Issue 3
September 2021

TRUMAN BODDEN LAW SCHOOL STUDENT LAW REVIEW

Coursework, case notes, interviews and hints & tips from the students of the Truman Bodden Law School of the Cayman Islands

Truman Bodden Law School

Student Law Review

Issue 3

September 2021

Contents: 2021 Edition

TBLS Alumni

Articled Clerk Reflective Reviews

Introduction to the 2021 TBLS Student Law Review

Michael Bromby

Academic Editor

The aim of this publication, now in its third year, is to provide incoming LLB1 students with examples of coursework that achieved high marks from the modules Legal Skills 1 & 2 during the 2020/21 year. In addition, we seek to capture and reflect on external speakers and other events during the academic year at TBLS. This year we feature two recent cases from England & Wales for the case notes section. One is a Supreme Court case on the lawfulness of commercial surrogacy arrangements. The other is a Supreme Court decision concerning a young man with autism who had experimented with explosive substances as an alternative option for a criminal case. As usual, the research task was on a new piece of legislation for this academic year, it reviews the deprivation of liberty under the Mental Capacity (Amendment) Act 2019. The debate outlines and moot skeleton arguments complete the set of assessed work for the first-year Legal Skills modules. These should be used as *examples of content*; they are not intended to replace the OSCOLA referencing guide, which should remain your ultimate source of guidance.

Following the success of the pilot 2019 and the more extensive 2020 Student Law Review, we have a slightly smaller collection of work this year. Covid-19, unfortunately, disrupted some of our editorial meetings and delayed the publication of this 2021 edition. However, we have a new section for the Professional Practice Course (PPC) featuring the best marked Practical Legal Research (PLR) submission. We hope this edition will continue to be of interest to the wider student body and hopefully to the legal profession in the Cayman Islands, prospective students and other interested parties.

The year 2021 was another difficult one due to the ongoing Covid-19 pandemic, which did not disrupt the general schedule for teaching or assessment. A small editorial team of first, second and third-year students met to discuss the format and content following the exam period. The editorial team met both in person and virtually using Microsoft Teams to compile the law review.

This entire publication is student-generated and student-edited, so I am grateful to the contributors and editors alike for their hard work and effort in putting everything together over the summer break. Staff identified appropriate student work and obtained appropriate consent for dissemination. Students then edited the collection and assembled further TBLS library hints and tips that have been chosen as the most useful during their first year of studies.

This year, we are delighted to feature not only the former Premier of the Cayman Islands, Alden McLaughlin, but also former Truman Bodden Law School student. We highlight his recent appointment to Queen Counsel in our Graduate Profile section. Included are the range of reports on TBLS in-house events and external events or activities that students have attended.

We hope this is a valuable resource and actively encourages submissions for the next edition. Please see the notes on the last page for further guidance on submissions. Lastly, we'd like to extend a huge thank you to our supporters listed on the back cover: the Truman Bodden Law School, the Portfolio of Legal Affairs and the TBLS Student Society.

Editorial Team: 2021 Edition

Representing the 2020/21 first year cohort, the incoming members of the editorial team.

Daisy Valdez

Daisy has just completed her first year as a student at Truman Bodden Law School. Daisy is an Associate Director, Corporate Services with Ogier Global. Daisy has been in the financial services industry for over 14 years and has significant experience in leading and managing teams of corporate administrators with a focus on the establishment and administration of corporate vehicles. Daisy enjoys reading and gardening in her free time.

Julie Balman

Julie is currently studying as a first-year full time student at Truman Bodden Law School. After completing a Bachelor of Arts in Law & Society in Toronto, Ontario, she decided to pursue her dream of becoming a lawyer in the beautiful Cayman Islands. Julie enjoys relaxing at the beach, working out and spending time with family and friends.

Representing the previous 2019/20 cohort, the continuing members of the editorial team.

Diana DeMercado

Diana is a full-time student and hails from Cayman Bac. She is a recipient of a Legal Scholarship at Harneys, where she is also employed and gains valuable legal experience in the Dispute Resolution practice group. Diana holds an associates degree from UCCI in business administration. Her hobbies include singing, writing and travelling. It is her long-term intention to become involved in politics as she is passionate about the future of the Cayman Islands.

Patrice Morgan

Patrice loves dry comedy, swimming in the Caribbean Sea, cello music, the view from a plane, peanut butter cookies and digging deeper into the why of the human experience. Twenty-five years after the seed was planted, she is now pursuing her law degree. A marketer by profession, Patrice enjoys the creativity of advertising, dance performance and quite recently, writing short stories or poems drawn from her life experiences.

Sharon Roy

Sharon is currently studying as a second-year full time student at Truman Bodden Law School. She joined us after completing her A levels at Saint Ignatius Catholic School. Sharon enjoys meeting new people, music, arts and photography. Currently the first-year representative for the TBLS Student Law Society, Sharon took a lead in organising events. Unfortunately, the lockdown changed some of these plans!

Representing the previous 2018/19 cohort, the original members of the first editorial team.

Janet James

Janet has a professional background in banking and compliance with a bachelor's degree in International Finance. Her over twenty years of working experience in the financial industry consisted of Mutual Funds, Hedge Funds, Stock Trading, Trust, Investment and Special Purpose Vehicles (SPV) Administration. Janet is currently in her third year of the LLB at TBLS and about to study the PPC course. She enjoys interior decorating and travelling in her spare time.

Annette Vaughan

Annette is a full-time student at Truman Bodden Law School Cayman Islands. She has just completed her third year in the LLB Programme and is about to commence PPC course. Annette is a teacher by profession and training and has recently retired after just over a total of thirty-eight years of service in her native Barbados and the Cayman Islands. She holds a BSc in Elementary Education and a MA in Language Arts Education. She is married to Bentley Vaughan and enjoys listening to classical and contemporary gospel music, singing, writing, reading, photography, vegetarian cooking, homemaking and travelling.

Graduation and Awards: 2021

University of Liverpool

Bachelor of Laws (Honours) Degree

Carter, Jackie

Cummings, Colleen

Gibbs, Tracy

James, Janet

Lee, Daniel*

Martinez-Suckoo, Janelle

Moyle, Ghita

Powery-Rosales, Luis

Quintana-Gonzalez, Kathy

Seymour, Jeffrey

Titus, Tiffany*

Vaughan, Annette

Watler, Amber

* Denotes a First Class Honours Degree

Prizes awarded for this year were:

Daisy Valdez & Andrei Segal

Sweet & Maxwell Law Prize for Best Performance in the First Year Modules

Jesse McNaughton

The University of Liverpool Law Association Prize; & Butterworths Lexis/Nexis Prize for Best Performance in the Second Year Modules

Tiffany Titus

Cayman Islands Chamber of Commerce Prize for Best Performance in the Third Year Modules

Tiffany Titus

The Tim Shea Memorial Prize for Best Performance over the Honours Degree Programme

Tiffany Titus

Dean's Prize of the School of Law and Social Justice for outstanding performance

Awards and Recognition of TBLS Staff and Alumnus

2021 was notable for the recognition of three particular individuals, all associated with the Truman Bodden Law school, in their way. First, our law school director, Mitchell Davies, British Empire Medal) BEM; second, a graduate and former Premier Alden Mclaughlin, Queens Counsel (QC); thirdly, the Solicitor General and chief officer of the Portfolio of Legal Affairs (the home of TBLS) Reshma Sharma QC.

Mitchell Davies, Director of TBLS, recognised with the British Empire Medal

Members of Parliament, senior civil servants, community leaders, and members of the public came together at a new venue to mark the 95th birthday of Her Majesty Queen Elizabeth II on Monday, 14 June 2021. This year's celebration at Government House on West Bay Road featured all the traditional highlights and regalia of the occasion, including the traditional parade by uniformed services, a royal salute and three cheers for Her Majesty the Queen. Past and new recipients of Queen's and National Honours were also recognised in a brief ceremony which preceded a garden party reception. Deputy Governor, Hon. Franz Manderson announced that the Queen had recognised the Director of the Truman Bodden Law School, Mr Mitchell Davies, with the British Empire Medal in the 2021 Queen's Birthday Honours.

Biography

Mitchell Davies has been the Director of the Truman Bodden Law School since 1992, then the Cayman Islands Law School. During his tenure, the Law School's student population has expanded from around twenty-five students to a total undergraduate and postgraduate enrolment approaching one hundred students. Mitchell previously taught at the Universities of Bristol and Buckingham in the UK. He has published extensively in UK law journals, particularly in the fields of Criminal Law and Private International Law, including The Comparative and International Law Quarterly, Legal Studies, the Journal of Criminal Law and the Charities Law and Practice Review.

He has also published in regional and US law journals. Criminal Law and Private International Law are areas in which Mitchell continues to teach and maintain a keen research interest. Mitchell is the General Editor of and contributor to the Cayman Islands Law Review, published annually by the Truman Bodden Law School. Mitchell has presented numerous academic papers at conferences in the UK and the Cayman Islands.

Mitchell is a member of various academic and professional boards. They include the University of Liverpool, Oxford Brookes University, the Cayman Islands Criminal Sentencing Committee, and the Cayman Islands Judicial Training Committee. He is also a member of the American Caribbean Law Initiative, a practical legal advocacy training group whose membership spans the Commonwealth Caribbean and the Southern United States. Since 1992, Mitchell has been the Secretary to the Cayman Islands Legal Advisory Council, a body charged with overseeing legal education provisions in the Cayman Islands.

TBLS Alumnus Alden McLaughlin awarded Queen's Counsel

The award of Queen's Counsel, more commonly abbreviated to QC, is a recognition of excellence in advocacy in the legal profession. The Chief Justice, Anthony Smellie QC, recommends appointments to the Governor in consideration of the needs of the jurisdiction. Appointments occur when prior holders relocate, retire, or channel their service into the local judiciary. It also happens in response to a need to maintain a stable pool of QCs relative to the size of the profession and local population. A formal ceremony admitting five new QCs to the Inner Bar of the Grand Court of the Cayman Islands took place on Friday, 3 September 2021.

Biography

Former Premier of the Cayman Islands Alden McNee McLaughlin, Jr., holds a 1988 Bachelor of Laws honours degree from the University of Liverpool, UK, and a professional practice certificate

from the Cayman Islands Law School. He was admitted to the bar in 1988 and was soon appointed an associate at Charles Adams & Company firm. The firm thrived, and he became a partner in 1993 (the firm by then having expanded to become Charles Adams, Ritchie and Duckworth). Mr McLaughlin undertook a wide array of work, including family law; succession, conveyancing, and corporate law; land law disputes; immigration, labour and planning tribunal matters; traffic and criminal matters; and civil litigation.

As Premier, Mr McLaughlin's leadership in overseas delegations included discussions and negotiations with CARICOM, the UK Government, the EU Commission, and representatives of many EU countries in Brussels, Paris, Berlin, Washington DC, and New York.

These discussions and negotiations spanned the range of matters significant to the Cayman Islands in several critical areas, from advocacy for Cayman's financial regulatory regime to human rights obligations and privacy and data protection, under Cayman's constitution, the provisions of the European Convention on Human Rights, and other conventions and regulatory regimes worldwide.

Among commendations, Professor Sir Jeffrey Jowell, KCMG, QC, who worked closely with the Cayman Islands on several occasions and attended two sets of constitutional negotiations with the UK Government, commented, "[Alden McLaughlin's] legal skills meet the highest standard of Silk in any Commonwealth country, including the United Kingdom…."

Now on the threshold of the conferment, Mr McLaughlin, like all the other new Silks, has committed to making his services available generally to the public and to undertake a fair share of pro bono work as expected of Queen's Counsel.

Solicitor General, Reshma Sharma awarded Queen's Counsel

Biography

Cayman Islands Solicitor General Reshma Sharma, began her legal career as an attorney-at-law of the High Court of Trinidad and Tobago. She holds a Master of Laws degree in Commercial Law (with commendation) from the University of Aberdeen; a Legal Education Certificate from the Hugh Wooding Law School; and a Bachelor of Laws (Hons) Degree from the University of the West Indies.

Appointed Cayman Islands Solicitor General in 2019, Ms Sharma previously acted in that role since 2017 while holding the post of Deputy Solicitor General. Her first local appointment was as Crown Counsel in May 2005. In June 2007, she assumed the position of Senior Crown Counsel. On various occasions since 2016, she has served as Acting Attorney General. As Chief Officer, she has overall responsibility and oversight for seven departments within the Portfolio of Legal Affairs.

Apart from litigation, Ms Sharma's responsibilities over the years have extended to various subjects. Her international work includes treaties and conventions; in this area. She has coordinated the preparation of periodic reports for the jurisdiction on different international instruments and has advised on matters relating extension and implementation of such instruments to the Islands. She also advises on issues relating to Overseas Territories sanctions orders and restrictive measures. She serves as counsel to the Cayman Islands Mutual Legal Assistance Authority under the Mutual Legal Assistance (USA) Act.

Before her first appointment in the Cayman Islands, Ms Sharma was the Acting Senior State Counsel in the Solicitor General's Chambers, Ministry of the Attorney General of Trinidad and Tobago.

Legal Skills 1: Case Note Assessment

Daisy Valdez

LLB1 (first year full time)

Case: Whittington Hospital NHS Trust v XX

Court: Supreme Court

Citation: [2020] UKSC 14

Judges: Lord Reed PSC, Lord Kerr, Lord Wilson JJSC, Lady Hale, Lord Carnwath

Appellant (defendant): Whittington Hospital NHS Trust

Respondent (claimant): XX

Material Facts

XX, at the age of 29, was diagnosed with invasive cervical cancer. The appellant failed to diagnose XX promptly, despite performing multiple pap smear tests in 2008 and 2012. The appellant admitted that this constituted negligence when the cancer was detected in 2013. In consequence of the late detection, XX's only choice was to undergo chemotherapy which damaged her uterus, bladder, and bowel, leaving XX unable to give birth to her own children.

XX harvested eggs from her ovaries to resort to surrogacy. She made arrangements for surrogacy using her own two eggs in the UK and engaged a commercial surrogacy agency in California to use donor eggs and her partner's sperm. XX was awarded general damages and for the cost of such surrogacy in the UK only. The appellant requested that the Supreme Court consider whether it was lawful to award damages to fund both surrogacy arrangements on the basis that commercial surrogacy is unlawful and against public policy in the UK.

Procedural History

Queen's Bench Division – Following *Briody*,[1] in September 2017, XX was denied an award for damages for commercial surrogacy using donor eggs in California. However, XX was awarded global damages and for the cost of two surrogacies to be done in the UK using her eggs.

Court of Appeal (Civil Division) – In December 2018, XX appealed on the basis that the court had erred in applying *Briody,* as her claim for commercial surrogacy outside of the UK should no longer be unlawful or against public policy. Her appeal was allowed, and the defendant appealed to the Supreme Court.

Issues to be decided

The supreme court was tasked with deciding whether it was lawful for:

- surrogacy where the claimant was unable to give birth to her own children, by the defendant's negligence, using the claimant's own eggs in the UK;
- surrogacy using donor eggs with a commercial surrogacy agency in a country where it is lawful to do so, but unlawful in the UK and contrary to public policy; and
- whether an award for damages in tort for the aforementioned surrogacy would be restorative of that which the claimant was denied of due to the appellant's negligence.

Ratio

It is not unlawful or against public policy to award damages for a claimant to plan for surrogacy in the UK using the claimant's own eggs and, in a country outside of the UK, where commercial surrogacy is lawful, using donor eggs. Surrogacy arrangements using commercial agencies outside of the UK can be restorative of what the claimant lost due to the appellant's medical negligence, and damages can be awarded accordingly.

[1] *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856.

Analysis of Ratio

Damages

Lady Hale, who was also a judge in *Briody*, acknowledged that the objective to assessing damages a person can be awarded in tort is to, as far as possible, provide damages for that which has been lost due to the harm that has been caused.[2] XX had been deprived of carrying her own children due to the appellant's negligence.

Surrogacy in the UK

The judgment reflects the extent to which the courts will consider the maintenance of precedent whilst considering the societal shift in public policy. The facts of this case were very similar to *Briody,* and nonetheless, the results and decision for an award of damages was quite the opposite.

Obiter statements (dissenting judgments)

In her judgement, Lady Hale said that it would be unreasonable to award damages in the UK for surrogacy arrangements in a country where the arrangement is not regulated and is subject to abuse.

Lord Carnwarth, in his dissenting judgement, said that, whilst the law on commercial surrogacy in the UK remains the same, therefore disapproves that damages should be awarded for a matter of law considered unlawful in the UK; notwithstanding that the country in which the arrangement is to be completed, is lawful.

Disposition

It was held that it is no longer against public policy in the UK to award damages for commercial surrogacy outside of the UK. The hospital's appeal was therefore dismissed.

[2] Ibid, 975.

Critique

In this case, the UKSC's judgment reflects a key feature of the UK's unwritten constitution; its ability to be flexible, conforming to today's society and public policy. Lady Hale, in deciding not to apply *Briody,* illustrated in her judgement how public policy has developed. She referenced that the government has shown their support via statutory changes, publishing guidelines on the practice of surrogacy,[3] and a request for consultation by the Law Commission on the reform of the UK law of surrogacy.[4]

Lord Carnwarth, in his dissenting judgment, was concerned with the consistency of application of the law. He was adamant that the law remained the same and, therefore, disapproved of damages for commercial surrogacy. Rob Weir QC discusses Lady Hale's position that the decision, in this case, did not mean that all may be awarded damages where the facts of the case are the same.[5] The defendants would have to prove that they would have had as many children as they are claiming for and that the costs would need to be reasonable.

What impact this decision will have on future cases to award damages for negligence on a matter of law that is lawful in another country but unlawful in the UK is unanswered. Rob Weir QC, in his article, suggests that it will remain to be seen whether this principle will be employed in future cases.

[3] Department of Health and Social Care, 'The Surrogacy Pathway: Surrogacy and Legal Process for Intended Parents and Surrogates in England and Wales' (Gov.uk, 23 July 2021) <https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales> accessed 21 June 2021.

[4] Law Commission, *Building Families Through Surrogacy: A new Law* (Law Comm No 244, 2019).

[5] Rob Weir QC, 'Surrogacy; simply claim what's reasonable: analysing XX v Whittington Hospital NHS Trust' (2020) 3 JPI Law 182-188.

Legal Skills 1: Case Note Assessment

Jordan Watler

LLB1 (first year full time)

R v Copeland [2020] UKSC 8

Court: Supreme Court

Citation: [2020] UKSC 8

Judges: Lord Reed PSC, Lord Carnwath, Lord Lloyd-Jones, Lord Sales, Lord Hamblen JSC

Appellant: Copeland

Respondent: The Crown (CPS Counter Terrorism Division)

Material Facts

Copeland (22), the appellant, who suffers from the developmental disorder known as Autism spectrum, was charged with two counts of "Making or possession of explosive under suspicious circumstances" unlawfully: contrary to section 4(1) of the Explosive Substances Act 1883 (The Act).[1] The appellant was found in possession of a small quantity of "HMTD" explosives, which were made from chemicals purchased online. The appellant subsequently detonated them using homemade initiators, in his backyard, to an insignificant degree. Manuals and notes for making the explosive "HMTD" were also found in Copeland's possession. In defence, the appellant claimed he had 'an obsessional need to understand how explosives work',[2] and he possessed the explosive substances for experimentation and self-education purposes of a 'Lawful objective' Section 4(1).[3]

Procedural History

[1] *R v Copeland* [2020] UKSC 8.
[2] *R v Copeland* [2020] 2 WLR 681.
[3] ibid.

October 2018: At the Preliminary hearing in the Crown Court, Judge Wall QC held that the defendant's defence on the basis "he made the HMTD and had it in his possession for a lawful object, being experimental and self-education" was not good in law. The Court of Appeal dismissed the defendant's appeal, considering that it was bound by the earlier decision in *R v Riding*[4] on the meaning of "lawful object" in section 4(1).[5]

January 2019: The appellant appealed to the Court of Appeal, Criminal Division. The appeal was dismissed. The Court of Appeal ruled it was also bound by the pass judgement in *R v Riding*[6] and concluded that the defendant's defence under section 4(1) was bad law.

Issues to be Decided

The Supreme Courts were tasked with finding the Proper Interpretation of Section 4(1) of (The Act). Does personal experimentation or self-education, absent of some ulterior unlawful purpose, be regarded as a lawful object?[7]

Ratio

"Experimentation and self-education are "objects" within the ordinary meaning of that term and are capable of being lawful objects for the purposes of section 4(1). This view is reinforced by the background against which section 4(1) was enacted, including the 1875 Act, under which possession of explosive substances for private experimentation and use was regarded as lawful and legitimate".[8]

Analysis of the ratio

There is nothing unlawful in the experimentation of self-education under section 4(1). The Burden and Standard of Proof under Section 4(1) are comprised of two limbs: 1) The burden of

[4] [2009] EWCA Crim 892.
[5] *Copeland* (n 2).
[6] *Riding* (n 4).
[7] *Copeland* (n 1).
[8] ibid.

proof rest upon the prosecution to provide evidence, showing "reasonable suspicion", of which the accused has the explosives in an "unlawful" way 2) The onus then shifts upon the accused, usually in trial to prove possession or the control of the explosive was intended for a "lawful object". The appellant did not have to show how the explosives would be used, but only that it would be a "lawful object". The defendant did not have to identify precisely how he would use the explosives or that such use would be lawful[9], *R. v Fegan*[10] and *Attorney General's Reference (No. 2 of 1983)* applied[11]. "Section 4(1) of the Act recognises the lawfulness of individuals making or possessing explosives for private experimentation". However, as mentioned by *Lord Sales*, "The 1883 Act, was emergency legislation passed in great speed due to threat from the Irish Nationalist Terrorism Group, which concern that the offences in 1861 act did not provide sufficient protection for the public"[12]. As such, referencing "Personal experimentation or private education "should not be considered sufficient in defence, the defendant should be required to demonstrate sufficiently the particulars of which it is lawful.

Disposition

Majority ruling 3:2, the appeal was allowed.

Critique

Lawful object is not the absence of criminal intent. Although, the court's reasoning was not focused on the Developmental Issues of the defendant (ASD). Practitioners should still understand the nature of "Obsessional Need" regarding Criminal liability. Especially in the case of perpetrators with special disabilities, such as ASD. Additionally, this ruling might lead to a small number of appeals of "Lawful Object".

[9] *Copeland* (n 1).
[10] [1972] NI 80.
[11] [1984] QB 456.
[12] *Copeland* (n 1).

Legal Skills 1: Research Task

Cory Martinson

LLB1 (First year full-time)

Mental health law has progressed slowly since its modern inception near the turn of the 19th century. Still, it is comparatively light years ahead of where it had been in the previous century, which saw the likes of *Lunatics Act 1845* and the *Idiots Act 1886*. To appropriately evaluate recent reforms in the *Mental Capacity (Amendment) Act 2019* (MCAA), it is essential to understand how statute and common law evolved since the creation of the *Mental Deficiency Act 1913* (MDA 1913). This reflection helps to fully appreciate why the Law Commission's report (LCR)[1] was necessary for 2017 and why changes are still needed today. It is important to note early on that while the MCAA received Royal Assent in May 2019 and was scheduled to be in force in October 2020, it will now not be fully implemented until April 2022.[2]

The MDA 1913 was followed by the *Mental Deficiency Act 1927* and then the *Mental Health Act 1959* (MHA 1959). These laws progressively provided for more scientifically based definitions of mental illness. The MHA 1959 in section 5 introduced a pathway for persons requiring treatment for a mental disorder to be admitted to a hospital or nursing home without being formally detained. Admitting patients in this manner allowed for them to be treated without the stigma of being formally detained and assisted in normalizing their care in line with that of other physical health abnormalities.[3] Section 5 of the MHA 1959 and its subsequent legal evolution is at the heart of the MCAA issues today. Section 5 was included in the *Mental Health Act 1983* (MHA 1983) in its substantive form in section 131, Informal Admissions of Patients. This section

[1] Law Commission, Mental Capacity and Deprivation of Liberty (Law Com No 372, 2017).
[2] Helen Whately, 'Implementation of Liberty Protection Safeguards' (HCWS377 16 July 2020).
[3] *Cheshire West and Chester Council v P* [2014] UKSC 19 [2] (Hale LJ).

continued to be sufficient to admit and treat people with the mental capacity capable of lawfully consenting to treatment. However, complications arose when a person who lacked capacity was treated without consent did not object to treatment in the same instance.

In *R v Bournewood* the issue was considered of whether a person, who could not legally consent to treatment but did not object, should be compulsorily held under the MHA 1983 or whether it was lawful to informally admit the person under section 131 of the same law.[4] A downside to being formally admitted and detained, besides the stigma to the patient, was the administrative burden it would place on the health care system. The House of Lords (HoL) decided in that case that the common law doctrine of necessity justified any such informal detention. Therefore, the tort of false imprisonment was not being committed against a patient and, thus, any perceived *de facto* detention was legal.[5] The doctrine of necessity gained much prominence in *R v Dudley and Stephens* where it failed to provide a defence to murder. It has since been successfully relied upon to bring about the lawful death of a conjoined twin after they were separated as decided in *Re A*.[6] These cases show that the doctrine has a long history, and its application can vary.

The *Bournewood* case was appealed to the European Court of Human Rights (ECHR) as *HL v UK*. *HL v UK* effectively sets aside the decision in *Bournewood* in that the doctrine of necessity was for several reasons. First, to ensure that people were not being arbitrarily detained. Secondly, each case needed to be examined individually. Finally, an objective determination by a judge would provide better safeguards for patients.[7] Changes were made via the *Mental Health Act 2007* (MHA 2007) which also amended the *Mental Capacity Act 2005* (MCA 2005). The MCA 2005 provided a legal framework for making decisions for persons who lacked the mental capacity to

[4] *R v Bournewood Community and Mental Health NHS Trust, ex p L R v Bournewood Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458, 459.
[5] ibid.
[6] J M Paley, 'Compulsion: Fear and the Doctrine of Necessity' (1971) Acta Juridica 216; *R v Dudley and Stephens* [1884] 12 WLUK 47; *Re A* [2001] Fam 147.
[7] HL v UK (2005) 40 EHRR 32; Kirsty Keywood, 'Detaining Mentally Disordered Patients Lacking Capacity: The Arbitrariness of Informal Detention and the Common Law Doctrine of Necessity' (2005) 13 Medical Law Review 112.

make decisions for themselves.[8] The amendment also introduced the Deprivation of Liberty Safeguards (DoLS), which aimed to ensure that persons who lacked the capacity and were going to be placed in a hospital or care home, were only deprived of their liberty if it was in their best interests.[9] The DoLS did not cover persons accommodated in supported living, shared lives and private and domestic settings where their liberty may also be deprived.[10] The DoLS created a complex administrative burden which was often not followed, criticized as not being fit for purpose and thus were deeply flawed.[11]

The DoLS became even more problematic when the *Cheshire West* case broadened the circumstance in which persons with limited mental capacity were considered to have been deprived of their liberty.[12] In Cheshire West, Lady Hale created "an acid test" containing two key elements which must be satisfied to determine if people, who lack the capacity to consent, have been deprived of their liberty even if they do not object:[13]

1. Is the person under continuous supervision or control; and
2. Is the person free to leave?

Continuous supervision or control includes when a person is not allowed out alone, and their activities are controlled.[14] Free to leave means "leaving in the sense of removing oneself permanently to live where and with whom one chooses".[15]

The number of people that were now subject to the DoLS skyrocketed as anyone living in supported living, domestic settings etc., where their liberty may also be deprived, were now

[8] Law Commission, Mental Capacity and Deprivation of Liberty (Law Com No 372, 2017) 26.
[9] ibid 31.
[10] ibid.
[11] ibid 35.
[12] Cheshire West and Chester Council v P [2014] UKSC 19.
[13] Nasreen Pearce and Sue Jackson, 'Deprivation of liberty after Cheshire West' (2014) 44 Family Law 871.
[14] ibid 872.
[15] ibid.

covered. In 2013-14 there were 13,715 cases under that regime which ballooned to 137,540 in 2014-15 and 227,400 in 2017-18.[16] It was evident that the DoLS were not designed to cope with such large numbers of cases and persons' rights were becoming, in essence, theoretical and illusory because cases were being rubber-stamped or not addressed at all.[17] *Inter alia* the LCR recommended that the DoLS "be replaced as a matter of pressing urgency".[18] The LCR proposed new Liberty Protection Safeguards which were intended to "to reduce unnecessary 'bureaucracy', reduce duplication of assessments, and focus scarce professional resources where they were most needed" but the new regime under the Mental Capacity (Amendment) Bill (MCAB) was widely criticized by many groups and was described by the HoL as possibly one of the worst pieces of legislation ever brought before it.[19] The Bill was drafted without any public engagement, in addition to what had been done by the Law Commission and was criticised for being hurriedly drafted.[20] It also did not include many changes suggested in the LCR.[21] Suggested changes in the law appear to delegate responsibility downward to care home managers and General Practitioners. Such changes include completing patient assessments, in the hopes of removing burdens elsewhere but failing to consider the increased burden and/or conflicts of interest the involvement of those positions may create.[22] The hope was to simplify processes thereby decreasing administrative burden while simultaneously strengthening safeguards for vulnerable persons, however, there is still too much uncertainty in critical areas such as who will conduct key assessments essential to determining if a person's care and living conditions are appropriate.[23] Much of the detail needed to efficiently protect the rights of the vulnerable under the legislation has yet to be created in the Codes of Practice and secondary regulations. So, the true positive impacts, if any, appear yet to be determined. Much of that work has been pushed

[16] 'Mental Capacity Act 2005, Deprivation of Liberty Safeguards England, 2017-18' (Health and Social Care Information Centre, 2 October 2018) <https://files.digital.nhs.uk/04/B15A3A/DoLS%201718%20 Final%20 Report.pdf > accessed 16 December 2020, 12.
[17] Law Commission n 8, 37.
[18] ibid 39.
[19] Lucy Series, 'Comment: Mental Capacity (Amendment) Act 2019 (UK)' (2018) 12 Elder Law Review.
[20] ibid.
[21] ibid.
[22] ibid.
[23] ibid.

back because of COVID-19.[24] While changes in the law are obviously needed, the government is preoccupied with Brexit. Now COVID-19 may be ill-situated to appropriately engage in lasting improvements that will solve most problems currently present.

Bibliography

Legislation:

Human Rights Act 1998

Idiots Act 1886

Lunatics Act 1845

Mental Deficiency Act 1913

Mental Deficiency Act 1927

Mental Health Act 1959

Mental Health Act 1983

Mental Capacity (Amendment) Act 2019

Cases:

Cheshire West and Chester Council v P [2014] UKSC 19

HL v UK (2005) 40 EHRR 32

[24] ibid (n. 2).

R v Bournewood Community and Mental Health NHS Trust, ex p L R v Bournewood Community and Mental Health NHS Trust, ex p L [1999] 1 AC 458

R v Dudley and Stephens [1884] 12 WLUK 47

Re A [2001] Fam 147

Secondary Sources:

Keywood, K 'Detaining Mentally Disordered Patients Lacking Capacity: The Arbitrariness of Informal Detention and the Common Law Doctrine of Necessity' (2005) 13 Medical Law Review 108

Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017)

Series, L 'Comment: Mental Capacity (Amendment) Act 2019 (UK)' (2018) 12 Elder Law Review

Mental Capacity Act 2005, Deprivation of Liberty Safeguards England, 2017-18' (Health and Social Care Information Centre, 2 October 2018) <https://files.digital.nhs.uk

/04/B15A3A/DoLS%201718%20 Final%20Report.pdf > accessed 16 December 2020

Paley, JM 'Compulsion: Fear and the Doctrine of Necessity' (1971) Acta Juridica 205

Pearce, N and Jackson, S 'Deprivation of liberty after Cheshire West' (2014) 44 Family Law 868

Whately, H, '*Implementation of Liberty Protection Safeguards'* (HCWS377 16 July 2020)

Legal Skills 2: Debate Resolution (Supporting)

Andrew Segal

LLB1 (first year full time)

Debate Resolution:

'This House believes that the cost of running jury trials with 12 jurors has become overly burdensome on the public purse. The time has come for England and Wales to reduce the size of the jury to a more manageable number.'

In supporting the above resolution, I submit the following:

A backlog of cases and cost cutting measures in recent years.

a. Unprecedented backlog due to Covid-19, the Crown Courts which handle the most serious cases had close to 40,000 cases outstanding before the pandemic, but that number has jumped by 38% by the end of 2020, official figures show.[1] Since 2010, 295 courts across England and Wales have closed under a Ministry of Justice austerity drive, including half of all magistrates courts.[2]
b. In the Crown Court, the minimum number of jurors required by law is 9 as stated in Section 17 of the Juries Act 1974. *Jubilee Line* trial proceeded with 9 jurors after 2 jurors had been discharged relating to fraud and a pregnancy, and a third due to a problem with their employer. The trial eventually collapsed wasting £25 million and 21 months of the jurors' lives.

[1] HC Deb 26 January 2021, vol 809, cols 1514

[2] Owen Bowcott, 'Criminal cases delayed across England and Wales as courts lie idle' (The Guardian, 19 August 2019) < https://www.theguardian.com/law/2019/aug/19/criminal-cases-delayed-across-england-and-wales-as-courts-lie-idle/> accessed 22 April 2021.

Smaller juries are not necessarily discriminatory.

a. In the United States (US), States determine the number of jurors. Florida uses a 6- or 12-person jury with the Supreme Court concluding in *Williams v Florida* that modification of the jury system through reduction in the number of jurors would not significantly affect the purpose served.[3] Hong Kong uses a 7 member jury and a decision can be reached with a majority of 5.
b. The lower courts such as the County Court consist of 8 jurors with a minimum number of 7, and the Coroner's Court consists of between 7 and 11 jurors. No case authority that the common law dictates juries are to be chosen by random selection. Many rely on the Lord Chief Justice's 1973 Practice Direction, declaring "A jury consists of 12 individuals chosen at random …" but Practice Directions are not "the law."[4] Larger juries do not necessarily mean less discriminatory juries.
c. A 2010 Ministry of Justice report studied the impact of all-white juries and discrimination. The study found no evidence of discrimination against Black, Asian, and Minority Ethnic (BAME) defendants.[5]
d. (A) Scottish Government mock jury study undertaken between 2017 and 2019 (that) studied jury decision-making found that in comparing 12 person juries to 15 person juries, jury size did not have any impact on the verdicts favoured by individual jurors before deliberating.[6]

[3] David M. Powell, 'Reducing the size of juries' [1971] U Mich JL Reform 87, 92.
[4] Penny Darbyshire, 'The lamp that shows that freedom lives – is it worth the candle?' [1991] Crim LR 740, 745.
[5] Ministry of Justice, Are Juries Fair? (February 2010) < https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf/> accessed 22 April 2021.
[6] James Chalmers and Fiona Leverick and Vanessa E. Munro and Lorraine Murray and Rachel Ormston, 'Three distinctive features, but what is the difference? Key findings from the Scottish Jury Project' (2020) Crim LR 1019, 1019.

BIBLIOGRAPHY

Bowcott O, 'Criminal cases delayed across England and Wales as courts lie idle' (The Guardian, 19 August 2019) < https://www.theguardian.com/law/2019/aug/19/criminal-cases-delayed-across-england-and-wales-as-courts-lie-idle/> accessed 22 April 2021

Chalmers J and Leverick F and Munro V and Murray L and Ormston R, 'Three distinctive features, but what is the difference? Key findings from the Scottish Jury Project' (2020) Crim LR 1019

Darbyshire P, 'The lamp that shows that freedom lives – is it worth the candle?' [1991] Crim LR 740

Hansard, House of Commons Debate, 26 January 2021, vol 809, cols 1514

Ministry of Justice, Are Juries Fair? (February 2010) < https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf/> accessed 22 April 2021

Powell D, 'Reducing the size of juries' [1971] U Mich JL Reform 87

Legal Skills 2: Debate Resolution (Opposing)

Julie Balman

LLB1 (first year full time)

Debate Resolution:

'This House believes that the cost of running jury trials with 12 jurors has become overly burdensome on the public purse. The time has come for England and Wales to reduce the size of the jury to a more manageable number.'

In opposing the resolution above, I submit the following:

Twelve Person Juries Promote Impartiality, Consistency and Verdict Accuracy

1. Mr. Justice Henchy in *De Burca v Attorney -General*[1] describes the jury as a group of people:

   "who, chosen at random from a reasonably diverse panel of jurors from the community, will produce a verdict of guilty or not guilty free from the risks inherent in a trial conducted by a judge or judges only, and which will therefore carry with it the assurance of both correctness and public acceptability that may be accepted from the group verdict of such a representative cross-section of the community."[2]

   1.1 In a 1977 study conducted by Michael J. Saks, participants were assembled into juries of six and twelve, where larger groups proved "more contentious, debated

[1] *De Burca v. Attorney General* [1976] I.R. 38
[2] Ibid.

more vigorously, collectively recalled more evidence from the trial and made more consistent and predictable decisions."[3]

1.2 When measuring the main determinants of jury efficiency, mainly verdict accuracy and deliberation time, 12 lay citizens are implicitly optimal for unanimous decision making.[4]

The Scottish Jury System Demonstrates Manageability

2. In Scotland, a study commissioned by the Scottish Government between 2017 and 2019 finds "there were no statistically significant differences in the number of guilty versus acquittal verdicts returned between 12 and 15-person juries, two-verdict and three-verdict juries, or between juries asked to reach a simple majority and those asked to reach a unanimous verdict"

2.1 Fifteen-person juries were "less likely to change their minds on the verdict than people in 12-person juries."[5] This finding indicates a reliability on larger juries to provide consistent judgments and manageability in an even larger jury system compared to the traditional common law jury.

[3] Michael J. Saks and Mollie Weighner Marti, 'A Meta-Analysis of the Effects of Jury Size' [1997] Law and Human Behavior, 451
[4] Takamitsu Watanabe, 'A numerical study on efficient jury size' < https://www.nature.com/articles/s41599-020-00556-1> accessed 10 April 2021
[5] Ibid.

Legal Skills 2: Summative Moot

Academic session 2020/21

Facts and procedural outline

Mrs Whisky had been purchasing Christmas presents in Liverpool city centre, on 23 December 2020. At around 5pm that day, she boarded a bus on Hanover Street, taking a seat on the second row of the bus. After she sat down, the bus moved off. When the bus conductor came along, she offered her fare of £3.50, but the conductor said that Mrs Whisky was drunk, refused the fare and ordered her off the bus.

As Mrs Whisky got up from her seat, she slipped and sprained her ankle. She claimed £2,500 in compensation from the Liverpool Bus Company for breach of contract alleging that the company had failed to ensure that the floor of the bus was safe and not slippery.

Liverpool Bus Company accepted that Mrs Whisky was not drunk, but denied liability in the High Court.

Lower court decision

Badger J held that:

(i) No contract had been formed between Mrs Whisky and Liverpool Bus Company (*Gibson v Manchester City Council* [1979] applied);

(ii) Even if there was a contract, liability was excluded as there was a large notice situated by the entry doors of the bus stating 'The floor of this bus can get slippery at times. Please take care. Liverpool Bus Company cannot accept liability for any injuries caused.' (*Canada Steamship Lines v The King* [1952] applied).

Mrs Whisky has decided to appeal to the Court of Appeal.

Senior Counsel should take point (i) and Junior Counsel should take point (ii).

Structure of the Moot

1st speaker – Senior Counsel for Appellant 10mins

1st speaker – Junior Counsel for Appellant 10mins

2nd speaker – Senior Counsel for Respondent 10mins

2nd speaker – Junior Counsel for Respondent 10mins

Skeleton Outline (1000 words)

Each team MUST construct and submit a skeleton argument and a list of authorities prior to the moot. The skeleton outline must be no more than 1000 words in length. Each team member should contribute 500 words and each team member's contribution will need to be clearly separated/distinguished. Contributions will be individually assessed along with each student's performance.

Legal Skills 2: Skeleton Argument for the Appellants

Erikah Bodden

LLB1 (first year)

IN THE COURT OF APPEAL

MRS. WHISKY **Appellant**

- V -

LIVERPOOL BUS COMPANY **Respondent**

SKELETON ARGUMENT ON BEHALF OF THE APPELLANT

Ground (i): Senior Counsel

No contract had been formed between Mrs. Whisky and Liverpool Bus Company (*Gibson v Manchester City Council* [1979] applied).

1) A contract was formed between Mrs. Whisky and Liverpool Bus company as there was an offer and acceptance
    a) In the case of *Ingram v Little* [1961] 1 QB 31, Judge Devlin J said in his judgment that "The first thing for a judge to do is to satisfy himself that the alleged contract has been properly formed… There must be offer and acceptance."
        i) The contract was formed when the bus stopped at the bus stop and the doors opened, which was the offer. This offer was accepted when Mrs. Whisky boarded that bus.

2) The Court erred in applying the case of *Gibson v Manchester City Council* [1979]
    a) The Principle in Gibson was as follows: The words "may be prepared to sell" cannot construe a legally enforceable contract as it is not an offer, but an invitation to treat.

i) This approach is erred as there is a contract formed between Mrs. Whisky and The Liverpool Bus Company based on Treitel's definition of offer and acceptance. An offer is an 'expression of willingness to be bound on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed' whilst acceptance is a 'final and unqualified expression of assent to the terms of the offer'.

b) To further support this claim is Lord Denning's judgement in *Storer v Manchester City Council* [1974] 1 WLR 1403. It was stated that "A contract is formed when there is, to all outward appearances, a contract. The bus opening was not an invitation to treat but an offer in which Mrs. Whisky accepted through conduct therefore the appellants claim for breach of contract seems to be legally plausible as there was an expression of willingness to contract on specified terms with the intention that it is to be binding once accepted

i) Lord Denning also stated that "you look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct, you can see an agreement on all material terms — which was intended thenceforward to be binding — then there is a binding contract in law even though all the formalities have not been gone through"

3) Intention to create legal relations

a) The Bus conductor in approaching the appellant Mrs. Whisky to pay the bus fare and in attempting to pay for her ticket although unable to show her intention to create legal relations. The appellant knew that if she had not paid her fare there would be a consequence.

i) In applying the principle in *Thornton v Shoe Lane Parking* [1971] 2 QB 163, CA that 'The offer was contained in the notice at the entrance and was accepted when the plaintiff drove into the garage…not when payment was due' it illustrates that a contract was formed between Mrs. Whisky and the Liverpool Bus company even though she did not have a chance to pay the fare.

Legal Skills 2: Skeleton Argument for the Appellants

Colleen Artuch

LLB1 (first year part time)

COURT OF APPEAL – Civil Division

MRS. WHISKY (APPELLANT)

v

LIVERPOOL BUS COMPANY (RESPONDENT)

INTRODUCTION: This is an application on the behalf of the Appellant to overturn the decision in the High Court.

POINT 2 OF THE APPEAL:

Even if there was a contract, liability was excluded as there was a large notice situated by the entry doors of the bus stating; 'The floor of this bus can get slippery at times. Please take care. Liverpool Bus Company cannot accept liability for any injuries caused.' (*Canada Steamship Lines v The King* [1952] applied).

ISSUE:

1. The High Court erred in applying *Canada Steamship Lines v the King* in rendering its decision in favour of the Liverpool Bus Company ("the Company"). The principles applying to the interpretation of exclusion clauses were laid down in this case as follows:

    1.1. In order to exclude liability for negligence, if the contract expressly mentions negligence, the courts will recognize it.

1.2. If the clause does not mention negligence, is the wording wide enough to cover negligence? If there is doubt, it will be construed in favour of the innocent party.

1.3. If the wording is interpreted to be wide enough to include negligence, the courts will ask whether the claimant has another basis for his/her claim.

The Company did not exclude its liability in clear enough terms and so the decision of the High Court should be overturned.

2. The Company cannot exclude its liability for Mrs. Whisky's injury. Mrs. Whisky boarded the bus, laden down with shopping, sat down in her seat and was not aware of the notice posted near the entry to the bus.

   The party seeking to rely on the exclusion clause must show it is part of the contract. This can be done by showing that either the innocent party signed a contract or that reasonable steps were taken to bring it to the innocent party's attention. Were there other signs noting the floors may be slippery when wet? Was there just the one notice on the bus? The Company did not take reasonable steps to bring the exclusion notice to her attention and as a result, is liable for her injury. It can also be argued that the notice excluding liability, was not prominently displayed and may have been lost among the advertisements commonly found on buses. *Parker v South Eastern Railway Co. Ltd*., and *Thornton v Shoe Lane Parking Ltd* applied.

3. The Company failed to successfully incorporate the exclusion notice into the contract with Mrs. Whisky. The clause was not written on a contractual document, so could not form part of the contract, under the rules of incorporation. Mrs. Whisky was not given the opportunity to agree to the exclusion when she boarded the bus. The Court of Appeal in *Chapelton v Barry Urban Council* applied.

4. Mrs. Whisky was already seated aboard the bus and was not given sufficient notice of an exclusion clause. *Olley v Marlborough Court Ltd* applied.

Legal Skills 2: Skeleton Argument for the Appellants

Xavian Ebanks

LLB (first year full-time)

IN THE COURT OF APPEAL

BETWEEN

Mrs Whisky (Appellant)

v

Liverpool Bus Company (Respondent)

SKELETON ARGUMENT
on behalf of Liverpool Bus Company (Respondent)

First ground of appeal

Badger J was correct in concluding that no contract had been formed between Mrs Whisky and Liverpool Bus Company.

Submissions:

1. In order for a contract to be considered legally binding in the eyes of the law, an offer must first be made by one party and accepted by the other.

    1.1 Tritel defines acceptance as 'a final and unqualified expression of assent to the terms of the offer'.

    1.2 Courts should look at the correspondence between the involved parties to determine whether an offer was made and whether that offer was accepted or not ***Gibson v Manchester City Council*** **[1979]**.

    1.3 While the House of Lords appealed the decision made at the Court of Appeal, Lord Denning MR statement that we should "look at the correspondence as a

whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material" should be applied.

2. There was no movement of consideration which is a requirement to make a contract legally binding.

    2.1 Consideration is defined in ***Eleanor Thomas v Benjamin Thomas*** **(1842)** by, Patteson J as 'something which is of some value in the eye of the law, moving from the plaintiff: it may be of some detriment to the plaintiff or some benefit to the defendant; but at all events it must be something moving from the plaintiff.'

    2.2 While Mrs Whisky did offer up a fare of £3.50, it was not accepted by the conductor and thus, there was no movement of consideration.

3. Due to there being no contract, Liverpool Bus Company did not owe Mrs Whisky a duty of care and so they should not be held liable for her accident.

    3.1 This is illustrated by applying the three point criteria laid out in ***Caparo Industries Plc v Dickman*** **[1990].**

Legal Skills 2: Skeleton Argument for the Respondents

Dillan Mungroo

LLB1 (first year full time)

IN THE COURT OF APPEALS
BETWEEN

Mrs Whisky

(Appellant)

v

Liverpool Bus Company

(Respondent)

SKELETON ARGUMENT
on behalf of Liverpool Bus Company ("Respondent")

Second Ground of Response

Even if there was a contract, liability was excluded as there was a large notice situated by the entry doors of the bus stating 'The floor of this bus can get slippery at times. Please take care. Liverpool Bus Company cannot accept liability for any injuries caused.' (***Canada Steamship Lines v The King*** [1952] applied).

Submissions

Although it is possible to exclude liability in negligence the courts have traditionally approached clauses which are said to exclude such liability on the assumption that it is inherently improbable that the innocent party would have agreed to the exclusion of the contract breakers negligence, to have this effect the contractual terms in question must exclude liability for negligence clearly and unambiguously.

There can be no liability on the part of Liverpool Bus Company as can be seen by the rules set out by Lord Morton in ***Canada Steamship Lines v The King***[1] 'The lessee shall not have any claim or demand against the lessor for detriment, damage or injury'.

Although in the event that a contract was in existence, Liverpool Bus Company cannot accept liability for any injuries caused as her boarding and taking a seat constituted accepting a non-written contract, and had not been induced to do so by any misrepresentation, she was bound by the terms of the contract, which states that the floor of the bus can get slippery at times, and it was wholly immaterial that she had not read it and did not know its contents as seen in ***L'Estrange v F. Graucob Ltd***.[2]

In ***Rutter v Palmer***[3] Scrutton LJ states, in construting an exemption clause certain general rules may be applied, the defendant is not exempted for the liability for the negligence of his servants unless adequate words are used, such as the words "please take care", secondly the liability of the defendant apart from the exempting words must be ascertained, then the particular clause in question must be considered, and if the only liability of the party pleading the exemption is a liability for negligence then the clause will more readily operate to exempt him.

Conclusion

Liverpool Bus Company is in no way liable for the injuries incurred by Mrs Whisky as all liability is excluded.

[1] (1952) AC 192.
[2] (1934) 2 KB 394.
[3] (1922) 2 KB 87.

Legal Skills 2: Debating and mooting hints and tips

TBLS Students

Be Prepared:

- ✓ Know the case and grounds for your argument, especially the weaknesses. This will give you a competitive edge and show the judges that you are prepared and confident.
- ✓ Conduct extensive research on the opposing arguments, as it will help you anticipate the upcoming rebuttal.
- ✓ Make compelling arguments. This allows your audience to stay aware and engaged.
- ✓ Create briefs of each case. This will assist you in answering questions from the judges.
- ✓ Never read from a script! You will lose your audience and engagement. Your audience may miss a compelling point whilst you are busy reading.
- ✓ Be in constant communication with your moot partner. This allows you to bounce ideas off one another, stay on track and even help you to memorize your arguments.
- ✓ Presentation is everything! Although this may seem like a small detail, dressing professionally helps present your audience with a positive image and professionalism.
- ✓ Record and video yourself when practising for your debate and moot. It will help you identify your weaknesses and strengths, and from there, you can improve your presentation before presenting it at the final assessment.

Practice, Practice, Practice:

- ✓ Always answer the judges' questions. Generally, they're looking for confirmation of your point or they are genuinely trying to obtain more information to understand your point. This can go a long way in establishing a good rapport with them.
- ✓ Time yourself when practising your oral arguments; although you are allotted 10 minutes, the entire time will be for your arguments and include questions from the judges.
- ✓ Be conscientious of your tone when practising your oral arguments. Making solid, factual points is only great if your audience can hear them.
- ✓ Practice reading your arguments aloud and in front of others. The more you know your submissions, the greater your advantage.
- ✓ Pace yourself; take your time and articulate your points to your audience.
- ✓ When it is not your turn to deliver arguments, be mindful and respectful of the other presenters. This especially comes in handy when formulating your rebuttal.

Practical Legal Research (PLR) Task 2020

Overview

Undertaking PLR is part of the Professional Practice Course (PPC) assessment. It requires students to engage with an area of Cayman Law that they have not been taught in detail, and use their knowledge of substantive law, practice and procedure to answer the problem. This is an example from last year's best marked PLR assessment that may be useful to LLB students as well as current PPC students on the course.

Instructions

You are an attorney, working in the Cayman Islands at Hawksbill Holkham, and have been consulted by a client John Adams who is seeking a written opinion on the legal issues arising from the follow facts:

John Adams advises that he along with his Caymanian business partner Peter Jones is the director of Cayman Caterers Limited, 'the Company', an ordinary resident company, which was incorporated in Cayman in 2007, to provide catering at events sponsored by companies in the financial services industry. John Adams informs you that the past few years have been a struggle as fewer and fewer companies sponsored events where catering was required.

He also advises you that one of their biggest clients, Small Catch Limited, has an outstanding invoice remaining for services provided over the course of last year in the sum of $175,000.

For some months now, John and Peter have realised that the Company is hopelessly insolvent. The Company owes $750,000 to Butterfields Bank; $90,000 to Peter's niece, Ann; and also owes in the aggregate $500,000 to other creditors, comprised of suppliers of food and beverages and

customers. The Company's assets are $150,000, comprised of catering equipment worth approximately $120,000 and about $30,000 in cash.

John advises you that they have been dodging their creditors all Spring in the hope that Small Catch Limited would pay them the debt owing. Ann has been telephoning John and Peter seeking the return of the money, as she is herself in financial difficulties.

John advises you that Peter was afraid that Ann would never get paid if the Company was wound up and so he recently decided to give the Company's equipment (worth $120,000) to Ann to offset the debt owing to her and in the hope that there would be no bad feelings. John has concerns about this transaction. He informs you that Peter has reassured him that this will not come to light if the company is wound up as he has altered the Company's financial statements so that the equipment is now omitted from the books and records along with Ann's debt. Peter has also informed John that Ann has agreed to secretly give them back any extra cash she has left over from selling the equipment once her debt is satisfied so that they can use it for their own personal use. John is wondering whether or not he should distance himself from the Company in its entirety. He informs you that before he was appointed a director of the Company, Tom Ferry was the previous director and John believes that the Register of Companies has never been updated since his appointment to replace Tom Ferry in 2009.

John informs you he is aware that the Company has hit hard times and he is looking for advice which is to provided in a Memo to him of no more than 1,500 words on the following matters:-

1. The various restructuring options open to the Company under Cayman Law.

2. Whether or not there are any statutory and/or fiduciary duties that he should be concerned about as a director of the Company.

3. The most practical option for Winding Up the Company in accordance with the Companies Winding Up Rules 2018.

4. The role of any liquidator in any Insolvency Proceedings.

Practical Legal Research (PLR) Task 2020

Olivia Connolly

PPC Student

14 April 2020

BY EMAIL

To: Mr. John Adams

From: Mr. Alex Clerk

File: JohnAdams/1

Subject: Memorandum re Cayman Caterers Limited

Dear Mr. Adams,

Background

1. Our firm has received instructions to provide you with advice in the form of a memorandum concerning your company, Cayman Caterers Limited (the "**Company**") of which you are joint owner and director, along with your Caymanian business partner, Mr. Peter Jones.

2. The business of the Company is to provide catering at sponsored by companies in the financial services industry, a service which demand for has decreased in recent years. We understand that the Company is insolvent, that being not able to pay its debts as they fall due.

3. The scope of this memorandum is to outline your options in relation to the restructuring and winding up of the Company. It will also advise upon whether or not you have breached or will potentially breach any statutory or fiduciary duties owed by you as a director of the Company.

4. In addressing the above, this memorandum will include an outline of the options available to you if you wish to dissolve the Company and will outline the role of any liquidator in potential insolvency proceedings.

Facts

5. The Company was formed in the Cayman Islands as an ordinary resident company in 2007 in accordance with the Companies Law (as amended) (the "**Law**").

6. The Company owes debts up to a total amount of $1,340,000 consisting of $750,000 owed to Butterfield Bank, $90,000 to Peter's niece, Anne, and an aggregate amount of $500,000 owed to various food and beverage suppliers and customers.

7. The Company has assets of $150,000 comprising of catering equipment worth approximately $120,000 and around $30,000 of cash. The Company is also owed $175,000 by Small Catch Limited, relating an outstanding invoice for services rendered last year.

Issues

8. The issues to be addressed in this memorandum are:
    a. The restructuring options available to the Company.
    b. Statutory and/or fiduciary duties that you should be concerned about as a director.
    c. What would be the most practical option should you decide to dissolve the Company.
    d. The role of a liquidator in any insolvency proceedings.

Conclusions

9. Issue (a): we advise that a scheme of arrangement would be beneficial to your company, to allow refinancing and to buy time recoup outstanding debts. A provisional liquidator would assist in conjunction with this process to prevent claims being brought during this time.

10. Issue (b): you may have breached your fiduciary duty in relation to the transaction with Anna, and a statutory duty relating to non-filing of notice.

11. Issue (c): a voluntary liquidation would be the best method to dissolve your company, as it would allow you the most control over the process, while protecting you from future claims.

12. Issue (d): note the main duties in paragraphs 33-38 and recommend appointing a professional liquidator.

Analyses

(a) Restructuring Options

13. There are two key methods of restructuring which can be found in the Law and the Winding Up Rules 2018; i) scheme of arrangement, and ii) appointment of a provisional liquidator ("**PL**").

14. Section 86 of the Law permits schemes of arrangement, which are agreements between the Company and its members/creditors in order to restructure the Company's debts.

15. The Company can apply to the Grand Court (the "**Court**") to summon a meeting and obtain an order to make enforceable such an agreement, should 75% of members and creditors be there and pass a majority vote.

16. Any restructuring plan agreed will be subject to the licensing requirements set down by the Trade and Business Licensing Law 2018 and the Local Companies Licensing Control Law (2019 Revision).

17. The advantage of this method is that it would allow you to formulate a repayment plan with Butterfield and other creditors and would buy more time to obtain help from other investors, or payment from Small Catch Limited.

18. The disadvantage is that other creditors can bring actions while the scheme is operating. These schemes can also be very costly, which is not desirable given your Company's low availability of liquid cash. It may also be difficult to gain majority agreement from your creditors.

19. You can appoint a PL under section 104(3) after the presentation of a winding up petition to the Court, but before a winding up order is given.

20. If you decide that the Company should be wound-up, it is a good option to appoint a PL as a moratorium is then put on all claims against the Company (in contrast with a scheme of arrangement). Also, this option does not require the consent of any stakeholders and the business can continue to trade while considering restructuring options.

(b) Statutory/Fiduciary Duties

21. You owe the Company common law fiduciary duties and also the duty to exercise care and skill. If you breach your duties, you will be liable to the Company for damages and may also be sued under the tort of negligence.

22. The transfer of equipment to Ann is a breach by Peter of his duty to act in the best interests of the Company. It is also a crime under section 134 of the Law should the Company be wound-up within 12 months of this transaction. Omitting information from a statement concerning a company's affairs is also a criminal offence under section 137 of the Law, which we have been told is Peter's intention.

23. You may be liable for a breach of your duties by failing to supervise Peter's activities. [case] You are required to under your fiduciary duties to notify the members, even if you did not carry out the transaction yourself and do not participate in sharing the excess proceeds as proposed by Ann. We also advise that you do not participate in altering any Company records, to avoid criminal liability under section 134.

24. If you receive any money from the transaction with Anne, you would be in breach of your duty not to make a secret profit (Cayman Islands News Bureau Limited v Cohen and Cohen Associates Limited).

25. You must ensure all statutory reporting requirements of the Law are met. Your failure to notify the General Registry (the "**Registry**") when you took over from Tom Ferry in 2009 is a breach of section 55. The Company is liable for a fine (section 57). You should update the Registry as soon as possible.

26. If you want to distance yourself from the Company entirely, you should resign according to the Articles and Associations of the Company ("**Articles**") and sell your ownership rights.

(c) Dissolution

27. The Company can be dissolved by voluntary liquidation ("**VL**"), compulsory liquidation ("**CL**") or strike off ("**SO**").

28. VL allows you to effect a dissolution yourself, by a board meeting and notice of a shareholders meeting being given wherein the members vote to pass a special resolution (or a written resolution if permitted by the Articles) You will need a 2/3 majority. The liquidation commences when this resolution is filed at the Registry.

29. The assets of the Company will then be distributed according to the rules of pari passau by a liquidator and the VL is deemed to have been complete three months after the liquidator has filed their final report.

30. Alternatively, the Company can apply to be dissolved by CL. As with a VL, once the liquidation commences, a moratorium is put on proceedings that can be brought against the Company. The main difference between a VL and CL, is where voluntary, it will have been your idea initiative and you will have more control over the process.

31. Companies can be dissolved under section 156 through strike-off from the Register of Companies. This method is cost effective and expedient however, does not use a liquidator. You as Director will retain all usual liability. With SO, creditors may apply to restore the Company for up to two years after the strike off and then sue.

(d) Role of Liquidator

32. The primary role of a liquidator is to wind up a company's affairs. The liquidator can be joint, voluntary or appointed by the court (compulsory). Their responsibilities are contained in Part V of the Law.

33. Liquidators are responsible for distributing assets according to existing agreements and the parri passau rule. The liquidator will prepare a Final Report which will be filed at the Registry after it is presented at a final general meeting.

34. Liquidators owe a fiduciary duty to maximise economic benefit to creditors and in relation to issue (b) of this memorandum, you must also note the powers contained in sections 136 and 137. Liquidators have the obligation to report any violations of the law to a liquidation committee.

35. You may act as liquidator yourself, however it is advisable to appoint a professional as they are experienced, and provide credibility to the distributions made, meaning a reduced likelihood of dispute.

36. You will have to pay the expenses of the liquidator, but that can be paid out of the Company's assets as decided by the members (section 130).

Yours sincerely,

A Clerk

Legislation and Case Law

The Companies Law (as amended)

The Winding Up Rules 2018

Cayman Islands News Bureau Limited v Cohen and Cohen Associates Limited [1988-89]

TBLS Events: Street Law

Sharon Roy

LLB (second year full-time)

Teaching can often be a very effective method of learning, and the street law program at the TBLS stands as a practical example of that. Street law is a global program geared towards educating secondary school students about the basics of law and civics. This program was established in 1972 by a group of law students at the Georgetown University Law Center in Washington DC, and its vision is to create a 'just and fair world powered by people who are informed, skilled and engaged in improving their lives, communities and governments.' It is an approach that uses various interactive teaching methods aiming to teach practical law.

The elements of practical law taught include human and civil rights, democratic principles, conflict resolution, advocacy, criminal and civil law, employment law, family law and consumer rights. All these are topics you will be exposed to during your time at TBLS. Thus, this is a fantastic opportunity for students to extend their understanding of school students whilst expanding their own.

Although it may sound intimidating at first, this program is a way for law students to get out of their busy law school schedules and tasks to do something that makes all the hard work and effort worthwhile. Law students who have participated in this program have often said it has made them more confident and helped them build key advocacy skills through interacting and answering questions that test their legal understanding of specific topics. It also allows them to explain complex concepts in a way that is easier for younger students to understand. For example, during the programme, the students participate in activities involving reading case scenarios and learning how to negotiate when looking at alternatives to dispute resolution. They will also be allowed to moot, all of which students at TBLS will have most likely experienced before the commencement of the programme.

The goal of the street law program in TBLS is to enthuse, inform and inspire school students about the law and legal study. The Truman Bodden Law school currently runs this program at Cayman Prep High School, intending to reach out to other schools in Cayman as well.

TBLS Student Activities: Internship

Jesse McNaughton

LLB2 (second year full-time)

This past summer, 2021, I spent two weeks of my well-earned 'dog days' interning at a law firm called Carey Olsen. The experience has been my first in an office setting. Although I did not receive my corner office, with a nameplate and the works, I was set up in a space beside a veteran attorney who would mentor me.

I aimed to find an intern position after finishing my second year at TBLS, as it is a suitable time to look toward engaging with professional legal training. Knowledge acquired in the classroom will be pointless if not applicable to our life experiences. An internship is also an effective way to explore options for when the educational haul ends. Keep in mind there may be places where you will be able to see yourself working and areas where you may not be inclined to find yourself. Of course, this is all part of the learning curve.

Some readers of the TBLS Student Law Review may not know me well. However, students familiar with me know that my attire and fashion sense is casual, to the point of facetiousness. Would you believe that during my first day at the firm, I was told that I was overdressed? Well, I shed the tie after the first day, leaving me with formal business attire minus the tie and blazer. It is a running joke now between some of my lecturers and me.

The experience was primarily one of becoming acquainted with the daily activities at a law firm or, in other words, becoming familiar with 'what lawyers do.' Per my request, I worked with the corporate team instead of the litigation team. I was introduced to reading details of contracts as well as reading the laws of the Cayman Islands. I will elaborate on a recently decided case that pertains to land law in the Cayman Islands:

The case in question is *Cayman Shores Development Ltd. and Another v The Registrar of Lands and Others* (2021). It involves land near Camana Bay purchased by Dart Enterprises. Locals know it as the old Britannia Resort. The previous land owners entered into agreements which gave the Second to Fifth Defendants—owners of the adjacent property—access to specific amenities on the land, including privileged access to the golf course, tennis courts and beachfront facilities. It had been advertised to the Second to Fifth Defendants that purchasing the adjacent property would include such privileged access, which was attractive to them.

In dispute was whether the agreements, as entered, constituted restrictive agreements or easements. The difference is that a restrictive agreement will not carry over on the land sale. Thus, if restrictive agreements were in place, Dart Enterprises would not be bound by such and could develop the land in any way seen fit without legal hindrances brought by the Second to Fifth Defendants.

The first issue that needed addressing was whether the Land Registry could be changed since restrictive agreements were stipulated. Regarding this matter, it was held that the noting on the register of restrictive agreements is not determinative of their validity and effect: section 93(3) of the Registered Land Law (2004 revision). In other words, it was not detrimental to the Second to Fifth Defendants' case that the register was, potentially, completed incorrectly. So long as there was proof of a valid mistake in filling out the register, it could be amended to recognise easements.

The paramount issue was whether the written agreement made between the initial parties should properly be construed as creating restrictive agreements or easements. Regarding this matter, it was held that the Rights (of access) granted to the Second to Fifth Defendants constituted easements. This ruling meant the Rights would carry over and bind Dart Enterprises. However, what is interesting is Cayman Islands law does differentiate between positive and negative covenants. This rule means that Dart Enterprises is bound, in a positive sense, to allow access to the Second to Fifth Defendants. Yet Dart Enterprises is not bound, in a

negative sense, to *not* interfere with access. Altogether, this means that Dart Enterprises can develop the land. Still, the Second to Fifth Defendants can claim damages for tortious interference, which will be assessed as an aggregate amount for a later settlement.

My reading of the case, all 184 pages, was my first reading of a first instance case. The difference was that counsels' submissions were examined meticulously. This method is different from the student's ordinary Westlaw reading because the focus was on the evidence above points of law.

Mr Dart has to become somewhat of a polarising figure in the Cayman Islands. His company oversees much development, and he is pretty wealthy. My point here is that Mr Dart can afford some "fancy" lawyers. While the judge did not adopt submissions made in his favour, I found them clever. For example, to be categorised as an easement, rights granted cannot be purely precarious, to be liable to be taken away at the "whim" of the servient owner: *Regency Villas*. Mr Dart's counsel argued that because the Second to Fifth Defendants were subject to fees, including tennis court fees, and for using golf carts, payment of a fee was for the right of access rather than an inherent right of access subject to a fee. Such fees could be levied so steeply as to make it unfeasible for the Second to Fifth Defendants to afford them, and this would negate the right.

After analysing the case, I experienced a "lightbulb" moment though the "lightbulb" may have been dimmer than it first appeared. That is, I thought that I had found a loophole in the case. Dart Enterprises was liable for interference with the golf course, as they had torn some turf away to be used at another property elsewhere, preventing the enjoyment of golfing. However, it was held that what were referred to as the Tennis Court Rights would be extinguished. This removal was because development, such as the highway, had already changed the neighbourhood's character and impeded tennis playing; thus, the Tennis Court Rights had already been rendered obsolete. I then thought, why would not the Golf Course Rights be rendered obsolete in a similar fashion after a period and development by Dart Enterprises? If

the *former* golf course were inundated with condominiums, that would surely change the neighbourhood's character. It occurred to me that Dart Enterprises may not be able to change the neighbourhood's features to benefit itself unilaterally, but what if it were to sell off small parcels and partner with other developers. My thought was: would then the Golf Course Rights be rendered obsolete, and Dart Enterprises be relieved of damages payable? I expressed this thought to a lawyer at the firm, whose response was that the court would not look kindly on the exercise. I suppose it is in the realm of uncertainty.

What struck me most, having participated in what lawyers do, or at least what corporate lawyers do, can be summed up with what was said to me by my acting mentor early in the two weeks I spent at the firm. He said I had survived four cases throughout my career, the primary one being *Carlill v Carbonic Smoke Ball Company* (with which first-year students will become well-acquainted). The case speaks to freedom of contract. Aside from reading the case, I read many private contracts throughout my internship. If well-drafted and subject to certain caveats, such as the Unfair Contract Terms Act 1977, private contracts can solidify agreements between parties as those parties see fit. Law School has me familiar with case and statute law. However, I learned from my entire experience that not all legal practice is the same, nor do all lawyers have or require the same skills. In the corporate world, interpersonal skills, including negotiation prowess, seem to be just as important as legal knowledge.

In the end, there was one disappointment. I had spent some time collecting respectable business formal attire. I had even made sure to appreciate shirt and tie colour coordination. Yet, these things might still be in my future. My acting mentor told me that if you wear a three-piece suit as a lawyer, you better be "on your game" that day.

TBLS Student Activities: Gala

Ghita Moyle

LLB3 (third year full-time)

The Truman Bodden Law School Student Society Annual Fundraising Gala took place on June 26, 2021. This event is the Student Society's primary fundraising initiative to support the needs of the law school students. This year, for the first time, it aimed to raise funds to provide a Caymanian Student with a tuition scholarship.

The event attracted 260 people to the Marriott hotel's ballroom. It was the biggest attendance for any TBLS Student Society galas. Under the "All that Jazz" theme, guests enjoyed an evening of live jazz music, entertainment and networking. The law school students could attend the gala thanks to the generous sponsorship of student tickets by Davenport Developments and CILPA. The support of law firms and government ministries such as the Ministry of Financial Services and Commerce and the Cayman Islands Monetary Authority made an impressionable impact.

The Student Society has pulled off what has been the most successful gala ever organised. Despite challenges and the looing academic deadlines, the team came together and worked tirelessly to provide its guest with a fantastic event and raise funds to support their fellow students. The team, led by Ghita Moyle (social chair and Liverpool representative), included Julie Campbell (President), Amber Watler (Vice President), Colleen Cummings (secretary), Tiffany Titus (treasurer), Jewel Ebanks (Fundraising Chair), Janet James (Fundraising and Operations Chair), Sharon Roy (Class Representative), Jordan Watler (Class Representative).

Highlights of the evening include an inspirational speech by the Honourable Premier Wayne Panton, also an alumnus of TBLS. The Alex Panton Foundation will also share this year's gala proceeds. The Honourable Premier and his wife, Mrs Jane Panton, delivered a heart-warming

message on behalf of the foundation. The Premier also presented an inspirational message on the importance and value of legal education right at home in the Cayman Islands.

As always, events such as the 2021 Student Society gala would not be possible without generous sponsors such as Walkers, Harneys and Maples. These firms regularly attend the TBLS to give career advice and offer mentorship programs designed to assist students from early law school until their induction into the legal profession. Some firms have secondment programmes to overseas offices where young lawyers can travel as far as Asia and the Middle East, gaining invaluable exposure.

Many other sponsors have supported this event with monetary or “in-kind” donations. The wines and welcome cocktails were graciously sponsored by Kon Tiki Bottle Shop, Jacques Scott and Tortuga.

Guests received some fantastic prizes for raffles and auctions. The prizes included beautiful jewellery from Prodigy Jewellers, Island Jewellers and Kirk Freeport. A live painting by Carlos Garcia was put up for live auction and raised a whopping $5200.

Ghita Moyle delivered the address on behalf of the Student Society. It was a message of inspiration and empowerment. It focused on the importance of inspiring those around us with our actions and words whilst empowering them to achieve their goals. The Student Society closed their remarks with a challenge to use their influence for good and consider their positions as role models in the community and to those coming up the ranks.

The TBLS Student Society also organised a 5K walk/run on September 12 2021. ABM Cleaning Services Ltd was the proud sponsor. It allowed the Student Society to reach its fundraising objectives before the upcoming academic year.

TBLS Student Activities: Life, Work & Everything Else

Patrice Morgan

LLB1 (second year part-time)

Congratulations, you have begun a new chapter in your life: studying law at the Truman Bodden Law School. If you already had a full life of work, school, family and friends, I would venture that you have already thought about how you will make room in your schedule to attend lectures, complete the required research and reading, and complete assignments. If you are organised, you have built a timetable to block out specific days and times for your studies and ensure that your work and family tasks aren't left behind.

After the first week, despite my best plans, reality hit hard and fast. Whether you are a full-time or part-time student, we have all had that 'come-to-Jesus' moment when after fighting traffic for over an hour, making and eating dinner, and attending to laundry, 10 pm was upon us, and we still had 3 hours of reading to complete. Managing a full-time job, finding time to spend with my husband and our home, and giving the proper time for my part-time course load came with lessons in humility, perseverance, and sheer will.

The plans I had laid out carefully had to be revised weekly and daily. However, I hope that some key takeaways from my trial and error approach and what I learned from my fellow students will help the incoming students better manage Life, Work & Everything Else.

Tips for Managing Time At Home

1. Assign a time to read, research, and complete assignments each night. Consistency is key.
2. Enlist the help of family members to get household chores done and ease your stress in that area. Chores shared get completed much faster and can be your downtime and family time.

3. Give your set timetable to friends & family members and ask them to treat your assigned time as an appointment - no disruptions.
4. Set your phone on silent, and leave it alone for your school appointment time.
5. Practice forgiving yourself when life events may throw your plans off-kilter, but get back on track.

Tips for Coursework

1. Before the lectures or seminars, read the class lecture materials and corresponding chapters. The first read establishes the landscape; the lectures or seminars will build the structure, and the cases and assigned or extra readings will "flesh out" a deeper understanding of the material.
2. Be strategic with your note-taking. During lectures or seminars, listen carefully and make notes of any cases or material not included in the slides. Using them to review and study will be so much easier.
3. Summarise the cases as you read them, which will help you remember when and how to apply them to problem questions.

Alumni Profile: Alden McLaughlin QC

Premier of the Cayman Islands (2013 - 2021)

Truman Bodden Law School (1983 - 1988)

Alden McLaughlin is the second TBLS graduate to hold the post of Premier of the Cayman Islands (following Juliana O'Connor-Connolly) and the first TBLS graduate (that we know of!) to be appointed as a QC. We were pleased to receive a reflective piece from Mr McLaughlin on how he came to the law school, and how that has shaped his career.

The following is from Alden McLaughlin:

I never started out wanting to be a lawyer. Indeed, having completed my A-Levels in 1981, going back to school was the last thing I wanted to do. I just wanted a job and a sports car. Cayman was a very different place 40 years ago, and with A-Levels, it was easy to get a good job. I joined the Civil Service in July 1981 as Assistant Labour Officer. A year later, I was transferred to the Courts Office and appointed Deputy Clerk of Court even though I had no legal training or experience and was not yet 21.

The administration of the Courts Office was going through some challenges and changes at that time, and a retired Jamaican High Court Judge, the late Ena B. Allen, was recruited as Clerk of the Court. Mrs Allen recognised that I was trainable but encouraged me constantly to pursue a formal qualification. In this, she found a ready ally in the late Dr Peter Rowe, who was the first Director of Legal Studies of the Cayman Islands Law School, which fortuitously commenced classes in October 1982.

The Director's office and the single lecture room were upstairs in the Courts Office, so Dr Rowe had to pass my office a few times a day on his way to the water cooler or to get coffee. At least once a week, he'd pop his head into my office and enquire, "Have you decided to join the Law School yet, young man?" For a long time, my answer was "No". It seemed to me I'd have no social life at all if I joined. In those early days, the course was five years, with students required to pursue studies at the school and articles of clerkship simultaneously. Articled Clerks went to school four mornings a week and worked in a firm four afternoons and one full day a week. Over that year, however, Mrs Allen, Dr Rowe and my parents slowly wore down my resistance, and in October 1983, I enrolled as a law school student and articled to Mrs Allen, Clerk of Court.

In those long-ago times, most law firms were anxious to take on articled clerks, and after much consideration, I realised that I would get broader training and that, generally, there were better prospects in the private sector. So, in April 1984, I resigned from the Civil Service and joined Charles Adams & Co. as an articled clerk to the late Colin Charles Adams. I completed the 5-year course of study and articles in October 1988, obtaining an LLB degree from the University of Liverpool and the local professional practice certificate. I was admitted to practice in the Grand Court on 14 October 1988 and immediately became an associate at Charles Adams & Co.

When I began as an articled clerk at Charles Adams & Co. in 1984, it was a small three-lawyer firm that did whatever work came through the door. Over the years, it grew into a firm of 10 lawyers and became the partnership of Charles Adams, Ritchie and Duckworth. I was made a partner in December 1993. I retired from the firm in 2005 following my first appointment as a cabinet minister. In recent years, the international firm Collis Crill has subsumed the firm.

Given the firm's small size, my training during articles and the early years of my practice required me to do a wide range of work. There was no specialisation in those days. My training and practice included family law, succession, conveyancing, corporate, land law disputes, immigration, labour and planning tribunal matters, traffic and criminal matters and civil litigation. My preferred area of practice was civil litigation. I appeared regularly before many tribunals between 1988 and November 2001 and the courts in Cayman in a wide range of matters. I appeared in several significant causes with senior counsel and on my own. I instructed many notable Queens Counsel, including Ramon Alberga, Pierre Lamontagne, Norman Hill, David (Bobby) Muirhead, Richard Mahfood and Geoffrey Vos. More than a dozen of the matters in which I appeared before the Grand Court and Court of Appeal are reported in the Cayman Islands Law Reports.

I served as President of the Caymanian Bar Association from 1998-2000 and as a member of the Legal Advisory Council during those years. I was also a member of the Grand Court Rules Committee for many years.

I was first elected to parliament in November 2000 and am now serving my 6th consecutive term as an elected representative. I served three terms in Cabinet, the last 2, from 2013-2021, as Premier. Over the past 21 years, I have put my legal education, training, and experience to multiple uses in various ways. These include drafting and constructing legislation and agreements, advocating, and successfully negotiating with the UK Government for significant constitutional advances for these Islands and leading local and international negotiations on behalf of the government. I have led delegations overseas for various discussions and negotiations with CARICOM, the UK Government, the EU Commission, and the Permanent Representatives of many EU states in Brussels. And I have also advocated on behalf of Cayman's financial services regulatory regime with government representatives and agencies in Paris and Berlin in the EU as well as in Washington DC and New York City in the USA.

Based on my broad and extensive legal experience, I was made one of Her Majesty's Counsel and admitted to the Inner Bar earlier this year. My education at the then Cayman Islands Law School and the excellent training I received while in articles provided the foundation for everything I have achieved in my legal and political careers. I shall be forever grateful to those who encouraged me to go to law school and trained me along the way.

To be a good lawyer requires more than a good brain and education. It requires a passion for the law Though it may seem "trite" to say so, and a desire to help people, right wrongs, and pursue justice.

Alumni Profile: Elkie Rose

Truman Bodden Law School (LLB 2010, PPC 2012)

Current Employment: Intertrust Law

Elkie Rose is a Caymanian attorney, wife, and mother of three children. She has extensive experience in the Cayman Islands financial services, and her global roles have propelled her passion for growing and implementing business strategies. She has also contributed significantly to developing and protecting women and children in the Cayman Islands. Elkie is one of the youngest female global general counsel, a TBLS graduate (of course) and now an equity partner here in the Cayman Islands. She was kind enough to take some time out and answer a few questions for us and feature as one of our alumni profiles for this year.

What made you want to pursue a Law Degree?

It is interesting how events in our life impact and sometimes catapult us into a completely different trajectory than we envisaged. My catalyst was an injustice to a family member. I felt compelled, and still do, to ensure that the undefended and weak in our society are represented and protected.

What were the benefits of attending TBLS, and how did it assist you in professional development?

There were many benefits, but the most significant would be my ability to simultaneously pursue my academic and professional development without sacrificing my most important responsibilities as mother and wife.

Briefly share thoughts of your experience as one of the youngest female Global General Counsels and now equity partner of a Cayman Islands law firm.

It is strange to hear it phrased that way, and the truth is that I sometimes take for granted how incredible my journey has been because I have been too busy working! If you agree that as human beings our greatest potential lies just outside of our comfort zone, and that is where you prefer to operate. In that case, you are never comfortable because you are constantly facing new challenges. I was fortunate to work for firms that gave me the space and platforms to develop my potential.

The many challenges, however, are coupled with many rewards. One of the greatest professionally has been the opportunity to work with and be mentored by amazing people who not only exude intellectual strength but understand the balance between exercising that and when to "deploy a feather's touch".

These intellectual giants have taught me that brilliant people do not need to put others down, they do not need validation and that often, the greatest among us go unnoticed.

What were some of your challenges in achieving your professional accomplishments?

As a female, my greatest challenge was raising a young family while trying to balance my journey's realities. The journey has also been exceptionally lonely at times because I could not find many who had taken a similar path to mine. I have also learned the hard way not to blindly trust those that extend an open hand and to build and rely on my strengths. If you agree with that position, you also agree that the key is to focus on developing your strengths.

What advice would you give the next generation of future lawyers?

This one is easy because it is the advice I wish someone would have given me many years ago.

1. **No one will provide you with anything** - there is nothing you will get easier or "as of right".
2. **You are stronger than the world gives you credit for** - hunger and thirst for wisdom all the days of your life and work hard to quell self-doubt.
3. **Build yourself unapologetically** - let the world sit on social media while you surround yourself with informational literature, music and relationships.
4. **No one is better than you** - accept nothing without being convicted in your mind. Irrespective of how senior some of us seem, we are still students of the law and life.
5. **You are just where you should be** - learn from your current circumstances because you will need those skills for the next round. You will remember that I said this!
6. **Rest in the knowledge that you are worthy** - much is required because much is given to you.
7. **Give tirelessly** - I remain cognisant that throughout my professional development, I received invaluable mentorship, which is why I am keen to play such an active role in training and mentoring. One of my most significant personal and professional burdens is ensuring we make decisions always considering what we want our island to look like for future generations. What is the point of generational overlap if we do not accept that each human being is mandated to mentor and guide future generations? Equally, what is the point of business continuity?
8. **Life is a marathon, not a sprint** - you need multi-dimensional stamina. Spend the time building yourself (physically, intellectually and spiritually). **Do not quit. Do not stop learning.** Whether you know it or not, someone is inspired or will be inspired by you.

I leave with you my favourite quote and pray that it inspires you the way that it has inspired me:

"Bear in mind if you are going to amount to anything, that your success does not depend upon the brilliance and the impetuosity with which you take hold but upon the everlasting and sanctified bulldoggedness with which you hang on after you have taken hold."

Dr. A. B. Meldrum

TBLS Alumni: Statistics

Although the Law School is situated in the Cayman Islands, many of our graduates have come from elsewhere. The flags below illustrate where our more recent graduates have come from, based upon their stated nationality in their application form.

Data from LLB graduations 2008-2021 only:

Cayman Islands: 92

Jamaica: 43

Canada: 42

United Kingdom: 13

United States of America: 7

Guyana: 5

Barbados: 3

India: 3

Trinidad & Tobago: 3

The Bahamas: 2

Belize: 2

St Vincent & Grenadines: 2

Kenya: 1

Germany: 1

Bermuda: 1

Cuba: 1

Colombia: 1

Sweden: 1

Honduras: 1

Tunisia: 1

Australia: 1

Brazil: 1

Articled Clerk Reflective Review

Everton Spence

Attorney General's Chambers (2020-2022)

The issue for consideration

Whether certain healthcare practitioners require parental consent before they can treat a child.

My role in the case

My role in the case was to conduct research and prepare draft advice for the client.

Following a discussion with my principal about the content of the instructions received from the client, it was determined at an early stage that a follow-up meeting with the clients was necessary to get a further understanding of the issues and gather relevant information for drafting the advice. I arranged the meeting, attended, and participated in a discussion on the issue. During the meeting, I asked pertinent questions to clarify and understand the scope of the client's concerns. I took copious notes of the meeting, which were later used to direct the research and craft the advice. Email communications with the client were also necessary as part of client management. Records of all correspondence were kept and became part of the client file.

In performing the task, research was first conducted into local legislation. The specific issues were beyond the scope of local legislation. Whilst the matter of consent was not explicitly addressed, certain principles were drawn from the local laws, which handled related issues such as parental responsibility, health practitioners, and counsellors. Various international instruments were consulted, including the jurisprudence of the European courts.

Local Laws Applied: Education Law (2016 Revision) sec. 2, Health Practice Law (2017 Revision) sec.2, Cayman Islands Constitution Order 2009 sec.17, Children Law (2012 Revision) sec.5, 75

Other Research material: Article 12 of the United Nations Convention on the Rights of the Child, European Convention on Human Rights (Article 8), Pretty v United Kingdom - [2002] All ER (D) 286 (Apr), Sahin v Germany [GC] (2003) 36 EHRR 765, Sommerfeld v Germany [GC] (2004) 38 EHRR 35, Gillick vs West Norfolk and Wisbech AHA and DHSS in 1985 "Gillick"), R (on the application of Axon) v Secretary of State for Health - [2006] All ER, Re W (a Minor) Medical Treatment [1992] 4 ALL ER 627, Z v Finland (1997) 25EHRR, KP v JP [2012(2) CILR 249], BACP Ethics and Guidelines.

In particular, the European Convention on Human Rights, the United Nations Convention on the Rights of the Child, and the Cayman Islands Constitution, which protect the right to private and family life, were very instructive. For example, the European Court of Human Rights ("ECtHR"), when considering the right to private and family life and its interplay with health care, determined that this right includes a right of autonomy. This right was also recognised in the primary common law authority, namely *Gillick*. The principles from this case were applied in drafting the advice.

I drafted the advice to the client, discussed this with my principal, made the requested changes, and sent the advice to the client.

Reflections on the Case

I learned how to assess information from various authorities, statutes, both local and international Courts, the Common Law, recognised guidance, and local legislation to understand an issue. It demonstrated the level of research which may be necessary for advising clients. I also appreciated that this was a sensitive issue, not only because it affected children but because of the nature of the concern and the significant implications of ensuring that we properly advised the client. Throughout the exercise, I gained an understanding of the general jurisprudence of the Courts, which was towards giving more voice to children, recognising that children who have the cognitive ability to consent should be allowed to do so and that there is no obligation in these

circumstances for a healthcare practitioner to obtain consent from the parents, before healthcare can be administered. I previously did not give thought to this issue and the wide attention international attention it received.

The research and findings demonstrated how difficult it was to lay down a rule as to what age a person with parental responsibility will be required to give consent. This would not account for the differing levels of understanding among children of the same age. It was appreciated that competence does not develop rigidly or uniformly to enable strict categories to be put in place. In applying Gillick, it was seen that the burden or responsibility would be upon the healthcare practitioner to conduct a proper assessment to determine whether the child possesses sufficient understanding of what is involved in giving consent which is valid in law.

In reflecting on this research, I can consider several areas of my learning and experience in the LLB and PPC programs which helped prepare me for this task. Skills such as reading the law allowed me to read the different legislation pieces and grasp their meaning. Interviewing skills helped me in interacting professionally with clients by actively listening, asking appropriate questions, and note-taking. Research skills provided me with the ability to gather relevant information from appropriate sources to address the issue. Writing skills provided the experience needed to focus on addressing the client's issues and writing to them in a proper format and language. The ability to analyse case law and other relevant authorities revealed the analysis to which I was exposed to, especially during the final year of the LLB and in certain aspects of the PPC. This legal formation during the program allowed me to appreciate and adapt to the practical legal environment with the additional support from the attorneys supervising my work in the Articles program. Constant support and instruction was provided throughout the process, and this helped to reinforce and build on my prior learning.

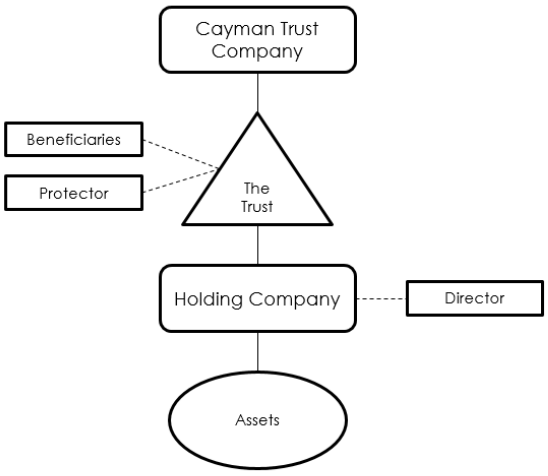
Articled Clerk Reflective Review

Alexandra Stasiuk

Walkers (2021-2022)

Terminating a Trust

We received instructions to terminate a Cayman Islands trust (the "**Trust**") and distribute the underlying assets of the trust (the "**Assets**") to the beneficiaries of the trust (the "**Beneficiaries**"). We understood that it was essential that the trust's termination and the Assets' distribution be effected before 30 June 2021. As detailed in the structure chart below, the Trustee of the Trust (the "**Trustee**") was a Cayman Islands trust company, and it owned the one issued share of a holding company (the "**HoldCo**"). In turn, the Holdco owned the Assets.



Issues to be considered

From the outset, it became apparent that multiple issues of trust and corporate law were operating. First, we were required to consider how the trust could be terminated. Ordinarily, a trust may be terminated by the Trustee distributing the whole of the trust property to beneficiaries who are entitled to receive it. However, the terms of the trust were highly

restrictive. The trust was also irrevocable. As such, the trust settlor could not unwind the trust unilaterally and recall the assets.

Furthermore, the trust's dispositive provisions prevented the Trustee from making any distributions until the trust's fifth anniversary (this date would fall after 30 June 2021). Given our deadline, we decided that the only way to terminate the trust was under the principle known as the rule in *Saunders v Vautier*[1] (the "**Rule**"). Under the Rule, if all the current, contingent or future beneficiaries of a trust are adults and have full capacity and they are all in agreement, they may agree together to bring a trust to an end and instruct the Trustee to transfer the trust fund to whoever those beneficiaries may collectively so direct.

Termination of the Trust was further complicated by the fact that the trust had a protector (the "**Protector**"). The Protector had the power to add beneficiaries to the trust. To remove any doubt that the Beneficiaries could invoke the Rule, we needed to release the Protector's power to add beneficiaries.

Subsequently, we were required to consider how the assets would be distributed to the Beneficiaries. We were told that the desired split of the assets would not be equal. Terminating the trust and distributing one share in the Holdco between multiple beneficiaries was not conducive to an unequal division of the assets. Ultimately, we advised that the director of the Holdco should issue a further 999 shares in the Holdco to be held on trust before the trust's termination. As a result, the shares in the Holdco could be divided unequally upon the termination of the trust (e.g. 250 shares to one beneficiary, 350 shares to another beneficiary and 400 shares to another beneficiary). Finally, the director of Holdco could declare a dividend of the assets to the beneficiaries as the only shareholders in Holdco. This declaration would be proportionate and pro-rata to the number of shares held by the Beneficiaries.

[1] (1841) Cr. & Ph. 240

Fundamentally, devising an accurate and precise timeline of events was needed to properly advise on the trust termination and distribution of the Assets. In the end, we advised the client as follows:

1. the director of the Holdco needed to issue a further 999 shares in the Holdco and transfer those shares on trust;
2. a deed of termination needed to be drafted, which evidenced the Protector releasing their power to add beneficiaries and the fact that the Beneficiaries were in agreement to terminate the trust by invoking the Rule;
3. the Trustee, the Protector and all the Beneficiaries needed to sign the deed of termination; and
4. the director of the Holdco needed to declare a dividend of the Assets to the Beneficiaries.

My role in the matter

I was tasked with drafting segments of the deed of termination, drafting a letter to the Trustee explaining the intention of the Beneficiaries and liaising with the client to explain our advice and collect executed documents. In addition, I participated in multiple team meetings between trust and corporate lawyers to plan the order of events necessary to terminate the trust and distribute the Assets.

Having studied the case of *Saunders v Vautier* during my LLB, it was beneficial to access my course notes to review the relevant principles. My notes on the case allowed me to explain the Rule to corporate lawyers who were otherwise unfamiliar with the concept. This Rule allowed for efficient discussion between trust and corporate lawyers to achieve the client's needs. Moreover, my participation in team activities during my LLB, such as mooting and debate, allowed me to use practical communication skills while working in a group.

Reflections

This matter highlighted the difference between theoretical study and practical application of the law. Going from studying a nineteenth-century case to drafting a document to model its principles gave me a healthy appreciation for my legal journey.

Further, this matter emphasised the importance of teamwork. During my studies, it was common to compartmentalise various areas of law. This matter cemented the end of that practice. Spotting legal issues beyond trust concepts, bringing in corporate lawyers to offer assistance and working together to find a solution was the pinnacle of collaboration.

I look forward to using this integrated approach in my future matters.

Articled Clerk Reflective Review

Krista Samuels

Walkers (2020-2022)

Explanatory Memorandum Review

We received instructions requesting a review of a Cayman Islands open-ended fund (the "**Fund**") explanatory memorandum ("EM"). The EM includes the redemption terms, investment objectives, risks, and strategies of the Fund. Generally, the terms of the EM, also known as an offering document, form part of the contract between the Fund and an investor. A subscription agreement, articles of association (if the Fund is an exempted company), and the EM would be provided to prospective investors before an investor invests in the Fund. It is a way for investors to understand the risks and critical terms of the investment vehicle. It would be reviewed carefully in any due diligence exercise to determine whether an investment in the Fund would fit any applicable investment criteria. Concerning investment vehicles registered as mutual funds under section 4 (3) or 4(4) of the Mutual Funds Act (as amended), (the "**Mutual Funds Act**"), Section 4(8) states that any material change affecting the information in the offering documents, an amended offering document or supplement must be filed with the Cayman Islands Monetary Authority ("**CIMA**") within a specified period (21 days). Examples of material changes include a change to service providers (investment manager, directors, administrator, auditor), a change in the investment objectives or strategies, a change of the Fund's name or a change in the Fund's registered office.

Issues to be considered

From a Cayman Islands law perspective, an EM for a mutual fund registered with CIMA must satisfy specific regulatory and statutory requirements regarding the disclosure of information to

in the EM to investors. CIMA's rule on the contents of offering documents gives guidance on the information that should be disclosed in an offering document to meet the statutory requirement pursuant to Section 4 (6) of the Mutual Funds Act that an offering document shall:

> (a) describe the equity interests in all material respects; and
>
> (b) contain such information as is necessary to enable a prospective investor in the mutual Fund to make an informed decision as to whether or not to subscribe for or purchase the equity interests.

It is essential for the EM to meet the relevant disclosure requirements and to have sufficient information to protect the fund sponsor from lack of disclosure or misrepresentation claims. The EM must also state that the Fund will adhere to specific statutory requirements under the Data Protection Act (as amended), the Proceeds of Crime Act (as amended), the Anti-Money Laundering Regulations (as amended), and the Mutual Funds Act. Furthermore, any failure by the Fund to satisfy the regulatory and or statutory requirements could result in CIMA taking enforcement action against the Fund.

My role in the matter

I had a very active role in this matter. My role included: reviewing the constitutional documents, the EM, the Companies Act (as amended) and CIMA's rules for calculating net asset values, segregation of assets and offering documents for mutual funds, and drafting directors' resolutions. This matter was a good introduction to understanding some of the regulatory and statutory obligations of mutual funds in the Cayman Islands.

Reflections

As a student, I learned the importance of being organised and having sufficient time management skills. This experience has helped significantly in practice as there are numerous ongoing matters

at any given time but different priority levels. The research and reviewing skills I gained as a student have also developed over time. Both are beneficial skills, particularly with reviewing lengthy agreements because we must identify what is relevant from a legal perspective of the Cayman Islands. As an articled clerk, I have learned the practical steps necessary to comply with relevant statutory or regulatory requirements. Overall, the knowledge acquired throughout my studies during the GDL and LPC has equipped me with a good foundation to tackle legal matters in day-to-day practice.

Submissions for 2022

Michael Bromby

Academic Editor

This Student Law Review relies on contributions from the students themselves, and the hard work of the editorial team over the summer.

During the 2021/22 academic year, if you plan to attend a TBLS run event or a legal event hosted elsewhere (perhaps by CILPA or one of the firms), please let me or any of the editorial team know. We can provide support and advice on how to construct your entry. We suggest that any article ought to contain three aspects (not necessarily headings):

- Descriptive – who, what, where, when
- Evaluative – why, how, so-what, what-next
- Reflective – what did you learn, how did your (legal) knowledge change

We would also welcome any other thoughts and contributions that would make interesting reading to the student body.

Equally, we welcome case notes and reflective reviews from articled clerks that summarize their learning experiences following their time at law school and entry into the profession. This might comprise a case note if there was litigation, a report on other types of work or even a commentary on introducing new regulations or laws in the Cayman Islands.

As ever, I am indebted to the students in the current editorial team from all the LLB year groups. They put a great amount of effort into this year's edition, which was late in its publication, primarily due to Covid-related delays. I am also grateful to the first-year Legal Skills students whose work was selected for inclusion. There were many excellent pieces of work to choose from, making the selection task harder still!

KINDLY SPONSORED

AND SUPPORTED

BY:

TRUMAN BODDEN
LAW SCHOOL
CAYMAN ISLANDS

CAYMAN ISLANDS
GOVERNMENT

Portfolio of Legal Affairs

TBLS Student Law Society

TBLS
Academic Press