

STATUTE LAW SOCIETY CONFERENCE

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Cold-blooded and warm-blooded presumptions

Lord Walker of Gestingthorpe

The general theme of this conference is the presumptions which are applied in construing legislation – what are sometimes called canons of statutory construction. They are principles about the interpretation of statutes, but generally they are not themselves expressly laid down by statute (section 3 of the Human Rights Act 1998 is a very important exception). I hope it will not seem wayward and inappropriate if I address statutory presumptions of a different sort – that is, statutory rules setting out a default position which is to be assumed or followed by the court unless, or except so far as, some other position is established. The displacement of the default provision may be effected by evidence, or by the exercise of judicial discretion, or by the two in combination.

Statutory presumptions of this sort are common, in almost every field of the law. There is a wide variety in the strength and stability of particular presumptions – that is in how much is needed, generally in the way of special circumstances, to overcome their inertia. How much is needed to displace a statutory default position may depend on whether it represents Parliament's preferred solution, other things being equal, to some question that raises issues of policy, or whether it is simply a neutral starting-point set in order to avoid a lacuna of uncertainty. I shall refer to the former as warm-blooded presumptions because they tend to engage instinctive human feelings about what is right and proper. Neutral default positions are, by contrast, relatively cold-blooded.

I start with a very cold-blooded presumption. It is in section 184 of the Law of Property Act 1925:

“In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the older.”

This presumption does not apply to intestate succession as between spouses.¹ Nor does it apply for inheritance tax purposes.² In each case the statute requires the deaths to be treated as simultaneous.

Before the enactment of section 184 the issue had to be decided as one of fact, with the onus of proving survival falling on whoever asserted it. In practice this produced much the same results, especially in the case of a married couple who had made wills in each other's favour, as if there had been a rule presuming simultaneous deaths. The old law was fully debated by the House of Lords, with the Lord Chancellor (Lord Campbell) dissenting, in *Wing v Angrave*³. That was a tragic case in which a husband, wife and their three children, bound for a new life in Australia, perished in a shipwreck off Beachy Head. There was dramatic evidence from the sole survivor of the wreck, who saw four of the family being swept off the deck by a single wave, and also expert evidence as to the capacity of males and females of different ages to resist asphyxiation. There was even the citation of a macabre Tudor case⁴ where a father and son had been hanged in the same cart.

But I must come back to section 184. What is the significance of “subject to any order of the court”? Does it give the court a discretion to displace the default rule if it would be fairer, or more sensible, to do so? That suggestion was firmly

¹ Administration of Estates Act 1925 s.46(3), added by Intestates' Estates Act 1952

² Inheritance Tax Act 1984 s.4(2)

³ (1860) 183

rejected in *Re Lindop*⁵, so establishing the cold-blooded nature of the presumption. Bennett J also decided, following Lord Campbell and taking what may seem rather a Lincoln's Inn approach, that since time is infinitely divisible, he could not hold that a husband and wife died simultaneously in a wartime air-raid even though the house where they were in bed was completely destroyed by a direct hit.

Wing v Angrave and *Re Lindop* were both considered by the Lords in *Hickman v Peacey*.⁶ It was another air-raid case, and the facts might have been devised for a mooted contest. Five adults, sheltering in a small air-raid shelter inside a basement in Upper Cheyne Row in London, died as the result of a direct hit by a bomb which reached the basement before it exploded. Four of the five dead were named as beneficiaries in wills made by two of the dead. The Court of Appeal held, by a majority, that the deaths were simultaneous and that section 184 did not apply. The Lords reversed this by three to two. The speeches contain some interesting general discussion about statutory construction, which is my main excuse for devoting so much time to section 184.

For the majority Lord Macmillan rejected a philosophical approach:⁷

“It is true that time is infinitely divisible and also that it is theoretically possible that the deaths of two persons may be absolutely coincident in time. ‘This is, of course, a profound and impressive truth,’ as Lord President Robertson once said in another context, and then proceeded to add ‘but there are times and places for everything, and I should hardly have thought a Tramway Act exactly the occasion which Parliament would choose for teaching businessmen metaphysics unawares’”.⁸

He took a practical view that the possibility of simultaneous deaths was a distraction:⁹

⁴ *Broughton v Randall* (1596) Eliz. Cro. 503

⁵ [1942] Ch 377.

⁶ [1945] AC 304.

⁷ p.323

⁸ *Edinburgh Street Tramways Co. v Edinburgh Magistrates* (1894) 21 R 688, 704

“But, with all respect, that is not an issue which the statute requires to be determined in order to bring it into operation or exclude its operation. All that is necessary, in order to invoke the statutory presumption, is the presence in the circumstances of an element of uncertainty as to which of the deceased survived the other or others.”

Lord Porter and Lord Simonds came to the same conclusion, but Lord Simonds was at pains to reach it by classical methods of statutory construction:¹⁰

“I conclude, then, that the true construction of section 184 is that it proceeds upon the footing that the proof of simultaneous death is impossible, or in other words upon the footing that, if survivorship is not proved, the only alternative is uncertainty. If it is thus read, there is no *casus omissus* and the section can be construed so as to cover every case in which it cannot be proved that one of two persons dying together survived the other.”

In dissent, Viscount Simon LC (with whom Lord Wright largely agreed) asked himself three questions:¹¹

- “(1) *Can* two or more persons die at the same time?
- (2) Can it be *proved* in a court of law that two or more persons died at the same time?
- (3) In the present case, is the proper conclusion on the evidence that the two testators and their beneficiaries in the shelter died at the same time?”

He answered these questions (i) Yes, (with some farsighted observations about death being a process rather than an event); (ii) Yes, for the law’s purposes (though not for scientific purposes); and (iii) Yes. The Lord Chancellor found no need of assistance from the “mischief” rule:¹²

“But this maxim has a valuable application only when the language of the statute which is being construed needs to have this additional light thrown

⁹ p.325

¹⁰ p.345

¹¹ p.317

¹² pp.315-316

upon it. The words we are considering do not in my opinion leave any doubt as to what they say and mean.”

This was despite the fact that the House was split by the narrowest margin. One gets the feeling that their Lordships may not have spent a lot of time studying each other’s speeches in the hope of reaching a common view. I wish I could say how times have changed.

In describing the presumption in section 184 as “cold-blooded” I do not imply that it may not have important consequences for families affected by it. It certainly may have such consequences. In particular, by diverting wealth down to the youngest of the victims of a multiple family tragedy it may result in the property becoming *bona vacantia*, since an uncle or aunt is, but a great-uncle or great-aunt is not, a potential intestate successor. The point is that section 184, as interpreted in *Re Lindop* (which must have been approved by the Lords in *Hickman v Peacey*) operates relentlessly, regardless of the human consequences. That is no doubt why Parliament changed the law, in 1952, for the limited purpose of intestate succession between spouses. Otherwise the combined wealth of a young couple who died together on their honeymoon would tend to end up with the family of whichever happened to be the younger.

The Law of Property Act 1925 did not apply in Scotland. Scottish law applied its common law rules (similar to those of the English common law) until 1964, when section 31 of the Succession (Scotland) Act was enacted. It was modelled on section 184, but with three distinct improvements. First, it did not apply as between husband and wife (neither was treated as surviving the other). Second, it did not apply where a testator made a gift to one beneficiary (X) with an express gift over to another beneficiary (Y) effects did not survive the testator. And third, it omitted the ambiguous parenthesis “(subject to any order of the court)”.

Section 31 was considered by the Court of Session in 1976 in *Lamb v Lord Advocate*¹³. Mr and Mrs Grant had died in a house fire. She was the younger, and was healthy whereas her husband was an invalid. She was seen to run back into the burning house and the circumstances suggested that her husband might already have perished. The Scottish courts addressed an issue of law which had not been recognised in the English cases, although it was latent in them: since the statute speaks of circumstances which make the question of survival “uncertain”, must the question be resolved to the point of certainty – that is, beyond reasonable doubt – in order to replace the statutory presumption? The Inner House, reversing Lord Grieve, held that section 31 was not concerned with the standard of proof. The Lord Justice-Clerk (Wheatley) said¹⁴

“I must confess to sympathy with the Lord Ordinary in his endeavours, even with the assistance of Jenkins J, to extract from the differing, varying, qualified and non-committal views of their Lordships in *Hickman v Peacey* an authoritative formula for the standard of proof required to negative ‘uncertainty’.”

He and the other members of the Inner House were unanimous that the ordinary civil standard of proof applied to displace the presumption.

The report in Sessions Cases does not name counsel for the successful claimer, but he was praised for his industry in citing four Commonwealth authorities, two from Canada and two from Australia. That was, more than thirty years ago, an unusual course. I am glad to tell you that the diligent counsel was your distinguished President, now Lord Rodger of Earlsferry.

Now I want to come to a very warm-blooded presumption. Section 26 of the Family Law Reform Act 1969 is headed ‘Rebuttal of presumption as to legitimacy and illegitimacy’ and it is in these terms:

¹³ 1976 S C 110

¹⁴ at 115

“Any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption.”

The heading of the section might have been better expressed as “Rebuttal of presumption as to parentage.” The driving force behind this change in the law was the recognition, by the second half of the 20th century, that it is generally more important for a child to know who his parents are than to be shielded from the possible stigma of illegitimate birth. The modern policy of the law is that in this area the truth, even if uncomfortable, is generally preferable to uncertainty or ignorance. It is no coincidence that Part III of the Family Law Reform Act (sections 20 to 25) contained, when originally enacted, provisions about the taking of blood samples and now (after amendment in 1987) contain provisions about bodily samples (appropriate for DNA testing). The development of the law in this area reflects profound changes both in social and moral attitudes and in the scientific means available to establish biological parentage.

The old, non-statutory presumption of the legitimacy of a child born to a married woman (who was not judicially separated from her husband) was very ancient, deriving from the civil law, which had the maxim “*pater est quem nuptiae demonstrant*.” It had come into English law, by way of canon law, by the 12th century. It was closely linked to, but logically distinct from, the rule of evidence that a wife could not give evidence to bastardise her own child, and a husband could not give evidence to bastardise his putative child. The converse presumption of illegitimacy arose when a woman judicially separated from her husband had a child more than nine months after the decree of separation.¹⁵

The exclusion of the husband’s and wife’s evidence to rebut the presumption of legitimacy was reaffirmed by the House of Lords in the notorious case of *Russell v*

¹⁵ See Hannen P in *Hetherington v Hetherington* (1887) 12 PD 112, 114

Russell in¹⁶ 1924, a case which was so luridly reported in the popular press that it led to statutory restrictions on the reporting of matrimonial cases. The rule was also applied, to my mind much more questionably, in the converse case of judicial separation, where neither of the separated spouses could give evidence to show that the child was legitimate.¹⁷ The rule has now been abolished in its entirety.¹⁸

Originally the presumption of legitimacy was rebuttable only by proof beyond reasonable doubt that the husband could not have been the father; and in practice, until the late 18th or early 19th century, such proof had to take one of two forms: either proof of the husband's impotence or proof of his long absence abroad – beyond what were called the four seas.¹⁹

The requirement of such a strict standard of proof was no doubt based partly on the need for certainty and partly on the stigma which attached to adultery as a quasi-criminal wrong against the cuckolded husband, actionable until 1857 by a suit for criminal conversation; it was therefore something that should be proved beyond reasonable doubt. The evidential rule excluding the spouses' evidence was based on what Lord Mansfield²⁰ called "decency, morality and policy," which the Earl of Birkenhead later explained²¹ as meaning more than mere aversion to muck-raking:

"What Lord Mansfield meant was that a deeply-seated domestic and social policy rendered it unbecoming and indecorous that evidence should be received from such a source; upon such an issue; and with such a possible result."

¹⁶ [1924] AC 687

¹⁷ See Goddard LJ in *Ettenfield v Ettenfield* [1940] P 96

¹⁸ Matrimonial Causes Act 1973 Section 48, consolidating a change made in 1965

¹⁹ See counsel's learned argument in *Morris v Davies* (1837) 5 Cl & F 163, 231, referring to Sir Harris Nicholas' resoundingly titled *Treatise on Adulterine Bastardy*; also the judge's advice to the Lords in the *Banbury Peerage Case* (1811) 1 Sim & St 153

²⁰ *Goodright's case* (1777) 2 Cowp 591,594

²¹ *Russell v Russell* [1924] AC 687, 699

Many of the old cases are peerage cases concerned with the devolution of titles of honour, a topic which in the 19th century combined the deferential reverence accorded to the peerage with the thrill of sexual scandal.

During the 19th century judges found the inflexibility of the original presumption increasingly repugnant to common sense. What of a full-term child who must have been conceived before marriage? What of a wife who had eloped and was (to the scandal of polite society) cohabiting with a lover, but with both husband and wife still living in England? These questions were explored in several cases which, even in the cold print of the law reports, bring home to us the punishment which Victorian society inflicted on an adulterous wife, whatever the mitigating circumstances – not merely social ostracism, but also loss of any right to maintenance, and any right to custody of her children, whatever their ages.

The *Aylesford Peerage Case*,²² decided by the House of Lords in 1885, is a striking example. The question was who should succeed the Seventh Earl of Aylesford, his younger brother or a son born to his wife in 1881. His wife had begun cohabiting with Lord Blandford, later 8th Duke of Marlborough, while her husband was in India, but he returned to England (and separated from his wife) four years before the son's birth. There was a question as to the admissibility of letters written in 1876 by the wife to her mother-in-law, and other letters which she wrote after the child's birth. Despite the evidential rule the Lords let in all these letters as part of the *res gestae*. The letters written in 1876 are set out in full in the law report and they are heart-rending, written by a mother who knew that she could not expect to see her two daughters (then aged four and one) again.

The deceased Earl's younger brother got the peerage. Lord Blackburn²³ restated the law in much more flexible terms:

²² (1885) 11 App Cas 1

“Now as to that, the case of *Morris v Davies*, a decision of this House, decides what, upon the balance of authority without that decision, I should have no hesitation in deciding, that such a presumption can be rebutted; and it also shows that it can be rebutted by the conduct of the parties, taking the whole *res gestae*, raising a strong and irresistible conclusion that the child born was not the child of the husband, but the child of another.”

Similarly in the *Poulett Peerage Case*²⁴ the House of Lords brushed aside both branches of the rule in a case where in 1849 a full-term son was born six months after the marriage of the heir to the Earldom of Poulett. He promptly separated from his wife and never lived with her again. His father’s longevity meant that it was 50 years before the question of succession had to be decided between two putative brothers with 34 years difference in age between them. The younger brother was successful. The Earl of Halsbury LC described the old “four seas” doctrine as “completely exploded.”

Although the evidential rule was reaffirmed by the Lords in *Russell v Russell* it applied only when the issue to be decided was legitimacy, not when it was adultery. This distinction, comprehensible only to a lawyer, meant that with the huge increase in the number of undefended divorces, the operation of the rule became more and more arbitrary.²⁵ Parliament has now abolished both rules. Their abolition can be seen as an example of a common law doctrine which had, with changing social conditions and attitudes, been progressively narrowed by the court by a process of distinguishing, but which needed statute law to administer its final *quietus*, as with the doctrine of common employment, or the “last opportunity” rule in tort.

The enactment of the Family Law Reform Act 1969 came at a time of rapid scientific progress. DNA evidence soon supplanted evidence about blood groups²⁶

²³ At p17

²⁴ [1903] AC 395

²⁵ See *Warren v Warren* [1925] P 107; *Ettenfield v Ettenfield* [1940] P 96, 103.

²⁶ Which had itself developed and become increasingly reliable: see Lord Reid in *S v S* [1972] AC 24, 41, and Lord Wilberforce in the *Amphill Peerage Case* [1977] AC 547, 573 (which was a sequel to *Russell v Russell*)

and provided a much more reliable guide to biological parenthood.²⁷ Part III of the Family Law Reform Act permits the Court to authorise (not order) tests to determine paternity. Under section 8 of the Children Act 1989 the Court can direct tests in the case of a young child. There is a good deal of case law as to the way in which the Court should exercise its discretion.²⁸ Sometimes, as in *Re F*²⁹ in 1993, the Court has declined to risk upsetting the relationships in a troubled but surviving marriage, after the wife had a child who might be illegitimate but had been accepted by both spouses as their child. But on the whole family judges take the view that it is better for all concerned to know the truth. In *Re F Balcombe LJ*, although reaching a different conclusion on the particular facts, set out the general rule as stated in *S v S*³⁰:

- “(1) The presumption of legitimacy merely determines the onus of proof.
- (2) Public policy no longer requires that special protection should be given by the law to the status of legitimacy.
- (3) The interests of justice will normally require that available evidence be not suppressed and that the truth be ascertained whenever possible. In many cases the interests of the child are also best served if the truth is ascertained.
- (4) However, the interests of justice may conflict with the interests of the child. In general the Court ought to permit a blood test of a young child to be taken unless satisfied that that would be against the child’s interests; it does not need first to be satisfied that the outcome of the test will be for the benefit of the child.”

These principles have not been affected by the welfare test introduced by the Children Act 1989.

²⁷ Bradney, Blood Tests, Paternity and the Double Helix [1986] Fam Law 378

²⁸ For a survey of the case law down to 1994 see Jane Fortin, *Re F ‘The Gooseberry Bush Approach’* 57 MLR 296.

²⁹ *Re F (a minor) (Blood Tests: Parental Rights)* [1993] Fam 314, 318

Neither the old strict standard of proof, nor the exclusionary rule in *Russell v Russell*, formed part of the law of Scotland. There was and is a presumption, rebuttable on the balance of probabilities that a child born to a married woman is legitimate. If a man marries a woman who already has an illegitimate child the circumstances may, but need not, raise an inference that he is the father. The House of Lords considered this question in 1971 in *James v McLellan*³¹.

Henrietta Howatson had an illegitimate child, William, in 1868. She married John McInnes in 1871, and two months later had another child, John. William was given the surname McInnes. John McInnes senior died in 1874. Lord Reid commented on the facts in prose as homely as Lord Denning's, but with main verbs:

“We must take into account the views of ordinary people prevalent at that time. As we are dealing with probabilities we can assume that those views were held by those people. It was not very uncommon for a man to put a young woman in the family way. If he did then the neighbours (and he himself) regarded him as under a strong moral obligation to marry her but they would not have thought there was any comparable obligation if the woman already had an illegitimate child by another man.”

Lord Reid inferred that William's name had been changed during the lifetime of John McInnes senior and went on:

“If the name was changed shortly after the marriage and William was John's son, the scandal would die down. The neighbours would think that all's well that ends well and co-operate. But if William was really another man's child any attempt to stifle the scandal was much less likely to succeed.”

Lord Reid's repeated references to scandal may seem a bit exaggerated to modern ears. But he was speaking of respectable tradespeople in Glasgow in the 1870s.

Perhaps the most remarkable Scottish case was *Gardner*³² which came before the Lords in 1877. Lord Cairns LC called it one of the most remarkable cases that had ever come before a court in Scotland. In 1839 Mr Gardner, who farmed near

³⁰ [1972] AC 24

³¹ 1971 SLT 162

Melrose, proposed to Miss Brodie but was rejected. He spent seven years in Australia and on his return she became engaged to him. On 29 August 1850 she had a daughter, Mary, whose birth was concealed. Mary was born in a hotel in Edinburgh and immediately separated from her mother. On 16 October 1850 they got married. Mr Gardner was an elder of Free Kirk but he disregarded his clergyman's appeal to him to recognise his daughter, although she regularly wrote to him as "Dear Father" from the boarding school to which she had been sent. In 1874 he offered Mary an annuity of £40 and a legacy of £1,000 if she would acknowledge that she was not his daughter. When she declined this offer, he started proceedings for the purpose of "putting to silence" his daughter's claim.

This singularly unattractive action succeeded at first instance, when both Mr and Mrs Gardner denied on oath that they had had sexual relations before marriage. Mrs Gardner claimed that she had been raped, either by an unknown assailant or by her brother in law's shepherd. Both appeal courts found this testimony incredible, and the circumstantial evidence for Mr Gardner's paternity irresistible. Lord said³³

"The facts which I have described would raise (I agree, with regard to Scottish law, not a presumption *juris et de jure*, but) a presumption of fact so strong that the man was the father of the child, that it would be extremely difficult to rebut or controvert it."

Finally, I want to put before you an issue of statutory construction which is still the subject of continuing litigation. It came before the Court of Appeal in four linked cases last January, and leave has been given for a further appeal to the Lords. So I shall express no opinion whatever about the likely outcome. But it is of relevance to my topic, since the issue could be described as the correct characterisation of the default position (a sort of presumption) prescribed in section 2(8) of the Damages Act 1996 as amended, and the correct characterisation of the Court's power, under section 2(9), to disapply the default position.

³² (1877) 2 App Cas 723

Subsections (8) and (9) are in the following terms:

- “(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of section 833 (2) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules.
- (9) But an order for periodical payments may include provision –
- (a) disapplying section (8), or
 - (b) modifying the effect of subsection (8).”

Except for those of you who specialise in cases of serious personal injuries, this needs some background explanation. The traditional approach to damages for personal injury – a single lump-sum award covering every head of damage that is admitted or proved – has been perceived as capable of working unfairly in claims for seriously disabling injuries, especially when the claimants are relatively young. Usually the unfairness is to the claimants, especially at times of high inflation. But there may also be unfairness to the defendant, or its insurers, especially if a young claimant dies much sooner than expected. These matters are fully considered by the House of Lords in *Wells v Wells*³⁴. In that case, decided in 1998, the Lords heard six days of argument and exhaustively reviewed the award of lump-sum damages for serious personal injuries, giving detailed consideration to the financial implications of the investment of damages in index-linked government securities (rather than a balanced portfolio). The Lords reaffirmed the general principle that damages should so far as possible provide 100% compensation to a successful claimant.

The Damages Act 1996 in its original form provided for awards of periodical payments only with the consent of both parties. Such an award is often called a “structured settlement”, an expression used in the 1996 Act in its original form but

³³ at 728

³⁴ [1999] 1 AC 345

omitted when it was amended by the Courts Act 2003. The 2003 Act inserted into the 1996 Act an entirely new section 2, section 2A and section 2B, containing a complicated code giving the Court power, independently of the consent of the parties, to order periodical payments. Section 2(8) and (9) are part of that code.

The immediate background was a claim for damages for severe personal injuries suffered by a 50 year old claimant, Mr Flora, who fell 35 feet from a ramp at Heathrow Airport.³⁵ The judge refused to strike out a claim for the exercise of the Court's discretion under section 2(9), and to exclude expert evidence of an economist comparing the RPI with other indices. The defendant appealed on the ground "that the judge had failed to recognise that the language of section 2(8) of the Damages Act 1996, when read together with section 9 of the Act, CPR r 41.8(1) and parliamentary intention, clearly established that in unexceptional cases the retail prices index was the index to which periodical payments were to be linked."

The Court of Appeal dismissed the appeal. Brooke LJ gave the leading judgment. He rejected³⁶ the argument

to "that in enacting section 2 (8) (9) of the 1996 Act, Parliament must be taken to have intended to provide compensation lower than that which would be awarded through adherence to the 100% principle if a periodical payments order was to be made. For the same reason I reject the argument that the courts should consider questions of affordability in determining what order to make because, as Lord Steyn said in *Wells v Wells*, policy arguments based on affordability are a matter for Parliament and not for the courts."

As to the argument that there would be an unacceptable waste of time and costs if expert evidence were regularly called in these cases, he said,³⁷

"If experience of the past is any useful guide, it is likely that there will be a number of trials at which the expert evidence on each side can be thoroughly tested. A group of appeals will then be brought to this Court to enable it to

³⁵ *Flora v Wakom (Heathrow) Ltd* [2007] 1 WLR 482

³⁶ para 29

³⁷ para 33

give definitive guidance in the light of the findings of fact made by a number of trial judges. The armies of experts will then be able to strike their tents and return to the offices or academic groves from which they came.”

In the meantime the Court of Appeal in *Flora* saw itself as holding the position, since it was doing no more than dismissing an appeal from the judge’s refusal to strike out the claim for exercise of discretion under section 2(9). But in the event *Flora* has given a lead which has been followed. My bare summary of Brooke LJ’s judgment does not do justice to its closely-reasoned discussion, which ranges from economic issues to the present state of the rule in *Pepper v Hart*.³⁸

The four linked cases (the first of which is named *Tameside & Glossop Acute Services NHS Trust v Thompson*) were all decided at first instance between November 2006 and June 2007. They came to be the group of appeals envisaged by Brooke LJ. They were all cases in which the claimants had been severely injured and liability was admitted. In all of them the first-instance judge had, in line with *Flora*, exercised the section 2(9) discretion and directed that periodical payments should be increased in line, not with the RPI but with ASHE (the Annual Survey of Hours and Earnings) for the appropriate occupational group (care assistants and home carers). The significant difference is of course that ASHE is based on wages, not retail prices.

The Court of Appeal (in a judgment of the Court delivered by Waller LJ) identified numerous issues. The first was

“whether, as a matter of law and statutory construction, section 2(8) of the Damages Act 1996 can only be modified in ‘exceptional circumstances’.

The second issue posed the same question by reference to law and precedent.

In these two issues the words “exceptional circumstances” are in inverted commas, indicating a quotation. Those words are not of course to be found in

³⁸ [1993] AC 593

section 2(9) (if they were, the issue would answer itself, though still leaving room for debate as to how exceptional the circumstances had to be). The quoted words do occur at the very end of Brooke LJ's judgment in *Flora*³⁹:

“It will then be for the trial judge to decide whether it is appropriate to use the powers given to him by Parliament in section 2(9) and to make such order for index-linking the periodical payments (if a periodical payments order is in fact made) as he considers appropriate and fair in all the circumstances, without being obliged to detect exceptional circumstances before he is at liberty to depart from the RPI.”

In the four linked appeals the Court of Appeal followed the lead given in *Flora*. So two different constitutions of the Court of Appeal have held that the default position in section 2(8) can be displaced fairly easily, in order to do what is appropriate and fair in the circumstances, without the circumstances being exceptional. The House of Lords will review these decisions, probably during the first half of 2009. In doing so the Lords may contribute some new thoughts to the interesting and difficult issues of statutory construction posed by section 2(8) and (9).

What conclusions can I invite you to draw from this brief survey of three very different presumptions? I cannot suggest anything very incisive or very profound. But section 184 of the Law of Property Act and section 2(8) and (9) of the Damages Act do illustrate, yet again, the importance and the difficulty of extracting the parliamentary will from language that might have been chosen to obscure, rather than disclose, the legislative purpose. By contrast in section 26 of the Family Law Reform Act Parliament was sorting out a tangle from which the common law could not entirely extricate itself without parliamentary assistance.

Sometimes the court's discovery (I might almost say invention) of the legislative purpose seems to be a matter of divination rather than rational exposition. In *Hickman v Peacey* the House of Lords might have discerned, in the

³⁹ para 37

parenthesis “(subject to any order of the court)” a power for the court to mould or even disapply the statutory presumption in circumstances where that was necessary to avoid an absurd or unfair result. In fact the three Law Lords who referred to the parenthesis treated it as obscure but irrelevant, apparently because it had not been argued that it gave the court any measure of discretion.

Probably such an argument would have failed, since in those days Parliament was less ready to confer on the court discretionary powers affecting property rights. Nevertheless it is surprising that the point was not considered at all. It remains to be seen what the Lords will make of the open-textured language of section 2(9) of the Damages Act.