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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 4

September 2022

Contents: 2022 Edition

TBLS Alumni

Articled Clerks

Introduction to the 2022 TBLS Student Law Review

Michael Bromby

Academic Editor

The aim of this publication, now in its fourth year, is to provide incoming LLB1 students with examples of coursework that achieved high marks from the modules Legal Skills 1 & 2 during the 2021/22 year. In addition, we seek to capture and reflect on various activities and events that take place during the academic year at TBLS. This year we feature two recent cases from England & Wales for the case notes section: the Supreme Court's analysis of employment rights in the *Uber* case, whereby a group of Uber drivers successfully claimed for their status as workers, plus the Court of Appeal's decision in a judicial review that attempted to challenge the Government's power to made Covid-19 restrictions – a very topical issue for this year. As usual, the research task was on a new piece of legislation and it reviewed the regulation of cosmetic fillers for aesthetic purposes in young persons. The debate outlines and moot skeleton arguments complete the set of assessed work for the first year Legal Skills module – please use these as good examples, they are not intended to replace OSCOLA, which should remain your ultimate reference guide.

This year we bring a broader collection of work, with a new section including a student consultation response on the Penal Code for the Law Reform Commission. We hope that this will be of interest to the wider student body and hopefully to the legal profession in the Cayman Islands and a wider body of prospective students and other interested parties.

Our editorial team has grown to include first, second- and third-year LLB students along with our first set of PPC editors who were the original editorial group back in 2019! They met regularly following the exam period to discuss the format and content. 2022 was again subject to the Covid-19 pandemic and took slightly longer than usual to prepare and publish.

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 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.

This year, we are delighted to feature past alumni, a social media guru Alanna Warwick-Smith, in our Graduate Profile section. We also have an articled clerkship reflective report from Daniella Carrazana, who studied with us at TBLS for both her LLB and PPC.

We look forward to presenting future editions and continue to hope that this is a useful resource. Submissions for the next edition are actively encouraged, there is some guidance to be found on the last page. Finally, a big 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: 2022 Edition

Representing the 2021/22 first year cohort, the incoming members of the editorial team.

Rose Ritch

Rose is a full-time student currently in her third year of her LLB. Upon completion, she plans to embark on the next chapter of her professional journey by pursuing the PPC at TBLS. Her academic journey includes holding an Associates with honors in Accounting from UCCI. Along with her academic pursuits she enjoys reading, traveling and spending time with family and friends.

Kimberley Sinclair

Bio entry.

Representing the 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 Vaughan recently received her LLB (Hons) and is currently reading for the Professional Practice Course (PPC) at the Truman Bodden Law School in association and Oxford Brookes University. She hopes to specialise in family law, particularly children's law. Annette is a retired teacher with thirty-eight years of service in 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, cooking, homemaking and travelling.

Graduation and Awards: 2022

University of Liverpool

Bachelor of Laws (Honours) Degree

Broderick, Debra

Brodhurst, Gabriella

Campbell, Julie

DeMercado, Diana*

Ebanks, Jewel

Ebanks, Shania

Ebanks, Stephanie

Eden, Merary

Frederick, Shamique

Hydes, Shyvon

Keliny, Joseph

McDonough, Joseph

McNaughton, Jesse*

Miller, Tiona

Roy, Sharon

Saad, David

* Denotes a First Class Honours Degree

Prizes awarded for this year were:

Lucy Hawkes

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

Manusri Prabhakar

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

Jesse McNaughton

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

Jesse McNaughton

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

Jesse McNaughton

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

Legal Skills 1: Case Note Assessment

Kristen MacKenzie

LLB1 (first year full-time)

Uber BV and Others v Aslam and Others

Citation: [2021] UKSC 5

Court: United Kingdom Supreme Court

Judges: Lord Reed P, Lord Hodge DP, Lady Arden, Lord Kitchin, Lord Sales, Lord Hamblen and Lord Leggatt JJSC

Appellants: Uber BV, Uber London Ltd, Uber Britannia Ltd

Respondents: Yaseen Aslam, James Farrar, Robert Dawson and others

Material Facts:

The Appellants consist of Uber BV, a Dutch parent corporation holding legal rights to the Uber app, Uber London Ltd holding a Private Hire Vehicle Operator's Licence for London with provisions for invitations and acceptance for bookings, and Uber Britannia Ltd, managing international licenses'. Journeys are booked through the Appellants' smartphone app, connecting passengers to drivers. The Respondents are contracted drivers who were active users of said app. Potential drivers undergo interviews and an induction process where they are given a welcome package advising expected standards of behaviour. Any failure to comply may be a breach of terms amounting to penalties or removal from the platform. The Respondents maintain that throughout the periods stated in their claims, they were "workers" for the purposes of the Employment Rights Act 1996, the National Minimum Wage Act 1998 and the Working Time Regulations 1998. Thus, entitling them to statutory protections, minimum wage and paid leave.

The Appellants assert their agency pursuant to the contractual agreement, and their relationship is strictly expressed as that of an independent, third-party contractor.

Procedural History:

Employment Tribunal - Held that the drivers were retained and integrated by providing requisite labour by and for Uber allowing the operation of a passenger transportation business. The regulatory obligations satisfied a relationship of an "employer" and "worker" under s. 230(3)(b) of the Employment Rights Act 1996, and s.54(3)(b) of the National Minimum Wage Act 1998, whereas the crafted contract bore no relation to the reality of the situation. The tribunal further regarded any driver who had the app switched on, who were within the territory in which they were authorised to work, and were willingly able to accept assignments, were "workers", and as such, the claimants were engaged in "working time" and "unmeasured work" under s.2(1) of the Working Time Regulations 1998 and s.44 of the National Minimum Wage Act 2015 respectively—resulting in their rights to paid annual leave and national minimum wage.[1]

Employment Appeal Tribunal & Court of Appeal (Civil Division) - Uber appealed the decision, stating the tribunal erred in law by disregarding the written contract and relying on regulatory requirements. The Employment Appeal Tribunal dismissed the case resulting in a subsequent appeal and dismissal by the Court of Appeal.

Issues to be Decided:

- Whether the drivers were only working with a passenger.
- Whether the appellants were employed as "workers" within the meaning of the Employment Rights Act 1996, s.230(3)(b) ("limb (b)").

[1] *Aslam v Uber BV* [2017] IRLR 4.

- Whether drivers were owed holiday pay under the Working Time Regulations 1998.
- Whether Uber underpaid drivers according to the National Minimum Wage Act 1998.

Ratio:

The drivers were bound to tightly defined terms regarding transportation services and strict standards imposed by Uber, putting them in a position of subordination and dependency. It is deduced in the findings that any driver who had the Uber app switched on, was within the territory in which they were authorised to work, and was willing and able to accept assignments, was working for Uber under a limb (b) "worker" contract under the Employment Rights Act 1996. This includes time spent pending the ability to accept passengers.[2]

Analysis of the Ratio:

The Contract

Highlighting the Partner Registration Form (Services Agreement as of October 2015)[3], the Court recognised inconsistencies within the performative tasks by drivers, remuneration by Uber, and stringent guidelines imposed concerning the terms dictated by the contract itself. The hierarchical nature of the relationship with drivers having little to no ability to influence such terms calls attention to the need for statutory protection. Lord Leggatt noted:

> 'It would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". Doing so would reinstate the mischief the legislation was enacted to prevent.[4]

[2] *Uber BV and Others v Aslam and Others* [2021] USKC 5 [136].
[3] ibid 22.
[4] ibid 76.

Utilising authority set by *Autoclenz Ltd v Belcher*[5] the Court held the written contract was not the starting point if the terms were not indicative of the actual agreement, considering all components of the conduct in practice.[6]

The Control

Beyond the calculated remuneration, Uber dictated which car models were acceptable, withheld passenger information, enforced an 80% acceptance rate, predetermined adequate routes, and deducted fares based on negative passenger feedback. If drivers did not strictly adhere to these terms, they were subjected to temporary penalties or removal from the platform.[7]

The Working Period & Wage

Arguing Uber's claim that drivers were only working whilst with a passenger, the Court upheld the decision in the Employment Tribunal that any driver who had the Uber app switched on was within the territory in which they were authorised to work and was willing and able to accept assignments was considered to be working. By *Ville de Nivelles v Matzak*, "working time" includes time spent on call if the individual is near or at their place of work.[8]

Disposition:

Unanimously dismissed.

[5] [2011] USKC 41.
[6] *Uber BV and Others* (n 2) 64.
[7] ibid 100.
[8] ibid 133.

Critique:

By ruling in favour of Aslam, the Supreme Court revolutionised areas of the gig economy by protecting the rights of workers based on the actual contents of their agreements. The Uber decision has since been applied in the case of *Addison Lee Ltd v Lange*[9] where Addison Lee was forced to accept that drivers were categorised as workers under the definition set out in s.230(3)(b) of the Employments Rights Act 1996, the Working Time Regulations 1998 and the National Minimum Wage Act 1998 ("limb (b)" workers). The issue surrounding the non-exclusionary clause allowing drivers to work for competitors simultaneously remains unanswered. However, the Court urged it was not evident in the context of this case.

[9] [2021] EWCA Civ 594.

Legal Skills 1: Case Note Assessment

Kimberly Sinclair

LLB1 (first year full-time)

Regina (Dolan and others) v Secretary of State for Health and Social Care and another

Citation: [2021] 1 WLR 2326

Court: Court of Appeal (Civil Division)

Judges: Lord Burnett of Maldon CJ, King, Singh LJJ

Appellants: Regina (Dolan and others)

Respondents: Secretary of State for Health and Social Care and another

Material Facts

In March 2020, England was in a state colloquially known as "Lock Down". The Secretary of State had imposed various restrictions by a subordinate legislation, the Health Protection Coronavirus, Restrictions England Regulations 2020, SI 2020/350, in response to the Covid-19 pandemic. The regulations enacted under this legislation had placed restrictions on citizens' liberty subject to the defence of reasonable excuse. The Secretary of State was given legislative competence under the Public Health Control of Disease Act 1984, amended by the Health and Social Care Act 2008. This amendment gave the ministers the legislative power to make regulations in a state of a public health emergency.

The regulations were placed under challenge by way of Judicial Review by the appellants. The regulations were challenged as ultra vires based on the 1984 Act. Additionally, they were violating various convention rights and domestic public law.

Procedural History

High Court (QB) - The court construed that the Secretary of State has statutory power to enact regulations in a public health emergency, thus allowing the imposition of the restrictions conferred by the 1984 Act. The other challenges on convention rights and domestic public law were refused because they were purely academic and unarguable. Therefore, the claim for judicial review was denied.

Issues to be decided

1. Was the enacted subordinate regulation imposed by the Secretary of State ultra vires the 1984 Act?
2. Were the restrictions imposed by the regulations unlawful?
3. Should the judicial review claim be permitted, and under what ground?

Ratio

The permission for judicial review was permitted under the ultra vires challenge only, given it was a matter of public interest and an active issue. The court recognised that settling this vires issue will eliminate the possibility of it being raised as a defence in a criminal proceeding. This was expressed in the case of *Boddington,*[1] where the House of Lords held that the argument about ultra vires could be raised by way of defence in criminal proceedings.

The Court of Appeal retained the substantive claim. It construed that the Secretary of State had legislative competence to make subordinate legislation, to impose restrictions on the whole population where there is an imminent threat to public health. The Secretary of State's delegated powers were conferred by the 1984 Act as amended by the Health and Social Care Act 2008. Therefore, it was inferred that the enacted regulations were intra vires because the ministers acted within their legislative capacity.

[1] *Boddington v British Transport Police* [1999] 2 AC 143.

The other challenges to the restrictions were refused on the basis that they were proportionate to the detriment at hand and in line with legislative intent. Therefore, the conditions made under regulations were constituted to be lawful. The rule in question was already repealed and replaced, which made the arguments purely academic and were, in any event, unarguable. It was further inferred that there is no justifiable or good reason to allow judicial review under those challenges in the public interest. Lord Slynn of Hadley pointed out that "appeals should not be allowed between parties unless there is a good reason in the public interest for doing so."[2]

Ratio Analysis

Ultra vires challenge

The court recognised that the ministers possessed a broad legislative power encapsulated in section 45 of the 1984 Act as amended in 2008. The court inferred that the ministers had the legislative capacity to impose restrictions construed to be proportionate to the public health emergency. The vires issue was considered an important matter to be settled by the court for general interest. Lord Slynn postulated that "where a large number of similar cases exist, the issue will need to be resolved in the near future."[3]

The 2008 amendment to the 1984 Act was accompanied by an explanatory memorandum, which interprets parliament's legislative intent; it primarily sought to safeguard the spread of a modern pandemic. Such directive was given to the ministers to enact regulations under a public health emergency. This addressed the principle of legality that parliament's intention was evident in the primary legislation. It was stated by Baroness Hale PSC that "the goal of statutory interpretation is to discover the intention of the legislation and the intention is to be gathered from the word used by Parliament."[4] Moreover, the court also recognised that the Civil Contingency Act 2004

[2] *R v Secretary of State for the Home Department, Ex p Salem* [1999] 1 AC [457].
[3] ibid
[4] *R v (Black) v Secretary of State for Justice* [2018] AC 215 [36].

was alternative legislation for the state of emergency. However, it is not as reactive due to the possibility of delay.

Convention rights and public law challenge

It was further inferred that the interference with convention rights was proportionate, justifiable, and appropriate for the people's interest. It was confirmed by Hickinbotton LJ "that a legislation will only be unjustified (and unlawful) unless it is incapable of being operated proportionately in all or nearly all cases."[5] The restrictions on civil liberties were subject to a reasonable excuse. The court also recognised that there was a balance between public interest and the threat imposed by the pandemic.

Disposition

The claim for judicial review was dismissed

Update

On the 9th of December 2020, the claimants made an application to appeal at the Supreme Court, which was dismissed.

Critique

The ruling, in this case, has clarified and closed the people regarding the Secretary of State's legislative power. Additionally, the ability to continue making regulations as the country continues to navigate the pandemic. Secondly, the moment has come for the grounds for judicial review to become more succinct. The Civil Procedural Rule and Committee must be amended to reflect societal changes. There is a need for a better gatekeeping function concerning judicial review proceedings to aid economic justice and become less time-consuming.

[5] *R (Joint Council for the Welfare of immigrants) v Secretary of State for the Home Department (National Residential Landlords Association intervening)* [2021] 1 WLR 1151 [118].

Legal Skills 1: Research Task Assessment

Ben Schow

LLB1 (first year full-time)

Introduction

Following the findings in the NHS PIP scandal report,[1] Sir Bruce Keogh (Keogh) was tasked with reviewing the regulations in the cosmetic intervention (CI) sector in the UK (the Keogh Report).[2] The Keogh Report found the regulatory provisions in place which governed surgical CIs – such as breast implants – to be wanting. Of greater concern was the near complete void of regulation in the non-surgical sector, usually Botulinum toxin (Botox), intense pulsed light (IPL) and dermal fillers (DF). These procedures offered 'a person having a non-surgical cosmetic intervention no more protection and redress than someone buying a ballpoint pen or a toothbrush.'[3] As a result, Keogh in his call for reforms, petitioned for 'greater protection of vulnerable people', with an emphasis on the young and girls particularly. Through a new 'legal framework' aimed towards informing and empowering the public, high quality care, and creating accessible redress and resolution, those seeking CIs would have protections equal to the potential risks involved.[4]

Regulations

In 2013, the provisions in law that regulated CIs could be categorized in one of two ways, either surgical (SCI) or non-surgical (NSCI).

[1] Sir Bruce Keogh, *Poly Implant Prothèse (PIP) breast implants: final report of the Expert Group* (Department of Health 2012)
[2] Department of Health, *Review of Cosmetic Interventions Final Report* (2013) (Keogh Report) <www.gov.uk/government/publications/review-of-the-regulation-of-cosmetic-interventions> accessed 19 December 2021.
[3] ibid 7.
[4] ibid 7.

Surgical Cosmetic Interventions

For SCIs, the relevant statutory body governing medical practitioners in the UK is the General Medical Council (GMC). All doctors who wish to practice must first register with the GMC.[5] Those who wish to perform SCIs – such as breast augmentation – must prove they are proficient in that respective field.[6] The GMC's 'Good medical practice' guidelines, define the ethical duties and fundamental principle that all consultant practitioners must 'work within the limits of their competence.'[7] Any healthcare professional who offers SCIs, by law, must register with the Care Quality Commission, which regulates these practices and oversees the inspection of premises operated by those professionals offering SCIs.[8]

Non-surgical Cosmetic Interventions

For the purposes of NSCIs, Botox is regulated as a prescription medicine which can only be prescribed by qualified professionals such as doctors, dentists, prescribing nurses and pharmacists.[9] Once the prescription has been acquired however, there are no legal provisions regulating who can administer the toxin.[10] As well the online purchase of Botox can undermine this limited regulation entirely.[11] Similar to Botox, the aforementioned non-surgical interventions, CPs, IPL, and DF have no requisite qualifications for individuals administering them.[12] As market products, CPs are regulated under the General Product Safety Directive if sold directly to the customer.[13] IPLs are covered under the Health and safety at Work etc. Act 1974

[5] 'Registration and Licensing' (General Medical Council 2021) <https://www.gmc-uk.org/registration-and-licensing/join-the-register/before-you-apply/how-to-register> accessed 19 December 2021.
[6] 'Revalidation' (General Medical Council, 2012) <www.gmc-uk.org/registration-and-licensing/managing-your-registration/revalidation> accessed 19 December 2021.
[7] Good Medical Practice' (General Medical Council, 2013) <www.gmc-uk.org/-/media/documents/good-medical-practice---english-20200128_pdf-51527435.pdf> accessed 19 December 2021.
[8] Choosing Cosmetic Surgery' (Care Quality Commission, 2019) <www.cqc.org.uk/help-advice/help-choosing-care-services/choosing-cosmetic-surgery accessed> 19 December 2021.
[9] Medicines Act 1968, s 9.
[10] David Archard and others, 'Cosmetic procedures: ethical issues' (Nuffield Council on Bioethics 2017) para 4.4 <https://www.nuffieldbioethics.org/publications/cosmetic-procedures> accessed on 18 December 2021.
[11] Sarah Clarke, 'DIY Botox kits: how safe are they?' (Beauty Treatment Expert, June 10 2013) <www.beautytreatmentexpert.co.uk/diy-botox-kits-how-safe-are-they.html> accessed 19 December 2021.
[12] Keogh Report (n 2) 14.
[13] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L11.

(H&SW),[14] and DFs are covered as device only if it has specific medical purpose.[15] Any premises where H&SW rules apply allow for the administration of Botox, CPs, IPLs and DFs with no apparent limit.[16]

European Union Regulations and Brexit

Not long after the release of the Keogh Report, Parliament introduced the Cosmetic Surgery (Minimum Standards) bill,[17] to patch the legislative holes the Keogh Report found. The bill however, failed its passage through Parliament. The Department of Health's own response to the Keogh report contained 40 potential reforms from which no significant change resulted, and responsibility was mostly passed to the EU.[18] The subsequent effect of Brexit, however, created a vacancy where the Act was necessary in order to ensure that the United Kingdom – no longer able to rely on EU regulations – had her own legislative protections for children as it relates to Botox and DFs.[19]

Botulinum Toxin and Cosmetic Fillers (Children) Act 2021

The Keogh Report found that when it came to NSCIs, there was less emphasis on the risks involved, and as evidenced above, even less regulation.[20] The Botulinum Toxin and Cosmetic Fillers (Children) Act 2021 (the Act) creates protections for the most vulnerable, and children relating to NSCIs. This is important because prior to the Act, many of these non-surgical cosmetic procedures could be, and were, administered by anyone.[21]

[14] Keogh Report (n 2) 14.
[15] Council Directive 93/42/EEC of 14 June 1993 concerning medical devices [1993] OJ L169.
[16] Keogh Report (n 2) 14.
[17] Cosmetic Surgery (Minimum Standards) HC Bill (2012-13) [60].
[18] Department of Health, *Government Response to the Review of the Regulation of Cosmetic Interventions* (Department of Health 2014). See also Sophie Cole (n 16) 38.
[19] Sophie Cole (n 16) 38.
[20] Victoria Martindale and Andre Menache, 'The PIP scandal, an analysis of the process of quality control that failed to safeguard women from the health risks' (2013) 106 J R Soc Med 173; Sophie Cole, 'The regulation of non-surgical cosmetic procedures' (2021) 11[1] Southampton Student Law Review 36.
[21] *R v Melin (Ozan)* [2019] EWCA Crim 557; [2019] Q.B. 1063; Sophie Cole (n 16) 38.

Policy Objectives

The Act's policy objective is to protect children under the age of 18 from the risks, both physical and mental, associated with the use of Botox, DFs and other subcutaneous injection procedures. Social media, popular culture, and the increased accessibility to NSCIs has resulted in many children using botulinum toxins and cosmetic fillers.[22] As a result, the Act's intervention is arguably justified as it established legislative safeguards protecting societies most vulnerable from health risks associated with non-surgical CIs and previous limits for legal recourse.[23]

Human Rights Issues

The Act may conflict with the rights of children. The Family Law Reform Act (Family Law Act),[24] makes it clear that any child over the age of 16 may consent to any surgical, medical, or dental treatment without the consent of a parent.[25] In addition, the Act appears to conflict with Article 8 of the European Convention on Human Rights (ECHR),[26] where the freedom of choice when it comes to an individual's desired appearance is defined.[27] Article 8 is supposed to protect against arbitrary interference by any public authority with private and family life, home, and correspondence.[28] It is important to note that, Article 8 rights will only be violated when, the 'Government fails to demonstrate the existence of a pressing social need to justify an absolute prohibition.'[29] Here, the Act meets a social and pressing need that has been ripe for regulation since the Keogh Report.[30]

[22] Explanatory Notes to the Botulinum Toxin and Cosmetic Fillers (Children) HL Bill (2019-21) [180], para 6 <https://bills.parliament.uk/bills/2620/publications> accessed on 18 December 2021.
[23] ibid [8].
[24] Family Law Reform Act 1969
[25] ibid s 8. See also Clerk & Linsell: *On Torts*, (23rd edn, Sweet & Maxwell 2020) ch 9, s 2(b).
[26] *Biržietis v Lithuania* App no 49304/09 (ECHR, 14 June 2016) (*Biržietis*).
[27] Guide on Article 8 to the European Convention on Human Rights (European Court of Human Rights 2021) para 258 < https://www.echr.coe.int/documents/guide_art_8_eng.pdf> accessed on 20 December 2021.
[28] ibid para 5
[29] ibid at para 258; Biržietis (n 27)
[30] Explanatory Notes to the Botulinum Toxin and Cosmetic Fillers (Children) HL Bill (2019-21) [180], 2,3,6,7 <https://bills.parliament.uk/bills/2620/publications> accessed on 18 December 2021.

Interference with Business Practices

Clause 1 of the Act restricts the use of, and administration of, Botox and DF on children under the age of 18 to registered doctors or practitioners under a doctor's direction, namely dentists, nurses, or pharmacists. This limitation prescribed by the Act appears to conflict with Article 1 of Protocol 1 with the ECHR.[31] When applying the direction of the European Court of Human Rights, deference is given to legislatures and the Court will respect the legislature's judgement, 'in implementing social and economic policies … as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation.'[32] The protection of vulnerable members of society seems a reasonable foundation.

Conclusion

The Act achieves its policy objective. It protects vulnerable people and children, without limiting rights when it comes to NSCIs. The Act ensures that children under 18 may still receive Botox and DFs, when medically prescribed, while ensuring that non-regulated practitioners cannot engage in these procedures. Lastly, the Act's policy foundation in public and general interest, maintains compatibility with the ECHR.

[31] ibid 7.

[32] Guide on Article 1 of Protocol 1 to the European Convention on Human Rights (European Court of Human Rights 2021) para 137. See also *Béláné Nagy v. Hungary* App no 53080/13 (ECHR, 13 December 2016); *Papachela and AMAZON SA v Greece* App no 12929/18 (ECHR, 12 March 2020).

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Legislation

Family Law Reform Act 1969

Medicines Act 1968

Council Directive 93/42/EEC of 14 June 1993 concerning medical devices [1993] OJ L169

Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L11

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Legal Skills 2: Debate Resolution (Supporting)

Kimberly Russell

LLB1 (First year full-time)

'This House believes that the age of criminal responsibility, as set by the Children and Young Persons Act 1933, is too low. The time has come for England and Wales to increase this to 12 years of age.'

In support of the resolution, these are my submissions:

1. Children, "the vulnerable," should be protected.

i. Some children accused of a crime are the most vulnerable. This means that these children come from impoverished backgrounds and may suffer from mental illnesses or difficulties in learning and communication.

ii. Vulnerable children's acts of crime may stem from the violence they encountered growing up. Studies show that a poverty-crime background can result in a child engaging in criminal behaviour.[1]

The United Nations Convention of the Rights of the Child, Article 3(1), states that all actions taken by private and public welfare should reflect the child's best interest. The underlying circumstances, such as the lack of a nourishing environment, should be considered instead of solely convicting a child based on their actions.

2. Element of Culpability

i. Children may not form the mens rea whenever they commit a crime. In common law, Mens rea establishes the criminal intent of a crime. There is no defence available in showing

[1] UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), adopted by General Assembly resolution 40/33 of 29 November 1985.

whether or not children have proven to be fully culpable of a crime. Instead, they are assumed to be fully aware of right or wrong.[2]

ii. In the past, the presumption of *doli incapax* was used to determine whether or not a child had recognised that their actions involved criminal intent or if it was just done mischievously. This presumption was abolished by the S.34 of the Crime and Disorder Act.

Scientific research shows that children have neurodevelopment immaturity, meaning they do not have the full awareness or the capacity to see the full consequences of their actions.[3]

Conclusion:

Lord Dholakia introduced a Private member's Bill to increase the minimum age of criminal responsibility.[4] However, the government is reluctant to increase the MARC in England and Wales.

England and Wales have one of the lowest Minimum Age of Criminal Responsibility in Europe. Scotland, on the other hand, raised their minimum age of criminal responsibility from 8 to 12, allowing for fewer children to enter the criminal justice system as a means of protecting the children's future instead of tarnishing it with a criminal record that will hang over with them for the rest of their life.

[2] UN Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention—Fifth Periodic Reports of States Parties due in 2014: United Kingdom, submitted 27 May 2014, published 6 March 2015, para 248

[3] UN Committee on the Rights of the Child (2019), General comment no. 24, para 22

[4] HL Hansard, 29 January 2016, col 1575

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Legal Skills 2: Debate Resolution (Supporting)

Nathanya Tibbetts-Nolasco

LLB1 (First year full-time)

The following submissions are made in support of the resolution:

1. Age of criminality incompatible with the European Union:

Per Lord Thomas of Swmgiedd, 'The current age of criminal responsibility at 10 is too young. It does not comply with United Nations convention on the rights of the child.'[5]

Globally the United Kingdom has fell behind when it comes to the age of criminality and convicting children at a fairly young age.

The Equality and Human Rights Commission (EHRC) has urged reform across the UK after the UN's committee on the rights of the child (UNCRC) decided the global minimum age at which a child can be prosecuted should be 14.[6]

'When you work with young people on a regular basis it's absolutely apparent that 10-year-olds are not able to be wholly held to account for the stuff they do, 10 years of age is "ridiculously young" to be prosecuting children and the age should be raised'[7] per, Andy Peaden.

2. Conviction and imprisonment at a young age would result in a young child living a full life of crime:

The possibility of young offenders being offered redemption are quite slim as statistics indicate that '84% of prisoners who have been to prison, young offender's institution or borstal, reoffend.[8]

[5] The Guardian, 'the age of criminal responsibility must be raised, say experts.' 4 November 2019

[6] UN Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Fifth Periodic Reports of States Parties due in 2014: United Kingdom, Submitted 27 May 2014, published 6 March 2015

[7] The Guardian, 'the age of criminal responsibility must be raised, say experts.' 4 November 2019

[8] Ministry of Justice, '*Prisoner's childhood and family backgrounds'* (Ministry of Justice, March 2012)

There is a whopping 69% percent of young offenders who reoffend within just one year of release.[9] Effective, April 8 2013, reprimands and warnings for youth were abolished under the Legal Aid Sentencing and Punishment of Offenders Act 2012 and replaced with youth cautions.

Youth cautions are a form of out-of-court disposal that can be used as an alternative to prosecution for juvenile offender in certain circumstance. This has resulted in a decrease of reoffending juveniles by 88%.

Conclusion

Criminalizing children at a young age has resulted in them leading a full life of crime. There are better ways to deal with children and young people than to criminalize them at such a young age.

[9] Ministry of Justice, '*Proven reoffending statistics*' (Ministry of Justice, July to September 2019) Age of criminal responsibility should be consistent across the jurisdictions. Allowing uniformity and a better understanding and protection of a child. Statistics have indicated that there should be more focus on rehabilitation programs of which would assist young offenders in reintegrating into society instead of criminalizing these young persons and tarnishing
their records for a life of which they will live.

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Legal Skills 2: Debate Resolution (Opposing)

Lucy Hawkes

LLB1 (First year full-time)

In opposition of this resolution, we submit the following points as to why the current age of criminal responsibility should remain at 10:

1) <u>Extenuating factors have greater impacts on youth injustice than legislation</u>

a) To effectively minimize the number of children brought into the system, focus should be placed on enforcement policies.

b) In 2004, the Home Office introduced targets to increase the number of less serious offences brought to justice,[1]'[and was] met at the expense of those…who might otherwise have received an informal response for minor transgressions…making a substantial contribution to the inflation in figures for detected youth crime.'[2]

c) Within one year of removing this policy, there was a 20% decrease in first time entrants of children in the youth system, highlighting the significance enforcement plays in delivering justice.[3]

d) Institutionalized discrimination in relation to mental health, disability, and race contribute to criminalization regardless of age. The youth justice system consists mainly of 'black, Muslim, and white working-class boys…[and] is clear that the failure of education, health, social care and other agencies…have contributed to their presence in the youth justice system.'[4]

2) <u>Need for legislation to protect society outweighs issue of age vulnerability</u>

a) In 2011, Minister Blunt reaffirmed the government's position on the matter, stating: '[C]hildren aged 10 are able to distinguish between bad behaviour and serious wrongdoing. It is entirely appropriate to hold them to account for their actions.'[5]

[1] Home Office, *Departmental Report* (Cm 7096, 2007)
[2] Nacro, 'Some facts about children and young people who offend' (2007)
[3] Charlie Taylor, 'Review of the Youth Justice System in England and Wales' (Ministry of Justice, Cm 9298, 2016)
[4] ibid
[5] HC Deb 8 March 2011, vol 524, col 171

b) In *R v Secretary for the Home Department Ex parte Venables and Thompson*,[6] Lord Justice Hobhouse described the murder committed by two 10-year-old children as 'exceptionally cruel…[threatening] the security of all mothers of young children.'[7]

c) In *R v Preddie*,[8] Lord Justice Latham emphasized the importance of deterrence and that 'violence of this sort will be punished severely, and that that will be the case even where the offenders are young.'[9]

Conclusion

The proposed resolution will not mitigate injustice against children in the system. Factors such as enforcement and institutionalized discrimination have greater effects on youth criminalization rates than legislation itself. Legislation must favour the protection of society, holding those accountable for serious wrongdoing, irrespective of whether age is deemed "too low". For these reasons, we submit to abandon an increase in the age of criminal responsibility.

[6] *R v Secretary of State for the Home Department, ex p Venables and Thompson* [1998] AC 407
[7] ibid [26] (Hobhouse LJ)
[8] *R v Preddie (Danny Charles)* [2007] 7 WLUK 79
[9] ibid [3] (Latham LJ)

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Legal Skills 2: Debate Resolution (Opposing)

Gamaliel Hutchinson

LLB1 (First year full-time)

In opposing the above resolution, we submit the following:

1. **<u>Prevention of reoffending individuals</u>**
    a. There are teams called YOT's (Youth Offending Teams) who can curtail this time in their youth and prevent reoffending later on in life.
        i. These programs offer is a second chance for the youth who commit offences; through giving referral orders allowing them to either financially compensate the victim, or even writing a letter of apology to the victim, etc. it helps in their change.
        ii. Not only that, but these programs aim to help parents with proper guidance of their children.
        iii. As a result of over 3,000 parents being involved with this, it had reduced reoffending in children by one-third[10].
    b. Raising the age would be removing the availability of these aids to the youth, resulting in potential reoffending increasing instead of decreasing.

2. **A 10-year-old has the capacity to commit crime**
    a. A study that has been conducted by Laurence Steinberg[11], an American psychologist, he brought forward evidence of an age crime curve, a system which proves that there is an "easily aroused reward seeking system," which encourages risk taking and sensation seeking, in young children to adolescents and reduces in later adulthood.
        i. This shows a gradual increase in susceptibility for reckless behavior and criminality from the ages of 10, peaking at age 19, and slowly lowering in later adult years.

[10] Emily Allbon & Sanmeet Kaur Dua: *"Elliot & Quinn's English Legal System" 21st Edition*

[11] *Steinberg et al (2018)*

ii. If it can be stated that there is a correlation between the age of a person and their mental drive to seek out sensations at the risk of hurting themselves or others, even children have the capacity to do crime and attempting to ignore it only adds more issues to the problem.

3. **Should there be no consequences?**

i. Raising the age range to 12 as the minimum and using the argument that children do not have the mental maturity of committing crimes, is a modern reinterpretation of the age old *doli incapax* rule, that of which was abolished because the court rightly stated it was "against common sense." [12]

ii. According to Zara Gunner[13], a Barrister, she states that the UK should follow the standard of other EU nations and raise it to either 12 or 14, with the UN suggesting ages as old as 16.

iii. More issues therefore arise, because one could argue that the 16-year-old is not responsible because of their intellectual immaturity. If the age of criminal responsibility is raised to 12 or any other number, would that deem consequences irrelevant because the youth don't understand their actions? Again, a modern interpretation of the *doli incapax* rule.

Conclusion

The age of criminal responsibility should not be raised to 12, because youths are seen as vulnerable and susceptible to crimes. Increasing the age limit would do nothing but prevent potential measures of reducing reoffending and rehabilitation, leading to a more decimated society of youths.

[12] C (a minor) v DPP (1994)

[13] The Age of Criminal Responsibility – Should it be Increased? <https://www.oblaw.co.uk/author/zaragunner/>

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Legal Skills 2: Summative Moot

Academic session 2021/22

Facts and procedural outline

Cotton, a nappy wholesaler, has regularly sold nappies to Paper, a nappy retailer. At the time when the events which gave rise to the present dispute occurred, there had been a rumour in the press that there was a shortage of nappies. This had caused a run on nappies.

Paper found himself very rapidly selling out of nappies. He therefore sent a letter to Cotton offering to buy 1,000 of the nappies which he usually bought, at the same price per nappy as he had paid the last occasion he had bought them. The letter concluded with the line "please reply by return of post." Cotton realised the urgency of the situation and immediately dispatched to Paper a properly addressed telemessage of acceptance. However, shortly after dispatching the telemessage, Cotton was approached by another retailer who had never previously bought nappies from Cotton but who now offered to take Cotton's entire stock of nappies for a much higher price than Paper had offered.

Cotton decided that he wished to accept this offer and immediately posted to Paper a properly addressed letter stating that he did not and could not accept Paper's offer. Paper, to whom therefore no nappies were delivered, sued Cotton for damages for breach of contract. The judge at first instance found that Cotton's letter was posted before the telemessage was delivered to Paper and that the telemessage reached Paper before the letter did.

Lower court decision

LinerJ held that:

(i) the telemessage of acceptance did not become effective until delivered, applying *Holwell v Hughes* [1974] WLR 155;

(ii) that the letter of rejection took effect upon posting, applying *Henthorn v Fraser* [1892] 2 Ch 27.

Paper 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 (Senior Appellant)

Jessica Jurgens

LLB1 (First year part-time)

Between:

PAPER Appellant (Claimant)

- and -

COTTON Respondent (Defendant)

SKELETON ARGUMENT ON BEHALF OF THE APPELLANT

COUNSEL FOR THE APPELLANT'S OUTLINE OF ARGUMENT

Ground (i) Senior Counsel for the Appellant

The telemessage of acceptance did not become effective until delivered, applying *Holwell v Hughes* [1974] WLR 155.

Senior Counsel's Submissions:

1. An intention to form a legally binding contract was made when the Appellant communicated an offer to the Respondent.

1.1. Professor Treitel's definition of an offer is an 'expression of willingness to be bound on certain terms, made with the intention that it shall become binding once it is accepted by the party to whom it has been addressed.'

1.2. *Storer v Manchester City Council* [1974] 1 WLR 1403 deemed that if intention is clear, there is a legally binding contract.

2. The time of receipt of when acceptance is communicated should be taken into consideration.

2.1. Professor Treitel's definition of an acceptance is 'a final and unqualified expression of assent to the terms of the offer.'

2.2. The general rule that the contract is made when and where the acceptance is received applies. *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34.

2.3. Acceptance is normally not complete until and unless it is communicated to the offeror. *Entores v Miles Far East Corp* [1955] 2 QB 327*,* communication by telex is not completed until receipt so this does not explain why posting exceptionally constitutes an acceptance without notification.

3. The Appellant should not suffer loss of profits or be at fault when telemessage of acceptance becomes effective.

3.1. *Manchester Diocesan Council of Education v Commercial & General Investments, Ltd* [1970] 1 WLR 241, Held, that the form of posting prescribed was directory and not mandatory.

3.2. Where acceptance is sent and received by telex or via instantaneous communication during normal office hours, then it is considered to have been communicated effectively to the offeror whether it has been read or not, *Tenax Steamship Co v Owners of the Motor Vessel Brimnes (The Brimnes)* [1975] QB 929.

3.3. Sales of Good Act 1979 Part VI Actions for Breach of The Contract 51 (2) 'The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract'.

Legal Skills 2: Skeleton Argument (Junior Appellant)

Alaye McLaughlin

LLB1 (First year full-time)

Acceptance via post is instantaneous as found in *Henthorn v Fraser* but that rule applies specifically for acceptance of an offer.

To distinguish from *Henthorn*:

1 - The wording used by Lord Herschell in *Henthorn* is both clear and specific in its reference to and **only applies to acceptance via post**:

'Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.'[1]

This case does deal with a letter sent containing information due to the differences in contents the principles stated in *Henthorn* do not apply.

2 – Not all communications made by letter are considered effective upon being posted:

'In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them.'[2]

'Lady Agnew received a letter desiring her to engage a servant for Lady Dunmore. She proceeds to take steps towards this by putting a letter into the post-office for the purpose of making the engagement. But, before this letter reaches its destination, her authority to hire the servant is recalled, and, by the help of an express, she forwards the recall, … and both reach the servant at once. They thus neutralize each other.'[3]

[1] *Henthorn v Fraser* [1892] 2 Ch 27 (CA) [33] (Lord Herschell).
[2] *Byrne & Co. v Leon Van Tienhoven & Co* [1880] 5 CPD 344 (Assizes) [348] (Lindley J).
[3] *Countess of Dunmore v Alexander* [1830] 9 S 190 [194] (Lord Gillies]

Revocation must be communicated to take effect -

3 – 'Rejection does not operate so as to destroy the power of acceptance until it comes to the notice of the offeror'.[4]

4 – The postal rule for acceptance is not meant to be convenient for everyone – it is meant to create certainty within the system to allow transactions that would otherwise not be possible

'It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both.'[5]

[4] Jack Beatson Andrew Burrows and John Cartwright, *Anson's Law of Contract* (3st edn, OUP 2020) 60

[5] *The Household Fire and Carriage Accident Insurance Company (Limited) v Grant* [1878-79] LR 4 Ex D 216 (CA) [223] (Thesiger LJ)

Legal Skills 2: Skeleton Argument (Senior Appellant)

Nyasha Muhlanga

LLB1 (First year full-time)

IN THE COURT OF APPEAL

Between:

COTTON Respondent

-and-

PAPER Appellant

Ground (i): Senior Counsel

The trial judge was incorrect in applying ***Holwell v Hughes***[1] to show how the tele message of acceptance was not effective until delivered.

Senior Counsel's Submissions:

1. An offer according to Professor Treitel 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.' The offer was made on certain terms and made with the intention that it would be legally binding had it been accepted.

   1.1. Professor Trietel defines acceptance as 'a final and unqualified expression of assent to the terms of the offer'. However, for the acceptance to be effective it must be unconditional, and the acceptance must be communicated. This is seen in the judgement of Lord Denning in ***Entores v Miles Far East Corporation*** [2] where he says 'The contract is only complete when the acceptance is received by the offeror'

[1] [1974] WLR 155
[2] [1955] 2 9 S 190

2. Liner J was incorrect in applying ***Holwell v Hughes***[3] because notification of acceptance was expressly stated by the offeror (Paper) to be through post. Therefore, acceptance via tele message was not effective acceptance.
   2.1. This is because of the presence of ***Yates v Pulleyn*** [4] which is authority that if a method of communicating acceptance has been expressly stated then it must be followed. Then if there is no valid acceptance then there is no legally binding contract.
   2.2. This was affirmed in ***Manchester Diocesan Council for Education v Commercial and General Investments Ltd***[5] in the judgement of Buckley J where he says, 'It may be that an offeror, who by terms of his offer insists on acceptance insists on acceptance in a particular manner, is entitled to insist that he is not bound unless acceptance is effected or communicated in that precise way,'

3. Liner J was incorrect in applying ***Holwell v Hughes***[6] to show how acceptance was not effective until delivered because acceptance was successfully retracted before acceptance tele message had been delivered.
   3.1. On similar facts of the case, we would apply ***Countess of Dunmore v Alexander***[7] which gives us the legal principle that postal acceptance may be retracted at any time before it reaches the offeror. This is seen in the *ratio* of Lord Balgray when he states 'He therefore writes a second letter countermanding the first. They both arrive together, and the result is, that no purchase can be made to bind the principal.'
   3.2. This shows that when Cotton posts the letter revoking the acceptance, Cotton has also 'countermanded' (revoked) the tele message acceptance. If the tele message acceptance is revoked the acceptance cannot be said to be effective once delivered therefore ***Holwell v Hughes*** [8]was used incorrectly by the Trial Judge.

[3] n[1]
[4] [1975] 237 EG 183
[5] [1970] 1 WLR 241
[6] n[1]
[7] [1830] 9 S 190
[8] n[1]

Legal Skills 2: Skeleton Argument (Junior Respondent)

Valentina Bustos

LLB1 (First year full-time)

In the Court of Appeal

Between

Mr. Paper (Appellant)

And

Mr. Cotton (Respondent)

Ground (ii): Junior Counsel

The court at first instance was correct in concluding that no contract was formed, as the letter of rejection took effect upon posting applying *Henthorn v Fraser*.

1. **For instantaneous methods of communication, acceptance must be delivered and communicated for it to be effective:**
   1.1 For instantaneous methods of communication, acceptance must be delivered and communicated for it to form a valid contract, applying *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327.
   1.2 In this case, the letter of rejection was posted before the tele-message was delivered. This makes the letter of rejection valid before the tele-message could become effective.

2. **Accepting by post is essential in the formation of this specific contract, as it was within the reasonable contemplation of the parties:**
   2.1 In *Henthorn v Fraser* [1892] 2 Ch 27, the court held that due to external factors, acceptance by post must have been within the parties' reasonable contemplation and therefore acceptance via post is valid.

2.2 As mentioned in this case, Paper is a regular customer of Cotton. It can be correctly assumed that because of this, it is normal for them to do business transactions typically by the post, especially because Paper sent his offer by letter and expressly stated in the letter to 'please reply by post'.

2.3 However, Cotton did not send his acceptance via post, had he sent his acceptance via post then it would be deemed a legally binding contract.

3. The Postal Rule use is generally one of convenience:

3.1 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels GmbH* [1983] 2 AC 34 Lord Wilberforce reaffirmed that the foundation of the postal rule is found in convenience.

3.2 Chitty on Contracts states that the posting rule is essentially one of convenience.

3.3 *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155 states that it doesn't operate if its application produces an inconvenience and absurdity.

3.4 It is convenient and reasonable for the letter of rejection to take effect as soon as it is posted, this is due to the risks associated with the postal rule. It is beneficial and practical for one party to at least know there is no contract.

4. Cotton did not follow Paper's expressed instructions in accepting his offer, therefore the tele-message containing the acceptance cannot be valid:

4.1 Paper expressly gave instructions to Cotton in how to accept his offer stating 'please reply by return of post', this is clear instructions given to Cotton that he must reply via post, however he didn't.

4.2 According to *Yates Building Company Ltd v RJ Pulleyn & Sons (York) Ltd* [1976] 1 EGLR 157, the court held that where specific instructions have been given to accept the offer, the offeree must follow their instructions.

Transitioning from the LLB to the PPC

Annette Vaughan and Janet James

PPC students

Some people have compared the initial Professional Practice Course (PPC) experience to that of a non-swimmer thrown into the deep end of a swimming pool. However, with adequate planning and mental preparation, the experience does not always have to be this way. Here are some questions about the transition to the PPC. We hope you find the answers beneficial as you embark on your journey.

What is the Professional Practice Course (PPC)?

This course prepares you for legal practice after completing the foundations of legal knowledge during your LLB. It is considered the vocational or practical stage of learning. It provides knowledge and skills to prepare you for legal practice.

What are some of the biggest challenges in transitioning from the LLB to PPC?

The challenges include switching from essay-style assignments and research-based projects to more scenario-based questions where the application of learning and skills is heavily focused on the steps one would take in a real-life situation. For example, in the LLB course, you were accustomed to writing more academically to make your research essays and coursework more interesting and intellectual. However, your writing can be in bullet points or short sentences on the PPC. You are encouraged to keep your answers short and simple because, in practice, when advising a client, you will need to be clear and practical. This style is generally accepted as you are expected to get straight to the point. There is also a greater emphasis on self and time management, especially since instructional time is less than in the LLB, which is a skill that may take time to develop and strengthen. These challenges can be conquered if you know them and have the tools to deal with them.

How can we overcome those challenges?

You were first preparing for sessions by answering the questions before class, and further reviewing your work after the class will help to consolidate your learning. For example, tutorials in the LLB are replaced by small group sessions in the PPC, where you must prepare answers to questions or advise a client in a given scenario. Ensuring that you prepare for all classes develops your presentation skills. The more practice you have, the more your understanding will improve.

In addition, the mock exams are critical in preparing because you can practice answering your response to the questions or the issues posed. Please pay attention to the feedback from the lecturers because it helps you understand the areas that need improvement before the final assessments.

How can students stay focused and manage their time during the PPC?

1. DEVELOP A GOOD PACE AND BALANCE

   It is essential to **develop a good pace and balance**; everything can sometimes seem overwhelming and complicated.

   a. There is also a greater emphasis on self and time management, especially since instructional time is less than in the LLB, which is a skill that may take time to develop and strengthen.

   b. The PPC entails reading, research, assignments, and preparation for small group sessions, so once the course commences, there is no time to 'slacken'. Free time will seem non-existent for the next nine months. Your non-instructional time will be taken up by either preparing for small group sessions, reading, or studying for your assessments. There is a total of (16) highly intense learning modules to complete within the school year.

2. USE A CALENDAR OR PLANNER

   a. One way to manage your time and stay focused is to **use a calendar or planner** to help you stay organised and on track. This will be useful in helping you to set your

academic and study goals and plan your time efficiently to meet submission deadlines.

3. SPEAK TO YOUR PERSONAL TUTOR OR A TRUSTED PERSON

    a. It is vitally important that you do not panic or become overwhelmed because this is a reality. If this happens or you need some advice or clarity regarding your course and plans, speak to your personal tutor or a trusted person who completed the course and would understand how you are feeling. The tutors are incredibly kind, approachable, and generally understanding.

We hope that you find this information helpful.

Practical Legal Research (PLR) Task 2021

Overview

Undertaking PLR is part of the Professional Practice Course (PPC) assessment, and 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 today by two new clients, Abbey and Josen Ebanks, who are seeking a written advice on the legal issues arising from the follow facts:

Abbey and Josen Ebanks met whilst on holidays in Columbia in 2016. Josen is Caymanian and Abbey is Canadian. Abbey and Josen married in 2018 and reside in Grand Cayman at Caribbean Paradise in South Sound. Abbey is 27 years old and is employed as an accountant at Waterman Copper and Co. Josen is 34 years old and works for the Government in the planning department.

Abbey has fertility issues and is unable to have children. However, Abbey and Josen are keen to start a family. They are considering adoption in light of recent events.

Abbey has been volunteering for the last six months at a foster home ran by the Department of Children and Family Services in the East End. Abbey has formed a close bond with a 4 year old boy called Dalian Roper, who is currently in foster care due to his birth mother suffering from drug and alcohol addiction issues and being no longer capable of caring for Dalian. Abbey has learned that Dalian is a candidate for adoption. Abbey is really keen that if this is the case that

she and Josen should be the candidates to adopt Dalian. Dalian has expressed to his social worker that he would like to go and live with Abbey.

Abbey has made enquiries with the Department for Children and Family Services and was informed that she needs to approach the Adoption Board in order to begin the application process. Furthermore, she has discovered that Dalian's mother would need to consent to the adoption taking place and she is concerned that this consent will be withheld as, during Dalian's mother's more lucid moments, she visits the foster home and says that nobody will take her son away from her.

Abbey and Josen feel that in adopting Dalian they will be providing him with a better life and will be able to bring him up in a more supportive environment. Abbey still, however, would want (if Dalian wished) for him to remain in contact with his birthmother. However, Josen is concerned that establishing such a relationship will affect the adoption of Dalian.

Abbey and Josen have consulted you today as they need advice on the adoption process in the Cayman Islands so that they can make an informed decision as to how to proceed in relation to Dalian. In a memo of no more than 1500 words please advise Abbey and Josen on the following issues:-

1. Are Abbey and Josen eligible to adopt Dalian?
2. What is the role of the Cayman Islands Adoption Board?
3. What is the procedure for applying to the Grand Court for adopting a child in the Cayman Islands?
4. What criteria will the Grand Court apply in deciding whether to make an Adoption Order?
5. Can Dalian's mother's potential refusal to consent to the adoption affect the adoption process?

Practical Legal Research (PLR) Task 2021

Brad Johnston

PPC Student

RESEARCH MEMORANDUM

To: Principal

From: Attorney

Date: 6 April 2021

Ref: AJE/377CF2021

Subject: Abbey and Josen Ebanks - Adoption Procedure & Court's Assessment; Birth Parent Consent

Background

1. Our clients, Abbey and Josen Ebanks (the ***Ebanks***), are seeking advice in relation to a child adoption in the Cayman Islands. The child, Dalian Roper (***DR***) is four years old and currently in a foster home ran by the Department of Children and Family Services due to his mother's (the ***Mother***) drug abuse issues which render her unable to care for him.
2. The scope of this memo is to investigate the Ebanks' concerns in relation to the adoption process and whether a lack of consent from the birth consent can affect the adoption.
3. I will then advise as to the Ebanks' likelihood of success in adopting DR from a procedural perspective before advising on options should the Mother withhold consent.

Facts

4. The Ebanks married in 2018 and reside in the Cayman Islands where they are both gainfully employed. They are keen to start a family through adoption due to fertility issues.

5. During her volunteering at DR's foster home, Abbey has bonded with DR and he has expressed that he would like to live with Abbey.
6. There are concerns that the Mother will not give consent as, during her more lucid moments, she has expressed she will not let DR be taken from her.
7. Abbey is amenable to having DR and the Mother remain in contact.

Issues

8. The issues involved in this case are namely:
    a) the Ebanks' eligibility to adopt DR;
    b) the role of the Cayman Islands Adoption Board (the ***Board***);
    c) the relevant application procedure to the Grand Court;
    d) relevant criteria applied by the Grand Court, and the Ebanks' likely success; and
    e) the effect of the Mother's potential refusal to consent to the adoption.

Conclusions

(i) *Eligibility*

9. The Ebanks seem to meet the eligibility requirements set out in Adoption of Children's Act 2021 (***ACA***). Confirmation is needed that they have been married and living together for the past three years.

(ii) *Adoption Board*

10. The Board plays a fundamental role in managing the adoption and producing reports for the Court. The Board will provide the Ebanks with the relevant forms and evaluate the Ebanks' home. If successful, DR will live with the Ebanks for three-months with close monitoring.

(iii) *Grand Court Procedure*

11. The Ebanks must apply to the Court within three-months of the expiry of DR's initial three-month residence with the Ebanks. The application is made on summons to the Grand Court and notice will be served on the Mother. The hearing should take place between eight and twelve weeks from the application date.

(iv) *Court Considerations*

12. The Court will apply three main criteria when considering the adoption order: i) the Mother understands the effect of the adoption in giving her consent; ii) the order is for the welfare of DR; and iii) the Ebanks are not being compensated for the adoption.
13. In the absence of the Mother's consent, the Ebanks would likely be successful in requesting the Court to dispense with the consent requirement, rendering the first consideration inapplicable.
14. The Ebanks' circumstances should satisfy the second criteria and there is nothing to suggest they are being rewarded for the adoption.

(v) *Birthmother's Consent*

15. Should the Mother not consent, the Ebanks can apply to have the consent requirement dispensed with. This application will likely be successful due to the inherent neglect meeting the ACA s.11 requirement. In any event, in its objective assessment, the Court would likely find that the Mother's withholding of consent unreasonable.

Analysis

(i) *Eligibility*

16. The Ebanks are over 25 and under 65 (ACA s.10(a)(i)) and both domiciled in the Cayman Islands (ACA s.9(1)).

17. The Ebanks must have been living together and married for at least three years per ACA s.9(2) at the date of the application. The Ebanks should confirm the date of their third anniversary and when they began co-habiting, however it is unlikely to be an issue given the length of the adoption process prior to the Court application (three-month minimum). Therefore, if the Ebanks were not married before June 2018, the commencement of the adoption process should be timed accordingly.

(ii) *Adoption Board*

18. Broadly, pursuant to ACA s.5, the Board is responsible for receiving applications, making necessary arrangements and evaluating DR and the Ebanks.
19. The Board, with a designated 'case committee' will conduct a series of interviews and home assessments, along with providing relevant forms, including medical assessments of both DR and the Ebanks.
20. After approving the initial reports, the Board will place DR in the Ebanks' home for three-months, during which the relationship development between DR and the Ebanks will be closely monitored. At any time during this period, the Board or the Ebanks may end the adoption process (ACA s.6(1)).
21. Once the three-months have passed, the Ebanks must apply to the Court within three-months (ACA s.6(3)).

(iii) *Grand Court Procedure*

22. The Ebanks will make an application for a joint adoption order to the Grand Court. The application will be accompanied by Board reports and social workers' affidavits.
23. The application is made by summons and includes a written statement according to Form A and B (ACA Rules Appendix) pursuant to the Adoption of Children Rules (***Rule***) 3(1). Notice and summonses must be issued and served on the Mother (even if she has consented) pursuant to Rule 5(2). Notice need not be served on DR, per Rule 5(3).
24. Confidentiality can be maintained by applying to the Clerk of the Court (Rule 3(4)).

25. The Court will schedule the hearing and parties will be notified by the Board (Rule 5(3)). With everything in order, the hearing will be approximately eight to twelve weeks from the application.

(iv) *Court Considerations*

26. ACA s.14 provides three statutory considerations for the Court.
27. Firstly, if DR's mother is willing to give consent (and the requirement of consent not be dispensed with), she must understand the effect of her consent (s.14(1)(a)). Her intermittent lucidity strengthens the rationale to apply for the Mother's consent to be dispensed with to avoid potential issues of incapacity the Mother may claim in the future.
28. Secondly, the adoption must be for the welfare of DR (s.14(1)(b)). This is a broad test and allows the Court to consider all the circumstances. Practically, the following factors support the application:
    a) Ebanks seem to be in a strong financial position with a professional career, thereby improving DR's opportunities and meeting his needs;
    b) Abbey has already formed a bond with DR;
    c) DR has expressed a desire to live with Abbey (although note this will be of limited weight due to DR being only four years old);
    d) the Ebanks' motivation to adopt due to fertility issues;
    e) Josen is a Caymanian and therefore already immersed in the local culture and community;
    f) the Mother's substance abuse issues and sporadic lucidity;
    g) potential harm DR may be exposed to given the Mother's instability; and
    h) on the facts, there is no father figure currently present.
29. Thirdly, the adoption must not be for reward or gain (s.14(1)(c)). There is no evidence to suggest the contrary. The Ebanks will make a declaration to that effect when completing the relevant forms.

(v) Birthmother's Consent

30. The Mother's consent is required per s.10(4). However, this is subject to s.11 which provides the court may dispense with the required consent; with two of the most relevant grounds being: i) the parent has persistently neglected or ill-treated the child, or has persistently failed, without reasonable cause, to discharge their parental obligations; and ii) the parent is incapable of giving their consent; the consent is unreasonably withheld, or for any other reason.
31. Further evidence will be required to support either ground. However, neglect and failure to discharge parental obligations seems inherent in the circumstances.
32. Should the first ground fail, the Court would need to assess whether the consent is unreasonably withheld. Per the case of *Re A*, the Court will undertake an objective assessment. Enhancing the welfare of DR alone is insufficient; the test requires consideration of what a reasonable parent would do in the circumstances. There is a strong argument that if the Mother was reasonable, she would realise that she cannot adequately provide for DR and he has a better future with the Ebanks.
33. In arguing against such application, the Mother may seek to rely on the case of *Re Murphy*, where the Court did not dispense with consent due to the birthparent's intention to contribute to the children soon, having generally abandoned them for the majority of their life. The Mother may argue that she will enrol in rehab and improve her circumstances, making it not unreasonable for her to withhold consent.
34. *Re Murphy* would likely be distinguished from the instant case for numerous reasons. The birthparent's reason for abandonment was due to emigrating, lack of financial means to visit the children, and alleged obstruction by the birthmother with whom the children lived. Curing the Mother's addiction, however, is of greater magnitude than improving financial circumstances. Moreover, the Mother, in her dissociative states, has a chance at endangering DR, unlike the circumstances of *Re Murphy.* The Mother is unlikely to be successful in relying on *Re Murphy*, especially if she has had long-term addiction issues with severe consequences. Further evidence should be sought regarding the Mother's circumstances.

35. Should the Court not dispense with the consent requirement, given that Abbey is amenable to allowing the Mother and DR to maintain a relationship, the Mother and the Ebanks can negotiate and have the order subject to certain visitation rights per s.14(2) and DR being raised in accordance with a certain religion per s.11(3).
36. From the facts it is assumed that DR's father is not present. In the event he cannot be found, his consent can be dispensed pursuant to s.11(1)(c) and Rule 7(2).

Legislation & Case Law

Adoption of Children Act (2021 Revision)

Adoption of Children Regulations (2021 Revision)

Adoption of Children Rules (2021 Revision)

Re A 1992-93 CILR Note 15a

Re Murphy *1984-85 CILR 342*

Re R 2014 (2) CILR 282

Cayman Islands Legal Assistance Clinic (CILAC) launched

The Cayman Islands Legal Advisory Council, Truman Bodden Law School, and Judicial Administration of the Cayman Islands Government announced) the launch of the Cayman Islands Legal Assistance Clinic (CILAC) on Wednesday, May 18, 2022.

This joint initiative will provide legal advice at no charge to members of the public in a range of areas of law, including civil, criminal, family, landlord-tenant, employment, immigration, and human rights.

The clinic will be staffed by students who are preparing to commence their articles of clerkship as part of their post-graduate Professional Practice Course (PPC) at the Truman Bodden Law School (TBLS). The students will deliver legal advice to clients under the supervision of qualified attorneys.

Truman Bodden Law School Students (TBLS) students and attorneys from the Cayman Islands Legal Practitioners Association (CILPA) gathered in Chief Justice Anthony Smellie's Chambers for an introductory meet-and-greet at the launch of the Cayman Islands Legal Assistance Clinic (CILAC) on Wednesday (18 May). Front row, from left, are TBLS students Felicia Connor, Ghita Moyle, Daniel Lee, Janet James, and Colleen Cummings. At rear are Attorneys Louise

Desrossiers (Travers, Thorpe, Alberga), Prathna Bodden (Samson Law), Ben Tonner (McGrath Tonner), Hayley Allister (Cayman Family Law), and Andrea Williams (Williams Law).

"The establishment of the Cayman Islands Legal Assistance Clinic will provide for greater access to justice through the provision of high-quality, no-cost legal advice to members of our community as a result of the generous donation of time and expertise of TBLS students and qualified attorneys," said the Honourable Chief Justice Anthony Smellie, QC.

Speaking about the role of TBLS students, Law School Director Mitchell Davies said: "The Cayman Islands Legal Assistance Clinic will provide a significant public service to the community as well as an exceptional hands-on learning experience for PPC students at the TBLS as they prepare to enter practice."

CILAC will operate one evening per month from Judicial Administration Building C (the former Bank of Nova Scotia Building) in George Town. The clinic will see clients by appointment only. For further information on the clinic or to book an appointment, please contact the clinic at CILAC@Judicial.ky or by telephone at (345) 244-3798. Visit their website at https://cilac.ky .

Student Consultation Response

TBLS Students

Consultation documents are frequently issued by Government or Law Reform agencies to allow interested members of the public, professionals or even students to write in with their views on either a number of questions that are provided, or just their general views about what is being proposed.

The text below represents the student submission made to the Cayman Islands Law Reform Commission in their call for submissions that closed in March 2022.

The Penal Code: Is it compatible with the Bill of Rights?

Discussion Paper, dated 17 December 2021

This response to the Law Reform Commission's discussion paper is not the official view of the Truman Bodden Law School, its staff or the Portfolio of Legal Affairs. A small number of students from the first year of the LLB, the PPC course and a former student met to discuss the LRC's recommendations and questions as an extra-curricular activity to further their understanding of law reform, criminal law and constitutional law.

Discussions took place over a period of six weeks, which raised a wide range of opinions and perspectives, which are encapsulated below. Participants in the discussion were Alison Armstrong, Valeska Borden, Kimberly Russell and Nettie Bulgin from the first year LLB; Felicia Connor from the PPC Course and Tracy Gibbs as a former LLB student. The submissions below were drafted by Kimberly Russell, Nettie Bulgin, Felicia Connor and Tracy Gibbs. Michael Bromby, senior lecturer, facilitated the discussions and the final drafting.

This discussion sessions were valuable to student learning and understanding of the law in England & Wales and the Cayman Islands. We hope that these submissions are useful for the Law Reform Commission.

Section 4: Minimum Age of Criminal Responsibility

Question 1: Do you agree with the recommendation of the UNCRC that the age of criminal responsibility should be increased? (This question brings about varied responses and not a single unified response on which everyone agreed)

Some discussion participants thought that the age of Criminal responsibility should remain at age 10. The children of this era have shown evidence of being much wiser than those of 10 or 20 years ago at the age of 10. The notion of keeping things secret from children such as adult language, childbirth, sexuality, puberty or even violence is a thing of the past.

Children are no longer sheltered from what was once known as Adult rated movies, not pornography but movies that contain high violent content, strong nudity, and profanity; in fact, cartoons that are supposed to be for children, are often times found to contain such strong subliminal messages and innuendoes, that completely eliminate the innocence aspect of children. Exposure to such things, results in a more open mind, one that matures quicker than it ought to and brings a level of awareness far beyond what their age should experience.

For those reasons, there was an agreement with the current provisions of the Penal Code s12 ss (1) and (2). Discussion also raised the question of whether children below the age of 10, in extenuating circumstances, should have criminal responsibility. For example, whether category A offences, committed by a child under the age of 10 should be dealt with as though they are of the age of criminal responsibility.

For those who answered yes, there was a range of opinions to support the increase.

Question 2: What age should the age of criminal responsibility be?

Age is used, in the case of young people, as an analogue for maturity, insight and understanding. This was demonstrated in the case of *R v Peters* –

> "Although the passage of an 18th or 21st birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual's true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an 18th or 21st birthday. Therefore, although the normal starting point is governed by the defendant's age, when assessing his culpability, the sentencing judge should reflect on and make allowances, as appropriate upwards or downwards, for the level of the offender's maturity."

Although longitudinal neuroimaging studies demonstrate that the adolescent brain continues to mature well into the 20s, the Court will ultimately decide whether it is reasonable to conclude from the child's age alone that the child's level of maturity, insight and understanding was likely or not likely to be that of a fully developed, mature adult.

The question is, do young people at the age of 10 have the capacity to understand the seriousness of what they have done? It is apparent that 10-year-olds are not able to be wholly held to account for the things that they do. Accordingly, the age of criminal responsibility should be increased.

It is recommended that the age of criminal responsibility be raised to 12 years of age as the first step before being possibly raised in the future to 14 years of age. Setting the age of criminal responsibility at 12 provides flexibility in addressing offending behaviour by children and allows for early intervention to help prevent further offending.

Putting children in prison begins a cycle of criminalization. Evidence shows children remain in cycles of disadvantage and imprisonment due to a lack of early critical support services including health, disability, rehabilitation and family support. The factors driving these children into the criminal justice system include significant rates of mental health disorders, cognitive disabilities

and hearing and language impairments, as well as discrimination, socioeconomic disadvantage and intergenerational trauma.

In order to maximize their potential to contribute to society, children must grow up in a caring, nurturing and protective environment. This requires strong parenting support programs and access to health, education and social services as well as to child sensitive justice and social welfare systems.

When processing and confining a child, this is not only a traumatic experience, but it also exposes the child to damaging consequences. These damaging consequences include, barriers to education and employment, fines and fees, suicide, physical and sexual abuse and disruptions to mental and physical development that incarcerated children experience.

Where a child is in conflict with the law and is already a victim of circumstance, mostly because of poverty and exploitation by adult crime associations, children who are exploited and driven by adults to commit crimes need to be protected, not further penalized. Instead, they should be given a chance to reform and rehabilitate. There is concern of children cohabiting with hardened criminals and no guarantee that in detention they will be protected from violence and exploitation in jail.

In relation to children under 12, the law should provide certain safeguards to ensure that harmful behaviour by children under 12 can be responded to in an appropriate and meaningful way which will not criminalize them.

Question 6: What safeguards should be put in place for children aged under the minimum age of criminal responsibility in relation to the use of police powers?

There isn't really much that can be added. As it currently stands, a child cannot be questioned without a responsible adult present. In cases where a child has committed an offence that is of Category A offence, then an officer should be given the power to deal with the child as though they are of age of criminal responsibility, whilst still maintaining the established protocols of

having a responsible adult present for questioning or any formal proceedings. In other instances, Police Officers should be permitted to act as an intermediary officer to observe or supervise the process of the child being safely handed over to DCFS, who would have child protective powers to initiate interventions.

General Comments

In paragraph 4.40 of the discussion paper, the failed private member's bill indicates that there is some parliamentary will to legislate to increase the age of criminal responsibility for England and Wales. It is noted that there is yet another private member's bill (HL Bill 31) before the current Parliament, also from the House of Lords, this time introduced by Lord Dholakia, a Liberal-Democrat peer. Whilst this bill received a first reading on 15 June 2021, there is yet to be second reading. Inevitably, the Government will most likely not support the bill, for the reasons mentioned in para 4.40. however, this does present an opportunity to revisit Government policy following the increase in criminal age in Scotland.

Likewise, the role in Scotland of the Children's Hearings (see https://www.chscotland.gov.uk/ and the grounds for referral as established in s 67 of the Children's Hearings (Scotland) Act 2011 may be suitable diversionary mechanisms for children who offend, ss (2) (j), or are who are perhaps below the age of criminal responsibility but have misused alcohol or drugs, ss (2) (k-l), or whose conduct affects others, ss (2) (m). Establishing a similar body to the CHS may be a suitable proposal for the Cayman Islands, irrespective of whether the age of criminal responsibility is altered or not, as a diversionary mechanism away from both the criminal courts and civil family courts.

Section 5: Compulsion by Spouse

Question: Should the offence of compulsion by spouse in section 16 of the Penal Code be repealed?

There was general agreement that it should be repealed.

A range of reasons were discussed. It is discriminatory against people who are not married, according to section 16 of the Bill of Rights. It is a very outdated approach and whilst it may not have been committed frequently, if ever, in the Cayman Islands it should be considered as better to be repealed explicitly, rather than simply being allowed to fall into abeyance.

A non-gendered defence of duress achieves the same measures in law and more effectively.

Section 6: Insulting the Modesty of a Woman

Question 1: Should the offence of insulting the modesty of a woman be repealed?

There was a general consensus from discussions that the offence should be repealed. It is discriminatory and should be replaced with gender neutral language, such as 'person' or 'individual'.

The term modesty is archaic and is rooted in religion, primarily conservative countries (in agreement with para 6.5). Given that the status of women has evolved in society and women are taking on other roles in addition to traditional duties, this term is outdated and paternalistic, it alludes to the fact that women have something to be modest about. It implies that women need to be taken care of or are in need of protection, thus devaluing their contribution to society. The wording also does not allow for men to complain of the same offence (in agreement with para 6.9).

Question 2: Should the reference to "insulting" words or behaviour in the offence of intentional harassment, alarm or distress be repealed?

The reference to "insulting" words or behaviour in the offence of intentional harassment, alarm or distress should not be repealed.

However, the word “insulting” appears to be subject to interpretation. Freedom of expression issues may arise as already identified in para 6.14. It may be helpful to replace it or have words like “degrading, disrespectful or offensive” to further describe behavior in statutory terms that are not subject to variable interpretation in courts. Other approaches may assist to distinguish from disturbance or annoyance, as noted in paras 6.16 and 6.17.

Section 8: Unnatural Offences

Recommendation 6: That the provisions in section 144 and 145(5) of the Penal Code that prohibit sexual activity between consenting same sex adults are repealed.

The general agreement was that the above provisions should be repealed. They conflict with the Civil Partnership Act 2020, which effectively legalizes same sex unions (para 8.9). Certain aspects of these provisions are also out of date and discriminatory (para 8.9), such as the age of consent (para 8.32), the right to privacy and family life (para 8.35) and freedom from discrimination (para 8.34).

This is an evolving issue and one that offers a variety of opinions, while many countries have decriminalized same sex relationships, others have not (para 8.2). The Cayman Islands has shown that it is a progressive country in many ways and could be seen as taking a leadership role regarding human rights within the Caribbean.

Internship Reflection - Criminal vs Civil: A reflective piece

Diana DeMercado

LLB3 (Third-year full time)

In the summer of 2021, I took part in *three* internship programs. During the first month, I worked at the Office of the Director of Public Prosecutions (ODPP), during the second I worked in the Attorney General's Chambers and for the remaining weeks I worked in the Corporate & Finance practice group at Harneys. This was an amazing and eye-opening experience because it allowed me to get a feel for different legal environments and gain a vast range of skills. Most importantly, these experiences helped shaped my view on what kind of legal practice I'd be interested in practicing in the future. This reflective piece will compare and contrast my experience in the two different realms of legal practice in Government – civil and criminal.

Office of the Director of Public Prosecutions

Firstly, the ODPP is responsible for all criminal proceedings brought within the Cayman Islands and is the Government's principal legal adviser on criminal matters. During my time at the ODPP, I assisted the Crown Counsels in preparing submissions and carried out research for trials which concerned intriguing matter such as murders in the Cayman Islands. The environment was extremely fast paced, with different types of criminal matters being heard every day. One particular thing I noticed was that the environmental was extremely formal. Prosecutors and interns are expected to wear full suits, with a preference of dark colors. This made the experience even more interesting and real. Moreover, the work delegated to me was very substantial. I was introduced to the Magistrates during mention hearings, I sat alongside investigators, carried out research for matters and assisted with writing sentencing submissions for the defendants. I commend the ODPP for giving me such a fulfilling internship experience. Prosecutors deal with almost hundreds of matters every week and it is important that their role in society is not understated.

Portfolio of Legal Affairs/Attorney General's Chambers

The Portfolio of Legal Affairs is headed by the Attorney General. The Office of the Attorney General is constituted by section 56 of the Cayman Islands Constitution Order 2009, under which the Attorney General is appointed as the principal legal adviser to the Government and the Legislative Assembly. The Crown Counsels in the Portfolio of Legal Affairs hear civil matters concerning the public and the Cayman Islands Government. It is effectively the opposite legal realm to the ODPP. Notably, the Portfolio deals with matters such as (but not limited to) judicial review, law reform, the law revision commission, and anti-money laundering. I can also recall a Crown Counsel undertaking research for immigration matters such as appeals against revocation of Permanent Residency. The environment was quite relaxed, and the matters were not as intriguing as they would obviously be at the ODPP. The atmosphere was also very formal. This is likely because they have direct contact with members of Cabinet and must remain poised at all times. What I found most interesting about the Portfolio is the level of labour and research which goes into actually *making* and *improving* our laws. This is what the Legal Drafting department and Law Reform Commission does. Although the Cayman Islands Parliament introduces laws by its Members, it is the hard workers in the legal drafting department that undertake tedious and intricate work to perfect it. The Law Reform Commission is also an extremely important body as it is an essential tool for improving laws to be more in line with societal and even global changes. The work carried out by these bodies in particular is vital to the people of Cayman. In all honesty, I did not undertake enough substantive work to give a full reflection on my personal work experience there. But overall, it was a rewarding experience to see how the different sides of legal practice in the Cayman Islands government work in theory and how each government legal body is necessary for the functioning of our society.

Alumni Profile: Alanna Warwick-Smith

Social Media Manager
Truman Bodden Law School (2013 - 2016)

Alanna holds a Bachelor of Laws Degree from Truman Bodden Law School (Class of 2016) and has experience ranging across Marketing, Human Resources and Sales. She is currently employed as a Social Media Manager at a real estate brokerage.

Alanna is a past President of Rotaract Blue Cayman Islands and past Director of the Cayman Islands Society for Human Resource Professionals (CISHRP). She is also currently a Director of the Cayman Islands Marketing Professionals Association (CIMPA) (2020-2022).

In February 2022 Alanna was awarded "Proud of them" recognition by the Ministry of Youth, Sports, Heritage & Culture for her efforts and achievements in community service. She has been recognized as a Role Model in the Cayman Islands in the 2023 edition of Cayman Parent.

Why Law?

I've had a deep love of country since I was a child and knew at twelve years old that I had political aspirations. I was fortunate, at least from my perspective, to have participated in political campaigns starting in the 2009 Cayman General Election.

I realized very early on that to want a higher experience of service and to serve my country and my people at that level I should have a better understanding of the law. For that reason, I always knew that law school was something I'd pursue. I just didn't know how early it would happen.

Looking back

I began my legal studies in September 2013 at 17 years old, which at the time was rarer than it is now. I was the youngest person in my class by a stretch, and was also sporting a mouth full of braces, but quickly found a network of friends who brought me under their wing.

I struggled missing out on some of the social events due to my age but it allowed me the time to focus on my studies.

I didn't realize at the time how much the class size and structure provided the strongest foundation to my legal education until I went to Liverpool in third year. I'd encourage all new and existing students to truly appreciate the attention and support provided by your professors.

Try and be as involved as you can. I was a proud member of the Student Society.

On reflection, I wish I'd participated more in initiatives such as mooting that provided opportunities for travel.

TBLS make every effort to provide a robust and rich student experience for their students and I owe a lot to Director Mitchell Davies who provided me a lot of pastoral support during my time.

If you are interested in time abroad, I would also encourage you to take up the opportunity to study abroad in Liverpool. That experience changed my life.

PIVOT!

Post-Graduation, I spent 2016-2018 pursuing a career in Human Resources – pivoting left after the completion of my studies.

I've greatly benefitted from extracurriculars – getting involved in professional and community service organizations to expand the reach of my network and learn skills outside of the workplace.

For anyone considering a career change, you learn many skills and can be presented with multiple opportunities through these channels such as leadership, financial management and marketing.

In 2019 I changed careers and moved to Marketing full time. I was able to make the change through spending my spare time learning more about the field and doing research on trends and what was next. These were all tangible skills gained from my degree.

Remember your why

As someone who self-defines as being type A plus, I struggled for a long time with not following my life plan of being a lawyer then going on to a future career in politics. I took a hard left and now spend my days creating content and analyzing data – and that's OK.

Never forget why you decided to pursue your degree and apply it to your everyday life.

I studied law because I wanted to help make the Cayman Islands a better place. For myself. For my future kids. For my future grandkids.

While I am not practicing, and politics is not currently in my future plan, I remember my why every day when I volunteer on weekends and when I donate my time to organizations that I know are doing amazing work in Cayman.

Remembering your why allows you to find meaning in the experiences and knowledge you gained from your degree.

Was it worth it?

As someone who doesn't 'use' my law degree on paper I'm often asked if I regret my degree – or 'was it worth it?'.

I'd say law school was one of the most challenging but rewarding experiences of my life.

Now on my third career, post law, I would enforce the following things to someone who maybe isn't sure if law is for them mid-education.

1. You will always land on your feet.

Your degree will provide you a level of credibility and authority that others do not have. My legal background provided me an entryway into Human Resources through Immigration work and supports me daily in my Marketing career through my attention-to-detail. People respect the time, effort and tears – there will be tears – that someone who studied Law has experience. They know that you can work, learn, and adapt.

2. Lean on your foundations

Don't hide or be ashamed of the fact that you didn't pursue a career in what you studied. In my very first intro-week session at TBLS – Matthew Rollinson told me – most people don't end up becoming lawyers. You aren't the first and you won't be the last. There is a wide network of people, and TBLS alumni, who didn't do their articles or qualify. Also, 'I have a law degree' is a great icebreaker or addition to pub games.

3. Talk to someone

Again, you aren't the only one experiencing this. Law School can be competitive, highly intensive and take a toll on your mental health if you don't stay on top of your personal health. Speak to a friend. Speak to a professor. You can get guidance through this time on what is the next best step for you or how to handle challenges. You're never alone. The network you make at this time will remain with you for years to come.

Overall, enjoy every day. This experience only happens once, and you should be proud to say you are studying at this level.

If you have any questions about my experience or would like to chat feel free to connect with me on LinkedIn or call me and say you read my profile!

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 2008-2022 only:

Cayman Islands: 105

Jamaica: 43

Canada: 45

United Kingdom: 13

United States of America: 7

Guyana: 5

Barbados: 3

India: 4

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

Daniella Carrazana

Conyers (2021 – 2023)

A transfer by way of continuation

During the Corporate seat in my Articles, one matter that I worked on was a transfer by way of continuation of a Cayman Islands exempted company.

The Cayman Islands Companies Act (the "Companies Act") provides that an exempted company incorporated and registered with limited liability and a share capital (including a foreign company registered by way of continuation in the Islands) which proposes to be registered by way of continuation as a body corporate limited by shares under the laws of any jurisdiction outside the Islands may apply to the Registrar of Companies in the Cayman Islands (the "Registrar") to be de-registered in the Islands.

The process and issues to be considered

The Companies Act sets out the process and documentation required to proceed with the application and the criteria to be satisfied for the Registrar to de-register the company in the Cayman Islands.

Further, some of the issues to be considered by Cayman counsel and by our counterpart in the jurisdiction to which the company is to migrate are:

1. whether the company's memorandum and articles of association permit the transfer;

2. the types of approvals required;

3. whether the transfer is permitted by the laws of the jurisdiction to which the company will continue; and

4. whether any consent or approval to the transfer required by any contract or undertaking entered into or given by the Company has to be obtained or waived.

My role in these transactions

My role was to consider and assess the aforementioned steps and to coordinate the process.

I assisted with reviewing the corporate documents of the company, drafting all documents required to be submitted to the Registrar (including resolutions for the de-registration and continuation, and certain affidavits/declarations, undertakings and notifications). I also liaised with the Companies Registry, the registered office for the company, as well as counsel in the other jurisdiction to ensure that the process and steps were fulfilled in accordance with Cayman law and the laws of the other jurisdiction.

Conyers provides useful articles on its intranet and website regarding the process and considerations for these transactions including the article https://www.conyers.com/publications/view/de-registration-of-cayman-islands-companies-being-continued-in-a-foreign-jurisdiction/.

Reflections

The process of de-registering and migrating a Cayman entity from the Cayman jurisdiction to another jurisdiction is interesting and also quite technical as the law prescribes in detail the way in which the de-registration and migration are to proceed. The skills and knowledge I acquired throughout my LLB and the Professional Practice Course (the "PPC") were useful foundation blocks that assisted me with conducting my research, assessing documents, navigating the Cayman Islands Companies Act and drafting the documentation required for the transaction.

Articled Clerk Reflective Review

Dwight Williams

Walkers (2021-2022)

Appointing the First Protector of a Trust

We acted for the trustee (the "Trustee") of a family trust (the "Trust"), who had received a request from the settlor (the "Settlor") to appoint a protector of the Trust (the "Protector"). Under Cayman Islands law, there is no statutory regime relating to the office of protector. Having said that, this role is included to provide additional oversight on certain decisions to be made throughout the life of the Trust. For example, the trustee may be required to obtain the consent of the protector prior to amending the terms of the declaration of trust or be required to follow the direction of the protector in relation to a distribution request received from a beneficiary.

We had understood from the Trustee that the Settlor wished to appoint his brother, a beneficiary of the Trust, as the first protector of the Trust. For completeness, a protector can either be a corporate fiduciary or a third-party individual, but most commonly, a settlor will choose to appoint a relative or trusted friend, who understands the settlor's wishes in terms of setting up the structure and who will honour those wishes in relation to the management and administration of the structure once the settlor passes away.

Issues to be considered

Prior to accepting the instructions, by carrying out a high-level review of the Trust Deed, it was determined that the Trustee nor any other party to the Trust, had the power to appoint a protector. We were then required to review the amendment provisions contained in the Trust Deed to ensure that the power was broad enough for the power holder to exercise the same in these circumstances to amend the terms of the Trust Deed to achieve the desired outcome.

My role in the matter

My first role involved the creation of the new matter in our systems, through which this work would be managed. To achieve this, a review of the Trust Deed and all supplemental documents relating to the Trust was conducted to gather the information needed to input into the matter creation process. Once the new matter creation process commenced, I then carried out a review of the conflict report with my supervising attorney to confirm that we were free from conflicts and could accept the instructions to act on behalf of the Trustee. We then liaised with the Compliance team to obtain their final approval for us to proceed with the matter. This resulted in us liaising with our client to satisfy additional due diligence requests to ensure compliance with our "Know Your Client" requirements pursuant to our Anti-Money Laundering regime.

My second role involved drafting two deeds, namely, a deed of amendment (the "Deed of Amendment") and a deed of appointment of first protector (the "Deed of Appointment"). From my review of the Trust Deed, I gathered that the Settlor could vary, add to or amend the terms and provisions of the Trust Deed. On that basis, we prepared a Deed of Amendment, to be entered into between the Settlor and the Trustee, wherein the Settlor would exercise his power of amendment to amend the terms of the Trust Deed to allow for the creation of the office of protector. The Trustee was a party to this Deed of Amendment to acknowledge the changes to the Trust Deed. Following the signing of the Deed of Amendment, the next step to be taken was to appoint the named Protector. This was achieved by preparing the Deed of Appointment naming the new Protector and including the appointee as a signatory to the Deed of Appointment, so as to signify acceptance of the role and agreement to the prescribed terms.

Reflections

In having to coordinate the new matter process, I obtained a full grasp of the principles of professional ethics and the duties of an attorney which came through observations, various internal collaborations and corresponding with the client. Although the process may be wearying at times, it is a vital one as it eliminates chances where a firm may become exposed to unwanted risks or fall prey to legal liabilities because of not conducting appropriate compliance checks. The collaborations experienced within the process reminded me of my GDL and PPC studies, whereby

greater benefits in numbers were realised when facing multi-faceted tasks, especially with tasks I did not possess the full knowledge to complete on my own. As lawyers, we will be expected to perform individually, however, when we work with others in an effective team, growth and success are always guaranteed.

On the surface, one would think that the settlor as the creator of a trust would have the powers to appoint any person at any time. However, this is not necessarily the case, as it is not possible to account for future situations that will arise, which may result in some powers being overlooked during the drafting of the constitutional documents relating to a trust. Fortunately, in these circumstances, the Trust Deed conferred powers on the Settlor to make variations, amendments and additions to the terms and provisions of the Trust, and as such, these powers were exercised to amend the Trust Deed to allow the Settlor to appoint a protector. This task reiterated the point that although no one can predict circumstances that may arise in the future, it is important that legal professionals keep such potential requests at the forefront of their minds when drafting, to allow for such amendments to be made as needed.

Although this matter was relatively straightforward, I enjoyed my work involvement and the experiences gained, and I look forward to continued insights on future legal matters.

Submissions for 2023

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 2022/23 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) then 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 own learning experiences following their time at law school and entry into the profession. This may comprise a case note if there was litigation, a report on other types of work or even a commentary on the introduction of new regulations or laws in the Cayman Islands.

As ever, I am indebted to the students in the current editorial team from across all the LLB year groups and (for the first time) from the PPC. They put a great amount of effort into this year's edition. 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 task of selection harder still!

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