 April 2020.
[93] Doris Graber, *Crime News and the Public* (Praeger Publishers 1980).
[94]For a discussion on the mechanics for identification through association with a celebrity see - Francis Alberoni in - Dennis McQuail, *'Sociology of Mass Communications'* (Penguin 1972).

and think to themselves ‘I could relate to that’, and, regardless of the effect it has on society,[95] it is a trope that has remained throughout decades of reporting.

Galtung and Ruge’s niche research resulted in their work not bearing the same weight as Steven Chibnall’s, or become the focus of this report. Personalisation is likely to have been inspired by Galtung and Ruge’s reference to elite nations and reference to elite persons[96] from 1965. Whilst Chibnall looked at it as a form of creating identification and ability to relate to the story, Galtung and Ruge only concerned the values with the attachment of celebrities or big nations[97].

In 1979 Dennis MacShane included the value individualisation[98], with particular reference to political reporting; in 1986 Nil Christie stated a theory called the ideal victim theory, based entirely on being able to identify with the victim[99]; in Harcup and O’Neil’s first study they identified a power elite and celebrity within their model[100] and upon updating their work in 2017 they retained celebrity in their model[101]. Simply acknowledging that a degree of personalisation exists in countless models demonstrates how important and relevant Chibnall’s work on news values is.

Many have included a form of personalization within their news selection model and Jewkes’ work to update Chibnall’s values is no exception to this. Much like MacShane, Jewkes referred to this as individualisation. In her book she characterises the value as the media engaging in a process of personalisation to create a human-interest appeal[102], which is still in practice as we can see from the three stories we observed surrounding the JLS star Ortis Williams. She furthers the notion put forward by Chibnall, that the media create a form of identification so that people can relate to and understand the stories. Jewkes puts this eloquently whilst looking at the white-collar crime committed in 2009 by Bernard Madoff in USA, where

---

[95]For an interesting discussion on the effects of personalization on informative reporting and consumption see - John Fiske, *Television Culture* (Routledge 1987).

[96] Johan Galtung, Mari HolmboeRuge, ‘The Structure of Foreign News. The Presentation of the Congo, Cuba, and Cyprus Crises in Four Norwegian Newspapers’ [1965] Journal of Peace Research.

[97] Johan Galtung, Mari HolmboeRuge, ‘The Structure of Foreign News. The Presentation of the Congo, Cuba, and Cyprus Crises in Four Norwegian Newspapers’ [1965] Journal of Peace Research.

[98] For an interesting take on a smaller model of news values focused political reporting see - Dennis MacShane, *‘Using the Media’* (Pluto Press 1979).

[99] Nils Christie, ‘The Ideal Victim’ in Ezzat Fattah, *From Crime Policy to Victim Policy* (Macmillan 1986).

[100] Tony Harcup, Diedre O’Neil, ‘What is News? Galtung and Ruge Revisited.’ (2001) Journalism Studies 2 (2).

[101] Tony Harcup, Diedre O’Neil, ‘What is News? Galtung and Ruge Revisited (again).’ (2017) Journalism studies 18 (12).

[102] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).

the media focused on the figure at the centre of the event as opposed to the complexity of the events that happened[103].

Individualisation is not the only value Chibnall inspired in Jewkes' news selection model. There is a further value that is called celebrity. Jewkes characterised this as the obsession with celebrity and the likelihood of reporting if there is a well-known name attached to the story[104]. Much like Galtung and Ruge's reference to elite persons, this value only concerns itself with the attachment of a well-known name to an event as opposed to identification, which in hindsight Jewkes covered with individualisation. We can see that Jewkes has effectively split the two observations Chibnall made in his value of personalisation, that celebrities garner more attention and that the media use a process of personalisation to create a sense of relatability in a story.

Nonetheless, there have been no changes aside from superficial ones to Chibnall's personalisation over the course of four decades. It remains true and intact and has even inspired a whole theory to crime news reporting called the ideal victim theory,[105] unlike immediacy, which has taken into consideration factors such as geography and demographics. This reiterates the continued importance of Chibnall's work to the current media landscape.

3.5 Simplification

Chibnall describes simplification as the oversimplification of reality and eliminating shades grey, reducing themes and the use of binary oppositions, such as good versus bad, to allow the story to be absorbed easily by the reader[106]. As Arthur Christiansen of the Daily Express put it, 'a story that cannot be absorbed on the first time of reading is a bad news story'[107]. This value itself is not explicitly prominent in the studies that we have researched for this report but may exist in other studies that we have not discussed.

However, in Jewkes' work to update Chibnall, she retained this value, with little to no change as to its nature. Much like Chibnall, Jewkes describes the value as reducing the number of themes within a story and to restrict the possible meaning inherent to the story[108]. Jewkes found this to be especially true in crime reporting as, although crime trends are complex, they are only reported in the news once official statistics are released so that they can be

---

[103] Yvonne Jewkes, *Media & Crime* (3rd edn, Sage Publications Ltd 2015).
[104] Yvonne Jewkes, *Media & Crime* (3rd edn, Sage Publications Ltd 2015).
[105] Nils Christie, 'The Ideal Victim' in Ezzat Fattah, *From Crime Policy to Victim Policy* (Macmillan 1986).
[106] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[107] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[108] Yvonne Jewkes, *Media & Crime* (3rd edn, Sage Publications Ltd 2015).

used as a hook for the story[109]. It seems that this ignores the reality and shifts the focus of a story elsewhere and uses the statistics as a number to flaunt at the audience as opposed to garner an understanding of how crime trends really operate (examples of this will be discussed when looking at structured access below).

Where this value is present, it takes away critical interpretation from its readers and guides them to one unanimous opinion. I believe it to be almost like treating the reader like a pre-school child to be taught or simply assumes all readers possess the same level of intellect.

It is important to explicitly state whether one of Chibnall's value is or is not present in another study. It does not dictate if the value is still relevant.

When Chibnall conducted his study, demographics were not a big concern, only becoming present in his values when necessary, which can be seen from his work[110]. It is important to consider other factors when we are looking at this value. Over time the amount of news outlets has changed, each with different target audiences;[111] therefore, it only stands to reason that they cater to their intended audiences which will have varying intellects and interests. This means some readers will be more interested in knowing complex details whereas some will only be concerned with a snippet of information. This would also affect the packaging of the information, where stories revolving the same topic will be outfitted differently depending on the audience.

We can observe this phenomenon by looking at three different stories all surrounding the same topic, from the same day (4th May 2020), regarding the Covid -19 Vaccine (this is the current news that is dominating news platforms and pushing all other news, including crime news, out of view[112]). The Daily Telegraph released a front page headlined '*Johnson; Vaccine is Endeavour of Our Lives*'[113]; the Daily Express released front page headlined '*BORIS LEADS £6BN GLOBAL RACE FOR VACCINE*'[114], denoting the issue of searching for the vaccine, to a race between nations; a headline by The Times read '*Vaccine is only way to beat virus PM*

---

[109] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).

[110] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).

[111]Jigsaw Research, 'News Consumption in the UK: 2019' (Ofcom, 24 July 2019) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/157914/uk-news-consumption-2019-report.pdf> accessed 1 January 2020.

[112] Kenneth Andrews, Neal Caren, 'Making the News: Movement Organisations, Media Attention and the Public Agenda' (2010) American Sociological Review 75 (6).

[113]Anna Mikhailova, 'Johnson: Vaccine is Endeavour of our lives' *The Daily Telegraph* (4 May 2020).

[114] Sam Lister, 'BORIS LEADS £6BN GLOBAL RACE FOR VACCINE' *The Daily Express* (4 May 2020) 4.

insists'[115], the story itself being concerned with the vaccine, the procedure, the effects and what happens in the meantime in and outside of our country. This illustrates that different news providers cater, and package news differently based on their target audience, regardless of the simplification value.

With demographics being a bigger consideration since Chibnall's study, we must see if simplification still applies to the way news is consumed now. If we look at the alleged crime event surrounding Liam Allan and three stories from three different papers, from the same date but addressing the same issue, we may get some answers. A story by The Guardian[116] focuses on the prosecutor and his critique of the current Crime Prosecution Service whilst the BBC [117] and The Independent [118] focus on the apology by the Metropolitan Police Force. Although there are different themes in the different stories, they are all concise as to what they are addressing.

The underlying theme of the stories happens to be the failure of the CPS, and each story maintains that singular theme throughout, as to sculpt the readers' destination and thoughts by the time they have finished reading the story. This illustrates that simplification is still very commonplace to the current media landscape. Whilst it may not have found a home in many of the news selection models, it is still relevant.

Besides this, in Jewkes' study she compares the restrictions that simplification places on the themes of news reporting to the range of possible meanings or opinions that people can construe from novels, poems and films[119].

We should also consider that, if we were to apply this value to different forms of news apart from crime or niche sources of news, it may not hold the same weight. Sources such as magazines/articles/news outlets that are designed to deliver mass amounts of information in their news reporting may not restrict themselves to one theme and leave the information for the consumer to make of as they please. Such an example would be an article

---

[115]Chris Smyth, 'Vaccine is only way to beat virus, PM insists *The Times* (4 May 2020) 2.

[116] Owen Bowcott, 'Solicitor for student in rape case criticises police and CPS' *The Guardian'* (30 January 2018) <https://www.theguardian.com/uk-news/2018/jan/30/met-police-and-cps-apologise-to-man-after-collapse-of-case> accessed 12 April 2020.

[117] BBC, 'Met Police apologise for Liam Allan rape case errors' *BBC* (London, 30 January 2018) <https://www.bbc.co.uk/news/uk-england-42873618> accessed 12 April 2020.

[118] Samuel Osborne, 'Liam Allan: Met Police apologise to 22-year-old man falsely accused of rape after failing to disclose crucial text messages' *The Independent* (30 January 2018) <https://www.independent.co.uk/news/uk/crime/liam-allan-met-police-rape-accusation-false-evidence-disclosure-arrest-mistake-detectives-a8184916.html> accessed 12 April 2020.

[119] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).

regarding the closure of the large hydrogen collider;[120] the information, whilst concise, does not necessarily follow a theme; its aim is not to lead readers to a conclusive opinion. This illustrates that the relevance of any news value may change with the demographic feature of the news source we try and apply the value to.

3.6 Titillation

Titillation is a value that has found its home in many news selection models and, considering what the value stands for, it does not come as a surprise. At its core titillation can be boiled down to the phrase, 'sex sells'.

Chibnall states that 'if the press lives by disclosure, it thrives on scandal'[121]. He goes on to say that it mostly applies to sexuality in all its forms as well as to other forms of illicit hedonism. The press thrives off this as it allows the reader to get close to the deviant spectacle and not pollute their morality, thankful to the degree of separation created by the newspaper[122]. This makes titillation a commercial context[123] in which the media can set the activities of personalities (we can reference the three stories surrounding Ortis Williams to observe this in practice).

In the first instance we can see that titillation includes far more than sex; it also includes drugs, bondage and any act of pleasure that may be deemed immoral by the "wholesome" society we live in. Because of this, many issues fall within the values purview and there is no surprise that the value would still be relative to today's media landscape.

Whilst titillation is a value of its own, within itself it acknowledges that parts of it are interwoven with others, namely, personalisation. Chibnall's work has stated that, if a celebrity is attached to a story that has the presence of titillation, the story gains newsworthiness significantly. This shows us that Chibnall's values can be interwoven with each other and do not necessarily stand alone.

Interestingly, titillation is the first time Chibnall has considered demographic within his values. With his first paragraph on titillation Chibnall outright says this may not apply as much to 'The Financial Times

[120] Emily Conover, 'The Large Hadron Collider is shutting down for 2 years' *Science News* (3 December 2018) <https://www.sciencenews.org/article/cern-large-hadron-collider-shutting-down-2-years> accessed 12 April 2020.

[121] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).

[122] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).

[123]To understand the effects of over reporting on sexual offences see -Chris Greer, *Sex Crime and the Media: Sex Offending and the Press in a Divided Society*(Routledge 2003); and Jason Ditton, James Dufy, 'Bias in the newspaper reporting of crime news' (1983) BJC 23 (2).

as it does to The Sun'[124]. This statement bears true to this day. A tabloid, such as 'The News of The World' may have a high content of sex stories, as was the case during the year 2000 when they ran a name and shame campaign to name convicted paedophiles[125], leading to a significantly higher number of sex stories in their paper compared to their already high amount.

This shows us that the relevance of titillation to current news articles is a question of degree as opposed to a simple 'yes' or 'no'. We could interpret illicit hedonism to cover all criminal acts that would be far from the material Chibnall produced, thereby making it apply to every crime story or the opposite.

Chibnall's consideration of the demographic still applies. In our current media landscape we still have tabloids, such as The Sun, that thrive off scandals involving acts of sex and we have other news formats that pay far less attention to affairs and are more concerned with geopolitics, for instance. However, it is worth noting that titillation has developed a much closer relationship with personalisation over time, as tabloids report heavily on celebrities, and even more so if there is a scandal present (these links can be observed in the three stories regarding the false accusations of Ortis Williams).

Whilst we can explore the links Chibnall's titillation has with other news models, we shall only do so for the sake of completion. As its relevance has already been established. Denis MacShane included scandal as one of his values, which considered a mix of personalisation and titillation, i.e., sexual scandals including high profile individuals[126]. The similarity between Chibnall's values and Dennis MacShane can easily be ascertained. If we go further along, it takes a far more brash name in Jewkes' work, sex. Much like Chibnall, her description of this value can be boiled down to the phrase, 'sex sells'[127].

3.7 Conventionalism

There is no better way to describe Chibnall's conventionalism other than the words of Stephen Jones: 'Events, however unusual, must be placed in a conventional context. Readers must be able to feel familiar with the story's setting'[128]. The reader must be able to understand and maybe even relate to

[124] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[125] Stephen Jones, *Criminology* (5thedn, OUP 2013).
[126] Dennis MacShane, *Using the Media* (Pluto Press 1979).
[127] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).
[128] Stephen Jones, *Criminology* (5thedn, OUP 2013).

the story even if through an association created by fear of their own safety[129]. Chibnall's conventionalism acknowledges interpretive reporting from journalists, but includes it only to a degree, and relies more on familiarity within a crime event[130].

It is worth noting that, although crime events that can be reported conventionally are more likely to be reported on, this may lead to crime events becoming identified as the same as each other if they have a similarity[131].

So, we can ascertain that, with each new reporting of a crime event, it may 'just become another crime'. A stabbing may be related to another stabbing and, if, incidentally, there are three or four stabbings unrelated to each other, these may even be linked to present a crime spree. This can be seen in an article presented by the Evening News, where they linked two incidents in opposite parts of London, citing it as a crime spree[132]. Whilst this one story does give us an insight to how it may operate and, if it still operates today, the degree of interpretive reporting has changed since Chibnall's study.

If we look at new media, we can see that fresh takes are sought after in the expansive media landscape,[133] events that can be linked, far beyond what is conventional, to garner the audience's attention, thereby, emphasising dramatization, personalisation or novelty of events as opposed to conventionalism.

Whilst we can see the real-world application of Chibnall's conventionalism still exists, it has not found a new home in many other news selection models that exist. The closest it has come is within Jewkes' simplification, where she picks up on the lack of interpretive reporting and within proximity, where things must be relatable. Regardless of this, the value does still hold relevance but not to the same degree because news is no longer as concerned with conventional angles as it was in the past.

3.8 Structured Access

[129] Stephen Jones, *Criminology* (5th edn, OUP 2013).
[130] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[131] for a discussion on the potential effects of conventionalism on the perception of crim see- Graham Murdock, 'Political Deviance: the press presentation of a militant man demonstration' inStanley Cohen, Jock Young (eds), *The Manufacture of News: Social Problems, Deviance and Mass Media* (Constable 1973).
[132] Jacob Jarvis, 'Two men stabbed in London last night as knife crime spree continues in the capital' *Evening Standard* (17 March 2019) <https://www.standard.co.uk/news/crime/two-men-stabbed-in-london-last-night-as-knife-crime-spree-continues-in-the-capital-a4093816.html> accessed 12 April 2020.
[133] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).

Structured access within a story is simply that stories are reinforced by 'experts' in a particular field[134] - authoritative figures that associate their credibility with the news (primarily government sources). In 1991 Ericson *et al*[135] made the point that these sources or experts rarely, if ever, provide evidence to back their claims. To see both Chibnall's and Ericson *et al*'s observations in practice, we can simply look at Donald Trump's vapid claims surrounding "Obamagate"[136].

To get a better understanding of structured access in practice, we can look at three stories regarding an increase in crime statistics. A story by The Guardian, titled '*Knife offences hit record high in 2019 in England and Wales,*'[137] regards an increase in knife crime and, to gain credibility, it associates the article directly with national statistics from the executive body of the UK's National Statistics Authority, a government department. This ties the story directly to the Government's credibility, reinforcing the story. Another story, by the BBC, follows the exact same beat, line by line with the headline, '*Knife crime in England and Wales rises to record high, ONS figures show.*'[138] It directly associates the story with the statistics on knife crime by the Statistics Authority. A story by the Economist, headlined '*Domestic violence has increased during coronavirus lockdowns,*'[139] regards an increase in domestic abuse. Notably, this is an American news source that has done what its British counterparts have, citing their own statistical authority. This serves to illustrate that news values do have a universal element and can apply to global media. Moreover, this illustrates the continued relevance of structured access in today's media landscape although it may look slightly different than how Chibnall intended.

We can also observe that, once an official statistic is released, it is likely to be reported upon, as it has been by various news articles above.

---

[134] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[135]Richard Ericson, Patricia Baranek, Janet Chan, *'Representing Order: Crime, Law and Justice in the News Media'* (OUP 1991).
[136] David Smith, 'What is 'Obamagate' and why is Trump so worked up about it?' *The Guardian* (12 May 2020) <https://www.theguardian.com/us-news/2020/may/12/what-is-obamagate-and-why-is-trump-so-worked-up-about-it> accessed 15 May 2020.
[137] Jamie Grierson, 'Knife offences hit record high in 2019 in England and Wales' *The Guardian* (23 April 2020) <https://www.theguardian.com/uk-news/2020/apr/23/knife-offences-hit-record-high-in-2019-in-england-and-wales> accessed 15 May 2020.
[138] BBC, 'Knife crime in England and Wales rises to record high, ONS figures show' *BBC* (23 April 2020) https://www.bbc.co.uk/news/uk-52395986> accessed 15 May 2020.
[139] The Economist, 'Domestic violence has increased during coronavirus lockdowns' *The Economist* (22 April 2020) <https://www.economist.com/graphic-detail/2020/04/22/domestic-violence-has-increased-during-coronavirus-lockdowns> accessed 15 May 2020.

However, what does this value mean in the modern landscape? We now have what we call influencers, and celebrities are given more attention than before. These people are essentially seen as an authoritative figure and have their own form of credibility, simply by associating themselves with an event or a story. Studies show evidence that celebrities (we refer to social media, influencers, and the mainstream) influence the choices made by consumers.[140] This also extends to social and political ideas. In 2012 John Street explored the link between celebrities and how they create social and political change, finding their celebrity holds credibility and influence.[141] Whilst this kind of change is expected from a politician, it is now within the power of celebrities.[142]

Though we can link the association between these individuals and the event to personalisation, this differs as the celebrity is not directly involved or has any relation to the crime event (as we saw in the stories regarding Ortis Williams). Here they are the bystander giving their account of the event or their opinion.

To contextualise this, we can look at the MeToo movement to highlight the level of sexual harassment and sexual assault women suffer through. It was given life by an activist called Tarana Burke, but only jumped into the light once Alyssa Milano tweeted the movement[143] which garnered responses from several high-profile names. This gave the movement an elevated level of credibility and incited reform[144].

We can see that structured access is still relevant to the modern media landscape though its form may have changed, and it may find itself intertwined with celebrity. But, this is still a truly relevant news value to the current medial landscape.

---

[140]Delonia Cooley, Rochelle Parks-Yancy, 'The Effect of Social Media on Perceived Information Credibility and Decision Making' (2018) 18 JIC <https://www.tandfonline.com/doi/abs/10.1080/15332861.2019.1595362> accessed 15 May 2020.

[141] John Street, 'Do Celebrity Politics and Celebrity Politicians Matter?' (2012) The British Journal of Politics and International Relations <https://journals.sagepub.com/doi/abs/10.1111/j.1467-856X.2011.00480.x> accessed 15 May 2020.

[142] For an interesting discussion on celebrities endorsing politics see- Craig Garthwaite, Timothy Moore, 'The role of celebrity endorsements in politics: Oprah, Obama and the 2008 democratic primary' (2008) JEL <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.175.8596&rep=rep1&type=pdf> accessed 24 April 2020.

[143] Abby Ohlheiser, 'The woman behind 'Me Too' knew the power of the phrase when she created it — 10 years ago' *The Washington Post* (Washington 19 October 2017 <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> accessed 24 April 2020.

[144] For further information on this movement see- 'History & Vision' (me too movement) <https://metoomvmt.org/about/> accessed 24 April 2020.

3.9 Novelty of Events

The final of Chibnall's eight news values is the novelty of events. Whilst all the other values present a degree of being interwoven with each other and being thematic. This value brings in unexpected, beautiful, glorious randomness. It states that events that are unusual or original are likely to garner the reader's attention[145].

Immediately, we can see the appeal of this news value and the way that it operates is clear and simple. Events that are outside the norm interest us; headlines or stories like '*Victim in tears after spotting child abuser in Asda who was supposed to be deported*'[146] or '*Shocking moment stranger attacks a man with a HAMBURGER and repeatedly punches his face in unprovoked attack in Manhattan*'[147], draw us in (and yes you read that correctly, a hamburger). Events like these are not everyday occurrences, which sparks our curiosity and pulls us in. This value does not associate itself with credibility of the evidence but more with the dispersion of the events from everyday life[148], making the need for the presence of other factors less important.

Whilst it is clear this value still applies as we can identify it in the current media landscape, we need to consider the effect of demographics. The two headlines mentioned are from news sources that would be considered as tabloids. Novelty of events may apply more to tabloids than to other news platforms like The Guardian. It is also worth taking a quick moment to think that what is unexpected may vary from reader to reader and audience to audience. Therefore, it stands to reason that it may be present, but it may take different forms in different platforms.

From an academic viewpoint this news value has found a home in other news selection models. Dennis MacShane calls it unexpectedness,[149], Harcup and O'Neil[150] call it surprise,[151] Greer calls it the Shock Factor[152]

---

[145] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[146] John Scheerhout, 'Victim in tears after spotting child abuser in Asda who was supposed to be deported' *The Mirror* (14 May 2020) <https://www.mirror.co.uk/news/uk-news/victim-tears-after-spotting-child-22025202> accessed 15 May 2020.
[147] Hannah Skellern, 'Shocking moment stranger attacks a man with a HAMBURGER and repeatedly punches his face in unprovoked attack in Manhattan' *The Daily Mail* (19 February 2020) <https://www.dailymail.co.uk/news/article-8019193/Shocking-moment-stranger-attacks-man-HAMBURGER-repeatedly-punches-face-unprovoked-attack.html> accessed 15 May 2020.
[148] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).
[149] Dennis MacShane, *Using the Media* (Pluto Press 1979).
[150] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited.' (2001) Journalism Studies 2 (2).
[151] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[152] Chris Greer, *Sex Crime and the Media: Sex Offending and the Press in a Divided Society*(Routledge 2003).

and Jewkes calls it predictability.[153] This value is clearly present in both modern reporting of crime events and academic study.

3.10 Summary

From the foregoing discussion we can see that Chibnall's values are still relevant although the degree of relevance or the form of the values may have changed over time. But it does still retain relevance to our current media landscape. We have also seen that demographics play a role in the application of these values, making them more relevant to one platform than another.

However, we do need to understand that there are other news selection models that are out there, and they may bear different degrees of relevance than Chibnall's work. This is what we will now discuss.

4 Harcup and O'Neil

4.1 Introduction

We are aware that other studies and news selection models exist. Of those Harcup and O'Neil have conducted two studies, which can be considered relevant to the same extent as Chibnall's.

Their first study in 2001[154] was to update the news values of Galtung and Ruge[155]. There they created a set of ten values, which retained the work of Galtung and Ruge and was consistent with Chibnall's work. Their second study, in 2017, was to update their own set of news values they created in 2001, with a consideration for the modern media landscape[156].

4.2 Harcup and O'Neil 2001

In their 2001 study of Galtung and Ruge's values there are many values that have similar qualities to what we have already discussed. To rapidly understand these values, we will compare them to work already discussed (above), where similarities exist.

These values are: The Power Elite, regarding stories concerning powerful individuals, organisations, or institutions, which consists of elements of personalisation and structured access; Celebrity, which concerns people who are famous, echoing the celebrity element of personalisation;

[153] Yvonne Jewkes, *Media & Crime* (3rdedn, Sage Publications Ltd 2015).
[154] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited.' (2001) Journalism Studies 2 (2).
[155] Johan Galtung, Mari HolmboeRuge, 'The Structure of Foreign News. The Presentation of the Congo, Cuba, and Cyprus Crises in Four Norwegian Newspapers' [1965] Journal of Peace Research.
[156] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).

Entertainment, which regards stories revolving around showbusiness, human interest, animals, drama and entertaining photographs (this has elements of dramatization, personalization, and titillation); Surprise, which is akin to novelty of events; Relevance, which is akin to Jewkes's proximity; Magnitude, which states stories that are perceived as sufficiently significant either in the numbers of people involved or its potential impact, much like proximity by Jewkes.

All the above values hold true and are relevant to the current media landscape and the reporting of crime. So, what about the new ones?

Harcup and O'Neil list 'bad news' as one of their new values. Bad news believes that stories with particularly negative overtones, such as conflict or tragedy, are newsworthy[157]. This value is not made to assess crime reporting but all reporting. However, it does still bear relevance. Ditton and Duffy found that violent or sexual crimes make up 2.4% of recorded crime, yet they make up 45.8% of news coverage[158]. Williams and Dickinson found that newspapers devote more than 60% of crime stories to reporting crimes of interpersonal violence[159]. So, the sheer fact that crime news is crime news makes it likely to be reported on. The worse the crime, the more newsworthy it is.

This value is also much like the observation, made by Hall *et al*, that any crime event can be lifted into visibility if it is associated with violence[160].

Next, we have good news. Good news regards stories with particularly positive overtones such as rescues and cures, as newsworthy[161]. Though this value may seem irrelevant to crime reporting, we could argue it applies to it to some extent, particularly, in events where an officer saves someone, and this makes headlines such as "Police officer saves life of young girl found standing on wrong side of bridge in West Yorkshire[162]". However, one must note that in headlines such as these, whilst they are related to police officers, an element of the crime prosecution service, they are often, if not always, devoid of crime. So, this value may not bear relevance for application to crime reporting.

---

[157] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited.' (2001) Journalism Studies 2 (2).
[158] Jason Ditton, James Dufy, 'Bias in the newspaper reporting of crime news' (1983) BJC 23 (2).
[159] Paul Williams, Julie Dickinson, 'Fear of Crime: read all about it?' (1993) BJC 33 (1).
[160] Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke, Brian Roberts, *Policing the crisis: mugging, the state and law & order* (2nd edn, Red Globe Press 2013).
[161] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited.' (2001) Journalism Studies 2 (2).
[162] Katherine Johnson, 'Police officer saves life of young girl found standing on wrong side of bridge in West Yorkshire' *examiner live* (28 March 2020) <https://www.examinerlive.co.uk/news/west-yorkshire-news/police-officer-saves-life-young-17998640> accessed (1 April 2020).

Another value is follow-up. Follow-up is a value much different to the ones we have so far looked at. Follow-up states that stories about subjects already in the news are likely to be more newsworthy[163]. This is a direct contradiction to Chibnall's observation that the media cannot deal with gradually unfolding events. We have seen from events such as the supposed disappearance of Madeline, that has been in the media for a decade, that this value applies to crime reporting. Although it is an update of Galtung and Ruge's work, it provides a bridging to a gap in Chibnall's work.

The last value we have is the newspaper agenda. Newspaper agenda believes that stories that set or fit the news organisations' own agenda are newsworthy[164]. We can see that this value focuses heavily on demographics but look at it through the scope of how a paper wants its overall image to be perceived. However, to assess this we need to understand the intricacies behind the driving forces of newspapers; their agendas may vary from, and not be limited to, deterrence, awareness or political aims[165]. To understand all the underlying agendas of a news organisation and its mechanics a more thorough analysis will be needed of the research. Whilst we could look at this perspective as a more relevant form of selecting crime news, this would require a deviation from the key purpose of this paper - to understand the relevance of Steven Chibnall's existing values[166]. In the meantime, we can confirm that such a thing exists[167]. Therefore, we need to keep this value in the back of our mind and acknowledge that it holds relevance in the modern media landscape.

4.3 Harcup and O'Neil 2017

Harcup and O'Neil delivered a comprehensive set of values in 2001, considering issues that Chibnall, Dennis MacShane or Jewkes did not. However, with an ever-changing media landscape, they returned to their work in 2017 to update it in the light of all the technological and social changes that have happened.

When updating their 2001 work, Harcup and O'Neil have kept many of their original values (Bad news, Surprise, Entertainment, Follow-up, The Power

---

[163] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited.' (2001) Journalism Studies 2 (2).
[164] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited.' (2001) Journalism Studies 2 (2).
[165] Stephen Jones, *Criminology* (5th edn, OUP 2013).
[166] For an interesting discussion on agendas of the mass media see- Maxwell McCombs, Donald Shaw, 'The Agenda-Setting Function of Mass Media' (1972) The Public Opinion Quarterly 36 (2).
[167] Stephen Jones, *Criminology* (5th edn, OUP 2013).

Elite, Relevance, Magnitude, Celebrity, Good news, and Newspaper agenda, now called News Organisations Agenda) to include all platforms[168].

Furthermore, they have included drama within their news selection model, which is much like Chibnall's dramatization and Jewkes' threshold, and a branch of Harcup and O'Neil's entertainment[169].

There are four new additions to their original set of values. The first is exclusivity. Exclusivity states that being available first to the news organisation because of interview, letters, investigations, surveys, polls and so on, is more newsworthy[170]. We can see that this value does not directly apply to crime reporting and is applicable as a generalisation to reporting. Owing to being applicable to reporting at a general level, it vicariously becomes relevant to the reporting of crime news. The second is conflict, which very much echoes Hall's observation that any event associated with violence can be lifted into news visibility[171].

We can see that exclusivity and conflict do not consider the technological changes since Chibnall's study but are more additions to close off gaps in Harcup and O'Neil's initial work. However, the last two values, shareability and audio-visuals, are truly relevant to the current media landscape, and instil what the current media landscape is.

Shareability states stories that are thought likely to generate sharing and comments via Facebook, Twitter, and other forms of social media[172] are newsworthy. In 2018, 64% of the UK population consumed their news through the internet[173] and 44% of UK adults got their news via social media[174]. Assessing these statistics, we can see that this value is one of the most relevant considerations to the current media landscape, and that it holds an important role.

---

[168] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[169] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[170] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[171] Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke, Brian Roberts, *Policing the crisis: mugging, the state and law & order* (2nd edn, Red Globe Press 2013).
[172] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[173] Jigsaw Research, 'News Consumption in the UK: 2018' (Ofcom, 2018) <https://www.ofcom.org.uk/__data/assets/pdf_file/0024/116529/news-consumption-2018.pdf> accessed 1 January 2020.
[174] Jigsaw Research, 'News Consumption in the UK: 2018' (Ofcom, 2018) <https://www.ofcom.org.uk/__data/assets/pdf_file/0024/116529/news-consumption-2018.pdf> accessed 1 January 2020.

We can see this value applies to all the social media platforms, such as Twitter, Facebook, Snapchat, and Instagram. All of which now deliver news and are at the forefront of our current media landscape.

But, what makes a story more shareable? Schaude and Carpenter, say that precisely what qualities give one story more shareability than another is hard to define[175]. However, they examined news that was favoured by readers and observed that the value proximity was present in 76 percent of stories and the value conflict was present in 31 percent of stories[176]. So, we can see that although shareability is its own value, the shareability of an event could be defined by other news values themselves. Furthermore, Harcup and O'Neil found that stories that had the presence of entertainment were ranked 1st, within their 'ranking of frequency of news value identified within 25 news stories shared on social media'[177]. Surprise ranked 2nd and bad news ranked 3rd, all of which have links to other news selection models, as we have seen.

We can observe that shareability is much like newsworthiness in the sense that there are attributes present in the story that make it more shareable as

shareability incorporates elements of news selection models within itself. We can ascertain that, if shareability relies upon other news values themselves, then those news values must be considered relevant. Even with a link that may be considered disparate, Steven Chibnall's news values remain relevant in the current media landscape, due to the relevance of shareability. In the meantime, shareability is likely to become a more major consideration in news selection[178].

Harcup and O'Neil's value of audio-visuals regards stories that have arresting photographs, video, audio and or events which can be illustrated with infographics as being more newsworthy[179]. This value is directly aimed at the current media landscape, where news is consumed through the internet, television, and social media platforms.

---

[175]Sky Schaude, Serena Carpenter, 'The News That's fit to Click' (2009) Southwestern Mass Communication Journal 24 (2).
[176] Sky Schaude, Serena Carpenter, 'The News That's fit to Click' (2009) Southwestern Mass Communication Journal 24 (2).
[177] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[178]Emily Bell, Taylor Owen, 'The Platform Press: How Silicon Valley reengineered journalism' (2017) Columbia Journalism Review <https://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php> accessed 1 April 2020.
[179] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).

In 2019 television was the most used platform for news by UK adults (75% of UK adults).[180] Whilst there is no need to explain that television revolves entirely around what we can see and hear, we can ascertain from this statistic that this value is very relevant for the current media landscape in both crime and everyday reporting.

If we look at more modern platforms, such as Snapchat and Instagram (49% of UK adults use social media for news[181]), these rely on audio visuals. They are platforms built entirely around images and short videos. Stories are boiled down to a screen of images and graphics, and audio where concerned. Within the platform itself tiles are created for individual stories or events/social events, which try to grab the attention of the user; there can be an endless number of these tiles. In such a competitive environment it is necessary for catching audio-visuals to entice readers to specific stories. Due to the nature of these platforms and the competitive environments they create, this value is incredibly relevant to the reporting of crime in the modern media landscape.

It is worth noting that apps like Snapchat try to learn the user's behaviours, and cater the content seen by each user individually[182]. We can ascertain that this increases the element of competition between news organisations within the platform as they all want our attention.

From research we can see that social media has become a huge part of our day-to-day life. Surveys show that 42 percent of people aged 18-24 form their opinions during elections through online sources like social media; for opinion formers it is even higher[183]. This does beg the question that maybe there should be some regulation, particularly, during elections.

However, much like shareability, we must ask what makes good audio-visuals. Harcup and O'Neil's work does not explicitly state what makes good audio-visuals. They have made observations that show it deserves to be a news value of its own. The first observation they make is that 'the most

[180] Jigsaw Research, 'News Consumption in the UK: 2019' (Ofcom, 24 July 2019) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/157914/uk-news-consumption-2019-report.pdf> accessed 1 January 2020.
[181] Jigsaw Research, 'News Consumption in the UK: 2019' (Ofcom, 24 July 2019) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/157914/uk-news-consumption-2019-report.pdf> accessed 1 January 2020.
[182] Snap Inc, 'Cookie Policy' (Snapchat) <https://www.snap.com/en-GB/cookie-policy> accessed 5 April 2020.
[183] Luke MacGregor, 'Survey reveals extent to which newspapers and social media influenced voting decisions at 2017 general election' *Press Gazette* (31 July 2017) <https://www.pressgazette.co.uk/survey-reveals-extent-to-which-newspapers-and-social-media-influenced-voting-decisions-at-2017-general-election/> accessed 1 January 2020.

shared story on both Facebook and on Twitter were strong on visual[184]. They also observed that such visual-led items seem to score highly for shareability on both Facebook and Twitter[185]. This does show that there is a strong link between the two values although they appear as their own separate values.

In 2014 Murray Dick observed that something that may not be considered a news story due to the lack of a conventional angle, can become a popular item if the data (over a period of time) is translated into an infographic[186]. Harcup and O'Neil observed this to be true when they found that one of the most shared stories on twitter in 2015 was that of several Palestinian children being killed, but the information was presented as an infographic[187]. This shows us one of the ways this value operates and what can create this value (infographics). It also shows us that this value can reinforce others, such as conventionalism, as the use of infographics can assist in delivering a conventional angle for the story. Furthermore, now the use of audio-visual aides can reinforce the newsworthiness of a story.

However, this does still leave us with the question of what exactly makes an event ideal for audio-visuals. Using the observations by Harcup and O'Neil[188] and Dick,[189] we can say that to some degree it is events that can associate themselves with statistics, much like how structured access operates. But this only rings true for the infographic element. We need to bear in mind that audio-visual covers photographs, videos audio etc. so it could be that this value applies only where these things exist within a story, meaning there are pictures or videos of the event.

At some point we might find it worthwhile considering things from the perspective of photojournalism[190]. It is also worth noting citizen journalism; where people are sending media to news organisations, there is a lot of complexity behind the selection of the audio-visual. That still requires study.

---

[184] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[185] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[186] Murray Dick, 'Interactive Infographic and News Values' (2014) Digital Journalism 2 (4).
[187] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[188] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).
[189] Murray Dick, 'Interactive Infographic and News Values' (2014) Digital Journalism 2 (4).
[190] Patrick Rossler, Jana Bomhoff, Josef Ferdinand Haschke, Jan Kersten, Rudiger Muller, 'Selection and impact of press photography: an empirical study on the basis of photo news factors' (2011) Universitatpostdam<https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/9369/file/ppr103_online.pdf> accessed 1 February 2020.

It could also be the case, much like shareability, that audio-visual is like newsworthiness.

4.4 Summary

Although we are assessing Chibnall's work and its relevance to the current media landscape. we have seen that Chibnall's work is still relevant through links and similarities in his work and his successors. However, two of the most relevant values in the current media landscape have come from Harcup and O'Neil. They are shareability and audio visuals. However, there is scope for further research, especially, regarding platforms that try and learn the user's news consumption.

Harcup and O'Neil state that their taxonomy should be a tool for analysis and further research, and it should prompt more research into news rather than less[191].

5 Other Influences and Observations on Selection

5.1 Introduction

Whist we cannot look at all the different theories for the driving forces behind the selection of crime news, it is beneficial to look at a range of others for better understanding of the process. We will now look at advertiser influence, ideal victim theory, journalistic gut feeling, some observations by Jack Katz, and some observations by Rob Mawby.

5.2 Advertiser influence

The influence of advertisers was acknowledged by Chibnall. He observed that newspapers rely on advertisement income and would therefore curate their papers to attract businesses to advertise within their paper[192]. This confirms that public relations are a concern for news organisations. More, current research shows that commercial influences can affect, the style, tone, length, and theme of reporting[193].

This shows that news worthiness may only be one of the considerations in a bigger picture. Although it may be a great newsworthy event, it may not get reported if the organisation deems it detrimental to their public relations. This does, however, appear to reflect Harcup and O'Neil's news

[191] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).

[192] Steve Chibnall, *Law and Order News* (Tavistock Publications Ltd 1977).

[193]FolkerHanusch, Sandra Banjac, Phoebe Maares, 'The Power of Commercial Influences: How Lifestyle Journalists Experience Pressure from Advertising and Public Relations' (2019) Journalism Practice <https://www.tandfonline.com/doi/full/10.1080/17512786.2019.1682942> accessed 1 January 2020.

organisation agenda. It does propose a question whether the news organisations' agenda should be a news value or viewed as a factor of control. To answer such a question extensive research may be required.

5.3 Ideal Victim Theory

In 1986 Nil Christie proposed the Ideal Victim Theory. His theory stated that media resources are allocated to the representation of those victims that can be portrayed as an "ideal victim"[194]. The ideal victim is described as a person or category of individuals who, when hit by crime, are given the complete and legitimate status of being a victim and are usually those that are vulnerable people, defenceless, innocent and worthy of sympathy and compassion, usually the elderly and women[195]. These people also have good backgrounds, i.e., are from an average or above working-class family, with no troubling issues in their pasts, etc. As opposed to those on the 'margins of society, i.e., the homeless, those with drug habits, young males or those from a lower working-class family (although the reality of the situation is different, the majority of victims in the UK are male youths subject to muggings)[196]. This theory is arguably inspired and has visible links to Chibnall's personalisation, but it appears more in-depth.

Greer identified this form of media selectivity in practice where two boys went missing in 1996 and only merited 60 articles in the media. Whereas in 2002 two girls of similar age went missing and were mentioned in 900 articles. The key difference between the two events were that the girls fit into the archetypal "ideal victim" as being young, bright, vulnerable, photogenic and from stable homes whereas the boys were from low income households[197]. Interestingly, this theory has some overlap with the portrayal of crime in fictional media, specifically in slasher horrors where the ideal victim is vulnerable and attractive[198].

5.4 Journalistic Gut Feeling

Through ethnographic research (research in relation people, culture, habits, etc.) Ida Shultz proposed two types of news values in his study. The explicit news values that we have come to know and study and what Shultz refers to as the silent doxic news values. The doxic ones are those that are created

---

[194]Nils Christie, 'The Ideal Victim' in Ezzat Fattah, *From Crime Policy to Victim Policy* (Macmillan 1986).
[195]Nils Christie, 'The Ideal Victim' in Ezzat Fattah, *From Crime Policy to Victim Policy* (Macmillan 1986).
[196]Nils Christie, 'The Ideal Victim' in Ezzat Fattah, *From Crime Policy to Victim Policy* (Macmillan 1986).
[197]Chris Greer, 'News Media, Victims and Crime' in Pamela Davies, Peter Francis and Chris Greer (eds), *Victims, Crime and Society* (2nd edn, Sage 2017).
[198] For an interesting discussion on crime in fictional media see - Carol Clover, *Women and Chainsaws* (Princeton University Press, 1992).

from the individual experiences of the journalist and are based on their beliefs of what makes a story newsworthy[199]. This is what is referred to as the journalistic gut feeling.

The study believes that the subjective point of view of the journalist plays an important role in the selection of news, which is agreed upon by the other ethnographic researchers such as Bourdieu[200]. Whilst we will not discuss the complex mechanisms of how this operates, we will acknowledge that the subjective point of view of journalists is likely to have an impact on the selection of crime news.

5.5 Observations of Jack Katz

Selection of crime news is a wide area of study, and there have been many observations that we can benefit from. In 1987 Jack Katz created his own set of news value, but the notable observations of his study are that almost all news values could be collapsed into a handful[201]. This observation shows the acknowledgement of links that exist across the board between different models. However, his secondary observation was that having an extensive list of values can be beneficial as they are tools for analysis and give researchers a good place to start[202]. As was also agreed upon by Harcup and O'Neil, these values are tools[203]. So, although we can say that Chibnall is still relevant, it does not mean we should not have any other news selection models; they are all simply tools to help us research crime in the media; one tool may be better suited for one job and another tool suited better for another job.

5.6 Observations of Rob Mawby

Much like this report, in 2010 Rob Mawby reviewed Chibnall's work for what was considered the modern landscape at his time[204] before the elevation of social media. According to Mawby, 'Chibnall's analysis is still largely valid'[205]. Whilst Chibnall's world is not the same world Mawby looked at, Chibnall has remained valid. The difference is that there are

---

[199] Ida Schultz, 'The Journalistic Gut Feeling' (2007) 1 (2) Journalism Practice 190-207.

[200] Pierre Bourdieu, 'The Political Field, the Social Science Field, and Journalistic Field' in Rodney Benson, Erik Neveu, *Bourdieu and the Journalistic Field* (Cambridge: Polity Press 2005).

[201]Jack Katz, 'What makes crime ''News"'?' (1987) University of California.

[202]Jack Katz, 'What makes crime ''News"'?' (1987) University of California.

[203] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).

[204] Rob Mawby, 'Chibnall revisited: Crime reporters, the police and '" Law-and-Order News"' (2010) BJC 50 (6).

[205] Rob Mawby, 'Chibnall revisited: Crime reporters, the police and '" Law-and-Order News"' (2010) BJC 50 (6).

others that are emerging as lead commentators in this field, with work that bears equal or more relevance to the discourse in crime and media.

6 Conclusion: a newer new set of news values

As we have seen, a lot has changed since Chibnall developed his set of values, and at the same time a lot has stayed the same. Whilst the media landscape has evolved dramatically, many of Chibnall's values remain relevant, be it a question of degree, form, etc. In the meantime, more important considerations have surfaced, such as shareability[206]. Shareability may have initially been identified as a single value,[207] but we have seen that it is far from a stand-alone and in fact is comprised of a collection of values which operate on their own but give rise to shareability. We have seen that celebrities or notable persons now have their own form of credibility[208] and influence.[209] We have, in addition, seen that news is not only consumed but also followed, much like in the supposed disappearance of Madeline McCann.

From all our observations we cannot decline the fact that Steven Chibnall still remains relevant to the current media landscape. To paraphrase Rob Mawby, it is not his world, but his values still apply[210]. All other models present do not diminish the relevance of Chibnall's work but supplement it (as the case with Jewkes[211]). Chibnall's set of values have proven to be flexible and malleable to fit many elements of the modern media landscape. As Harcup O'Neil put it, these studies are to inspire further research. According to Jack Katz, says news values are tools for analysis and, although they can all be collapsed, having all these values helps us in our analysis of crime in the media.[212]

Yes, Steven Chibnall is still relevant. Our observations can lead us to follow in the footsteps of our predecessors and propose a "newer" set of news values for discussion, which can be contested as there will be exceptions in

---

[206] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).

[207] Tony Harcup, Diedre O'Neil, 'What is News? Galtung and Ruge Revisited (again).' (2017) Journalism studies 18 (12).

[208] John Street, 'Do Celebrity Politics and Celebrity Politicians Matter?' (2012) The British Journal of Politics and International Relations <https://journals.sagepub.com/doi/abs/10.1111/j.1467-856X.2011.00480.x> accessed 15 May 2020.

[209] Delonia Cooley, Rochelle Parks-Yancy, 'The Effect of Social Media on Perceived Information Credibility and Decision Making' (2018) 18 JIC <https://www.tandfonline.com/doi/abs/10.1080/15332861.2019.1595362> accessed 15 May 2020.

[210] Rob Mawby, 'Chibnall revisited: Crime reporters, the police and '" Law-and-Order News"' (2010) BJC 50 (6).

[211] Yvonne Jewkes, *Media & Crime* (3rd edn, Sage Publications Ltd 2015).

[212] Jack Katz, 'What makes crime ''News"'?' (1987) University of California.

their practical application. However, all the stories we have analysed so far consist of or follow, at least, one of the subsequent values:

- **Sensory**: whether the event does, or can, have a form of media (photos, videos, sound clippings, other media or information which can be placed in graphic form) attached to it, so that it entices the audience's senses. This can include the use of infographics to portray information in a digestible format.
- **Shareable entertainment**: whether the event can be shared and/or become viral through association with the dramatic, humorous, scandalous, erotic, bizarre, good, or bad. There is more concern about the presence of these associations, which will then give rise to shareability
- **Notable entity**: whether there is a celebrity, well known individual, company, country or organisation attached to the story. This attachment can come through association of that entity with the event, potentially, through relating with or supporting the victim(s), and/or lending their credibility to the event through sharing the event.
- **Ideal Persons**: whether the person(s) in the event can be perceived as a wholesome and idyllic individual who can be brought to the forefront of the story and/or be related to. Children fit this criterion better than adults as they are deemed pure, innocent and vulnerable.
- **Conflict**: The more conflict associated with an event the better. This conflict can be peaceful in the form of protest or an all-out riot and anything in between. This does not exclude conflicts in court.
- **Relativity**: whether the story relevant in its timing, in its reference to cultural and social happenings and spatially (i.e., whether it is information that the audience would like to know); the bigger the impact of the information the better it is.
- **Durability**: whether there is scope for the story to generate further stories in the future and if can it be followed. If a story can generate more stories through its gradual unfolding, it is likely it can be given its own page on news websites or even its own hashtags on social media platforms, generating more interest.
- **Thematic**: whether there is a theme or themes that can be followed by the reader. There is no longer a concern about shades of grey and allowing the reader to come to their own conclusion is acceptable. However, this differs between platforms and organisations because of the role of demographics.

- **Morality**: whether the event or story regards something that deviates from the perceived morality of society. This can vary from white-collar crime to acts of obscene sexuality.
- **Exclusivity**: whether this story is the first report on the event and/or the first to obtain new information or a new angle.

Whilst there are exceptions, the presence of any one of these values may make an event newsworthy enough to be reported on. All the events we have looked at in this article have, at least, one of these values present. The list of proposed values not only applies to all the stories here but is consistent with (and attempts to condense and supplement) all the research we have seen.

As already stated, these values are subject to practical application and have exceptions. Therefore, they can be contested as they are simply tools, and certain tools are better for certain jobs.

We must also acknowledge that these news values may be a cog in a much larger machine in the selection of crime news. If we look at the journalistic gut feeling[213], the influence of advertisers[214], or even consider the grand implication of cookies[215] in the current technological era, we find that all of them may have their own implication on crime news selection.

These are merely tools for better understanding, and they cannot answer all the questions on how crime news is selected.

Shabazz Ullah, LLB (Hons.)

[213] Ida Schultz, 'The Journalistic Gut Feeling' (2007) 1 (2) Journalism Practice 190-207.
[214]FolkerHanusch, Sandra Banjac, Phoebe Maares, 'The Power of Commercial Influences: How Lifestyle Journalists Experience Pressure from Advertising and Public Relations' (2019) Journalism Practice <https://www.tandfonline.com/doi/full/10.1080/17512786.2019.1682942> accessed 1 January 2020.
[215] A packet of data used to identify the user and or track their access to the server.

LEGAL OPINION

VIOLATION OF PATIENTS' FUNDAMENTAL RIGHTS BY MENTAL HOSPITAL REGIME

Eleanor Plaistow-Trapaud

ABSTRACT

This paper considers the impact of mental hospital regime on patients' rights. Mental Health is becoming more widely discussed within society. Mental patients are amongst the most vulnerable, and potentially dangerous, persons admitted to therapeutic institutions; therefore, they need to be both intently cared for and carefully controlled to ensure they are receiving effective treatment for their disorder without posing a danger to themselves or others. The regime within a mental hospital encompasses the patients' entire experience, some aspects of which are regulated by statute in the form of the Mental Health Act 1983 and others by the common law. However, it potentially violates patients' fundamental rights under the Human Rights Act 1998. But then, the same regime, that includes the acts of hospital staff members, etc., which would otherwise constitute a *prima facie* violation of patients' rights, is justified both by the Human Rights Act 1998, the Mental Health Act 1983 (as amended) and the common law. Some suggestions for improving the present law are tendered.

Keywords: Mental Health Act 1983 – human rights – mental hospitals, informal patients – compulsory patients – patients' rights

1 Erving Goffman's portrayal of a psychiatric unit in Asylums

Goffman's *Asylums*, published in 1961, was an observational study of the characteristics of a psychiatric institution and the effect of that on its patients. It highlighted, among other things, the way patients entered with an identity shaped by social arrangements of ordinary life and were stripped of such identity to conform to the arrangements of the "total institution". Although it was written almost sixty years ago, a lot of the practices discussed in it, such as restricting patients' freedom, replacing their clothes, defining them by their disorder and occasionally physically restraining them, are still found within the mental hospital regime today. This poses the question as to whether the regime in a mental hospital today *prima facie* violates a human's rights found in the European Convention on Human Rights, set out in schedule 1 of the Human Rights Act[1].

1.1 The regime in Mental Hospitals

Mental Hospital regime covers a patient's entire experience in a psychiatric hospital[2], primarily derived from the MHA[3], which governs, among other things, the admission, assessment, detainment, treatment, discharge and care of the patients. The MHA Code of Practice[4]also provides further guidelines on the open-door policy, close observation, searching of patients and their correspondence and the seclusion of patients, constituting a large portion of a patient's experience.

Psychiatric hospitals nowadays aim to provide a therapeutic environment for patients to encourage a healthy relationship between patients and hospital staff[5] and to rehabilitate them into society through a course of treatment, as opposed to entirely segregating mentally disordered patients, as depicted by Goffman. This paper investigates whether hospitals meet these aims, as certain provisions such as seclusion, close observation and searches may cause patients distress and may encroach on patients' human rights.

---

[1] Human Rights Act 1983, Schedule 1 (hereafter referred to as *HRA)*

[2]B. Andoh, "Legal Aspects of Mental Hospital Regime in England and Wales", *Med. Sci. Law* (2002) vol 42, No. 1. 14.

[3] Mental Health Act 1983

[4] The Mental Health Act 1983 Code of Practice (2015), hereafter referred to as *COP*.

[5] B, Andoh "Legal aspects of Mental Hospital Regime in England and Wales" *Med. Sci. Law* (2002) Vol. 42, No.1 p14, 18.

1.2 Current Human Rights legislation

To establish whether an individual's human rights have been affected, it is first important to understand the rights they are entitled to. Though there is no strict definition of human rights, they have been discussed as rights afforded to all human beings which are basic and fundamental to the individual[6], and are necessary for the respect of human dignity[7]. Thus, they are in need of protection from arbitrary interference[8]. This paper will be concerned primarily with legal rights set out in UK legislation.

The European Convention on Human Rights (*ECHR*) is an international treaty between member states of the Council of Europe and is fundamental in providing a framework for human rights in UK legislation. The *ECHR* was enforced with a view of protecting human rights[9] and does so by allowing individuals who are dissatisfied with the outcome in a domestic court to apply to the European Court for redress[10] in cases regarding human rights. Such "rights and freedoms" are split into Articles 2 - 18 and set out the specific rights that are to be protected. The *HRA*, passed in 1998, incorporates the *ECHR* in Schedule 1, although not in its entirety[11], though the Articles which are primarily focused on within this essay shall be discussed in detail below. Human rights may be either "absolute" or "qualified"[12]. Absolute rights include Art.2, Art.3 and Art.6, which cannot be limited by any authority. However, qualified rights including Art.5, and Art.8, may be limited where proportionate to promote specific and legitimate aims[13]. Articles 2, 3, 5, 6 and 8 are noted here.

Article 2 of the Convention provides that everyone's right to life shall be protected by law[14] and is arguably the most fundamental of human rights;[15] thus, it is absolute and cannot be derogated from[16]. Art.2 poses both a

[6] S. Foster, *Human Rights and Civil Liberties.* (3rd edition Pearson 2011) Ch 1, p 4
[7]H. Davis, *Human Rights Law,* 3rd edition (Oxford 2013) 1.1
[8] S. Foster. *Human Rights and Civil Liberties,* 3rd edition (Pearson 2011) Ch 1 p 5
[9] R. Stone. *Civil Liberties and Human Rights,* 10th edition (Oxford 2014) 1.6.1
[10]R. Stone & R. Costigan, *Civil Liberties and Human Rights.* (11th edition Oxford 2017) 1.6
[11]R, Stone. *Civil Liberties and Human Rights,* 10th edition (Oxford 2014) 2.2.2
[12] G. Dickens and P. Sugarman, "Interpretation and knowledge of human rights in mental health practice", *British Journal of Nursing* (2018) 17.10, 664-667.
[13] G. Dickens and P. Sugarman, "Interpretation and knowledge of human rights in mental health practice." *British Journal of Nursing,* 17.10 (2008): 664-667.
[14] Human Rights Act *1998* Schedule 1 Article 2(1) "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."
[15] S. Foster, *Human Rights and Civil Liberties,* 3rd edition (Pearson, 2011) Ch 4, p186
[16] S. Foster, *Human Rights and Civil Liberties* (3rd edition, Pearson, 2011) Ch 4, p187

negative obligation on the state not to intentionally deprive a person of their right to life[17] and a positive obligation to protect one's right to life[18].

Article 3 states that "No one shall be subjected to torture or to inhumane or degrading treatment"[19] which there can be no derogation from[20], as clarified by the European Court in *Ribitsch v Austria*[21]. The Courts have interpreted torture as inhuman treatment for a purpose[22], causing very serious and cruel suffering[23]. Thus, it is unlikely that any treatment in a mental hospital would amount to torture. However, inhumane and degrading treatment does not have these requirements and should be "interpreted to extend to the widest possible protection against abuses, whether physical or mental…;"[24] thus, mental health professionals may be liable for a violation of Art.3[25] if patients are found to have been neglected, abused, or in unsafe or unsanitary conditions[26], as occurred in *Price v United Kingdom.*[27]

Article 5 provides that "everyone has the right to liberty and security of person" and that no one shall be deprived of his liberty save in accordance with a procedure prescribed by law.[28] There have been cases where the European Court has found a violation under Art.5 where certain conditions are imposed on a patient which would amount to a deprivation of liberty, for example, where a patient's discharge was subject to conditions meaning he would never be without supervision.[29]

---

[17] S. Foster, *Human Rights and Civil Liberties* (3rd edition, Pearson, 2011) Ch 4 p187

[18] *Ibid.*

[19] Human Rights Act *1998* Schedule 1 Article 3 "No one shall be subjected to torture or to inhumane or degrading treatment or punishment"

[20] L. Gostin, P. Bartlett, P. Fennell, J. McHale and R. Mackay, *Principles of Mental Health Law and Policy,* 1st edition (Oxford, 2010) 3.113

[21]*Ribitsch v Austria* (Application 18896/91) [1995] 21 EHRR 573 "The protection to be afforded to the physical integrity of individuals was not to be limited by the requirements of a criminal investigation and the obvious difficulties inherent in the fight against crime. The applicant's injuries showed that he had suffered ill-treatment amounting to both inhuman and degrading treatment. There had been a violation of Article 3."

[22]*The Greek Case* [1969] 12 YB 170

[23]*Ireland v United Kingdom* [1978] 2 EHRR 25

[24]*United Nations Body Of Principles For The Protection of All Persons Under Any Form of Detention or Imprisonment,* GA Res. 43/173 (1998)

[25] L. Gostin, P. Bartlett, P. Fennell, J. McHale and R. Mackay, *op. cit.*, 3.114

[26] *Ibid*

[27]*Price v the United Kingdom* [2001] (Application 33394/96) BHRC 401

[28] Human Rights Act *1983* Schedule 1 Article 5(1)

[29]*R (Home Secretary) v Mental Health Review tribunal* [2004] EWHC 2194 (Admin)

Article 6 provides that everyone shall have access to a fair hearing[30] and is arguably at the heart of any democratic society[31]. Article 8 preserves the right to respect for one's private and family life, his home and his correspondence"[32] and that there shall be no interference with this except in accordance with the law[33]. The right to a private life embraces personal autonomy and the right to make choices regarding one's own life,[34] and the right to correspondence. With regard to patients' correspondence, this has been found to extend to all forms of communication, as established in *Halford v United Kingdom*[35]though here we are primarily concerned with the post of the patients inside institutions.

2. Introduction to the conflict between the Mental Hospital Regime and Fundamental Human rights

It has been suggested that the hospital regime is characterised by a clash of interests between the patient's rights under the *ECHR* and the legal constraints imposed on them in the interests of health and safety,[36] which may encroach on their freedoms[37]. *R (G) v Nottinghamshire Healthcare*[38] depicts the balance struck between patient's absolute freedom and the protection of themselves and others where a patient, restricted from smoking in his bed for the protection of other patients, claimed that breached his right to a private life, though the Courts found one's "private life" did not extend to absolute independence. The case of *Pountney v Griffiths*[39] established a hospital staff member's power to control a compulsory detained patient in

[30] Human Rights Act *1998* Schedule 1 Article 6(1) "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interestsof juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[31] S. Foster, o*p. cit*., ch 7, p305

[32] Human Rights Act *1998,* Schedule 1 Article 8(1) "Everyone has the right to respect for his private and family life, his home and his correspondence."

[33] Human Rights Act *1998* Schedule 1 Article 8(2) "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

[34]German website and others, 'Article 8 ECHR - Right To Private Life, Family Life, Correspondence And Home' (*Human Rights Law*, 2019) <https://human-rights-law.eu/echr/article-8-echr-right-to-private-life-family-life-correspondence-and-home/> accessed 6 April 2019.

[35]*Halford v United Kingdom* [1997] 24 EHRR 523

[36] B, Andoh*, op. cit*., p14, 18

[37] *Ibid*.

[38]*R (G) v Nottinghamshire Healthcare NHS Trust* [2009] EWCA Civ

[39]*Pountney v Griffiths* (1975) Q.B.D

pursuance of the Act; thus, Courts are willing to provide justifications under the *MHA* for conduct which would usually be found to contravene a patient's Human Rights.

Considering the above, it is felt necessary to investigate whether the aspects of the mental hospital regime, *prima facie,* violate a patient's fundamental rights set out in the *HRA,* whether any violations are justified by legislation or common law, and whether this satisfies the standard projected by the European Convention on Human Rights. Recommendations for reform of the law to ensure a safer system for vulnerable mentally disordered patients will then be presented.

3. ASPECTS OF MENTAL HOSPITAL REGIME

3.1 Informal admission to a psychiatric hospital

The mental hospital regime begins with admission and therefore it is important to understand who exactly may be detained, as the regime effects all in-patients. The *MHA* encourages the informal admission of patients, as the least restrictive form of care should always be sought; this is provided for in section 131(1) which states that a patient who requires treatment for a mental disorder may be admitted without further formality[40]. Thus, patients may, on their own behalf or at the hands of their guardian in the cases of minors[41], admitted to hospital if suffering from mental disorder, as they would to a general hospital in the case of a physical disorder[42].

Informal patients are considered voluntary as they may remain in hospital or leave and refuse treatment at their own will;[43] thus, they are generally not subject to the provisions of the Act. But, it must be noted that they are not entirely exempt from compulsion as, if necessary, they may be detained for a short period of time under section 5[44]. This is used if the hospital staff

---

[40] The Mental Health Act *1983* s131(1) "Nothing in this Act shall be construed as preventing a patient who requires treatment for mental disorder from being admitted to any hospital or registered establishment in pursuance of arrangements made in that behalf and without any application, order or direction rendering him liable to be detained under this Act, or from remaining in any hospital or registered establishment in pursuance of such arrangements after he has ceased to be so liable to be detained."

[41] *R v Kirklees MBC ex parte C* [1993] 2 FLR 187

[42] B. Hale, *Mental Health Law,* 6th edition (Sweet and Maxwell, 2017), 1-005

[43] B. Andoh, "The Informal Patient in England and Wales", *Medicine, Science and the Law* (2000), 40(2), 147-155.

[44] Mental Health Act *1983* s5(1) "that the patient is suffering from mental disorder to such a degree that it is necessary for his health or safety or for the protection of others for him to be immediately restrained from leaving the hospital"

deem the patient unfit to leave[45] and they may be detained by a nurse for up to 6 hours[46], or a registered medical practitioner for up to 72 hours[47] after personal assessment of the patient[48]. This allows the hospital staff time to make an application for compulsory admission[49], thus depicting the reason 'informal' patients do not always express their true wishes.

3.2 Compulsory Admission to a psychiatric hospital

A patient may also be detained compulsorily at the instance of the hospital for assessment (under section 2), assessment in an emergency (under section 4), and treatment (under section 3) if they are non-offender patients (i.e., not involved in criminal proceedings). A patient may also be admitted through referral by a police officer (under sections 135(1) and 136). Moreover, the courts can remand an offender-patient (one involved in criminal proceedings) to a psychiatric hospital for a report (under s. 35) or treatment (under s.36) or under an interim hospital order (under s.38) or order that patient to be admitted under a hospital order without limitations (s.37) or with limitations (s.41, MHA 1983).

3.3 Open door policy

Before 1959 the doors of psychiatric facilities were predominantly locked, keeping patients in to ensure they received their treatment[50], though experts suggested that this undermined the relationship between patients and staff.[51] However, today, largely as a result of the MHA 1959 which brought in informal admissions and because the vast majority of hospital patients are informal patients, the hospitals now, subject to exceptions, operate an open-

---

[45] Mental Health Act *1983* s5(4)(b) "the patient is suffering from mental disorder to such a degree that it is necessary for his health or safety or for the protection of others for him to be immediately restrained from leaving the hospital"

[46] Mental Health Act *1983* s5(4) "If, in the case of a patient who is receiving treatment for mental disorder as an in-patient in a hospital, it appears to a nurse of the prescribed class—(a)that the patient is suffering from mental disorder to such a degree that it is necessary for his health or safety or for the protection of others for him to be immediately restrained from leaving the hospital; and(b)that it is not practicable to secure the immediate attendance of a practitioner or clinician for the purpose of furnishing a report under subsection (2) above, the nurse may record that fact in writing; and in that event thepatient may be detained in the hospital for a period of six hours from the time when that fact is so recorded or until the earlier arrival at the place where the patient is detained of a practitioner or clinician having power to furnish a report under that subsection."

[47] Mental Health Act *1983* s5(2) "If, in the case of a patient who is an in-patient in a hospital, it appears to the registered medical practitioner or approved clinicianin charge of the treatment of the patient that an application ought to be made under this Part of this Act for the admission of the patient to hospital, he may furnish to the managers a report in writing to that effect; and in any such case the patient may be detained in the hospital for a period of 72 hours from the time when the report is so furnished."

[48] The Mental Health Act *1983* Codes of Practice 2015 para 12.9

[49] B. Hale, *Mental Health Law,* 6th edition (Sweet and Maxwell, 2017), 1-021

[50] B. Andoh, *op. cit.*

[51] *Ibid.*

door policy. The locking of wards, by way of an exception, therefore, occurs where it is necessary for the specific needs of some patients. This, however, is likely to be problematic if it is used as a blanket standard.

3.4 Treatment without consent

Bodily integrity is highly regarded within UK law[52], thus touching an individual without consent shall generally be considered unlawful,[53] let alone providing treatment. *Gardner*[54] reiterated this in terms of mental health law, holding that the *MHA* is not intended to subject patients to compulsory treatment without consent[55] unless there is clear statutory authority to the contrary. Consent for the purpose of the Act means voluntary and continuing permission of the patient to receive a particular treatment based on knowledge of the purpose, nature, effect and risks of the treatment[56]; and treatment must be for the particular mental disorder, or consequences of which, that the patient is suffering from[57], for the purpose of alleviating, or preventing a worsening of, such disorder or one or more of its manifestations[58]. However, considering the nature of mental health, treatment may be administered without consent in certain circumstances.

The principal aim of admission to hospital is to maximise the health and safety of both patients and the community[59]. To achieve this Part IV of the *MHA* provides that compulsory patients, detained under s2, 3, 36, 37, 38 & 47, may be given treatment without consent under s63[60] where it is not required, or where the safeguards in s57[61] which requires both consent and

[52] R. Griffith, "Limits to consent to care and treatment", *British Journal of Nursing* (2017) 26(16), 942-943.
[53] *Ibid*.
[54] *R v Gardner, and another, ex parte L* [1986] 2 All ER 306
[55] L. Gostin, P. Bartlett, P, Fennell, J. McHale and R, Mackay, *op. cit*., 13.01
[56] Mental Health Act *1983* Codes of Practice (2015) para 24.34
[57] *GJ v The Foundation Trust* [2009] EWCH 2972 (Fam); [2010] Fam 70, para 54
[58] Mental Health Act *1983* Codes of Practice (2015) para 23.3
[59] L. Gostin, P. Bartlett, P. Fennell, J. McHale and R. Mackay, *op. cit.,* 13.02
[60] Mental Health Act *1983* s63 "The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering, not being a form of treatment to which section 57, 58 or 58A above applies, if the treatment is given by or under the direction of the approved clinician in charge of the treatment".
[61] Mental Health Act *1983* s57 (1) "This section applies to the following forms of medical treatment for mental disorder— (a)any surgical operation for destroying brain tissue or for destroying the functioning of brain tissue; and (b)such other forms of treatment as may be specified for the purposes of this section by regulations made by the Secretary of State."

a second opinion from a registered medical practitioner[62], or s58[63] which requires either consent or a second opinion by a medical professional[64] have been followed. Some patients may lack the capacity to consent, meaning their impairment or disturbance of the mind renders them unable to comprehend or retain information about the treatment to arrive at an informed decision[65], in which case it is required that a medical professional shall make decisions about treatment on their behalf in their best interests. This was depicted by *Re F (Mental patient: Sterilisation)*[66] in which the mentally disordered adult, who had the mental age of a small child, was lawfully sterilised without consent in her best interests. If the circumstance does not fall into one of these categories, treatment without consent will amount to battery[67].

Not all psychiatric patients lack the capacity to make decisions about their treatment[68] though compulsory treatment may also be given in cases of necessity. *Witold Litwa*[69] established that, where compulsory treatment is given for the purposes of preventing death or serious injury to others,[70] it will be lawful under the common law doctrine of necessity, providing further justification. However, it is widely established that even though treatment may be administered to those who do not consent, it is a principle

---

[62] Mental Health Act *1983* s57 (2)(a) and (b) "Subject to section 62 below, a patient shall not be given any form of treatment to which this section applies unless he has consented to it and— a)a registered medical practitioner appointed for the purposes of this Part of this Act by the regulatory authority(not being the responsible clinician (if there is one) or the person in charge of the treatment in question) and two other persons appointed for the purposes of this paragraph by the regulatory authority(not being registered medical practitioners) have certified in writing that the patient is capable of understanding the nature, purpose and likely effects of the treatment in question and has consented to it; and (b)the registered medical practitioner referred to in paragraph (a) above has certified in writing that it is appropriate for the treatment to be given."

[63] Mental Health Act *1983* s58 (1) "(1)This section applies to the following forms of medical treatment for mental disorder— (a)such forms of treatment as may be specified for the purposes of this section by regulations made by the Secretary of State; (b)the administration of medicine to a patient by any means (not being a form of treatment specified under paragraph (a) above or section 57 above or section 58A(1)(b) below) at any time during a period for which he is liable to be detained as a patient to whom this Part of this Act applies if three months or more have elapsed since the first occasion in that period when medicine was administered to him by any means for his mental disorder."

[64] Mental Health Act *1983* s58 (3)(a) and (b) "Subject to section 62 below, a patient shall not be given any form of treatment to which this section applies unless— (a)he has consented to that treatment and either the approved clinician in charge of itor a registered medical practitioner appointed for the purposes of this Part of this Act by the regulatory authority has certified in writing that the patient is capable of understanding its nature, purpose and likely effects and has consented to it; or (b)a registered medical practitioner appointed as aforesaid (not being the responsible clinician or the approved clinician in charge of the treatment in question) has certified in writing that the patient is not capable of understanding the nature, purpose and likely effects of that treatment or being so capable has not consented to it but that it is appropriate for the treatment to be given."

[65]*Re MB (Medical Treatment)* [1997] 2 FLR 426, at 437

[66]*Re F (Mental Patient: Sterilisation)* [1990] 2 A.C.1

[67] J. McHale, "Consent to treatment". *British Journal of Nursing* (1995) 4(4), 239-239.

[68] B. Hale, *Mental Health Law,* 6th edition (Sweet & Maxwell, 2017) 6-004

[69]*Witold Litwa v Poland* [2000] (Application 26629/95) ECHR 141

[70] L. Gostin, P. Bartlett, P. Fennell, J. McHale and R. Mackay, *op. cit*., 13.117

of the *MHA* that consent should always be sought[71].

3.5 Searches of patients

The case of *Pountney v Griffiths*[72]established that compulsory detention gives hospital staff an implied power to control and discipline patients in pursuance of the Act, which includes searching patients and their belongings[73]. This was discussed further in *R v Broadmoor*[74]in which the outcome of *Pountney* was expanded, to search with or without cause, despite medical objections, to ensure the hospital could maintain a safe and therapeutic environment for patients. However, this is only applicable to compulsory patients because informal patients are not subject to the same standard of control,[75] as established in *R v Runighian*[76], in which an informal patient was held not to require leave to apply to the courts after the conduct of a nurse amounted to an assault on him.

However, the power over compulsory patients is not a blanket standard, as also discussed in *Broadmoor*[77] that this power was only necessary in higher-security hospitals and was, thus, not applicable to low-risk hospitals[78]. But, it is necessary to have provisions in place for the searches of "low risk" patients to ensure the safety of others. The *COP* provides hospital staff may search detained patients, if necessary, without their consent, in exceptional circumstances where the particular patient has dangerous or violent tendencies[79] and the searching is proportionate to the identified risk[80]. This provides protection for the rights of pateints who do not purport to be dangerous or violent, whilst simultaneously providing a safeguard for hospital staff and patients to enable a search of a patient where reasonable.

Informal patients are not entirely exempt from searches either; they may still be searched under the *Criminal Law Act* which allows reasonable force to be used in the prevention of a crime[81]. Therefore, if a hospital member of staff suspects a breach of peace, they are able to use necessary force to prevent this. The doctrine of necessity may also be used where there is reason to believe a patient has something on their person, or elsewhere, that

[71] Mental Health Act *1983* Codes of Practice (2015) para 24.41
[72]*Pountney v Griffiths* [1976] AC 314
[73] B. Andoh, *op. cit.*
[74]*R v Broadmoor Special Hospital Authority* [1998] 08 LS Gaz R 32
[75] B. Andoh, *op. cit.*
[76]*R v Moonsami Runighian*[1977] Crim L.R. 361
[77]*R v Broadmoor Special Hospital Authority* [1998] 08 LS Gaz R 32, (1998) Times, 17 February
[78] B. Andoh, *op. cit.*
[79] Mental Health Act *1983* Codes of Practice (2015) para 8.31
[80] Mental Health Act *1983* Codes of Practice (2015) para 8.30
[81] The Criminal Law Act *1967* (further referred to as CLA)s3(1)

they may use to threaten the health or safety of themselves or others[82]. Both provisions under the *COP* and the *CLA* afford the hospital and patients some level of protection; however, it may be problematic as the hospital staff must be on constant alert for signs that a patient may become a risk to others.

3.6 Close observation

Close observation is a preventative measure within a psychiatric unit which aims to reduce harm to patients by creating a therapeutic environment[83]. Where a patient's assessment shows that they present a serious risk of suicide or harm to themselves or others, a member of staff is assigned to observe the at-risk patient, for a certain period, above the general level of observation[84]; this is to reduce the risk of self-harm or suicide, thus protecting the health and safety of the patient[85]. Though this does not seem too intrusive, in practice it may encroach on the patient's personal freedom[86] or cause distressing effects[87]. It has been suggested that close observation is not an effective method for this reason, and instead, practitioners should focus generally on building collaborative relationships with high risk patients[88]. However, a study by Jones *et al* on this topic found that patients who had been closely observed by a familiar nurse, who would engage with them, felt safer and reassured[89]. This suggests that the effectiveness of such a method is dependent on its approach by hospital staff.

Where hospital staff negligently allow the process of close observation to break down, and as a result a patient is able to commit suicide or severely self-harm, the hospital may be liable[90]. This was established in the Scottish case, *Hay v Grampian Health Board*[91], where the fault of the ward staff during the patient's close observation allowed him to do significant harm to himself, the hospital was liable for his subsequent brain damage; it is likely that English courts would also take this approach. However, thankfully the *COP* has issued clear guidelines on this process in paragraphs 26.28 - 35[92], which, where successfully incorporated into the regime of hospitals,

---

[82] B. Andoh, *op. cit.*
[83] The Mental Health Act *1983* Codes of practice (2015) para 26.4
[84]D. Stewar,. L. Bowers & F. Warburton, "Constant special observation and self-harm on acute psychiatric wards: a longitudinal analysis". *General Hospital Psychiatry*, (2009), 31(6), 523-530.
[85] B. Andoh, *op. cit.*
[86] *Ibid.*
[87] B. Hale, *Mental Health Law* (6th edition, Sweet & Maxwell, 2017) 6-022
[88] R. Ashmore, "Close observation". *Mental Health Practice*, (1999), 2(9), 27-27.
[89]J. Jones, M. Ward, N. Wellman & T. Lowe, "Psychiatric inpatients' experience of nursing observation: a United Kingdom perspective" *Journal of Psychosocial Nursing*, (2000) 28 (12) 10-20
[90] B. Andoh, *op. cit.* 1
[91]*Hay v Grampian Health Board* [1995] 6 Med LR 128
[92] Mental Health Act *1983* Codes of Practice (2015) para 26.28-35

significantly reduce the risk of self-harm by patients[93].

3.7 Seclusion

Seclusion is a form of restraint of a patient who is at the current time so disturbed they present a risk to themselves or others[94]. It is understood as the forcible removal of a patient to a locked room without any means of egress[95] where it is immediately necessary to contain such severe behavioural disturbance, which would likely cause harm to others[96]. This has been described as a positive therapeutic intervention method, although many hospital authorities omit it from their policies[97] and in others it must be an absolute last resort[98] when all other steps to pacify the patient have been exhausted, and there is no effective alternative[99].

Seclusion is associated more with a custodial style of psychiatric nursing, rather than the enlightened ideology of today[100] though it is justified through common law and legislation, and there are clear guidelines for its lawful application set out in the *COP*[101]. Firstly, there is the decided case of *Griffiths*[102] which provided an implied power to control and discipline detained patients[103] and *The Criminal Law Act,* s3[104] which authorises reasonable force to prevent the commission of a crime. Additionally, the common law doctrine of necessity allows for precautions to be taken in the interests of the patient's health or safety, or that of others and therefore both compulsorily detained patients and informal patients may be subjected to seclusion[105] if they pose a significant risk to themselves under this doctrine.

Seclusion was initially introduced as a humane alternative to mechanical restraint[106] and, if enforced in the intended spirit, maintains as a therapeutic intervention[107]. Despite this, it remains a controversial subject as it, *prima*

[93] Mental Health Act *1983* Codes of Practice (2015) para 26.29
[94]B. Andoh, "The seclusion of psychiatric patients: a birds eye view". *Mountbatten Journal of Legal Studies*, December 2003, 7 (1 2), pp. 51-58, 51
[95] T, Mason. (1994). "Seclusion: An International Comparison". *Medicine, Science and the Law*, 34(1), 54-60.
[96] Mental Health Act *1983* Codes of Practice (2015) para 26.103
[97]H. Leopoldt, "A secure and secluded spot… seclusion of patients in psychiatric hospitals" *Nursing Times* (1985), 81 (6), 26-8
[98] B. Andoh, "Legal aspects of Mental Hospital Regime in England and Wales". *Med. Sci. Law* (2002) Vol 42, No. 1
[99] T. Mason, "Seclusion: An International Comparison". *Medicine, Science and the Law*, (1994) 34(1), 54-60.
[100] L. Savage & E. Salib, "Seclusion in psychiatry". *Nursing Standard*, (1999), 13(50), 34-37.
[101] Mental Health Act *1983* Codes of Practice (2015) para 26.103-150
[102]*Pountney v Griffiths* [1976] AC 314
[103] B. Andoh, "The seclusion of psychiatric patients: a bird's eye view". *Mountbatten Journal of Legal Studies*, December 2003, 7 (1 2), pp. 51-58, 56
[104] Criminal Law Act *1967* s3(1)
[105]"Seclusion of Psychiatric Patients". *Medical Law Review* (2003) 11 (3): 384 at 387
[106] P. Hodgkinson, "The Use of Seclusion". *Medicine, Science and the Law,* (1985), 25(3), 215-222.
[107] J. Connoly, *Treatment of the insane without mechanical restraints* (Smith Elder and Co.: London,1856).

facie, restricts the freedom of the patient[108] although the *COP* states that such restrictive interventions should only be used in a way that respects human rights.[109]

3.8 Patients correspondence

A patient's post may be withheld, under s134 of the Act if there is an application from the recipient to do so[110] or, within a high security hospital, if staff consider the package may cause distress or danger to the patient;[111] thus, hospital managers have the right to open one's letter to determine whether it should be withheld,[112] subject to correspondence from a list of authorities of whom this section of the Act does not apply to[113] and notice must be given to the patient, and where practicable the sender[114]. The

---

[108]B. Andoh, "The seclusion of psychiatric patients: a birds eye view", *Mountbatten Journal of Legal Studies*, December 2003, 7 (1 2), pp. 51-58, 51

[109] The Mental Health Act *1983* Codes of Practice (2015) para 26.2

[110] The Mental Health Act *1983* s 134 "(1) A postal packet addressed to any person by a patient detained in a hospital under this Act and delivered by the patient for dispatch may be withheld from the postal operator concerned (a)if that person has requested that communications addressed to him by the patient should be withheld"

[111] The Mental Health Act *1983* s 134(b) "subject to subsection (3) below, if the hospital is one at which high security psychiatric services are provided and the managers of the hospital consider that the postal packet is likely— (i)to cause distress to the person to whom it is addressed or to any other person (not being a person on the staff of the hospital); or (ii)to cause danger to any person; and any request for the purposes of paragraph (a) above shall be made by a notice in writing given to the managers of the hospital, or the approved clinician with overall responsibility for the patient's case"

[112] Mental Health Act *1983* s134(4) "The managers of a hospital may inspect and open any postal packet for the purposes of determining— (a)whether it is one to which subsection (1) or (2) applies, and (b)in the case of a postal packet to which subsection (1) or (2) above applies, whether or not it should be withheld under that subsection;"

[113] Mental Health Act *1983* s134(3) "Subsections (1)(b) and (2) above do not apply to any postal packet addressed by a patient to, or sent to a patient by or on behalf of— (a)any Minister of the Crown or the Scottish Ministersor Member of either House of Parliament or member of the Scottish Parliamentor of the Northern Ireland Assembly; (aa)any of the Welsh Ministers, the Counsel General to the Welsh Assembly Government or a member of the National Assembly for Wales; (b)any judge or officer of the Court of Protection, any of the Court of Protection Visitors or any person asked by that Court for a report under section 49 of the Mental Capacity Act 2005 concerning the patient;(c)the Parliamentary Commissioner for Administration, the Scottish Public Services Ombudsman, the Public Services Ombudsman for Wales the Health Service Commissioner for England, or a Local Commissioner within the meaning of Part III of the Local Government Act 1974; (ca)the Care Quality Commission;(d) the First-tier Tribunal or the Mental Health Review Tribunal for Wales; (e) the National Health Service Commissioning Board, a clinical commissioning group, a Local Health Boardor Special Health Authority a local social services authority, a Community Health Council, a local probation board established under section 4 of the Criminal Justice and Court Services Act 2000)or a provider of probation services; (ea) a provider of a patient advocacy and liaison service for the assistance of patients at the hospital and their families and carers; (eb)a provider of independent advocacy services for the patient; (f)the managers of the hospital in which the patient is detained; (g)any legally qualified person instructed by the patient to act as his legal adviser; or (h)the European Commission of Human Rights or the European Court of Human Rights. and for the purposes of paragraph (d) above the reference to the First-tier Tribunal is a reference to that tribunal so far as it is acting for the purposes of any proceedings under this Act or paragraph 5(2) of the Schedule to the Repatriation of Prisoners Act 1984"

[114] Mental Health Act *1983* s134 (6) "Where a postal packet or anything contained in it is withheld under subsection (1)(b) or (2) above the managers of the hospital shall within seven days give notice of that fact to the patient and, in the case of a packet withheld under subsection (2) above, to the person (if known) by whom the

definition of "distress or danger" may be problematic as there is no legal guidance on what will amount to this; thus, it is seemingly at the hospital staff's discretion to weigh up the prospect of this causing harm to the patient against their rights to private life, to ensure it is lawful and their rights under Art.8 are not violated. However, due to the lack of guidelines, standards may differ across institutions. Additionally, within an ordinary psychiatric hospital only outgoing mail from the patient to a recipient who has expressed in writing that they do not wish to receive such from the patient may be intercepted[115], in which case the right of the patient to send mail is then overridden by the rights of the prospective addressees;[116] thus, further interference may constitute a breach of privacy. However, the incoming correspondence of these patients is not censored;[117] so, lower-risk patients may still receive distressing post which may cause them harm, although the justification of this is that they may exercise their right to not open their mail at all.[118] Where hospital staff suspect dangerous articles have been sent to a lower risk patient, they still have powers under s3(1) of the *Criminal Law Act*[119] to take reasonable measures to prevent the patient from receiving the article[120].

4. EFFECT OF HOSPITAL REGIME ON THE HUMAN RIGHTS OF PATIENTS

4.1 How the rights of an informal patient may be affected

The basis of an informal admission is freedom from subjection to the *MHA*. Therefore, the safeguards for informal patients need to be thoroughly discussed as, subsequently, they are not protected by the provisions within the Act which provide the basis of a medical recommendation, foreseeability of the length of their detention[121], access to a tribunal, and procedural safeguards to ensure they have given legally effective consent and their detention is in their best interests[122]. Thus, informal detention may

postal packet was sent; and any such notice shall be given in writing and shall contain a statement of the effect of section 134A(1) to (4)"

[115] B. Andoh. "Legal aspects of Mental Hospital regime in England and Wales". *Med. Sci. Law* (2002) Vol 42, No. 1

[116] *Ibid.*

[117] *Ibid.*

[118] *Ibid.*

[119] Criminal Law Act *1967* s3(1)

[120] R. M. Jones, *Mental Health Act Manual* (11th edition, 2008) p498

[121] R. Kramer, "The Bournewood Case". *Tizard Learning Disability Review* (2002) 7(4), 21-25.

[122] Mental Health Act *198,3* s131

amount to arbitrary detention, and subsequently breach Art.5(1)[123] of the Convention which protects a person's liberty and security of person.

This was discussed in *R v Bournewood,*[124] in which a mentally disabled non-dissenting patient was informally admitted to hospital and kept there, for a seemingly limitless amount of time, and refused visitation from his carers in fear he may want to leave with them. The House of Lords' interpretation of liberty in this case was of concern because they found his liberty was not deprived as he did not attempt to leave,[125] suggesting physical restriction is necessary to be deprived of one's liberty[126]. The European Court found that an informal patient may lawfully be detained, though no attempt to leave is not conclusive that they have not been deprived of their liberty[127]; subsequently, the Court found that the hospital staff had exercised complete control over *L* and despite his non-resistance, he was deprived of his liberty. This decision considerably broadens the scope of patients who have been "detained" for the purposes of Art.5 and shall provide further protection for informal patients[128]. Additionally, the *MHA 2007* recognised this issue and now places a duty on the responsible clinician to carry out assessments and obtain a second opinion for incapacitated patients, and it also allows for patients and their representatives to apply to a tribunal[129].

Conversely, patients who consent to being informally admitted may be too high of a risk to be afforded the freedoms that a voluntary patient should be, though hospitals must still care for patients in the least restrictive manner. Therefore, the hospital must provide sufficient risk assessment safeguards to avoid breaching their duty under Art.2 of the Convention which provides that everyone's right to life shall be protected by law.

The case of *Rabone*[130] considered this scenario. M, who suffered severe depressive episodes and was at a high risk of suicide, was informally admitted. Her parents expressed concerns about her being granted leave; however, a doctor approved two days' leave on the agreement that she would not self-harm. The next day, she hanged herself. The Supreme Court

---

[123] Human Rights Act *1998* Schedule 1 Article 5(1)
[124]*R v Bournewood community & Mental Health NHS Trust, ex p L* [1999] 1 A.C 458
[125]*R v Bournewood Community and Mental Health NHS Trust Ex p.* L [1998] UKHL 24
[126]*R v Bournewood Community and Mental Health NHS Trust Ex p.* L [1998] UKHL 24
[127] L. Gostin, P. Bartlett, P. Fennell, J. McHale and R. Mackay, *op. cit.,* 3.68
[128] P. Bartlett, O. Lewis and O. Thorold, "Mental Disability and the European Convention on Human Rights" (Boston: MartinusNijhoff Publishers, 2007) 37
[129] L. Gostin, P. Bartlett, P. Fennell, J. McHale and R. Mackay, *op. cit.,* 3.69.
[130]*Rabone(in his own right & as Personal Representative of the Estate of Rabone) and another v Pennine Care NHS Trust* [2009] EWHC 1827 (QB)

held that where the doctor is negligent in the face of the real and immediate risk to the patient, as happened in the case, there was a violation. Lord Roger, in *Mitchell,*[131] suggested that, where such a risk is present, a patient should be compulsorily detained to satisfy the hospital's obligations under Art.2. However, the *COP* states that informal patients who would be at risk if they left hospital should be provided safeguards such as therapeutic engagement and adequate observation,[132] suggesting that the hospital must ensure the safety of informal patients without subjecting them to compulsory detention

4.2 How the rights of a compulsorily detained patient may be affected

Compulsory patients are lawfully detained. Thus, certain restrictions upon their human rights are within the powers of the state; however, these are subject to safeguards to prevent arbitrary conduct from the hospital authority. For safeguards to sufficiently protect patients, they must be unambiguous. Nevertheless, some areas of the law may be open to interpretation and, therefore, be ineffective in providing a blanket standard of care across all institutions.

Admission for assessment under s2 of the Act lawfully provides for the detention of a patient up to twenty-eight days[133], a short period intended to protect a patient who does not satisfy the requirements under s3. However, if a further detention of a section 2 patient is necessary, an application must be made under s3 of the Act which cannot go ahead without the consent of the nearest relative[134]. This is for the purposes of providing a safeguard to the patient as it has been suggested that their nearest relative is the best position to determine whether a patient needs to be compulsorily

[131]*Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 3 All ER 205, [2009] 2 WLR 481

[132] Mental Health Act *1983* Codes of Practice (2015) para 8.14 "The safety of informal patients, who would be at risk of harm if they wandered out of a clinical environment at will, should be ensured by adequate staffing levels, positive therapeutic engagement and good observation, not simply by locking the doors of the unit or ward."

[133] Mental Health Act *1983* s2(4)

[134] Mental Health Act *1983* s11(4) "An approved mental health professional may not make an application for admission for treatment or a guardianship application in respect of a patient in either of the following cases—(a)the nearest relative of the patient has notified that professional, or the local social services authority on whose behalf the professional is acting, that he objects to the application being made; or (b)that professional has not consulted the person (if any) appearing to be the nearest relative of the patient, but the requirement to consult that person does not apply if it appears to the professional that in the circumstances such consultation is not reasonably practicable or would involve unreasonable delay." The Nearest relative is defined in s26(1) "(1)In this Part of this Act "relative" means any of the following persons:—(a)husband or wife or civil partner ;(b)son or daughter;(c)father or mother;(d)brother or sister;(e)grandparent;(f)grandchild;(g)uncle or aunt;(h)nephew or niece."

detained.[135] But, there is no procedure for ensuring the relative has consented, thus potentially creating scope for the exploitation of compulsory patients. For example, in *TTM*[136], a patient was detained for 10 days under s3 of the Act despite their nearest relative's objection and without an application for a displacement. This is contrary to the *COP*.[137] Currently the only remedy is to make an application to the courts for *habeas corpus,* as seen in the case of *GD*[138]. This is seemingly a long-winded approach where the rights of the patients had already been significantly impacted.

Patients detained under sections 2 or 3 of the Act have the right to apply to have their case reviewed by the Mental Health Review Tribunal under s66(1)(a) and (b),[139] thus providing a further safeguard, the importance of which was reiterated in *R (MH).*[140] Art.5(4) provides that anyone who has been deprived of their liberty via detention shall have speedy access to the courts to review the lawfulness of their detention;[141] however, the particulars of the law are again omitted from the statute which allows for confusion as depicted in *R(Modaresi),*[142] where the patient's application collided with a bank holiday and was struck out as late by the time it was processed. This opportunity for error clearly fails to comply with the provision set out in Art.5(4) and deprived this patient of the opportunity to have her detention reviewed. Lord Neuberger upheld the approach in *Pritam Kaur*[143] and found that in these scenarios the notice will be validly served on the first succeeding day,[144] thus providing a remedy for the patient in *Modaresi* in common law, though the written *MHA* provision is still ambiguous, thus, suggesting it may not be in accordance with the *ECHR*.

4.3 The open-door policy and how it may affect the rights of an inpatient

[135]Department of Health and Social Security, *et al* (1978) para 3.16
[136]*TTM v Hackney Borough Council and Others*, 14th January 2011
[137] The Mental Health Act *1983* Codes of Practice (2015)para 14.59 "Before making an application for admission under section 3, AMHPs must consult the nearest relative, unless it is not reasonably practicable or would involve unreasonable delay."
[138]*GD v The Managers of the Dennis Scott Unit at Edgeware Community Hospital* [2008] EWHC 3572
[139] Mental Health Act *1983* s66(1)(a)
[140]*R (MH) v The Secretary of State for theDepartment of Health [2004] EWCA Civ 1690.*
[141] Human Rights Act *1998* Schedule 1 Article 5(4)
[142]*R(Modaresi) v Secretary of State for health* [2013] UKSC 53
[143]*Pritam Kaur v S Russell & Sons Ltd* [1973] 1 QB 336
[144]*R(Modaresi) v Secretary of State for health* [2011] EWCA Civ 1359

The open-door policy provides a therapeutic environment[145]for patients. However, it increases risks for patients, as it provides an opportunity for patients to abscond from hospitals and, while at large, go on to cause harm to themselves or others[146]. Since the HRA was passed, it has been debated whether locked doors provide a method of ensuring patients' safety, or a deprivation of a patient's freedom. The case of *Savage*[147]provides for the former, as it concerns a patient who was able to abscond due to an "open-door ward" and subsequently committed suicide. Here Lord Roger held that, as a result of a hospital authority's improper system for supervising mentally ill patients, where a patient is able to commit suicide, the authority will have violated the patient's right to life under Art.2.[148]

It may be questioned whether putting an informal patient in a locked ward would be *prima facie* illegal, amounting to unlawful imprisonment and breaching art.5(1).[149] However, the *COP* state that a deprivation of liberty is unlikely to occur in these circumstances as long as the patient is duly informed, consenting and still free to leave,[150] thereby suggesting that whether a deprivation of liberty is found depends on how well the patient is informed.

4.4 How treatment of the patient without consent may affect their rights

Considering the basic principles of autonomy, it is understandable how treating a patient without consent may constitute inhuman or degrading treatment for the purposes of Art.3.[151] Common law established that determining what shall be done to one's body is a fundamental right;[152] thus, a breach would amount to a violation of human rights. However, the lawful exceptions to this are seemingly broad. S.58 of the Act provides that drug treatments may be administered without consent for up to three months at the discretion of the responsible clinician, after which a SOAD must certify that the patient is unable to understand the nature, purpose or likely effects of the treatment and it is appropriate for the treatment to be given[153]; however, three months is a lengthy period of time for unconsented treatment

---

[145]B. Andoh, *op. cit.*

[146] M. Rae, "Improving Safety Key Dilemmas". *Mental Health Review Journal* (2006) 11(3), 23-26.

[147]*Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681

[148]*Savage v South Essex NHS Trust* [2008] UKHL 74; [2009] 1 AC 681; [2009] 1 All ER 1053

[149] B. Andoh*, op. cit.*

[150] The Mental Health Act *1983* Codes of Practice (2015) para 8.11

[151] Human Rights Act *1983* Schedule 1 Article 3 "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[152]*Re MB (Caesarean section)* [1997] EWCA Civ1361

[153] Mental Health Act *1983* s58(3)(b)

to be administered without external safeguarding. The leading case here is *Herczegfalvy*[154] in which a patient was force-fed and forcibly given medication; the Court concluded that measures which were found to be of therapeutic necessity could not be regarded as inhuman or degrading treatment[155]. Additionally, *Haddock*[156] suggested that *ECHR* provisions should not cut across the grains of good medical practice; therefore, such treatment shall be lawful if considered a therapeutic necessity. However, the courts are seemingly reluctant to acknowledge the extent to which psychiatric treatment which is not precluded by s.57 may raise human rights concerns[157].

In *R (B) v Dr SS*[158] B lacked capacity. Though it was argued that section 58 of the *MHA* is incompatible with the *ECHR*, the Courts affirmed that the obligations of the state under Art.3 do not entitle a patient in *B's* position to refuse treatment where it is shown to be a therapeutic necessity[159]. Similarly, in *R (on the application of PS)*[160] the courts held that treatment without consent in accordance with the *MHA* would only violate Art.3 if the proposed treatment reached the minimum level of severity as to amount to ill-treatment, and the justification of therapeutic necessity could not be shown[161]. However, studies have shown that anti-psychotic treatments have extrapyramidal effects in up to 55% of cases;[162] thus, they are not unproblematic and their administration without consent should arguably be further scrutinized by the courts. Considering the purposes of Art.3 as an absolute right, it is questionable as to why the courts have taken such an approach to unconsented treatment of mental health patients as on the surface the concept of such conduct *prima facie* violates the fundamental right to autonomy of one's body. Though the justifications are so broad and cover such a wide range of conduct, they are seemingly restrictive for a patient who lacks capacity.

A patient's qualified rights under Art.8 may, therefore, be more difficult to assert, despite the fact that even unlawful touching of someone may

---

[154] *Herczegfalvy v Austria* [1993] 15 EHRR 437
[155] *Herczegfalvy v Austria* [1993] 15 EHRR 437
[156] *R (JD) v Haddock* [2006] EWCA Civ 961 para 33
[157] P. Bartlett, "'The Necessity Must be Convincingly Shown to Exist': Standards for Compulsory Treatment for Mental Disorder Under the Mental Health Act 1983" *Med Law Rev* (2011) 19 (4): 514
[158] *R (B) v Dr SS and Others* [2005] EWCA Civ 28
[159] L. Gostin, P. Bartlett, P. Fennell, J. McHale and R. Mackay, *op. cit.,* 3.117
[160] *R(on the application of PS) v Responsible Medical Officer* [2003] EWHC 2335
[161] *R(on the application of PS) v Responsible Medical Officer* [2003] EWHC 2335
[162] J. Bobes *et al*., "Frequency of Extrapyramidal Adverse Reactions in Schizophrenic Outpatients Treated with Risperidone, Olanzapine, Quetiapine or Haloperidol: Results of the EIRE Study". *Clinical Drug Investigation* (2002) 22, 609.

constitute a violation of their privacy[163], further established in *Storck*[164]. Additionally, in *YF*[165]the courts implied that most treatment of patients detained within psychiatric facilities would constitute interference with Art.8 and require justification[166]. Unfortunately, these justifications are easily satisfied as compliance with the statute or conduct for the purposes of medical necessity will suffice[167] though there is not much guidance on compliance with the statute. Even the *COP* states that treatment outside of s57 and 58 is not regulated.[168] Thus the clinical practitioner must act in accordance with the *MHA* or deem the conduct necessary, which only requires the conduct to be more than ordinary, reasonable or desirable[169]. Therefore, considering the above, it has been suggested that *ECHR* standards are underdeveloped in this area[170] and, perhaps, do not provide vulnerable patients sufficient protection.

4.5 How being closely observed may affect a patient's rights

It is widely accepted that hospitals must use the least restrictive form of intervention.[171] Therefore, close observation must be administered effectively to ensure it is not so intense as to violate a patient's right to a private life under Art.8 though still effective to prevent a patient harming themselves, thereby fulfilling the hospital's duty under Art.2.

The case of *Keenan*[172] portrays the importance of effective close observation, as a 28-year-old with a history of self-harm was placed in segregation, in which time he killed himself. His mother claimed the state had not taken sufficient precautions to protect her son's life; thus, the hospitals failure to closely observe the high-risk patient resulted in his death by suicide. This action failed at the time though it was later suggested that this case could pose implications on practitioners to provide comprehensive risk assessment and management of suicide risk,[173] and the more recent case

---

[163] R. Griffith, "Limits to consent to care and treatment". *British Journal of Nursing,* (2017), 26(16), 942-943.
[164]*Stork v Germany* [2006] 43 EHRR 6
[165]*YF v Turkey* Application No. 24209/94, judgment of 22 July 2003, (2004) 39 EHRR 34.
[166] P. Bartlett, "'The Necessity Must be Convincingly Shown to Exist': Standards for Compulsory Treatment for Mental Disorder Under the Mental Health Act 1983", *Med Law Rev* (2011) 19 (4): 514
[167] B. Hale, *Mental Health Law*, 6th edition (Sweet & Maxwell: 2017) 6-001
[168] Mental Health Act *1983* Codes of Practice (2015), para 24.29
[169]*Handyside v the United Kingdom* [1976] 1 EHRR 737.
[170] R. Griffith, "Limits to consent to care and treatment". *British Journal of Nursing* (2017) 26(16), 942-943.
[171] C. Billings, "Close Observation of Suicidal Inpatients". *Journal of the American Psychiatric Nurses Association*, (2001) 7(2), 49-50.
[172]*Keenan v United Kingdom* [1998] EHRLR 648
[173]A. Persuad and D. Hewitt, "European Convention on Human Rights: effects on psychiatric care", *Nursing Standard* (2001),15(44):33-7

of *Savage*[174] suggests it is likely this case would have succeeded in today's court, as a patient's right to life is absolute. Therefore, where a patient feels as though their rights to a private life have been infringed, it is likely to be justified on the grounds of necessity[175] for the purposes of protecting their rights under Art.2.

However, most patients who feel their rights to privacy have been encroached on pinned it on the intrusiveness that close observation imposes[176] and the lack of information given regarding its purpose.[177] This is seemingly due to the remote and unempathetic approach of the hospital staff, which could likely be resolved where staff were more engaging with the patients at risk. Having said this, there are common law justifications and (depending on the legal status of the patient) justifications under the *MHA* for close observation. Furthermore, the *COP,* which refers to such method as 'enhanced observation', provides clear guidelines on how the process should be carried out, stating that this method should focus on engaging the patient therapeutically[178] and that staff should balance the potentially distressing effect of close observation against the identified risk of the particular patient[179]. Therefore, where close observation is not successful,[180] it is likely to be due to the individual hospital and a breakdown of the procedure set out in the *COP.*[181]

4.6 How the searching of patient's person and possessions may affect their rights

Generally, searches of patients will be justified, even where they violate Art.8, where there is reasonable grounds to do so, either under common law for high-security hospitals, as discussed in *Broadmoor*[182]or in lower-risk hospitals, which are not subject to routine searches, unless in exceptional circumstances[183] where there is reasonable cause to suspect the patient may

---

[174] *Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681

[175] B. Andoh*, op. cit.*, 14

[176] N. Bowles, P. Dodds, D. Hackney, C. Sunderland & P, Thomas, "Formal observations and engagement: a discussion paper" *Journal of Psychiatric and Mental Health Nursing,* (2002) 9, 255-260

[177] J. Jones, M. Ward, N. Wellman & T. Lowe, "Psychiatric inpatients' experience of nursing observation: a United Kingdom perspective" *Journal of Psychosocial Nursing,* 28 (12), (2000) 10-20

[178] Mental Health Act *1983* Codes of Practice (2015) para 26.30 "…It should focus on engaging the person therapeutically and enabling them to address their difficulties constructively (eg through sitting, chatting, encouraging/supporting people to participate in activities, to relax, to talk about any concerns etc)."

[179] Mental Health Act *1983* Codes of Practice (2015) para 26.34

[180] J. Meehan, N. Kapur, I. Hunt *et al*. "Suicide in mental health in patients and within 3 months of discharge: national clinical survey". *Br J Psychiatry* 2006, 188:129-34.

[181] D. Stewart, L. Bowers. & F. Warburton, "Constant special observation and self-harm on acute psychiatric wards: a longitudinal analysis". *General Hospital Psychiatry*, (2009), 31(6), 523-530.

[182] *R v Broadmoor Special Hospital Authority* [1998] 08 LS Gaz R 32

[183] The Mental Health Act *1983* Codes of Practice (2015) para 25.3

introduce prohibited items into the institution[184]. Thus, even where this patient does experience a violation of their rights under Art.8, it is likely to be justified as necessary under Art.8(2) in the prevention of disorder or a crime or for the protection of health[185]. This was discussed in the case of *Leech*[186] where the courts were prepared to allow restrictions upon qualified rights for the purpose of security.

The argument for this is improvement of safety provided by searches, decreasing the likelihood of patients withholding dangerous items. So, potentially protecting another's rights under Art. 2 of the Convention is arguably more beneficial than ensuring the protection of rights to a private life under Art.8. This is suggested by the case of *Lambert*[187]*,* which did not consider the prospect of searching patients; however, it did involve the successful claim against a hospital authority for not providing adequate security measures. Therefore, it is more likely that a hospital will be scrutinized for not taking precautions to ensure patients are not withholding dangerous articles, thus jeopardizing other patients' right to life under Art.2.

4.7 How the provisions under s139 of the Mental Health Act may affect a patient's rights

S139 of the *MHA* provides that no person shall be liable in respect of any act done purporting to be done in pursuance of this Act[188]. The aim of this provision is to protect hospital authorities against frivolous claims[189] through providing a mode of filtering the claims before they go forth. However, this provision has been subject to some scrutiny as it has been said to hinder a patient's ability to apply to the courts[190] and, thus, violate their rights under Art. 6(1).[191]

In *R v Bracknell*[192] Lord Simon stated he was in favour of this section as patients are likely to harass courts with groundless charges. This seemingly undermines the protection that the *ECHR*, and the MHA strives to provide

[184]Head of Corporate Business (NHS). (2015) Searching Mental Health inpatients, visitors and personal property policy. Version 3 s1.4
[185] Human Rights Act *1998* Schedule 1 Article 8(2)
[186]*R v Home office, ex parte Leech (no. 2)* [1994] QB 198
[187]*Lambert v West Sussex Health Authority, The Times,* February 8 2000
[188] Mental Health Act *1983* s139(1)
[189] L. Gostin, P. Bartlett, P. Fennell, J. McHale and R. Mackay*, op. cit*., 25.09
[190] B. Andoh, "Protection for acts done in pursuance of the Mental Health Act 1983". *Medicine, Science and the Law* (2008) 48(2), 96-107.
[191]Human Rights Act *1998* Schedule 1 Article 6(1) "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"
[192]*R v Bracknell JJ, ex parte Griffiths* [1976] AC 314

patients, to which access to a court is imperative. What is the purpose of the law if it is not adhered to? In the case of *Seal v Chief*[193] Baroness Hale argued that this section represented a disproportionate interference with the fundamental right of access to the courts;[194] However, the European Court found that disproportionality in the circumstances would be the only way Art. 6 would be infringed[195]. This was further discussed in the case of *Ashingdane*[196] where it was found that this provision did not infringe one's rights under Art. 6 as it did not entirely restrict access to the courts, which would still be available in cases where the hospital staff were negligent or acted in bad faith. Therefore, this provision remains in the legislation.

4.8 How the interception of patient's correspondence may affect their rights

Article 8 of the convention expressly protects a person's right to correspondence although this is subject to limitations "in accordance with the law."[197] The *MHA* authorises mail of compulsory patients to be intercepted where necessary. However, there is no authority to withhold or inspect the post of informal patients[198] and the Department of Health[199] has stated that it is not necessary to open outgoing post from patients other than ones detained in high-risk hospitals (only to check that the recipient is not someone who has requested it to be withheld). Therefore, if correspondence is intercepted outside of these guidelines, a breach of Art. 8 may be found. This was discussed in the case of *Foxley.*[200] It was found there that, once an order which permitted the interception of mail had expired, interception then violated the claimant's rights under Art. 8. Therefore, it may be the case that, if a compulsory patient subsequently becomes informal or the risk of distress and danger is not currently present, Art. 8 may be infringed. However, it may be difficult for a high-risk patient to prove unlawful interception of incoming mail as the concept of danger or distress is at the

---

[193]*Seal v Chief constable of south wales* [2007] UKHL 31; [2007] 4 ALL ER 177

[194] L. Gostin, P. Bartlett, P. Fennell, J. McHale and R. Mackay, *Principles of Mental Health Law and Policy.* (1st edition, Oxford, 2010) 25.09

[195]*Salontaji-Drobnjak v Serbia* Judgement of 13th October 2009 para 134

[196]*Ashingdane v The United Kingdom* [1985] 7 EHRR

[197] Human Rights Act *1998* Schedule 1 Article 8(2) "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

[198]L, Gostin; P, Bartlett; P, Fennell; J, McHale and R, Mackay, *op. cit*., 25.11

[199]Department of Health, R*eference Guide to the Mental Health Act 1983,* (2008) para 14.6

[200]*Foxley v United Kingdom*, Judgment of the European Court of Human Rights, June 20, 2000, The Times, July 4, 2000.

hospital's discretion. Although, the case of *Herczegfallvy*[201] conceded that the discretion that the hospital authorities had relied on did not afford the applicant the minimum degree of protection against arbitrariness that the law required; thus, their conduct was unlawful and a violation of Art. 8 was found, depicting how the courts will not accept every justification by hospital authorities. Additionally, the *COP* states that hospitals should have a written policy for the exercise of their power to withhold mail,[202] thus providing for a lawful implementation of such power. Despite the lack of power to open or inspect parcels with regard to informal and low risk patients, if a patient is sent articles of potential danger through the post, the hospital staff still have powers under s3(1) of the *Criminal Law Act*[203] to take reasonable measures to prevent the patient from receiving the article[204].

4.9 How the method of seclusion may affect a patient's rights

Seclusion is intended to be a therapeutic intervention for a seriously disturbed patient; however, it remains controversial for having the potential to encroach on both patient's rights under Art. 3 and Art. 5 of the convention if not executed lawfully and as a last resort. However, the *COP* has issued extensive guidelines for seclusion can be carried out effectively, minimising the risk to the patient.[205] *Munjaz*[206] depicted how the courts are lenient towards deviation from the *COP* surrounding seclusion as a mere departure from such would not constitute the minimum threshold of severity required to amount to a breach of Art.3; thus, slight deviation from the *COP* shall not constitute a violation of fundamental rights where the hospital has good reason.[207] This may be questionable because, although the *COP* is not binding, there is no guidance on seclusion within the *MHA*[208] and, therefore, it seems logical that sufficient weight would be placed on the *COP*[209] to ensure a standard of care throughout all institutions.

On the surface seclusion may seem to amount to a deprivation of liberty for the purposes of Art. 5; however, *R v Deputy Governor of Parkhurst Prison*[210] established that seclusion itself is not a deprivation of liberty as it

---

[201] *Herczegfallvy v Austria* [1993] 15 E.H.R.R 437
[202] Mental Health Act *1983* Codes of Practice (2015) para 37.38
[203] Criminal Law Act *1967* s3(1)
[204] R. M. Jones, *Mental Health Act Manual* (11th edition, 2008) p498
[205] Mental Health Act *1983* Codes of Practice (2015) para 26.103-150
[206] *Colonel Munjazv. Mersey Care N.H.S. Trust* (1) *The Secretary of State for Health and (2) The National Association for Mental Health (MIND) (Interested Parties)* [2003] E.W.C.A. Civ.
[207] G, Dickens & P, Sugarman. (2008). "Interpretation and knowledge of human rights in mental health practice". *British Journal of Nursing*, 17(10), 664-667.
[208] P. Hodgkinson, "The Use of Seclusion", *Medicine, Science and the Law*, (1985) 25(3), 215-222.
[209] *Koskinen v. Finland* (1994) App. No. 20560/90
[210] *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58

is justified under the statutory power to detain a compulsory patient. Additionally, the case of *A v United Kingdom*[211] saw a patient unsuccessfully challenge his five-week seclusion because it did not amount to a breach of Art. 5 as it was necessary for his safety and that of others. Even where circumstances are found to be unlawful, as seen in the case of *S v. Airedale,*[212] the courts are reluctant to find a breach of Art. 5 when considering seclusion. This could be a matter of concern as case law is broadening the scope of mental health law to such an extent that practitioner's powers under the Act are increasing, and the *ECHR* may not be providing vulnerable patients the level of consideration that it is seemingly intended to.

However, in*Munjaz,*[213] the European Court revisited the contention that M's seclusion had amounted to a further deprivation of liberty and although, upon the facts of *M's* case as a long-term inpatient her seclusion did not amount to a breach,[214] the court conceded that a lawfully detained individual could be further deprived of their liberty through the method of seclusion.[215]

5. SUMMARY AND RECOMMENDATIONS

In summary, for the MHA to successfully achieve its aim of maximising health and safety for both patients and the community, through providing treatment for the mentally disordered whilst ensuring they do not pose a threat to others, some derogation from human rights is necessary. Additionally, seemingly many derogations from qualified rights were in the name of protecting one's absolute right to life. Thus, this is logically justified. However, in some circumstances the level of severity that the European Court perceived as necessary to constitute a violation of one's rights is seemingly high considering the purposes of the Convention of protecting human dignity. Therefore, where patient's rights were significantly constrained, for example, concerning Art. 3 when treating patients without consent, there was no violation found unless this infringement amounted to ill-treatment, despite the fact that "degrading and inhuman treatment" is supposed to extend to the widest possible protection

[211]*A v United Kingdom* [1980] EHRR 648
[212]*S v. Airedale N.H.S. Trust* [2003] E.W.C.A. Civ

[213]*Munjaz v. United Kingdom (Application no. 2913/06, ECtHR)*
[214]*Munjaz v. United Kingdom (Application no. 2913/06, ECtHR)* para 65
[215] Andrew Parsons, "Mental health law briefing 188 – Is seclusion a deprivation of liberty?" RLB Law <https://www.rlb-law.com/briefings/mental-health-law/seclusion-a-deprivation-of-liberty/> accessed 20th April 2019

of abuses.[216] This is seemingly to protect medical professionals from unwanted litigation although it appears the primary focus should ensure that no unnecessary constraints are imposed on a vulnerable patient's human rights.

The *COP* provides comprehensive guidelines for medical professionals to ensure their conduct, when carrying out procedures within the regime, does not infringe a patient's rights to the extent that it would amount to a violation under the *ECHR*. However, in some circumstances it was found that slight deviation from the Code would not amount to a violation of rights; this may be questionable as the guidelines provide clarification where the legislation does not, although this was only accepted by courts when the hospital had good reason. Therefore, fundamentally, the *COP* provides important safeguards for patients.

Also, some lack of clarity was found within the legislation. It was also found that provisions, which are intended to safeguard patients, subsequently allow for patient's rights to be compromised. The European Court also established that UK legislation must provide sufficient clarity in order to be in accordance with the Convention[217]. However, currently the only form of redress is to go through the Courts, which is an extensive process when one's rights have already been infringed. Therefore, offered here are some recommendations for reform within the regime that would further safeguard vulnerable patients and ensure their rights are not unnecessarily infringed.

5.1 The need for additional safeguards afforded to the form used in transferring a Section 2 patient to admission under Section 3 of the act

Considering the lack of procedural safeguards to ensure the patient's nearest relative has consented to their treatment under s3 of the Act and the impact this has on their fundamental rights, it is proposed the form which the practitioner must fill out in order to transfer a s2 patient to s3, should contain a provision where the nearest relative must sign to ensure they have consented to this treatment. This will provide clarity to the procedure as it is currently unclear to the hospital authority whether the nearest relative has

[216] United Nations Body of Principles for The Protection of All Persons Under Any Form of Detention or Imprisonment, GA Res. 43/173 (1998)

[217] *HL v United Kingdom* [2000] ECHR 45508/99

consented and, so, whether the application is lawful. Additionally, where it was not reasonably practicable to obtain such consent, for the purposes of not causing an unreasonable delay, the practitioner must provide reasoning or evidence as to why consent was not obtained. This would have been beneficial in both the case of *R (on the application of H)*[218] and *GD*[219] as in those cases the hospital omitted from obtaining consent from the patient's nearest relative. Furthermore, hospital authorities rely on the provision of S6(3)[220] of the *MHA* which provides that any application for admission which appears to be duly made and founded on the necessary medical recommendations may be acted upon; thus, where a hospital relies on an application that appears to be lawful, they will be likely to avoid liability. I do not disagree with this provision as it allows for patients to be processed through the Mental Health system without delay in their best interests; however, the implementation of this safeguard on the s3 admission form would make it striking that the admission is not lawful unless it is completed, or there is a lawful reason in place as to why it is not. Thus, it would significantly reduce the number of vulnerable patients who should be afforded the protection which the provision of a nearest relative brings, though they may be unlawfully detained and may then only seek remedy through the courts.

5.2 The need for clarification in S66(1)(a) of the Act

It is also necessary to discuss the lack of clarity that surrounds section 66(1)(a) of the *MHA*. The European Court of Human Rights held in *HL v UK*[221] that, in order for the law to be coherent with the Convention's standard of lawfulness, the legislation must be sufficiently precise so that a patient may reasonably see the consequences of any given action.[222] Despite the discussion in the case of *R (Modaresi) v Secretary of State for Health*[223] which has certified in common law the allowances for bank holidays and

[218] *R (on the application of H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)* [2001] 3 WLR 512, CA

[219] *GD v The Managers of the Dennis Scott Unit at Edgware Community Hospital and The London Borough of Barnet,* Queen's Bench Division (Administrative Court), 27th June 2008

[220] Mental Health Act *1983* s6(3) "Any application for the admission of a patient under this Part of this Act which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given or of any matter of fact or opinion stated in it."

[221] *HL v United Kingdom* [2000] ECHR 45508/99

[222] B. Hale. *Mental Health Law* (6th edition, Sweet & Maxwell 2017) 3-019

[223] *R (Modaresi) v Secretary of State for health* [2011] EWCA Civ 1359

weekends in relation to s66(1)(a) of the Act, it is clearly necessary for this to be incorporated into the *MHA* in order for the section to be coherent with the Convention's standard of lawfulness. It is also necessary to provide peace of mind to patients (the need for clarity aside) as the right to apply to a tribunal is considered a fundamental right under the *ECHR*; thus, if the law surrounding this is unclear, this right will be grossly affected, and the process could be considered *prima facie* unlawful.

5.3 The need to ensure Law Reporters correctly report judgements to maintain clarity in the law

Considering clarity in the law it is also necessary to discuss the case of *R v Mental Health Act Commission, ex parte Smith*[224] where the court held that the detention of a compulsory patient gave the hospital authority the implied power to exercise control over the patient under s.120(1)(b)(i) of the Act. The concept of this judgement is clear, as it is understandable how this would be necessary to maintain a fully functioning hospital; however, what is unclear is the reference to the section of the *MHA*; Section 120(1) exists within the section, but there is no provision of any subsections of it. Therefore, there seems to have been a law-reporting issue here as it is unlikely that the judge would have concluded on the basis of a non-existent subsection. For the protection of patients who are compulsorily detained under the Act it is imperative that the legislation is understandable and foreseeable, so it is coherent with the European Convention on Human Rights. Additionally, section 6(2) of the Act expressly grants hospital authorities power to detain patients in accordance with other sections of the Act, which impliedly grants them permission to control patients, as this is inevitable in the case of compulsorily detained patients. *Ex parte Smith* relied on section 120(1) of the Act instead of section 6(2) even though this is clearer and more concise.

5.4 The need for additional safeguards regarding the transfer of a section 2 patient to admission under section 3 of the Act

Considering the lack of procedural safeguards to ensure the patient's nearest relative has consented to their treatment under s3 of the Act, and the impact this has on their fundamental rights, it is proposed the form, which the practitioner must fill out for the transfer of a s2 patient to s3, should contain a provision where nearest relative must sign to show they have consented. This will provide clarity to the procedure, as it is currently unclear to the hospital authority whether the nearest relative has consented

---

[224] *R v Mental Health Act Commission, ex parte Smith* [1998] 43 B.M.L.R, 174

and, thus, whether the application is lawful. Additionally, where it was not reasonably practicable to obtain such consent, for the purposes of not causing an unreasonable delay, the practitioner must provide reasoning or evidence as to why consent was not obtained. This would have been beneficial in both the case of *R (on the application of H)*[225] and *GD*[226] as in those cases the hospitals avoided obtaining consent from the patient's nearest relative. Furthermore, hospital authorities rely on the provision of S6(3)[227] of the *MHA* which provides that any application for admission which appears to be duly made and founded on the necessary medical recommendations may be acted upon; thus, where a hospital relies on an application that appears to be lawful, they are likely to avoid liability. I do not disagree with this provision as it allows for patients to be processed through the mental health system without delay in their best interests; however, the implementation of this safeguard on the s3 admission form would make it clear that the admission is not lawful unless it is completed, or there is a lawful reason in place as to why it is not. Thus, it would significantly reduce the number of vulnerable patients who should be afforded the protection which the provision of a nearest relative brings.

Eleanor Plaistow-Trapaud, LLB (Hons.)

[225]*R (on the application of H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)* [2001] 3 WLR 512, CA

[226]*GD v The Managers of the Dennis Scott Unit at Edgware Community Hospital and The London Borough of Barnet,* Queen's Bench Division (Administrative Court), 27th June 2008

[227]Mental Health Act *198,3* s6(3) "Any application for the admission of a patient under this Part of this Act which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given or of any matter of fact or opinion stated in it."

Coping with Covid-19 in Higher Education: A crisis can be an opportunity

Prof. Patricia Park

Abstract

In the higher education sector, nearly all commentators and university administrators are claiming that the Covid-19 crisis represents a major threat to the system: that there will be catastrophic shortfalls in university revenue, which will lead to massive job cuts as well as severe disruption to learning and research. These effects will undoubtedly occur and, given the massive public debt that governments have been forced to accumulate to counter Covid-19, there is little hope that the Treasury will be willing to help the higher education sector recover. It is, therefore, for vice chancellors and governance committees to ensure that they adapt and take advantage of the new opportunities that will certainly come.

Keywords: Higher Education and Covid-19 - governance n higher education – planning for a post-Covid culture in higher education – managing the student experience – the new reality – choices in a post-Covid economy

Introduction

For many people, especially those in the media, crises are all about gloom and doom. But, for visionaries and risk takers, they represent opportunities for real, meaningful change. Not change that is forced upon decision-takers but change that is realised by decision-makers.

In the higher education sector, nearly all commentators and university administrators are claiming that the Covid-19 crisis represents a major threat to the system. That there will be catastrophic shortfalls in university revenue, which will lead to massive job cuts and severe disruption to learning and research. These effects will undoubtedly occur, and given the massive public debt that governments have been forced to accumulate to counter Covid-19, there is little hope that the Treasury will be willing to help the higher education sector recover. It is for vice chancellors and governance committees to ensure that they adapt and take advantage of the

new opportunities that will certainly come. The Covid-19 crisis is playing out on a global scale and there will be winners and losers globally.

Governance

Since the beginning of the pandemic, universities have operated in crisis management mode; taking decisions quickly, with minimal consultation. As the emphasis shifts from emergency rapid response to events to scenic planning for coping with the consequences of the pandemic, boards of governors are considering how best to contribute. There is a potential for fundamental change – not necessarily in the character of universities, but how work is done. At the moment the executive and boards are working through short and medium term scenarios but there needs to be a move from crisis management to the next stage. The conversation between the board and executive needs to be much more about things not going back to being the same but what all the current changes mean from a cultural point of view, and how does it actually give the university the opportunity to accelerate and advance things.

Professional behaviours and expectations across society may change as the remote working model beds in across different professions as a result of the pandemic. Although the prospect of fundamental changes in ways of working could be daunting there is also an opportunity to explore the alternative to cost-cutting by creating new forms of value. Like most organisations, universities can sometimes be reluctant to change operating processes, but Covid-19 has created a burning platform that has forced people to change and staff and students have risen to the challenge and done a brilliant job. However, now people can also see that such changes made out of expediency are working and should certainly change the way universities operate in the future. A good example is the ability to collaborate on some things has increased and that should impact everything from basic services through to multidisciplinary research projects. Universities will need to work collaboratively with the whole research and development community to create a clear vision of where research is heading and how science fits into society. This will not be easy in a time of crisis; but it will be worth the effort.

Governor's' assessment of their university's initial response to the Covid-19 crisis should give an indication of the underlying culture, capability and capacity at their institution. The role of any governing body is to be the strategic mind of the organisation which gives a fresh perspective, drawing on their own experience, and testing different approaches from different

sectors. Governors have already been forced to think creatively about things and so should make that an advantage and take the opportunity to have conversations that might previously have been in the 'too difficult' box.

Governors, of course have a responsibility for the sustainability of their own institution, not the health of the sector as a whole; but a potential lack of sector-wide and sector-led thinking about the future shape of higher education leaves a gap that the absence of a coordinating body only government and regulators can fill. This is not only about institutional autonomy but about sourcing the best ideas and insight about the role of higher education in a post Covid-19 world.

The major risk for universities is that they await government intervention rather than taking the initiative. Each sector has a special case to plead and if the higher education sector waits in the queue it will be there a very long time. Decision-making in government is never fast, and waiting as a recipient of government action can be frustrating and lead to a sense of powerlessness.

Planning for a post-Covid future

Strategic planning is a much more comfortable process when the future is reasonably predictable. The higher education sector has benefitted in the past from offering an established model of education, loose enough to accommodate innovation in practice without really having to change significantly how things are done. Historically university strategies have too often been exercises in consultation without moving the dial on university activity; usually because it is hard to challenge the status quo from inside, a lack of a driver to make change, or a lack of an external burning platform.

Boards could use the terminology of React; Resilience; Recovery; Renewal and New Reality as suggested by KPMG to help them think through the different time horizons for decision making and the actions that might be required at each stage. At the moment universities are now moving from the React stage to Resilience after securing the continuation of teaching in some form for the summer term. Universities are now assessing the short, medium and long term financial impact of the pandemic and thinking through how to manage those losses without irrevocably damaging the long term sustainability of the university or its mission. This is not without challenge. There remains significant uncertainty about the extent, and how soon, universities will be able to operate a full on-campus offer; will overseas students return and what home students will choose to do. Not only must governors keep an eye on the React and Resilience but also look towards

the medium term Recovery and the longer term more substantive pressures on the sector with Renewal and the New Reality.

The current crisis will bring to the for some of the deep-seated cultural issues that have meant change in universities have been incremental, but the really positive activity in the React phase shows that universities can mobilise in extraordinary ways and with speed and agility when they need to.

Moving forward to the New Reality

The last few months have shown some of the wider changes that were known to be out there, and how the existing model could be disrupted. Creative boards and thinkers can also imagine a range of different potential futures and the responses to them by building on the closer relationships between industry/academia and government used to address the pandemic.

To creative thinkers and Governors the fundamental question should be "Why does what we do now continue to be the right answer – or where do we need to update our thinking?"; followed by "what is absolutely core to the institution and therefore needs to be kept sacred?"

As universities look forward to the New Reality, these questions should remain at the heart of the issues that boards need to consider. Across all university activities there will come a decision point where, for each activity governors need to support and challenge universities to answer these key questions. Through this pandemic there will also be the opportunity to explore new avenues and perhaps address some of the shibboleths that have endured. Does the university need to do all the activities across the frontline, middle and back office itself? Is now the time to proactively explore the role of collaboration – or even merger – activity. Should the university build on the current collaboration with other universities and business? Is the portfolio mix the right one and how can the university balance the needs of the wider economy post Covid-19, as well as support a strong recovery in the places where the university operates?

If the strategy does pivot – and undoubtedly will in some areas- what activity will any new organisational structure be there to support; there may be potentially some quite significant structural changes to the way universities operate, which include:

- How to consider the different student experience across what might become very mixed learner cohorts?

- How do you create the academic flexibility and agility required to meet those potential demands?

- What could it mean for professional services; the estate; the systems and indeed the workforce of the future?

Managing the student experience in the New Reality

All students, whether new or continuing, form an original ‘expectation’ of what their learning experience will be like at university. For the majority, they expected their learning experience to be embedded into a wider student experience – one with access to campus facilities, extra-curricular opportunities and in-person support. This is the benchmark that actual provision will be measured against. It is the benchmark that provides context to the price of tuition. In short, they expect to pay for a sandwich that has a filling.

Covid-19 has already changed the higher education landscape more than most of us could have imagined three months ago. Indeed, it has changed students’ lives by the same measures. They are aware that their universities are endeavouring to move teaching online, ensure learning outcomes are met and ward off any complaints with their carefully worded force-majeure clauses.

But as time moves on universities will only be able to hide behind a global pandemic for so long. With the new academic year shoddy and inconsistent online provision, and subsequent ‘death by PowerPoint’ will no longer be justified. With no wider student experience to mitigate the poor learning experience with students paying the same fees, understanding by students will crumble and will be replaced by frustration and impatience.

The traditional methods of physical learning works because of the wider experience. Moving a once physical course online will test the ability of academics to ‘think outside the box’. In fact, it will require throwing ‘the box’ out of the window and start again.

Will students be listening to podcasts? Are they watching you-tube content that explains key concepts for their degree? Are they sending voice notes on WhatsApp to friends to check that they have understood things correctly?

It is important that the frameworks and spaces that students use already are used. Generation Z is already learning vast amounts of information and content outside lecture theatres via different methods. Academics should both recognise and use them.

In the future it will be difficult to give students a Student Union club night, or a campus café whilst they are at home, but it is vital to give thought to how a wider experience outside of learning can be provided.

At an institutional level, it will be imperative to work with Student Unions to work out what a student community will look like. It is this wider experience that acts as a pressure valve to what goes on in a lecture theatre. Could there be a 'local student union' for all students living within a geographical area? Whatever it is, it is imperative that students can feel 'known' and 'valued' – both by their peers and their academic staff.

A high-quality online learning experience can have further benefits to older learners who did not have the opportunity to attend university when younger, as well as overseas learners from underdeveloped countries who can neither afford the travel nor the fees. The key is in the quality of the experience and much has been learned in this respect in the last few months. Universities now understand how to use online education at a very sophisticated level. The pandemic has done what the IT departments in universities have been trying to do for years. This has, in turn opened up space for a much more sophisticated discussion about how people learn online and how they learn face to face. The question is 'how can we maximise both of these opportunities?'

Plan for research to guide choices in a post Covid economy

The impact of the Covid-19 pandemic and the wider economic shock reminds universities that targets for research are not destinations in their own right. The need for a compelling new vision for the university is more important than ever to both make the case for continued public and business investment, and to make wise choices on how that money is spent. The research and development sector and its champions in government are going to have to work harder than ever to make the case and a strong vision is needed to underpin compelling arguments.

A strong clear vision will come from collaboration with the academic community and businesses. To be effective, this vision will need to reach beyond ivory towers and science parks. It should help people connect to what research means to individuals and citizens of the society they live in.

Science is the exit strategy from this pandemic, so it is not surprising that science has a higher public profile than perhaps it did before. The universities should build on this moment of maximum exposure. The

research vision should reflect what people – the taxpayers who fund the research- want that research to do for them and society.

To be able to deliver excellent, creative research, there needs to be a supportive research culture so that diverse researchers from all disciplines can work at their best. This means that the research culture must also be a factor in the university bureaucracy review as driven by the decision-making processes post Covid-19.

Conclusion

We have discovered, as have many sectors, that providing the best education, research and civic engagement – fulfilling the ambitions of what it is to be a university – can be threatened by disruption, just as in any other industry. Currently there has never been such a strong imperative to really step back and think about the different options open to a university to meet current and future societal and economic needs as we enter the New Reality. Some of which may well lie outside of the university as it is currently structured.

Prof. Patricia Park, Emerita Professor, Solent University

Why were the killers of PC Harper not convicted of murder?

Simon Parsons

Abstract

This article explains why the killers of PC Harper were not guilty of murder because they lacked the *mens rea* for that crime. It also maintains that the trial judge made an error of law and directed the jury in a way which was over-generous to the prosecution. The article correctly points out that the sentences imposed on the killers were not unduly lenient. Finally, the article considers whether the killers should have been labelled as murderers rather than as manslaughterers and how the law could be reformed to achieve that result.

Keywords: conspiracy to steal, murder, *actus reus, mens rea*, intention, error of law, manslaughter, unduly lenient sentences, labelling.

Introduction.

In August 2019 three young men Henry Long, Albert Bowers and Jessie Cole conspired to steal a quad bike. They acquired a SEAT car to do this to which they attached a stolen loop to tow the bike. The plan was that when the bike was stolen Jessie Cole would ride the bike when it was being towed. The conspiracy had an escape plan in that if the police tried to apprehend them, they would detach the bike and pick-up Jessie Cole and try to escape by driving the SEAT at high speed. The SEAT's brake lights had been disconnected to assist the getaway. On 15th August 2019, with Long driving, they succeeded in their plan and were towing the bike away when the police tried to apprehend them whereupon the escape plan was implemented. Tragically while that was happening PC Andrew Harper became entangled in the loop and he was dragged along an abrasive road surface for about a mile and he died of his injuries. Long and the others knew they were dragging something because Long tried to get rid of whatever was being dragged. What they did not know, until later, was that a person had become

caught in the loop and was being dragged along the road behind them. They were charged with murder but after a trial at the Old Bailey before Mr Justice Edis they were acquitted of murder. Instead Bowers and Cole were convicted by the jury of manslaughter;[1] Long having already pleaded guilty to that offence. Long was sentenced to 16 years in prison whilst Bowers and Cole both received 13 years.

The definition of murder.

The definition of murder is often condensed to the form 'unlawful killing with intention to kill or to cause grievous bodily harm', to be contrasted with those forms of homicide which consist of unlawful killings without an intention to kill or an intention to cause grievous bodily harm. The unlawful killing is the *actus reus* and the intention to cause grievous bodily harm or to kill is the *mens rea*. Murder is a result crime so the unlawful killing must have been caused by the defendant's act. At the time of that act the defendant must have had the *mens rea* for murder. Thus, the act and *mens rea* must coincide. What is clear is that PC Harper was unlawfully killed and that killing was caused by the Long's act of driving to escape whilst PC Harper was attached to the SEAT. What is more difficult to find is an intention to grievous bodily harm or to kill. At some point in the drive, they knew what they were towing because they slowed the SEAT when the body was detached and there was street lighting but by that point PC Harper was already dead. The jury were not sure that Henry Long knew prior to that that the car he was driving was dragging a human body. If Long was not guilty of murder as a principal then Bowers and Cole could not guilty as accomplices because their criminal liability derives from his as a principal.

The meaning of intention.

The question is why did Long not have the *mens rea* for murder? The answer depends on the meaning of the word 'intention' which can be divided into 'direct intention' and 'indirect (or oblique) intention'. Direct intention is where an actor wants or desires a consequence of his behaviour. Most murders involve direct intention. The mercy killer who kills on compassionate grounds and the sadistic killer who kills for pleasure both

[1]The species of manslaughter was unlawful act manslaughter with the unlawful and dangerous act being the carrying out of the dangerous conspiracy to steal which was 'such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm': *Church* [1966] 1 QB 59 at 70. Long was the principal and Bowers and Cole the accomplices.

have a direct intention to kill and both would feel a failure if the victim did not die. But Long did not have a direct intention to cause grievous bodily harm or to kill PC Harper as he could not care less whether PC Harper died or lived as Long's purpose or desire was to escape from the police. But did Long have an indirect intention to cause grievous bodily harm or to kill PC Harper?

The meaning of indirect intention.

There is a second meaning of intention which arises where an actor realises that when carrying out his purpose for acting a second consequence will result. Consider the case of an actor who owns an aircraft. He plants a bomb aboard that aircraft which is timed to blow up in mid-flight. The bomb explodes, destroying the aircraft and killing the pilot. The actor states that he wanted to claim the aircraft's insurance value and that he did not want to kill the pilot but he foresaw that the pilot would be killed by the explosion. The Courts have struggled to convict such an actor of murder. In *Hyam*[2] the House of Lords held indirect intention meant foresight of highly probable consequence so in the example if the actor foresaw the death of the pilot with that degree of foresight then as part of the *substantive law,* he would have an indirect intention to kill the pilot and would be guilty of murder. But, in *Moloney*[3]the House of Lords held that foresight of a natural consequence is *evidence* from which a jury is entitled to infer indirect intention but when it is so inferred it does not mean purpose or desire. The problem with that is that the degree of foresight is very low and thus the law of murder is widened but also a question of law is being decided by a jury- the presence of indirect intention which as a matter of substantive law has no meaning. This makes the law of indirect intent uncertain. In *Woollin*[4] the House of Lords attempted to clarify the law of indirect intent by holding that if a consequence is a virtually certain result of an act and the defendant foresaw it as such then a jury is entitled to find that the consequence was intended even though it was not the actor's purpose to cause it (the *Woollin* direction). There is clarification as a high degree of foresight is required thus the ambit of murder is narrowed but it still has foresight as a matter of *evidence* so the meaning of indirect intention is 'some ineffable indefinable notion of intent, locked in the breast of the jurors'.[5] Thus, in the example,

[2][1974] 2 All ER 41 HL.
[3][1985] 1 All ER 1025 HL.
[4][1998] 4 All ER 103 HL.
[5]Clarkson &Keating, Criminal Law, Text and Materials (5th ed) pp129-130.

the actor states that he wanted to claim the aircraft's insurance value and that he did not want to kill the pilot but he foresaw that it was virtually certain (and objectively it was virtually certain) that the pilot would be killed by the explosion. In such case a jury is entitled to find that the actor had an indirect intention to kill and to convict him of murder. But one day a jury will ask a judge what the meaning of indirect intent is when it is found from foresight. The judge will have no answer other to tell the jury to use their common sense. The way to advance consistency and certainty in the criminal law would be to accept that, where there is foresight of a virtually certain consequence of serious injury or death, there is, as a matter of the substantive law, an indirect intention to cause grievous bodily harm or kill as any moral dilemma (such as that involving mercy killers) that might exist could be provided for by a necessity defence which would make the act lawful. As Rix LJ says in *Matthew & Allen* at present 'there is very little to choose between a rule of evidence and one of substantive law'.[6]

Did Long have an indirect intention to cause grievous bodily harm or to kill?

It is clear that Long did not have a direct intention to cause grievous bodily harm to, or to kill, PC Harper as he couldn't care less whether PC Harper died or lived thus, he would not have felt a failure had the officer lived. Long's purpose was to escape. Rather this was a case of indirect intent and the *Woollin* direction should have been given and the application of that direction by the jury would have meant Long could not be guilty of murder because while objectively it was virtually certain that PC Harper would die 'the jury were not sure that Henry Long knew that as he was driving from Admoor Lane to Ufton Lane the car he was driving was dragging a human body'.[7]Thus, he did not foresee PC Harper's serious injury or death as virtually certain so that part of *Woollin* direction was not satisfied which meant that the jury were not entitled to find an indirect intent to cause grievous bodily harm or to kill. However, Mr Justice Edis when dealing with the issue of Long's foresight did not give the *Woollin* direction. That was an error of law. Instead, he asked the jury to consider two questions. '[First],at some point whilst P.C. Harper was being dragged along the lane by the Seat did Long know there was a person being dragged along?[Second],if so, did

[6][2003] EWCA Crim 192 at [45].

[7]Sentencing remarks of Mr Justice Edis p2.

he intend to cause that person really serious harm?'[8] It is clear that Long's acquittal on the count of murder was because the jury were not sure that he knew that a person was being dragged by the Seat so they could not move on the second question. The prosecution had failed to make the jury sure that Long had the *mens rea* for murder despite the judge's direction being over-generous to the prosecution as the first question should have directed the jury that to find the *mens rea* they had to be sure Long foresaw that his action was virtually certain to result in a person's grievous bodily harm or death. Only then would they be entitled to find an indirect intention to cause grievous bodily harm or to kill.

Conclusion.

This is a very tragic case and PC Harper's widow and family were very shocked by the manslaughter verdicts and the sentences. PC Harper's widow has demanded a retrial but the rule against double jeopardy will prevent that. However, since 1988 the Attorney-General has been able to refer to the Court of Appeal for rectification of an unduly lenient sentence passed on a defendant convicted in the Crown Court.[9]A sentence is unduly lenient if it falls outside the range of sentences that a judge could reasonably consider appropriate: *Att-Gen's Ref(No 4 of 1989).*[10] Such a reference has now been made. The question is will it succeed? It seems unlikely as Mr Justice Edis carefully followed the manslaughter sentencing guideline and the guideline for sentencing young offenders so that the sentences should be within the correct range.[11] PC Harper's widow is campaigning for life sentences for killers of emergency workers.

There is also the question of labelling as Long and his accomplices surely should be labelled as murderers rather than manslaughterers because of their couldn't-care-less attitude. The problem with the current law is that all the culpability eggs are in the foresight basket. It is unfortunate the Law Commission 2005 proposals[12] to divide murder into first-degree murder and second-degree murder have not been enacted into law as the latter would have introduced a new type of *mens rea* for murder: that of "reckless indifference" which would be defined as 'the state of mind of a person who does not intend to cause death but realises that his conduct involves an

[8]*Long, Bowers & Cole v R*[2020] EWCA Crim 1729 at [22].
[9]Criminal Justice Act 1988 sections 35 &36.
[10](1990) 90 Cr App R 336 at 371.
[11]The Court of Appeal held that the sentences were not unduly lenient no 8 at [102].
[12]The Law Commission Consultation Paper No 177.

unjustifiable risk of causing death and goes ahead regardless. It is the attitude of "too bad" if death results'[13]. Long and his accomplices had exactly that attitude when they embarked on truly terrifying driving in an attempt to escape justice.

Simon Parsons

(Former Associate Professor, Solent University)

[13] *Ibid.*, point 5.31.

NOTES FOR CONTRIBUTORS

1. Articles for consideration should be submitted online to the editor, Daniel Reed, email: **daniel.reed@solent.ac.uk** Articles should be no less than 5,000 and no more than 10,000 words.
2. The Editor welcomes shorter Legal Comments up to 5,000 words, case-notes, book reviews and analyses. Contributors should specify the length of their submissions.
3. The contribution should be attached as a Word document or Rich Text (RTF) document.
4. Any article or other contribution submitted should be the original unpublished work of the author. It should not have been submitted for consideration for publication elsewhere.
5. Neither the Editor nor the University accepts any responsibility for loss of, or damage to, any contributions submitted to the Journal.
6. Footnotes/references should be at the bottom of the page.
7. An Abstract of no more than 300 words, and Keywords should be included.
8. Cross-references should not be to page numbers but to the text accompanying a particular footnote.
9. An email address for correspondence and a telephone number, at which the author may be contacted, should be supplied.
10. All contributions will be anonymously refereed and any suggestions for amendments sent to the author.
11. Authors undertake to check proofs and to return them to the Editor by the specified date.
12. The Editor reserves the right not to accept any alterations or corrections made..
13. Copyright in all contributions remains with the author. The University acquires publication rights.
14. In all matters the decision of the Editor is final.