

The Shaping and Misshaping of Identity through Legal Practice and Process: (Re)discovering Mr Kernott

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Abstract

The focus of this paper is the construction of identity within the context of English legal practice and process. Its subject matter is the protracted civil litigation that extended from a brief County Court hearing in 2007 to the Supreme Court judgment of *Jones v Kernott* [2011] UKSC 53. Taking as its theoretical basis recent work by Hilde Lindemann, *Holding and Letting Go: The Social Practice of Personal identities* (Oxford University Press, 2014) the author analyses the reported judgments of the appellate courts, as well as a recently recorded first hand narrative account of Mr Kernott, as a means to examining how far long-established legal practices and customs can operate to construct, hold and let go of personal identity.

Key words: Kernott, identity, narrative, personhood, counterstory

INTRODUCTION

The focus of this paper is the construction of identity within the context of English legal practice and process. By examining in detail the narrative accounts arising from a single course of litigation, and by analysing these through one philosophical view of the social construction of identity, the paper seeks to demonstrate how legal representation and the experience of legal processes can bring about the disintegration of self-identity, whilst at the same time shaping a particular identity that through the reported ‘facts of the case’ become a matter of permanent public record. Whilst this paper’s findings are particular to one reported case, the practices that it observes are commonplace, and on this basis the paper seeks to draw some general conclusions as to how long-established legal practices and customs can operate to construct, hold and let go of personal identity.

THE SOCIAL CONSTRUCTION OF IDENTITY

Steph Lawler observes that “‘Identity’ is a difficult term: more or less everyone knows what it means, and yet its precise definition proves slippery.”¹ It can refer to ‘both its public manifestations...and the more personal, ambivalent, reflective and reflexive sense that people have of who they are’² and

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¹ Steph Lawler, *Identity: Sociological Perspectives* (Polity, 2nd edn, 2014) 1

² *Ibid* 7

importantly for the purposes of this study, it has been recognised increasingly that identity even in this broadest sense of the term is ‘socially produced’ rather than being innate or ‘a property of the person’.³ It is the social construction of identity that forms the focus of this paper, within the context of the English legal system. It takes as its theoretical basis Hilde Lindemann’s recent work in this area where she argues that the ongoing, interactive process of constructing identities is essentially ‘a moral practice: it is the practice of initiating human beings into personhood and then holding them there.’⁴ On this basis, Lindemann identifies her study as being based upon a ‘naturalized moral epistemology’.⁵ This she describes as being distinct from ‘idealized moral epistemology’⁶ due to its focus on actual, lived-out practices, yet extended from the naturalised epistemology of moral philosophers who have sought to ground their work in the social sciences.⁷ She argues that whilst a social science approach can help to inform our understanding of human behaviours and motivations, the arts and humanities have an important and distinctive role to play here too; albeit one that is less easily defined and quantified. She states:

The humanities and arts yield helpful moral knowledge: historians can show us how morality changes over time; philosophy, literary studies, and cultural studies provide resources that help us think critically about distributions of moral responsibilities and the social orders they support. Novelists, poets, playwrights, and other artists can help us see the intricate ways in which morality works out – often painfully – in everyday life or show us how it might change for the better.⁸

Lindemann’s study might best be summarised then as a work of moral philosophy, grounded in social reality but pursued in the broader context of the humanities.

Lindemann dissects the process of constructing identity into four distinct elements and in so doing, provides a convenient analytical tool for this study. Firstly, there is some mental activity; thoughts or feelings, from which personality or a sense of ‘self’ can develop.⁹ Even this first-person perspective is to some extent, Lindemann argues, socially constructed since in my making sense of the “many

³ *Ibid* 2. A detailed examination of sociological texts on the topic of identity is beyond the scope of this paper. Lawler refers the reader to Robin Williams, *Making Identity Matter* (Sociology Press, 2000), Anthony Elliott, *Concepts of the Self* (Polity, 3rd edn, 2013), Anthony Elliott and Paul du Gay (eds), *Identity in Question* (Sage, 2009) and Paul du Gay, Jessica Evans and Peter Redman (eds) *Identity: A Reader* (Sage, 2000).

⁴ Hilde Lindemann, *Holding and Letting Go: The Social Practice of Personal identities* (Oxford University Press, 2014) ix

⁵ *Ibid*

⁶ *Ibid*

⁷ *Ibid*, xi. Lindemann cites as examples Albert Musschenga ‘Empirical Ethics, Context-Sensitivity, and Contextualism’ (2005) *Journal of Medical Ethics* 30: 467-90 and Joshua Knobe and Shaun Nichols, *Experimental Philosophy* (Oxford University Press, 2008)

⁸ *Ibid*, xi

⁹ Lindemann (n 1) 53-54

states of mind crossing my consciousness”¹⁰ I draw on master narratives “from the common store.”¹¹ The second element is the physical or bodily expression of these mental states; the public expression of private thought and “the raw data out of which others form their sense of me.”¹² Other persons’ *recognition* of this expression constitutes the third element, and the fourth is their *response* to what they see. This can happen in a way that causes an individual ‘to flourish personally and in...interactions with others’¹³ but it can be done in ways that are destructive; perhaps identifying an individual within a social group that is perceived to be inferior, so creating and perpetuating an ‘us’ and ‘them’ divide, or by holding an individual in an identity that is no longer relevant or appropriate, so refusing them (and us) the possibility of moving on and acknowledging an identity that more accurately represents them.¹⁴ Furthermore, although it is often the case that adults who are both ‘mentally and morally competent...can do the lion’s share of maintaining their own identities,’¹⁵ circumstances can arise where one, some, or even all four, of these components ‘misfire.’¹⁶ There are then multiple opportunities for aspects of a person’s identity to be misrepresented, mistaken or misconstrued.

IDENTITY AND PERSONHOOD

In this four-stage analysis of the social construction of identity, Lindemann draws our close attention to practices that are intrinsic to human society. They are forms of behaviour that people engage in ‘without thinking, automatically, or as we say, naturally.’¹⁷ Lindemann acknowledges too that they occur often simultaneously or at least much more quickly in practice, than her meticulous analysis might suggest. So it might seem that this participatory practice that Lindemann describes is after all simply her observation of human behaviour, or her interpretation of that behaviour as some form of sociological study. But Lindemann goes further than this. Referring again to the four stage process through which identity is constructed, she states:

Recognition and response are often matters of understanding who someone is and treating them accordingly. Whether these understandings are self-conceptions or others’ sense of who we are, they consist of a web of stories depicting our most important acts, experiences,

¹⁰ *Ibid*, 54

¹¹ *Ibid*

¹² *Ibid*

¹³ *Ibid*, x

¹⁴ *Ibid*

¹⁵ *Ibid*, 169

¹⁶ *Ibid*, 134

¹⁷ *Ibid*, 53. Lindemann recognises here that her generalisation may not apply to persons with severe cognitive disabilities or some forms of autism.

characteristics, roles, relationships and commitments. This narrative tissue constitutes our personal identities, which play a crucial role in the practice of personhood.¹⁸

This concept of the ‘personhood’ is fundamental to Lindemann’s approach. On this view, human life is a shared activity, and a person’s right to life includes the right to a level of social interaction that serves to affirm their identity *as a person*. Hence she defines it as ‘the practice of physically expressing *one’s personality* to other persons who recognize the expression for what it is and respond accordingly.’¹⁹ There is then a distinction between holding in personhood, and holding ‘in a particular identity’²⁰ and this distinction is of particular importance when considering whether either practice ‘exerts imperatival force’²¹ upon the actions of another. Lindemann asserts that ‘under ordinary, privileged circumstances...those who can be held in personhood must be so held by the other persons with whom they interact. Letting them go casts them out of social and moral life, and to live outside that is to have no kind of human life at all.’²² Holding someone in personhood, she says, ‘needn’t take much effort: ...eye contact, a smile, or a nod of recognition might be all that is required [but] [b]ecause the stakes for that person can be so huge and the claim on you is so small, it seems as if there is indeed an obligation to engage in this kind of holding.’²³ By contrast, determining the extent to which we are obliged to hold another person in a particular identity is a much more complex task. Here Lindemann concedes that ‘a great many considerations might have to be weighed in a judgment of this sort.’²⁴

THE SOCIAL CONSTRUCTION OF IDENTITY IN THE CONTEXT OF LEGAL PRACTICE AND PROCESS

Lindemann’s observations concerning the four elements of the social construction of identity are based around key stages in human development, beginning with identity formation in infancy and ending with a consideration of ‘identities at the end of life’.²⁵ This research adopts an analogous approach; by focusing its investigation of how the identity of the litigant is variously constructed, held and let go of around the extended ‘lifecycle’ the civil litigation process. Thus its remit extends from the steps leading up to the first instance hearing, continues through the appeal process and reaches forward to the formal reporting of the litigation and its subsequent uptake in the media.

¹⁸ *Ibid*, ix

¹⁹ *Ibid*, 97

²⁰ *Ibid*, 121

²¹ *Ibid*, 120

²² *Ibid*

²³ *Ibid*, 121

²⁴ *Ibid*, 121-122

²⁵ *Ibid*, chapter 6. Lindemann also gives specific consideration to ‘calling the fetus into personhood’ in chapter 2

Of course, it may be argued that the ‘life’ of the legal dispute starts much earlier than this; it begins in fact with a dispute between two or more parties that they may first seek to resolve through non-legal means. This is true. However, the aim of this research has been to analyse *law’s* creation of identity; which aspects of a litigant’s expressions do we recognise and respond to and in what way? And in our ways of recognising and responding, how to our actions serve to create, maintain or let go of the identities that are created? And to what extent are our practices positively constructive, or destructive, in the lived experiences of individuals who become involved in the litigation process?

A leading English civil law case, *Jones v Kernott* [2011] UKSC 53, provides the focus for this research. In so far as it has travelled through the English court system and been considered in four separate hearings, as a result of appeals lodged by the representatives of both of the parties involved at one point or another, the case presents us with an aptly ‘rounded’ subject of study. But other than it being a notably comprehensive in terms of its consideration by the courts, there is nothing particularly remarkable about the journey of this litigation through the English civil justice system. Similarly, it is significant but not unusual that the parties in the case, especially Mr Kernott, received considerable media attention as the litigation reached the higher courts. And since the Supreme Court’s decision in the case currently stands as the leading authority on a topical area of law (the rights of former cohabitants to the family home) it has been the subject of much debate and analysis among legal practitioners and academics. Within all of this legal discourse, the case of course bears the title of the litigating parties, *Jones* and *Kernott*, italicised through tradition and representing the ultimate personification of the point or points of law that the final outcome of their dispute established.

THE ROLE OF THE COUNTERSTORY

It is in terms of its sources that this research *is* unusual, since as well as drawing on case reports, court documents, newspaper reports, journal articles and other legal texts; it builds its discussion around Mr Kernott’s own narrative account of the litigation process.²⁶ This aspect of the paper stems from the author’s wider concern to ‘uncover the lost human stories of law’²⁷ through the recording and analysis of appellants’ first-person narratives. How accurately do the reported ‘facts of the case’ describe or appropriately shape appellants’ identities? Do the human beings that exist behind the ‘names of cases’ know that they lend their names to established points of law? And what might happen if we

²⁶ This was recorded in an interview with Len Kernott in November 2013 and has been supplemented by ongoing correspondence via telephone. I am sincerely grateful to Mr Kernott for participating in this research and for allowing me to publish extracts from this narrative.

²⁷ See further D Watkins ‘Exhuming Human Remains from Case Law: The Role of Narrative Research in Legal Education’ [2009] 3 Web JCLI and D Watkins, ‘Recovering the lost human stories of Law: finding Mrs Burns’ (2013) Law and Humanities Vol. 7 No.1, 68

ask them? Will they recognise themselves? In taking this approach the author draws on well-established 'law and narrative' scholarship that highlights the role of particular stories as a means to challenging long-established modes of behaviour or practice.²⁸ Lindemann's earlier work *Damaged Identities: Narrative Repair*²⁹ has also been influential here. Lindemann contends that 'just as a counterstory could be developed by an individual to define herself morally, so a counterstory that reidentifies an individual can be generalized to revise a moral understanding about a group to which the individual belongs.'³⁰ On this basis, it is surely possible for us to take Mr Kernott's counterstory, and see it as a reasonably typical story of a lay person's experience of litigation. We have already concluded that whilst *Jones v Kernott* is a notable case because of the points of law it establishes, there is nothing particularly noteworthy about its procedural aspects. And in looking at this particular story of litigation as a means through which we have constructed Mr Kernott's identity, this paper constitutes a re-telling of commonplace litigation practice and process that might cause us to reconfigure that process, and so prompt us to see it differently. As a means of emphasising this different perspective, extracts from Mr Kernott's first-person narrative are presented verbatim in the forthcoming discussion.

IN THE BEGINNING...

I met Miss Jones in or around about 1980/81 where we went out for it must be three years before we had our first child. And when I first met her she had a house share then moved into a mobile home. And then I moved in with her when she was pregnant with my first child in 1983 for six months. And we bought a bungalow together which was in need of renovation. In 1986 we had another child and our life was very busy in rebuilding the property, when we both worked together to make a nice home for our children and us...

It was how things should be you know like I was so much in love and I think her with me. And I used to train a lot and go out with my mates sometimes on a Friday night and do the man thing, as you do. And we had some good holidays. As I say we had some good holidays in America, we took the kids to Disney World and we were like a very tight unit, it was lovely. It's how things should be, how I think how couples should be.

²⁸ See for example Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1988-1989) 87 Mich. L. Rev. 2411; Mari J. Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story', (1988-1989) 87 Mich. L. Rev. 2320; Richard Delgado 'The Inward Turn in Outsider Jurisprudence' (1993) 34 Wm. & Mary L. Rev. 741; Patricia Ewick and Susan Silbey 'Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative' (1995) Law and Society Review, Vol. 29, No.2, 197; Martha-Marie Kleinhans 'Rewriting "Outsider" Narratives' (2007-2008) 2 Charleston L. Rev. 185

²⁹ Hilde Lindemann Nelson, *Damaged Identities: Narrative Repair* (Cornell University Press, 2001)

³⁰ *Ibid*, 19

And, as I say, we both worked and we worked for our family. And in 1993 just things were different. Things seemed a bit distant and I moved out the house 39 Badger Hall Avenue into a friend's house thinking that I'd be back in the property, you know, just going through one of these glitches that a normal couple do; relationships are hard they're not always...you know you've got to work at them. I was expecting to be back together within about a week. But it didn't materialise. And my son must have been about seven or eight and my daughter ten. And it was I don't know a change of lifestyle I was living missing my family and just hoping and praying that I'd be back together with them. It was just like a nightmare you sleep in one bed in your home and then you're sleeping on a bed without your family there waking up not next to your partner and getting your kids up. Just the normal things that people do.

So for a couple of years I was to and from properties with different people, my mates and that and I decided to buy a bungalow because I needed to have roots again. I bought a bungalow that needed renovation and I was hoping that the money that I would get from my other bungalow would pay to do things. But in the meantime I was seeing my children...

In this recounting of the historical circumstances that surrounded the legal dispute between Mr Kernott and his former Partner, Ms Jones, it is apparent that Mr Kernott's sense of self is expressed primarily with reference to his relationships with others; his former partner, his children and his friends, and is legitimised through repeated references to his perceived norms of social behaviour; "how things should be"... "a normal couple"... "normal things that people do"... "do the man thing." This form of expression allows him to create a credible picture of himself as a 'normal bloke' living a 'normal life'; once part of a couple, bringing up children, going on family holidays, going to the gym. It is an example of that which Lindemann describes as 'the public expression of private thought... "the raw data out of which others form their sense of me"' or, in other words, the second 'expressive' stage in Lindemann's analysis. As Lindemann acknowledges, all such expression is necessarily selective.³¹ In presenting our thoughts and ideas to the world, we do so in a way that either consciously or subconsciously emphasises aspects of ourselves that we wish to project to a particular audience.³² So whilst the description that Mr Kernott gives here is admittedly selective, we all possess and consistently use this privilege in the manner in which we present ourselves, without losing claim to authenticity. We remain free to question, affirm or reject Mr Kernott's expression of identity here; to hold on to or let go of the identity of the 'normal bloke' that he portrays.

³¹ Lindemann (n 4) 97-98

³² *Ibid*, 98

This form of expression contrasts significantly with Mr Kernott's first expression of himself, or his story, in a legal context.³³ In a letter dated 4 March 2008, Mr Kernott's solicitor writes 'Dear Len. **Re: Ms Jones – The Property.** I enclose a copy of your witness statement which we completed following our meeting last week and you signed it.' The language here is indicative of how witness statements are commonly prepared; it is *your* statement and *you* signed it, but *we* completed it. Mr Kernott's is a mediated statement, set out in a form that is acceptable to the court, some twenty-two numbered paragraphs, comprising of mostly short, factual sentences: 'I met the Claimant Ms Jones in 1980 or 1981 and we started a relationship. We did not live together to begin with.'³⁴ 'We instructed Solicitors and Badger Hall was purchased in joint names of myself and Ms Jones who sold her mobile home at the same time.'³⁵ It contains of course a great deal of information that will be of use to the court and ends with Mr Kernott stating sincerely that 'I believe the facts stated in this Witness Statement are true.' In terms of providing the court with an outline of the 'facts of the case' the witness statement is sufficient. But as an expression of the identity of Mr Kernott it is flawed or misshapen, in the sense that it constrains the manner in which is able to present himself. And so, in Lindemann's terms, there is a 'misfire' in the second component, or 'a faulty story' that may cause the remaining components to misfire, unless its faults are recognised and restored by other means.³⁶

The Disorienting Effect of Legal Proceedings and the Disintegration of Personhood

The form of the witness statement is significant also in that it strips away from Mr Kernott all of the 'props' or supports that he leans upon heavily in validating his self-identity. There is no room in a court document for overt references to perceived norms of social behaviour, so Mr Kernott loses, or has taken from him, his usual terms of reference. He cannot claim to be a 'normal bloke' when telling his story in the in the context of legal proceedings. The litigation process serves also to remove him, or at least distance him, from the relationships that he relies upon in maintaining his identity as a father, as part of a broken relationship, but nevertheless in his view, still as a part of a family.

Prior to the onset of the dispute, Mr Kernott remained on reasonably good terms with his former partner, but of course this became strained as he sought to persuade her that he needed to release his share in the property. Once the dispute became a legal one, any direct communication between the parties came to an end, and animosity increased. The relationship between Mr Kernott and his children also became more and more strained as the litigation proceeded. He explains:

³³ Mr Kernott's witness statement, dated 28 February 2008

³⁴ Paragraph 2 of the witness statement

³⁵ Paragraph 5 of the witness statement

³⁶ Lindemann (n 4) 134

I went to see a solicitor and explained the situation he said to me write down everything you spent in the house blah, blah, blah what you've done and he took it from there. She didn't have a solicitor this time because I don't think she believed it was going to happen. And then [he] sent her a letter and then she had to go and see a solicitor obviously and that's when it started. Communication sort of cut off. And it was horrendous. It was sad, it was really sad. There's nothing to be proud of. So that's when the letters started and the day was set for court...But it was just seeing that person who you loved sort of hating you. And now it's becoming public, it's not personal anymore.

Although prior to the commencement of legal proceedings, Mr Kernott had continued to call in at the former family home; celebrating the children's birthdays there, for example, or when calling in to pick up his children, this ceased when the litigation started: *No...we didn't see each other. I used to pick Dean up when I took him boxing...and things and I used to wait for him outside. And if I ever picked Lauren up well she was in university so it was I picked her up outside, I used to pick the kids outside the house. But it was wrong because that's my house. You know I'm not allowed in it no more. It's surreal. As I said before it's like a bad dream, you're waiting to wake up but you never do.*

Although he was hoping to recover 25% of the value of the property at the first hearing, Mr Kernott was awarded 10%, and his former partner 90%. The decision was appealed: *So we got the appeal in... Started the proceedings for the appeal and... the more it goes to court the more it's going to cost you. And the more emotion...the more you start hating each other.* The appeal was dismissed in the High Court, and a further appeal was made by Mr Kernott's solicitor to the Court of Appeal.³⁷ After the Court of Appeal hearing, Mr Kernott recalls: *Actually I remember the first court of appeal we got in the same carriage on the train home, on the underground, from the underground to Fenchurch Street and she was in the same carriage and it was really God we're just hating each other now. It was strange... I tried to get another carriage but obviously the doors were shutting because it's obviously embarrassing for her as well. Because I was with someone, I was with the understudy and she was on her own. So, as I say, it was a strange... And then we got handed down 50/50.*

Mr Kernott's relationship with his daughter now came under particular strain; *I had a couple of arguments with my daughter over things...and I phoned straight up and apologised... it just seemed arguing with my daughter was the biggest horrible..., you know, it is horrendous. I hated myself for upsetting her. But she wouldn't see reason and I felt really bad about that. It was awful... it was horrendous it was. I don't know... it was horrible.* Following the Court of Appeal 50/50 decision Ms Jones' solicitor appealed and the case went to the Supreme Court, where the decision of the Court of Appeal was reversed to the original 10/90% split in favour of Ms Jones.³⁸ During this final stage in the litigation, the former couple's children accompanied their mother to the Supreme Court; *And it*

³⁷ The High Court judgment is reported at *Jones v Kernott* [2009] EWHC 1713 (Ch) and the Court of Appeal judgment at *Kernott v Jones* [2010] EWCA Civ 578

³⁸ The Supreme Court judgment is reported at *Jones v Kernott* [2011] UKSC 53

was seeing my children with Miss Jones the other side, to the right of me, that was very, I don't know, heart breaking. And it was I don't know it was just surreal. It was "this isn't right, it's crazy."...I don't know, we were hating each other at the time. And as I say seeing my kids... Dean come up, my son, and had lunch with me and Lauren had lunch with her mum, Miss Jones.

Since the conclusion of the litigation, Mr Kernott and Ms Jones continue to live nearby one another in the same town but have completely severed all contact; *I've convinced myself that she doesn't exist....I can be in the same room as her because if my daughter ever gets married it's going to be awkward. But I will never row with her because I just don't want nothing to do with her.... I've seen her up here...a couple of times in the supermarket because she only lives round the corner to me, so I see her in her car a lot but we just look the other way. She's obviously [feels] the same...* It is notable that Mr Kernott expresses here feelings of shame and discomfort regarding his involvement in the litigation *there's nothing to be proud of*; particularly with regard to his daughter; *I hated myself...I felt really bad.* These are accompanied by increasingly antagonistic feelings for his former partner, which he presumes are reciprocated, there being repeated descriptions of their *hating each other*. This indicates that Mr Kernott's sense of self-worth diminished rapidly during the litigation process and consequently he reveals increasing levels of disorientation; *strange...this isn't right...it's crazy...surreal.*

THE CONTINUING CONSTRAINT OF EXPRESSION

Foundational to Lindemann's explanation of the social construction of identity is the ability of the person to give some verbal or physical expression to their thoughts. We have seen already that although Mr Kernott is invited to provide a written factual account of the dispute, the form in which this account is written, constrains his ability to provide the court with a full account of himself. Subsequently in giving oral testimony in court Mr Kernott's narrative is severely constrained by the manner and form in which it is constructed. Drawing on the work of Atkinson and Drew,³⁹ Steven Cammiss and this author have noted elsewhere the reasonably obvious point that courtroom narratives are constructed 'within the question and answer adjacency pair...[and] witnesses, therefore, are rarely given free rein to tell their story to the court.'⁴⁰ Mr Kernott describes his experience of this as follows:

³⁹ J.M. Atkinson and P. Drew, *Order in the Court: The Organisation of Verbal Interaction in Judicial Settings* (Macmillan, 1979)

⁴⁰ The point is made within a discussion of narrative constructions in the trial process, seeking to demonstrate that "the story of the trial can be just as important as the story in the trial in influencing the outcome." See S Cammiss and D Watkins 'Legal research in the humanities' in D Watkins & M Burton (eds) *Research Methods in Law* (Routledge, 2013), 71-84, at 77.

I went in the court and didn't want to get personal because she's the mother of my children and I thought it would just be a straight forward answer some questions or whatever, but it wasn't. And when Miss Jones got up and said she just got really nasty and personal and that set the tone of the next court... it must have been about three hours it took the first case it was only short and simple. And afterwards we...just had a quick discussion, the judge will come to a conclusion, when he does we'll let you know... And then a few weeks afterwards it was handed down and I got 10% to 90...

Perhaps more importantly, Mr Kernott did not at the time appreciate that his testimony in the County Court hearing would be the sole occasion, throughout the entire litigation process, when he would be invited to speak in court. In accordance with long-established rules of procedure, Mr Kernott was not invited to speak again in the higher courts, as he was represented by counsel. This constitutes a complete blocking or shutting down of his ability to express his views – a complete ‘cease fire’ as opposed to a ‘misfire’ of the second component of Lindemann’s analysis throughout court proceedings that spanned over a three year period.⁴¹ As Mr Kernott’s narrative now demonstrates, this had a profound effect on his ability to maintain his sense of identity in the context of the proceedings. With regard to the High Court, then Court of Appeal hearings he states:

I expected to speak because there were some things that were said in the first court case that I wanted to readjust... but it wasn't allowed. So that was frustrating... You just sit there because you're sort of overcome it's like this daunting thing. And it was like a big chamber your voice echoed. And it was just strange. And it was only a judge and a clerk in the room... That was it. That took about two hours that one, it was even less than the first one. And then we just went out and he said we're going to have to, you know, obviously wait until we hear what he's got to say... So that happened in another about a month. And it was the 10% again...

And then it was this big one, it was the same court but a different room where there were more people. And it was in front of three Lords and you think they've got to see sense and I was expecting to be able to talk to get my point of view across. But I was never allowed to do that. You sit there and her barrister is telling the judge and you just want to get up and say, "Hang on a minute that's not right" but you can't you're not allowed, you've just got to be there for the hearing and it's just your barrister speaking, and the Lords are asking them questions.

But they're talking about you...they're not talking to you. They're talking about you to someone else. And it's strange. You don't get much eye contact with them because they're not talking to you. But it's

⁴¹ Ms Jones began proceedings in Southend County Court in October 2007. The first hearing took place at Southend County Court in April 2008. The High Court hearing took place on 12th May 2009, with the decision being given on 10 July 2009. The Court of Appeal hearing took place on 3 March 2010 and judgment was given on 26 May 2010. The hearing at the Supreme Court took place on 4th May 2011, with judgment given on 9 November 2011

about your life, your future or fairness and you think I just want to...well hang on a minute this is not right. I could have done more, of course I could have done more... but it was "ask me why, talk to me." But they're not. And that's the thing. But you just want to get up and scream. And then it's closed they have an adjournment, have some lunch, went back in - you just want it over and done with because you think what are you doing here? It's out of your hands.

Finally, when referring to the Supreme Court hearing, Mr Kernott explains

I put my hand up. I wanted to jump up but it was jumping up in front of loads of reporters behind me and when they were saying things...tutting, "This isn't right." "What?" You're going, "No that's not how it happened." But no one wanted to, you know, as I say they were talking about you rather than to you. And then people were writing things behind me down and it was just.. no.. it was out of my control. It was other people doing the talking. It was really strange...you just want to get up and say everything, you know...you just want to get up and say everything. And I was going round and round in...I'm going to say this and I had speeches to give out. But it doesn't work because how you perceive something isn't how it is on the day. And you're thinking I'm going to get up there I want to be so confident and get everything across and they're going to, "Well he's not a bad bloke is he? He's done well." And it's just the way it is and it doesn't happen. And you get a mind-set and it wears you down, you're going over the same thing all the time...I thought there's going to come a day when they'll want to hear what our intentions were again. And I was always...thought no someone's going to look at me and say, "Well, Mr Kernott, stand up" but we've done all that. But I had this concept of just I want to get up and say this speech and everything's going to be alright.

There is evident here a very strong desire for an opportunity to express a view, to reassert an opinion, to create an opportunity for others to acknowledge him at least as 'not a bad bloke.' But arguably by this stage, although he remains physically present as an appellant or a respondent at each court hearing, Mr Kernott as a person had largely disappeared. This is evidenced most powerfully by his experience of being refused admittance to the court room for the final hearing:

So about a year later it went to the Supreme High Court and...And we sat down in a room with my barrister and my lawyer. And then I went in the court room which then I wasn't allowed in because it was full up. And that was when I just said to the security, "I'll go home then." And then my barrister said to the security, "It's Mr Kernott" and he said, "Oh, down the front."

A LOSS OF AGENCY

At this point in the paper, the reader, and perhaps especially the legal practitioner, may wish to issue a strong reminder that Mr Kernott, acting under his own free will, instructed a solicitor and then a

barrister to act for him in his dispute with Ms Jones, and so he voluntarily gave up his right to address the higher courts. He could, at least in theory, have represented himself during the trial process and so spoken freely on his own behalf at each hearing, had he chosen to do so. This is acknowledged.⁴² However, the concerns of this paper relate to a loss of agency that occurred in the course of the legal proceedings, which is presented here as essentially a moral issue, rather than a legal one. Mr Kernott's legal representatives had a duty to represent his case to the best of their ability and they did so. However it is argued that they, together with all others involved in the proceedings, held also a moral duty to respect his autonomy. Lindemann argues that 'respect for autonomy, notions of personal responsibility, and individualized conceptions of moral agency...are widely shared in westernized, postindustrial societies. In the form of life characterised by those moral understandings, individuals are held to account for how they conduct themselves; we are expected to lead our own lives, not the lives of others.'⁴³ In other words, whilst it is conceded that Mr Kernott relinquished the right to represent himself in court, he did not relinquish that which Lindemann terms 'the freedom to shape...[his] life.'⁴⁴

Together with expressing his frustration at not having an opportunity to speak in court, throughout his narrative recollection of many aspects of the legal proceedings, Mr Kernott expresses the view that his dispute with Ms Jones escalated to an extent and at a pace that was beyond his control. His narrative also provides us with some clues as to how this occurred. Although Mr Kernott was the first to seek legal advice, it was Ms Jones who issued proceedings. Mr Kernott anticipated this, but envisaged that the matter would be resolved conclusively at the county court hearing. He explains:

[It was] on the court day that Miss Jones' solicitor offers that money to my solicitor. And he turned it down....So they turned that down, my solicitor turned that down. And they went into court I got up in the stand... I met the barrister on the day. He seemed alright. Not in my world...Very well spoken. Obviously educated...but he's a barrister from a chambers. It was them and us sort of thing. You had your faith in him because that's what it was. But it was just when they have to wear the gowns it's just daunting... I met him actually in a room in the court house, he come in with...my solicitor...so we discussed a quick brief, you know, what's going on. He had to go and meet the judge before the case. And he come in and said, "I haven't got a lot of faith in this judge. If we lose we'll appeal." And that's what happened... it must have been about three hours it took the first case it was only short and simple. And afterwards we...just had a quick discussion, the judge will come to a conclusion, when he does we'll let you know... And then a few weeks afterwards it was handed down and I got 10% to 90...

⁴² Although the situation is of course not as simple as that.

⁴³ Lindemann Nelson (n 29) 105

⁴⁴ *Ibid*, 104

My solicitor called me, I saw my solicitor and he said, "Don't worry about it we're going to appeal against it because it's outrageous, you know, 10% it's never been heard of." It has but it's very rare. So we got the appeal in... I don't know. I was expecting it to go up because I kept getting information from my solicitor that that was outrageous 10% it can only go up. That's why we appealed. Because he thought that was outrageous.

I went to court... a massive place. And went in there you go through security, it's just a different world. It was such a different world...Same barrister...My solicitor turned up and I went with his understudy...But it's just in that building and it's just strange you shouldn't be here. And then, as I say, the judge then said, "It shouldn't even have come to this, this is stupid." That's what he said, you know...You just sit there because you're sort of overcome it's like this daunting thing. And it was like a big chamber your voice echoed. And it was just strange. And it was only a judge and a clerk in the room. There was no...I think there was one extra person there doing a thesis for his university thing. And it was just, you know...That was it. That took about two hours that one, it was even less than the first one. And then we just went out and he said we're going to have to, you know, obviously wait until we hear what he's got to say...So that happened in another about a month. And it was the 10% again. But in the meantime it was ... "how are we going to appeal...don't worry about a thing, this is outrageous we're going to appeal." I was never asked "do you want to appeal?" "Do you want to go this far?" It was "everything's in place, the bundles are there, it just goes to a higher part of the court." And then it was this big one [the Court of Appeal], it was the same court but a different room where there were more people.

[Here] I even shook hands with her barrister. Because it was, I don't know, he was sort of more my level. They were talking now and again, the two barristers, and everyone had...left and I was waiting and he was alright. It was his job and he was only doing a job. It was strange, I shook his hand. He come up and talked to me, you know, "All the best" and it was like, more friendly than my barrister, it was really strange... But he's being a man I suppose he's got to level with me. But it's something that he's working for Miss Jones, but deep down does he know how I'm feeling as a man.

I got a phone call...I was at work it must have been about four months, three or four months [later] and I was at work in the ice-cream van, got a phone call... and I can remember the words he said. He said, "Don't let's get excited but you've won your court case. You've got awarded 50/50." ...my solicitor kept saying he'd tried to get hold of her solicitor and it seemed like it was going our way she's not going to appeal against it. So that was a relief... And I thought this is the conclusion, it's over and done with and then procedures start she'll have to sell the property, she'll still have £100,000 out of it to go and buy a flat or whatever, you know, but she's got £100,000 like we both have...And then it was right up until the deadline of your appeal, you're allowed to appeal, she done it within the last hour. And then I got a phone call the next day saying she's going to appeal against it,

she's going to go to the Supreme High Court because they granted her permission, is it permission to appeal?

So...now I knew it was going to go to back to how it was. But I did discuss with my solicitor will they go 20, 30 or 40. He said no it either be 10 or the 50 that I was awarded. So that's what you got, you know, if it was 30 it wouldn't be so bad. But it's just money is becoming...it's just becoming a snowball thing it's just money, you know, it's daunting they've never given any figures but deep down you're talking thousands...

[At the Supreme Court it was the] same barrister...same company...We'd only see each other on the day. It was, I don't know, how can you get your life in a couple of minutes? you know, it's strange. But I felt, not a game to him, but I was just another, you know, obviously he'd never been to the Supreme High Court it was an adventure, and it would be good if he won it would have been brilliant for his company. But I don't know we just become a bit of fodder I think. It's just the way it is. You win or lose. If they win they're going to be the best barristers in the town; and if they lose it's just another case tomorrow. And it's just how it is...when it was handed down I got a phone call...I just got a phone call from a secretary saying we're so sorry and everyone's distraught that we've lost the case. And "you can come and see [your solicitor]."

Again the reader, or our imaginary practitioner, might wish to point out at this stage that Mr Kernott is a competent adult and in just the same way that he had instructed legal representatives to act for him; he was free to disagree with their suggested courses of action. Solicitors and barristers act upon the instructions of their client; so even if Mr Kernott was not free to speak in court, he remained at all times free to issue an instruction to his solicitor to settle the claim, or to withdraw from the proceedings. But when we view such claims through the perspective of Lindemann's theory, we begin to understand that this idea of Mr Kernott being free to 'issue instructions' to his legal representatives, is overly simplistic. Lindemann disputes the idea that the exercise of moral agency, or my putting into practice exercising the freedom to shape my own life, is a capacity that I possess merely by virtue of my own competency.⁴⁵ Rather, based on her more general assertion that identity and agency are closely connected, Lindemann contends that 'freedom of agency requires not only certain capacities, competencies and intentions that lie within the individual, but also a recognition on the part of others of *who one is*, morally speaking.'⁴⁶ And in addition 'I must see *myself* as a morally trustworthy person if I am to act freely. Both others' recognition that I am a morally trustworthy

⁴⁵ *Ibid*, 23

⁴⁶ *Ibid*, 26

person and my own sense of myself as a morally responsible person... are required for the free exercise of moral agency.⁴⁷

We have seen already that within the context of legal proceedings, Mr Kernott very rapidly loses his sense of self; he is in alien environment and disorientated. By contrast, this is very familiar territory for his legal representatives. This is what they do. And so these factors combine to foster an environment in which Mr Kernott follows his solicitor's advice without question, and places unquestioning faith in his barrister. These are professionals who can be trusted to navigate these surroundings successfully, as opposed to Mr Kernott who, in his own eyes and theirs, cannot. In accordance with established practice, Mr Kernott encountered his barrister only at court, on the day of each hearing. They developed no relationship (*It was them and us sort of thing. You had your faith in him because that's what it was*) and spoke only very briefly at each hearing, causing Mr Kernott to ask *how can you get your life in a couple of minutes, you know, it's strange*. Returning once more to Lindemann's view that 'personhood is the practice of physically expressing one's personality to other persons who recognize the expression for what it is and respond accordingly',⁴⁸ we can see that Mr Kernott needs instinctively to express his views to his barrister, to present himself and his story, in order to be recognised and held in personhood. But there is very little time for Mr Kernott to do this and, in any event, little or no recognition or response on the barrister's part to this briefest of expressions. By contrast, in a simple act of engaging in friendly conversation and shaking hands with him, Ms Jones' barrister conveys a sense to Mr Kernott that he is 'levelling' with him; and that *he know[s] how I'm feeling as a man*. If only for an instant, Mr Kernott appears 'as a man' or even as 'a normal bloke' in the litigation process, as a result of being given an opportunity to engage in a 'normal' conversation, followed by a recognition and response that holds him in his identity; "*All the best.*"

Now, with the benefit of hindsight, Mr Kernott questions this wholesale relinquishment of agency that took place in the litigation process; suspecting that he represented a 'bit of fodder' for a game, or adventure, that his barrister engaged in. Whilst we can appreciate this view, a slightly more generous explanation is equally possible. The lawyer-client relationship can be compared here by analogy to that of doctor and patient. Both lawyer and doctor possess the knowledge and professional qualifications necessary for 'doing what's best' for the patient or client. Lindemann asserts that 'members of special social and professional groups hold special, atypical values. Something led them to choose their profession; they believe in its goals and believe it can do good things. They...favour the use of society's resources for their profession. This is not necessarily because they will earn more if society's resources are devoted to their sphere; it is more because they have an unusual view about

⁴⁷ *Ibid*, 22

⁴⁸ Lindemann (n 4) 97

the value of the services in the field to which they have given their lives.⁴⁹ She offers this as one explanation for the conflicts that can occur between a doctor and her patient (or the patient's family members), over the issue of continuing life-prolonging treatment, where the patient is terminally ill and she, or her relatives, wish treatment to cease. The patient may wish to end her life in a way that most closely reflects her identity, as constituted by a wealth of stories and experiences that she and her family share, but the doctor wishes to hold the patient in her identity as a medical case, for whom continuing treatment can alleviate suffering and prolong life.⁵⁰ Applying this analysis to Mr Kernott's legal representation, it is entirely possible and indeed probable, that Mr Kernott's legal representatives strongly encouraged him to appeal the county court and high court decisions, based on their genuine and legitimate belief that the award of 10% was 'outrageous'⁵¹ and because they possess an unusual and perhaps overly optimistic view of the potential benefits of prolonged litigation.

THE CREATION OF MR KERNOTT'S MISSHAPEN IDENTITY

So far this paper has focused mainly on the process through which Mr Kernott's sense of identity diminished to the point of disappearance in the course of the *Jones v Kernott* litigation. In the following discussion, it will seek to demonstrate how conversely, a misshapen form of identity for Mr Kernott was created, nurtured and sustained through the course of the litigation process.

The primary source for discovering Mr Kernott's identity in this context is the County Court hearing on 21st April 2008 since this was the occasion on which Mr Kernott was able to express his views, both orally at the hearing and in writing prior to the hearing, albeit in a constrained fashion as we have already seen. Aspects of Mr Kernott's witness statement have already been discussed and further aspects are drawn upon in the forthcoming discussion. Of course, in terms of gaining access to Mr Kernott's oral representations and the responses to these in court, a transcript of the trial would have provided the author with an additional rich resource for analysis. In accordance with established procedures, the trial was audio-recorded. However, the recording has been destroyed and no transcript was ever created.⁵² This leaves the judgment of Dedman, J. as the only 'first-hand' response to Mr Kernott's account.

⁴⁹ *Ibid*, 167

⁵⁰ *Ibid*, Lindemann considers extensively the issue of identity at the end of life, and 'what and when to let go' in chapter 6

⁵¹ *Ibid*, 167-168. Lindemann acknowledges that the 'principle of respect for patient autonomy' usually 'swings the burden' in favour of respecting the patient's choice but she goes on to make the point that 'in the physician's epistemic environment, refusal of treatment can be seen as a sign that the patient is not mentally competent and therefore not capable of exercising autonomy. So, often, the bias in favour of treatment remains in place.' The issue of autonomy in decision making is returned to in the final part of this paper.

⁵² Email correspondence from Southend County Court to the author dated 15 January 2014 explains this. Later correspondence dated 25 April 2014 confirms that: 'Due to the age of this case I am afraid that the Court no

This judgment stands too as the primary source of ‘the facts of the case’ and as such is treated with some reverence in the higher courts, despite being the subject of an appeal. As Nicholas Strauss QC explains in the High Court; ‘Turning to the facts of the present case, I must take these almost entirely from the judgment. There was some dispute as to the facts between the parties, and both were cross-examined, but there is no appeal against the judge’s findings of fact and I cannot go behind them.’⁵³ In the Court of Appeal, Jacob LJ offers the following explanation for this: ‘the Judge, having seen and heard the parties was in a better position to decide the matter – and particularly the intentions of the parties – than we are.’⁵⁴ And although he decides that in this case ‘the evidence, findings and reasoning simply provide no support’⁵⁵ for the judge’s decision, Rimer LJ yet agrees in principle that ‘an appellate court must exercise caution before reversing a judge on the facts.’⁵⁶ This view is repeated in the judgment of Lady Hale and Lord Walker in Supreme Court: ‘The trial judge has the onerous task of finding the primary facts and drawing the necessary inferences and conclusions, and appellate courts will be slow to overturn the trial judge’s findings.’⁵⁷

As Jacob LJ affirms, it is only Dedman, J. who writes his judgment ‘having seen and heard the parties’⁵⁸ and this increases our expectation that we will ‘find’ Mr Kernott in these much-hallowed ‘trial judge’s findings’; they are surely the ‘birth records’ of his legal identity and they will give us some insight establishing which aspects of his identity were responded to and acknowledged, and which were let go of in the course of the first hearing. How surprising then, that Mr Kernott possesses no copy of this judgment. No copy of the judgment was retained by the County Court and at the time of writing, the author’s attempts to retrieve a copy of this judgment from Mr Kernott’s legal representatives or from the higher courts have proved unfruitful. Mr Kernott’s ‘birth records’ seem to have disappeared. As the litigation proceeded to the higher courts, the judgments were reported and these provide us with second, third and fourth hand accounts of ‘the facts of the case’ as established in the first hearing. As we will see, whilst they are loathed to overturn Dedman, J.’s findings, judges in the higher courts have the unavoidable opportunity of emphasising (holding on to) or minimising (letting go of) aspects of this first judgment, and indeed aspects of the intervening appeal judgments, as they see fit. In so doing, they work to emphasise or minimise aspects of Mr Kernott’s identity that these ‘facts of the case’ reveal.

longer holds any papers relating to the case, is able to print any orders from its computer system or has a copy of the tape recording.’

⁵³ *Jones v Kernott* [2009] EWHC 1713 (Ch) para. 41

⁵⁴ *Kernott v Jones* [2010] EWCA Civ 578 para. 109

⁵⁵ *Ibid*, para. 83

⁵⁶ *Ibid*

⁵⁷ *Jones v Kernott* [2011] UKSC 53 para. 36

⁵⁸ *Kernott v Jones* [2010] EWCA Civ 578 para. 109

Ice Cream and Benefits

In his witness statement, Mr Kernott explains that during the course of his relationship with Ms Jones, he worked as ‘a self-employed ice cream salesman’ mostly in the summer and in the winter he also did some building work for friends.⁵⁹ Also in his narrative account of his experience of the legal proceedings, Mr Kernott makes reference to this work. For example, he recalls that he was working on the ice cream van when he was called by his solicitor, informing him of the Court of Appeal decision. And when recalling the years following his separation from Ms Jones he states: *I was seeing my boy...he'd come to work with me down the market. I sold ice-cream down there every Saturday and Sunday and sometimes my daughter would come...And during that time I used to have my van parked up at Badger Hall Avenue but I was living somewhere else.* He also makes limited reference to the building work that he carried out on the property; *we bought a bungalow together which was in need of renovation...our life was very busy in rebuilding the property, when we both worked together to make a nice home for our children and us.* As stated previously, Mr Kernott’s narrative is selective; featuring the aspects of himself that he chooses to display⁶⁰ and, as also recognised earlier in this paper, Mr Kernott’s sense of self tends to be expressed primarily with reference to his relationships. Hence he presents his occupation as secondary information; it was what he was doing when he received an important phone call; it was something he did with his son; he continued to park his van at the former family home. There is no reference to claiming state benefits in Mr Kernott’s witness statement. He recalls that the issue was raised in the course of the County Court hearing, when Mr Kernott confirmed in his oral testimony that he claimed unemployment benefits for a period of two to three months during one winter the 1980s whilst still living with his family.

There is no reference at all to Mr Kernott’s occupation as an ice-cream salesman in the High Court judgment, nor any mention of Mr Kernott claiming benefits, but Nicholas Strauss QC does refer to building work carried out by Mr Kernott on an extension to the home ‘which was built and paid for largely by Mr. Kernott and enhanced the value of the house from about £30,000 to £44,000.’⁶¹ Subsequently Wall LJ and Rimer LJ describe Mr Kernott’s work on the property in similar terms in the Court of Appeal⁶² but Wall, LJ also asserts for the first time in the reported legal proceedings that Mr Kernott was ‘employed in the summer months as an ice cream salesman and in the winter either claimed benefit or undertook work as a builder.’⁶³ This information is then partially repeated under the heading of ‘the facts of the case’ by Lady Hale and Lord Walker in the Supreme Court: ‘Mr

⁵⁹ Paragraph 3 of the witness statement

⁶⁰ Lindemann (n 4) 97-98

⁶¹ *Jones v Kernott* [2009] EWHC 1713 (Ch) para. 42

⁶² *Kernott v Jones* [2010] EWCA Civ 578, paras 12 and 68

⁶³ *Ibid*, para. 12

Kernott worked as a self employed ice-cream salesman during the summer and claimed benefits during the winter if he could find no other work.⁶⁴ Mr Kernott is now affirmed as a regular benefits claimant, whilst the reference to Mr Kernott doing building work is removed altogether.

Subsequently his work on the property is also slightly down-played: 'Mr Kernott did some of the labouring work and paid friends and relations to do other work on it. The judge found that the extension probably enhanced the value of the property by around 50%.⁶⁵ Following the decision of the Supreme Court, Mr Kernott's occupation as self-employed ice cream salesman becomes one of the primary identifiers used to describe him in national newspaper coverage of the outcome of the litigation proceedings;⁶⁶ and the reference to benefits is taken up and exaggerated; one article describing him as 'a former part-time ice cream seller who now lives on incapacity benefits.'⁶⁷

The Absent Father

In his witness statement, Mr Kernott recalls that 'The children, especially [my son], stayed with me regularly following the separation...[My son] stayed every other weekend at least. [My daughter] often stayed also...I contributed financially towards the children. I gave them pocket money. I bought items for them including shoes, school uniforms, etc. Sometimes the children would relay a message from Ms Jones about what needed to be bought for them and I would either purchase the items directly on request or give them the money.'⁶⁸ Nevertheless, he now says *looking back in hindsight...I should have done more. But I did not have the resources. I had to start all over again by buying another place and I couldn't physically do it. And that's how it was... I got the kids clothing when they needed it...but never a set amount like in maintenance and I do feel guilty for that. It is something that I should have done better; because, as I say, looking back in hindsight, that's what you're expected to do. And I didn't do it so I felt like a bit of a failure to my kids.* These accounts describe Mr Kernott as a father who remained in regular contact with his children, particularly his son, but who acknowledges that he failed to provide a consistent or formally agreed level of maintenance to their mother.

⁶⁴ *Jones v Kernott* [2011] UKSC 53, para. 37

⁶⁵ *Ibid*, para. 38

⁶⁶ Mark Reynolds 'Father given just 10% of house he owned with his ex' *Daily Express* November 10, 2011 <http://www.express.co.uk/news/uk/282800/Father-given-just-10-of-house-he-owned-with-his-ex> (accessed 30 May 2014); Owen Bowcott 'Supreme court rules on property rights for unmarried couples' *The Guardian*, 9 November 2011 <http://www.theguardian.com/law/2011/nov/09/court-rules-property-rights-unmarried> (accessed 30 May 2014)

⁶⁷ Steve Doughty and Eleanor Harding, 'Unmarried father has half share of £250,000 house cut to 10% by the Supreme Court' *Mail Online* 10 November 2011 <<http://www.dailymail.co.uk/news/article-2059423/Unmarried-father-Leonard-Kernotts-half-share-250k-house-cut-10-Supreme-Court.html>> (accessed 30 May 2014)

⁶⁸ Paragraph 16 of Witness statement

Mr Kernott's depiction of himself as a far from perfect parent but at least as one who continued to be actively involved in his children's lives, was not taken up by Dedman, J. following the County Court hearing. An issue that is taken up and discussed extensively in the reported course of proceedings is 'the lack of significant assistance from Mr. Kernott with the children while they were growing up.'⁶⁹ In the Court of Appeal we see a very deliberate allegiance to the trial judge's findings on this point. Indeed somewhat exceptionally, we are given sight of an extract from the judgment of Dedman, J. which states:

'The investment which the Claimant [i.e. Ms Jones] has made and in particular over the last 14 years with no contribution from the Defendant [i.e. Mr. Kernott] towards the purchase of the property means that she is entitled to the larger share of the property. In addition on the evidence I was satisfied that she did so with very little contribution from him to the maintenance and support of the two children whilst they were growing up being housed, fed, watered, educated and looked after generally by the Claimant.'⁷⁰

Elsewhere in the Court of Appeal judgment Rimer LJ describes Mr Kernott's financial contribution as being 'limited to modest assistance towards the maintenance and support of the children'⁷¹ and Wall LJ reports that 'the appellant made no offer of maintenance for the children. He says that he had contact with the children and from time to time and purchased items for them.'⁷² The language here indicates that Wall LJ is making a direct reference to Mr Kernott's witness statement; yet in this briefest of expeditions outside of the territory of 'the judge's findings', Wall LJ acknowledges but soon disregards Mr Kernott's claims of contact and contribution, adopting vague language that dismisses Mr Kernott's more itemised account. Later in the Supreme Court, Lord Walker and Lady Hale repeat the assertion that 'the judge...found that he [Mr Kernott] made very little contribution to the maintenance and support of their two children who were being looked after by their mother...[and] The judge observed that he was able to afford his own accommodation because he was not making any contribution towards the former family home, nor was he making any significant contribution towards the support of his children.'⁷³

The most notable foray outside of the judge's findings on this issue occurs in the High Court decision of Nicholas Strauss QC. Although he concludes that it was not a significant factor in Dedman J's decision, and queries whether it should even be a factor in his own, the deputy judge's discussion of

⁶⁹ This is a paraphrase from the judgment of Dedman, J. by Nicholas Strauss QC in *Jones v Kernott* [2009] EWHC 1713 (Ch) para. 46

⁷⁰ This is para. 30 of the judgment of Dedman, J, set out in Wall LJ's judgment in *Kernott v Jones* [2010] EWCA Civ 578 para. 19

⁷¹ *Kernott v Jones* [2010] EWCA Civ 578, per Rimer LJ at para. 80

⁷² *Ibid*, per Wall LJ at para 13.

⁷³ *Jones v Kernott* [2011] UKSC 53, paras 39-40

Mr Kernott's lack of contribution operates only to accentuate the level of Mr Kernott's apparent neglect. Within the course of a few short paragraphs, Dedman J's concern for a 'lack of significant assistance'⁷⁴ becomes 'little or no contribution from Mr. Kernott';⁷⁵ then 'the possibly controversial factor that Mr. Kernott contributed little or nothing to the maintenance of the children'⁷⁶ and concludes as 'the fact that Mr. Kernott did not contribute to the maintenance of the children'⁷⁷ and 'the non-payment of maintenance for the children.'⁷⁸ Lack becomes little or nothing, and then nothing at all. Once more, this depiction of Mr Kernott is taken up and exaggerated in national press coverage of the case, the Daily Express describing him as 'A Father who left his partner nearly 20 years ago to care for their children on her own.'⁷⁹

CONCLUSIONS

The preceding paragraphs have sought to demonstrate that certain aspects of identity were expressed, responded to and affirmed during the court proceedings that determined the outcome of Mr Kernott's dispute with his former partner, and that these aspects of identity are those that Mr Kernott either explains differently or implicitly refutes when presenting his own version of events. Nevertheless, these combine to form the identity of Mr Kernott that exists now as a matter of public record. Previously, it has been established that also in the course of the legal proceedings, Mr Kernott's self-identity diminished rapidly to the point of disappearance, causing him to navigate the legal proceedings in a state of disorientation. It has already been noted in this paper that Mr Kernott's experience of the litigation process is not unique. The aspects of his identity that have been discussed are particular to him but the legal processes that have been described are commonplace. The terms 'instructing solicitors' and 'instructing counsel' are commonly used in legal practice but they are mostly inapt. As we have seen, the notion that non-legally qualified but competent adults have full capacity to direct the course of legal proceedings is overly simplistic, when considered in light of the interrelationship between identity and agency. Witness statements are required to be sworn as true before submission to the court, but they are co-constructed and standardised in both style and form. A litigant who is represented in court proceedings will commonly meet their barrister on the day of the hearing but otherwise all correspondence between the litigant and the barrister is mediated by the instructing solicitor.

⁷⁴ *Jones v Kernott* [2009] EWHC 1713 (Ch), para. 46

⁷⁵ *Ibid*, para. 43

⁷⁶ *Ibid*, para. 50

⁷⁷ *Ibid*, para. 52

⁷⁸ *Ibid*

⁷⁹ Mark Reynolds 'Father given just 10% of house he owned with his ex' *Daily Express* November 10, 2011 <http://www.express.co.uk/news/uk/282800/Father-given-just-10-of-house-he-owned-with-his-ex> (accessed 30 May 2014)

Litigants who have legal representation have limited opportunity to speak freely at the first hearing, and no opportunity to speak thereafter. So when a case proceeds to appeal, the litigant finds that he or she is increasingly spoken *about* in court yet decreasingly spoken *to*. This can have devastating consequences to personal identity. As Lindemann explains; ‘out of the contexts and conditions in which we can maintain our own self-conceptions, we run the risk of losing sight of who we are – at least temporarily – unless someone else can lend a hand.’⁸⁰ This last observation leads us to the final point for consideration. This paper has based its discussion upon Lindemann’s view that the ‘practice of initiating human beings into personhood and then holding them there’⁸¹ is essentially ‘a moral practice.’⁸² But what is the relationship between this moral practice and legal practice? Whose responsibility is it to ‘lend a hand’ to the affirmation of personal identity? Who could or should have acted to hold or maintain Mr Kernott in his identity as the litigation developed from a County Court dispute to a Supreme Court hearing?

As explained earlier, Lindemann frames this as the question of determining ‘whether holding in personhood exerts imperatival force’⁸³ and in providing her answer to this question she draws a distinction between the generic and the specific. There is a difference between holding in personhood, and holding someone ‘in a particular identity.’⁸⁴ We recall Lindemann’s bold assertion that ‘under ordinary, privileged circumstances...those who can be held in personhood must be so held by the other persons with whom they interact,’⁸⁵ tempered by her reminder that the level of social interaction that is required for the fulfilment of this obligation can be quite small.⁸⁶ Mr Kernott’s recollection of his brief conversation with Ms Jones’ barrister is a notable example of such an interaction. By contrast, we are reminded of his recollection of his very limited interaction with his own barrister before each hearing; his description of the Court of Appeal hearing; *they’re talking about you...they’re not talking to you. They’re talking about you to someone else...You don’t get much eye contact with them because they’re not talking to you*; and his being refused entry to the Supreme Court hearing. An equally bizarre example of the ‘letting go’ of Mr Kernott’s personhood is evidenced in the judgment of Wall, LJ following the Court of Appeal hearing; he writes ‘The respondent was born on 26 November 1954. In 1980, when she was 26, she met the appellant, whose age we do not know.’⁸⁷ Since Mr Kernott was present throughout the Court of Appeal hearing, perhaps he could have been asked to inform the court of his birth date. So when we take a generic view of holding in personhood, the relationship between moral and legal practice is impossible to

⁸⁰ Lindemann (n 4) 170

⁸¹ *Ibid*, ix

⁸² *Ibid*

⁸³ *Ibid*, 120

⁸⁴ *Ibid*, 121

⁸⁵ *Ibid*, 120

⁸⁶ *Ibid*, 121

⁸⁷ *Kernott v Jones* [2010] EWCA Civ 578, para. 8

sever. Accordingly, the answer to the question of whose responsibility it is to ‘lend a hand’ to the affirmation of personal identity, is ‘everyone’. Holding in personhood is a moral and social responsibility that we possess (and indeed can assert entitlement to) by virtue of being human.

But what of holding someone in a particular identity? Throughout the course of the litigation, who, if anyone, was responsible for affirming Mr Kernott’s understanding of himself as ‘a normal bloke’, as an engaged but far from perfect father, as part of a broken relationship but nevertheless still part of a family? At this stage it is helpful to return once more to Lindemann’s discussion of the doctor-patient relationship. She envisages a scenario whereby a competent patient makes a conscious choice to appoint a proxy to make decisions on his or her behalf, when necessary.⁸⁸ The role of the proxy differs from that of the doctor who, as we have already discussed, may instinctively desire to continue treatment regardless of the patient’s wishes. If the issue of whether or not to continue treatment arises at a point when the patient is no longer able to assert her autonomy, then it is the proxy’s task to exercise this autonomy on the patient’s behalf; ‘holding onto the patient as the person they have known and cared about, making decisions that reflect [a] understanding of who the patient is.’⁸⁹ If we take this distinction and apply it to the litigation process that this paper has sought to describe, it is arguable that the responsibility of holding Mr Kernott in his particular identity fell to his legal representatives, not as a matter of choice or principle, but in practice as a result of their initial failure to hold him in personhood. To explain further, we have seen already the significant loss of agency that occurs alongside a loss of self-identity. At the same time as Mr Kernott loses his sense of self-identity, he places his ‘faith’ in his legal representatives, effectively transferring his decision-making powers to them. Arguably then, in relation to Mr Kernott, they become his proxy decision makers; not by choice but through circumstance.⁹⁰ And as proxy decision makers, they owe Mr Kernott a moral duty to exercise autonomy on his behalf; to represent him in a manner that reflects the person who he considers himself to be. The duty is one that they would not consciously recognise or accept, but arises nevertheless.

Finally, it is necessary to consider how far we might be required to hold Mr Kernott in the identity of the ‘normal bloke’ that he presents in the extracts of his narrative account set out in this paper. Are we obliged to relinquish his identity as revealed by the ‘facts of the case’ and subsequently exaggerated in the press in favour of that which is revealed in his first-hand account? Or conversely, must we dismiss his account on the basis that the trial judge had the benefit of hearing ‘both sides of

⁸⁸ *Ibid*, 176-177

⁸⁹ *Ibid*, 176

⁹⁰ *Ibid*, 174

the story’ and objectively determined the relevant facts?’⁹¹ Patricia Ewick and Susan Silbey remind us that narratives are necessarily subjective and constitutive; ‘stories people tell about themselves and their lives both constitute and interpret those lives; the stories describe the world as it is lived and understood by the storyteller.’⁹² Furthermore, Lawler explains that although the stories through which we explain ourselves will ‘always incorporate the life stories of others. They will not be the same as those others’ stories; they will always be particular versions.’⁹³ On this basis we may feel justified in dismissing Mr Kernott’s account as wholly subjective and opt to return to the familiar security of the facts as determined by the court. However, it is argued that to do so is to overestimate the objectivity of the trial judge’s findings. Jerome Frank maintained that an unquestioning adherence to the judge’s findings of fact – as can be seen in the appellate courts’ consideration of *Jones v Kernott* - represents a form of ‘modern legal magic’ that lawyers choose believe in in order to avoid the terror of uncertainty.⁹⁴ He states:

The ‘facts,’ it must never be overlooked, are not objective. They are what the judge thinks they are. And what he thinks depends on what he hears and what he sees as the witnesses testify – which may not be, and often is not, what another judge would hear and see...[and] since the ‘facts’ are only what the judge thinks they are, the decision will vary with the judge’s apprehension of the facts.⁹⁵

If we possess the bravery to accept or at least entertain this alarmingly subjective account of ‘the facts of the case’ then our objection to the subjective nature of Mr Kernott’s own narrative account must surely diminish. Subsequently, we are free to hold on or let go of the identity of Mr Kernott as revealed in both of these two accounts. But importantly, neither can lay claim to our full allegiance.

The paper concludes by focusing attention back to Lindemann’s view of the broader concept of personhood, and the mutual duties that arise from it. She states ‘[i]n the most general terms, personhood gives us ourselves; we can’t be who we are without other persons who initially hold us and then maintain us in personhood.’⁹⁶ These are universal duties of vast significance. Yet a close

⁹¹ It must be conceded after all that Ms Jones might well disagree with Mr Kernott’s version of events and her own narrative is not recorded in this paper.

⁹² Patricia Ewick and Susan Silbey ‘Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative’ (1995) *Law and Society Review*, Vol. 29, No.2, 197 at 198.

⁹³ Lawler (n 1) 33

⁹⁴ Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, 1950) 50. At 23-24, Frank states: ‘Considering how a trial court reaches its determination as to the facts, it is most misleading to talk, as we lawyers do, of a trial court “finding” of the facts. The trial court facts are not “data”, not something that is “given; they are not waiting somewhere, ready made, for the court to discover, “to find.” More accurately, they are processed by the trial court-are, so to speak, “made” by it, on the basis of its subjective reactions to the witnesses’ stories.’

⁹⁵ *Ibid*, 55

⁹⁶ Lindemann (n 4) 23

analysis of Mr Kernott's experience of the litigation process has demonstrated that both the holding and the letting go of personhood occur at a very subtle level. The exercise of recognising someone's personhood and holding them there 'needn't take much effort'⁹⁷ but the letting go can occur discreetly and unintentionally, through the operation of long-established process and practices. This paper has sought to draw our attention to such practices, in the hope that we might see them, and perhaps ourselves, differently.

⁹⁷ *Ibid*, 121