causation, remoteness of damage and measure of damage's should not be applied by analogy in such a case. It should not be confused with equitable compensation for breach of fiduciary duty, which may be awarded in lieu of rescission or specific restitution.'

EQUITABLE CLAIMS SET-BACK

The trend towards reliance by lenders on equitable remedies when suing solicitors has thus received a severe set-back. Mere negligence does not amount to a breach of trust or fiduciary duty and, importantly, the defendant's weapons of causation, remoteness and mitigation remain available. The practical consequence is likely to be that claims alleging breach of trust or breach of fiduciary duty will no longer be made or pursued by lenders against solicitors in cases where the basis of the claim is breach of the duty of skill and care.

This can be seen in the most recent decision in the Bristol & West litigation – a ruling by Chadwick J in *Bristol & West Building Society v Fancy & Jackson* (4 July 1997, unreported) – where claims for breach of fiduciary duty were pursued to trial in only two cases out of the eight actions tried (this case was one of a series of 87 actions brought by the building society against solicitors and listed for trial at the same time. Eight actions were eventually tried together). In only one of the cases – *Steggles Palmer*, where the solicitor was (unknown to the lender) acting for the vendor as well as for the purchaser and the lender – was a breach of fiduciary duty (namely, a breach of the 'double employment' rule) established. However this made no difference to the damages recoverable.

LEVEL OF RECOVERY

In future, lenders are likely to seek equitable remedies against solicitors only in cases involving dishonesty or serious conflicts of interest. But even in such cases, it is questionable whether an equitable claim will produce a larger recovery than the common law claim, at least where there has been a misrepresentation in the report on title (as there often will be). For the common law remedies are very similar in outcome to the equitable remedies when there has been a misrepresentation (see, for example, *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] CLC 1958 [1997] AC 254 and *Downs v Chappell* [1996] CLC 1492 [1997] 1 WLR 426).

FUTURE CLAIMS

In future, lenders are likely to seek equitable remedies against solicitors only in cases involving dishonesty or serious conflicts of interest.

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Judicial Review

Detention of children during Her Majesty's pleasure

by Dr Christopher Forsyth

Dr Christopher Forsyth

In February 1993 Robert Thompson and Jon Venables, two ten-year-old boys, murdered James Bulger, a two-year-old boy, in an act which the trial judge described as being of 'unparalleled evil and barbarity'. Upon conviction, the judge pronounced the sentence which is mandatory when children are convicted of murder. They were to be 'detained during Her Majesty's pleasure' (*Children and Young Persons Act* 1933, s. 53(1)) which meant that they were detained 'for so long as Her Majesty' – in practice, the Home Secretary – 'considers appropriate'. The judge told the youthful convicts that they would be held 'for many, many years'. But how long would they be held before they might be released on license?

The horror of the crime led many of the public to believe that the murderers should remain in detention for a very long time; and a petition signed by 278,000 people was submitted to the Home Secretary calling for them never to be released. Others, a far smaller number, thought that because of their tender years they should receive not punishment but only remedial treatment during their detention; and they should be released once it was clear that they were no longer a danger to the public.

SETTING THE TARIFF

Under the existing law (primarily Pt. II of the *Criminal Justice Act* 1991, especially s. 35) and practice (see the policy statement made by Dame Angela Rumbold on 16 July 1991 (Hansard (HC Debates), cols. 311–2)), it was for the Home Secretary, after receiving a report from the trial judge and consulting the Lord Chief Justice, to set what is known as 'the tariff'. This is the period considered necessary to meet the needs of retribution and general deterrence for the offence; and only once it was drawing to an end would the prisoner be considered by the Parole Board for release. This procedure for setting the tariff was the same as that adopted for adult prisoners sentenced to a mandatory life sentence.

In any event, the trial judge thought that eight years would serve the needs of retribution and deterrence; and the Lord Chief Justice thought ten years. However the Home Secretary, having regard to the public concern about the case (as evidenced by the petitions) and the need to maintain confidence in the criminal justice system, set the tariff at 15 years. And so the stage was set for *R v Home*

Secretary, ex parte Venables and Thompson [1997] 3 WLR 23, an application for judicial review in which the two boys challenged the Home Secretary's decisions in setting the tariff on several grounds. His decisions were overruled in the House of Lords and thus did this horrible murder give rise to what will in future years become a leading decision on several aspects of judicial review.

THE HOME SECRETARY'S MISTAKES

The case demonstrates the development in the context of the detention of children of the already strong judicial policy that determining the penal element in a sentence – such as fixing the tariff – is a function akin to that of a sentencing judge. Thus such decisions are to be accompanied by the highest standard of procedural propriety (as in *R v Home Secretary, ex parte Doody* [1994] AC 531) and to be decided with strict regard only to relevant considerations.

TABLOID JOURNALISM

Ill-informed and emotional criticism, fanned by tabloid journalism, should not determine how long any individual stays in jail or detention.

Consequently the Home Secretary could not take into account the public clamour (as evidenced by the petitions) for a severe penalty in the *Venables and Thompson* case (per Lords Goff, Steyn and Hope; Lord Lloyd dissenting), although he could take into account public concern of a general nature (for instance, 'relating to the prevalence of certain types of offence'). This, it is submitted, is clearly right. While public confidence in the administration of justice is important, ill-informed and emotional criticism, fanned by tabloid journalism, should not determine how long any individual stays in jail (or detention).

But that was not the only error made by the Home Secretary. His policy of treating children detained during Her Majesty's pleasure in the same way as mandatory life prisoners meant that he set the tariff and then did not, save if evidence about the circumstances of the commission of the crime or the applicant's state of mind at that time came to light, review it. This policy was rejected as unlawful (Lords Browne-Wilkinson, Steyn and Hope; Lords Goff and Lloyd dissenting), mainly on the ground that it was too rigid in that it excluded review on the ground of events that had occurred since the commission of the offence. This reasoning does not depend upon the applicants being children, although with children the changes in the individual as the child grows up are likely to be greater.

THE WELFARE OF THE CHILD

But in addition, in the case of children, s. 44 of the *Children and Young Persons Act* 1933 required that '*every* court in dealing with a child shall have regard to the welfare of the child' (emphasis added). Surprisingly, perhaps, counsel for the Home Secretary conceded that the minister (although not a court) was bound by this duty. It then followed that, while he could set a provisional tariff, he was bound, in having regard to a child's welfare, to keep that tariff under review and to adjust it (if appropriate) to take account of the precise circumstances of the child as he or she grew up.

THE IMPORTANCE OF THE DECISION

The consequences of the decision will be far-reaching. Several high profile murderers who have been set very high tariffs, or told that they will remain in prison for the rest of their lives, may seek to force the Home Secretary to review their tariffs on the ground that they have changed over the years since the crime. For the general law of judicial review, however, the case is likely to be less dramatic. None the less the extensive discussion of the errors made in setting an over-rigid policy (which was arguably in conflict with a statute) and the determination of relevant and irrelevant considerations will prove very valuable. The orthodox principles of judicial review, ever flexible, have once more borne fruit in a novel and difficult area of decision-making and have brought fairness even to the perpetrators of an horrific murder.

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Legal Education & Practice

The Faustian bargain and the devil you know

by Nick Johnson

Vocational legal education is on the cusp between the universities and the professions. Historically the universities stayed aloof from the process of training, regarding the courses as lacking intellectual and educational credibility. The training schools such as the Inns of Court School of Law and The College of Law were regarded as trade schools that were wholly subordinate to the professions. The polytechnics, with clear vocational aims, were more amenable to partnership with The Law Society and largely accepted professional regulation of their Common Professional Examination and Law Society Finals courses.

LEGAL PRACTICE COURSE

The Legal Practice Course (LPC) brokered a compromise between the providers of legal education and The Law Society, which brought a few of the old universities into the market. Standards, in the form of outcome statements, were specified by The Law Society with each provider building its own course around them. Rigorous and continuing control is retained by The Law Society through a system of validation and inspection.