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Progressing the rights to light debate: Part 3: judicial attitudes to current practice

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Progressing the rights to light debate - Part 3: Judicial attitudes to current practice

Abstract

Purpose – The paper examines judicial attitudes to current surveying practice in rights to light disputes. It tests the assumption that the use of the Waldram methodology is endorsed by the courts and seeks to establish whether, despite its acknowledged limitations, its continued use can be justified on this basis.

Design / Methodology / Approach – Analysis of reported judgments.

Findings – Neither the fifty-fifty rule, nor any other aspect of the Waldram methodology, has the status of a rule of law, or is otherwise approved of by the courts. On the contrary, the methodology has been the subject of judicial criticism. Although the courts frequently rely on the expert evidence presented to them, they have consistently expressed disquiet over aspects of the methodology. Particular concerns have been expressed over its inability to cater for the effects of sunlight and externally reflected light, on its dependence on internal room design, and on its failure to distinguish task illumination from general room lighting. There is also no indication that the judiciary are aware of the extent to which the Waldram threshold of adequate illuminance falls short of that prescribed by contemporary standards. The paper concludes that the courts' attitudes to the Waldram methodology cannot therefore justify its continued use by surveyors, either when acting in the capacity of expert witness, or when advising clients who may be contemplating litigation in a rights to light dispute.

Research limitations/ implications – Makes a further contribution to the debate, started in this journal in 2000, about the future of surveying practice in rights to light disputes.

Practical implications – Places new information in the public domain which has implications for judges in future rights to light cases, and for the professional liability of surveyors when advising clients in contemplation of possible rights to light litigation.

Originality / value – Presents the first comprehensive analysis of judicial attitudes to modern rights to light surveying practice since its introduction in the early part of the 20th century.

Keywords – Buildings, Easements, Law, Light, Measurement, Disputes.

Paper Type – Research paper.

Introduction

This is the third in a series of papers published in response to Pitts' (2000) call for a debate on the future of surveying practice in rights to light disputes. The first paper (Chynoweth 2004)

reviewed the methods employed by surveyors when measuring an alleged infringement of a right to light in the context of the underlying legal principles. Where a right to light exists the law was seen to provide building owners with an entitlement to “sufficient light according to the ordinary notions of mankind” and the paper also described how the courts have frequently used expert evidence from surveyors when determining the meaning of this term in particular contexts. Surveyors’ evidence in rights to light cases was seen to rely on the arguments proposed by Percy Waldram and, in particular, on his central premise that the threshold of adequate illumination was represented by a sky factor of 0.2 per cent (the so-called “grumble point”). The convention (sometimes described as the “fifty-fifty rule”) was also described whereby surveyors regard a room as well lit as long as 50% of its area, measured at working plane height, continues to receive a sky factor of 0.2%. These techniques were collectively described in the paper as the “Waldram methodology”.

The second paper (Chynoweth 2005) examined the origins of the Waldram methodology, and sought to identify the rationale and the underlying scientific basis for its adoption in the early part of the twentieth century. Based on a review of archival material it revisited Waldram’s original arguments and re-examined some of the evidence on which they were based. It concluded that there was a lack of reliable evidence to justify the original adoption of the 0.2% sky factor value, and suggested that many of the assumptions underpinning modern rights to light practice were based on inaccurate, and sometimes misleading information. Its findings therefore cast doubt on the legitimacy of the techniques currently employed by surveyors in rights to light cases. Subsequent research (Defoe & Frame 2007) has cast further doubt on aspects of the methodology.

Many rights to light surveyors concede the limitations of existing practices which are now being highlighted by the research but nevertheless defend their continued use on the basis that they are supported by the courts. The current paper therefore seeks to test this assumption by reviewing the judgments of all reported cases in which the Waldram methodology has been used, and in which the nature of the expert evidence has been discussed. Specifically, it aims to establish whether existing practices are indeed endorsed by the courts and whether, despite the reservations described above, their continued use can be justified on this basis.

Research Method and Initial Findings

Sixteen reported cases were identified which were heard between 1922 and 2006. The majority of these were English although three Irish cases also satisfied the selection criteria. These were also included in view of the historical similarities in the two legal systems. An

initial examination was undertaken to ascertain the extent to which the courts' decisions in each case were consistent with the experts' findings in applying the Waldram methodology.

The results are displayed in Table I and tend to suggest that the courts will readily accept the experts' recommendations as to whether an actionable injury has occurred in a particular case.

[Take in Table I]

It can be seen from the final column that the court's decision on liability was consistent with the experts' findings in 14 of the 16 cases. In 12 of these, as shown in the penultimate column, the court followed the experts' findings that an actionable injury had occurred. In one instance (*Charles Semon & Co v Bradford Corporation*¹) the court followed the expert recommendation against a finding of liability. In the remaining case (*Deakins v Hookings*²) it will be seen that the experts found an actionable injury in one of the two subject rooms but not in the other, and the court came to an identical conclusion on liability in respect of each room.

Of the two cases in which the court decision did not follow the expert guidance (see final column) it is perhaps significant that the findings from the Waldram methodology were extremely marginal in one of them. In *Ough v King*³ the court was certainly prepared to disregard the fifty-fifty rule, but this was in circumstances where the room was said to be only 51.27% adequately lit, thus exceeding the Waldram threshold by only 1.27%. Of the 16 cases studied only one, *Smyth v Dublin Theatre Company Ltd*⁴, therefore appears to provide evidence of the court's unequivocal departure from the findings of the expert witnesses.

Judicial Support

An examination of the judicial comments in many of the cases indicates the usefulness, to the courts, of receiving evidence which is capable of quantifying the otherwise nebulous concept of sufficiency of light according to ordinary notions of mankind. In the leading case of *Colls v Home & Colonial Stores* Lord Davey had earlier referred to the right to light as "having a ragged edge to it" and as being impossible to ascertain "by metes and bounds".⁵ He therefore

¹ [1922] 2 Ch 737.

² [1994] 1 EGLR 190.

³ [1967] 3 All ER 859.

⁴ [1936] IR 692.

⁵ [1904] AC 179, at 200.

regarded the experience of surveyors who are “practically conversant” with the measurement of rights to light as being “entitled to great respect”.⁶

Elsewhere, evidence based on the Waldram methodology is described as “exceedingly useful”⁷ and “very helpful”⁸ and the judges often express considerable gratitude to the individual witnesses. In *Gannon v Hughes* Johnston J observed that the “learned experts” had “assisted me considerably”⁹ and in *William Cory & Son Ltd v City of London Real Property Co Ltd* Upjohn J described himself as “indebted to the experts...for the great care with which they have addressed their minds” to the issues.¹⁰

The fifty-fifty rule itself has also received limited judicial endorsement in a number of cases. Most recently, in *Regan v Paul Properties DPF No 1 Ltd*, it was described as “a very useful guide which will apply to the majority of cases concerning infringements of rights to light, especially where the dominant tenement is a dwelling house and the room in question is a living room”.¹¹ Although it is not regarded as indicating ideal levels of illuminance its significance as a measure of the bare threshold of adequacy was emphasised in *Deakins v Hookings* where it was described as “a pretty irreducible minimum”.¹²

Nature of Expert Evidence

Nevertheless, the courts’ willingness to accept evidence based on the fifty-fifty rule has led some surveyors to treat it as having greater legal significance than was ever intended.¹³ In particular, the clear legal distinction between a rule of law, and the process of ascertaining the facts to which the rule can be applied, has sometimes been insufficiently clear in some of the practitioners’ textbooks (for example Ellis 1989, pp. 33-37; Anstey 1992, p. 13 & 57).

Although surveyors are inevitably involved in providing legal advice to clients during preliminary rights to light negotiations their role in court is more restricted. The value of their expert testimony lies in assisting the court to understand the factual situation to which it can then apply the established legal rules.

⁶ Ibid, at 204.

⁷ *Fishenden v Higgs and Hill Ltd* [1935] All ER Rep 435, per Maughan LJ at 452.

⁸ *William Cory & Son Ltd v City of London Real Property Co Ltd* (1954) 163 EG 514; Judgment available online at <http://www.lawlectures.co.uk/williamcory.pdf>, per Upjohn J at 3.

⁹ [1937] IR 284, at 290.

¹⁰ Note 8.

¹¹ [2006] EWHC 1941 (Ch), per Smith J at [67].

¹² Note 2, per Cooke J at 192.

¹³ *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, per Millett J at 893.

The courts regard the fifty-fifty rule as a surveying technique which can assist this process and they have variously described it as “a convenient rule of thumb”¹⁴, “a very rough guide”¹⁵ and “a useful guide to be adopted or discarded according to the circumstances”.¹⁶ Although the issue would no doubt have appeared self-evident to most judges a number of the judgments expressly emphasise that the fifty-fifty rule is not a rule of law.¹⁷

Significance of *Colls v Home and Colonial Stores*

In fact, the judgments also emphasise that the evidence from the expert witnesses simply forms one component of the detailed factual matrix to be assembled by the court before applying the relevant legal rule when deciding on liability. The rule itself is part of the law of nuisance. It is therefore, by definition, a broad and flexible one and the courts have been unwilling to substitute a more rigid approach involving what have been described as “hard and fast mathematical standards”.¹⁸

As mentioned in the introduction to this paper, the rule, which is stated in *Colls v Home & Colonial Stores*, refers to the entitlement to “sufficient light according to the ordinary notions of mankind”.¹⁹ This form of words, of course, leaves considerable room for discretion by the courts when interpreting the rule in a particular situation. The courts’ approach to liability, and to the role of expert evidence within the process, was described by Maughan J in the following terms in *Sheffield Masonic Hall Ltd v Sheffield Corporation*:

“But I do think I ought to say that in my opinion, it is possible to exaggerate [the expert] evidence in a particular case. The question to be solved by the court is not really a question which can always be fairly decided by the amount of direct sky which will reach a hypothetical table 2 feet, 9 inches high in a particular room. I think it is safer to rely upon the view expressed in *Colls v Home and Colonial Stores Ltd* (1904), and to consider whether, as a matter of common sense, there is such a deprivation of light as to render the occupation of the house uncomfortable in accordance with the ordinary notions of mankind.”²⁰

¹⁴ *Ough v King*, note 3, per Diplock LJ at 862.

¹⁵ *William Cory & Son*, note 8 at 6.

¹⁶ *Carr-Saunders*, note 13.

¹⁷ *Carr-Saunders*, *ibid*; *Ough v King*, note 14; *Regan*, note 11, per Smith J at [62].

¹⁸ *Fishenden*, note 7.

¹⁹ Note 5, per Lord Davey at 198 & 204.

²⁰ [1932] 2 Ch 17, at 23.

The courts therefore see themselves as involved in the exercise of common sense rather than with the application of scientific principles and this leads to a much more instinctive process than is sometimes assumed. An examination of the decision-making processes actually undertaken in the sixteen cases discussed in this paper therefore indicates that the expert evidence was less significant to the decision than might initially have been supposed. In particular, the courts often gave as much, or more, credence to the evidence of lay witnesses as they did to the expert testimony.

Importance of Lay Witnesses

Although this has been dismissed as being too subjective in two recent cases²¹ the overwhelming view of the judiciary appears to be that the evidence of lay witnesses is to be preferred over that of the experts due to their better understanding of how the subject rooms are actually used. As graphically described by Meredith J in *Smyth v The Dublin Theatre Company Ltd*, “the wearer of the shoe is the one best qualified to say if and where it pinches”²² and this approach is also expressly described by Maughan J in *Price v Hilditch*:

“I confess that for my part I would prefer, in cases of this kind where the injury is not, as it so often is, hypothetical, to deal with the matter very largely as depending upon the actual evidence of ordinary members of the public who have used the rooms before and after the alleged obstruction, and who could give positive evidence as to the injury, if any, which they have suffered.”²³

Of the 14 cases noted above as having been decided in conformity with the Waldram approach very few of them can therefore be regarded as the straightforward product of the expert evidence. Many of them represent the courts’ overall impressions gained from having heard the evidence of lay witnesses alongside that of the experts. The most recent case of *Regan v Paul Properties DPF No 1 Ltd*²⁴ is a clear example of this, as are the earlier cases of *Deakins v Hookings*²⁵ and *Gamble v Doyle*²⁶.

Others represent a grudging acceptance of the expert testimony in circumstances where the court has expressed a clear preference for the evidence of building occupants but, for

²¹ *Carr-Saunders*, note 13, per Millet J at 891; *Midtown Ltd v City of London Real Property Company Ltd* [2005] EWHC 33 (Ch), per Smith J at [79].

²² Note 4, at 705.

²³ [1930] 1 Ch 500, at 504.

²⁴ Note 11.

²⁵ Note 2.

²⁶ (1971) 219 EG 310.

whatever reason, this is not available. This is apparent from the judgments in both *Price v Hilditch* (referred to above²⁷) and *William Cory & Son Ltd v City of London Real Property Co Ltd*²⁸.

Finally, some actually represent decisions which are consistent with the expert evidence but which have clearly been decided in spite of it. The cases of *Gannon v Hughes*²⁹ and *McGrath v The Munster & Leinster Bank Ltd*³⁰ both fall into this category. Although the decisions in these cases appear, superficially, to be consistent with the Waldram methodology the judges in each case were critical of it and were not prepared to base their decisions upon it. In *Gannon v Hughes* Johnston J noted that he “cannot not say much for the ‘grumble point’ as a test which would be of much use in cases like the present”³¹ and Dixon J observed in *McGrath* that:

“I....regard the expert evidence as not being of great help in the present case except by way of giving a general picture of the situation. I hope I have made it clear that this is not by reason of any lack of precision in that evidence but solely because I regard the methods adopted as being inherently inadequate to give a sufficiently comprehensive result.... In the absence of any available scientific method, one has to fall back on the admittedly faulty but less limited method of human observation.”³²

Judicial Scepticism

Judicial scepticism about the methodology has not been confined to these 2 cases, or to cases where the courts have made decisions on liability which are inconsistent with the expert evidence. They are a common feature of many of the cases studied, even in situations where the court has ultimately chosen to place some limited reliance on the experts’ findings.

By way of example, Meredith J seems to have been particularly unimpressed by Waldram’s evidence in *Smyth v The Dublin Theatre Company Ltd*. After hearing a detailed description of the methodology, in person, from its architect and leading proponent he notes in his judgment that “Mr Waldram’s charts, carefully prepared and interesting as they were, leave me cold”.³³ The underlying basis of many of the judicial criticisms is that the methodology is too rigid,

²⁷ Note 23.

²⁸ Note 8.

²⁹ Note 9.

³⁰ [1959] IR 313.

³¹ Note 9.

³² Note 30, at 325.

³³ Note 4, at 705.

and presents too simplistic a picture, to be of genuine assistance to the courts in reaching decisions which have to take account of so many variables.

This is clear from Dixon J's judgment in *McGrath* where he remarks that: "the principle selected is too selective and too ideal, and there are too many factors, of a practical or tangible character, that it does not and cannot take account of."³⁴ These sentiments were echoed by Upjohn J in the *William Cory* case in his dismissal of one expert witnesses' evidence which focused entirely on the movement of the 0.2% threshold: "What he said was quite useful as a test, but it does not consider anything like the whole ground that I have to consider".³⁵

Specific Criticisms

Within this general scepticism about the methodology's overall lack of sophistication, a number of specific criticisms are also apparent from the judgments. The first of these deals with its inability to accurately represent the complexity of the external lighting environment which the court has to consider.

One aspect of this relates to the role of externally reflected light, and another, to the effect of sunlight on the daylight enjoyed by building occupants. Although it is almost an article of faith amongst practitioners that reflected light and sunlight have no significance in the right to light the situation may actually be more complicated.

External Environment I: Role of Externally Reflected Light

The question of externally reflected light was addressed in the *Sheffield Masonic* case, where Maughan J criticised the Waldram methodology for its inability to distinguish a small obstruction situated immediately outside a window from a large one located some distance away from it but still obscuring the same percentage view of the sky.

He considered it obvious "to anybody who has ever considered the matter for five minutes"³⁶ that the effect on the building occupier is greater in the former situation and that this is due to the continued availability of externally reflected light in the latter. As his judgment also distinguished these observations from the decision in *Dent v Auction Mart Co*³⁷ (which is

³⁴ Note 30, at 324.

³⁵ Note 8, at 7.

³⁶ Note 20 at 24.

³⁷ (1866) LR 2 Eq 238.

often cited as authority for excluding the effect of reflected light) the issue should arguably receive more attention by experts than it has to date.

External Environment II: Significance of Sunlight

The effect of the sun's position in the sky was discussed in *McGrath*. Dixon J considered that the Waldram approach was unrealistic as it assumed that the sky had a uniform luminance distribution whereas, in reality, this was not the case:

“There is no such uniformity when there is direct sunlight. Even when the sky is overcast and there is only skylight – using that term in the sense of the extra-terrestrially reflected or refracted sunlight – it may be doubted if there is ever uniformity. Observation suggests that even on a day on which there is only skylight, the intensity of light in any portion of the sky is more likely to be an inverse function of the angular distance of that portion from the source of light, the sun. It is not merely on account of the extra sunlight that is considered desirable to have windows facing south and west. It is for these reasons that I consider the direction of the new obstruction relative to the windows of the plaintiff's office, of great importance and, as pointed out, this is a factor of which the ‘grumble line’ or ‘sky factor contour’ takes no account.”³⁸

The lighting designer's distinction between “skylight” and “sunlight” has, of course, always been an artificial one and on occasions the courts have been willing to blur the distinction in rights to light cases.³⁹

The distinction, in any event, rested on technological limitations in the early days of daylight measurement which no longer apply. As Nabil & Mardaljevic (2005) have recently demonstrated, Dixon J's instinctive assumptions were entirely correct. In the northern hemisphere, even under predominantly overcast skies, windows on southern elevations do, of course, receive greater levels of daylight than those facing in a northerly direction.

Indeed the continued use of the uniform sky in rights to light calculations has remained something of an anomaly since its replacement by the CIE overcast sky (BSI 1997) in 1955. The adoption of the CIE standard general sky in 2004 (BSI 2004), which now specifically takes account of the sun's position in the sky, must surely add further weight to Dixon J's criticisms of the Waldram approach.

³⁸ Note 30, at 324.

³⁹ *Allen v Greenwood* [1980] Ch 119, at 134; *Deakins v Hookings*, note 2, at 193-194.

Dependence on Internal Room Design

The second specific criticism relates to the methodology's dependence on the internal design of the affected rooms in deciding whether they are the subject of an actionable injury. It was pointed out by Maughan J in *Price v Hilditch*, and again by Millett J in *Carr Saunders v Dick McNeil Associates*, that the right to light under section 3 of the Prescription Act 1832 is a right in favour of a building, rather than to a particular room within it.⁴⁰ The extent of the right should therefore not necessarily be measured by reference to the internal arrangements of particular rooms.

Despite this, the Waldram approach is constrained by the design of the actual rooms under consideration in two respects. Firstly, the sky factor at a particular point on the working plane is heavily influenced by the actual height of the window head in the room. Secondly, having established the position of the 0.2% sky factor contour in the room, the actual depth of the room will largely determine the outcome once the fifty-fifty rule is applied. Maughan J considered both these aspects in *Fishenden v Higgs and Hill Ltd* and concluded that the experts' plans:

“...may, I think, often be exceedingly misleading if the so-called fifty-fifty rule with regard to the amount of light which rooms should enjoy is applied to a room which has any unusual depth in it, or applied to a room where the windows are in any sense unusual, because the light falling at table height from the window at a particular part of the room depends directly upon the depth of the room and the height of the window, and obviously those things have got to be carefully considered in applying the rule.....”⁴¹

Distinction between Task Illumination and General Room Lighting

The final specific criticism draws attention to an inconsistency within the methodology which ignores the distinction between task illumination and general room lighting, both of which are important in good lighting design (CIBSE 1994 pp. 26-7).

Task illumination is concerned with the quality of light required to perform specific tasks at particular points at the working plane and is generally expressed as an absolute level of service illuminance (historically measured in foot candles but now measured in lux). General room lighting on the other hand relates to the user's perceptions as to whether a room appears

⁴⁰ Note 23, at 508; Note 13, at 894.

⁴¹ Note 7, at 452.

bright or gloomy. This is largely affected by the relationship between the internal and external illuminance (as measured, for example, by the sky factor) and the distribution of daylight within the room (as measured, for example, by the fifty-fifty rule).

In general, as long as a room appears sufficiently well lit according to principles of general room lighting, there is no requirement for task illumination to be provided in all parts of the room. It will usually be sufficient (and indeed, more pleasant) for additional levels of service illuminance to be confined to the areas of the room in which this is actually required.

It will be apparent from this description that the Waldram methodology, which utilises the sky factor and the fifty-fifty rule, is concerned entirely with the measurement of general room lighting. The irony is that the entitlement to a right to light appears to be restricted to task illumination.⁴² Perhaps unsurprisingly therefore, the courts have often expressed frustration with its inability to provide any meaningful assistance in determining the adequacy of light in rights to light situations.

This can be seen, in particular, in the cases of *Smyth v Dublin Theatre Company* and *Carr Saunders v Dick McNeil Associates*. In each case the affected rooms had particular task illumination requirements close the windows. Although the experts' plans showed that the general room lighting was sufficient according to the fifty-fifty rule, the tasks previously performed in the rooms could no longer be carried out due to the loss of light in the immediate vicinity of the windows. For example, in *Carr Saunders*:

“..... it is clear that the effect of raising the height of the defendants' building by two storeys, while it did not reduce the light over the whole of that space below a reasonable standard, severely diminished the amount of light in two of the places where it was reasonably to be expected, that is to say near the two windows.....The room as a whole may be adequately lit, but significant portions of it near the windows, not merely the corners or parts unlikely to be well lit, are poorly lit by direct light.”⁴³

For the same reason in *Smyth* Meredith J considered that the Waldram approach was more appropriate for town planning situations where the general lighting of the room as a whole was most relevant. He did not consider it helpful in rights to light situations in view of the

⁴² *Midtown Ltd v City of London Real Property Company*, note 21, per Smith J at [60].

⁴³ Note 13, per Millet J at 893.

frequent requirement to consider the need for task illumination close to windows in an affected room:

“The practical minimum tolerable is different from the theoretical minimum tolerable of the experts, and differs for different parts of the room in which different ordinary purposes are customarily satisfied. There is nothing special, peculiar or extraordinary in requiring a reasonable amount of direct light near the window of a room laterally lighted.”⁴⁴

Task Illumination and the Role of Lay Witnesses

This particular shortcoming in the methodology has actually been a recurrent feature in rights to light cases. Even in situations where the judgments have not made the distinction between task and general illumination explicit the judges have often couched the same issue in different terms. Frequently this takes the form of seeking particular evidence from the users of a room in order to better understand the actual requirements for task illumination within it.

As already discussed, the evidence of lay witnesses is often then used to moderate the experts’ raw conclusions. This is apparent in *Deakins v Hookings* where the court held that a significant loss of light in a kitchen was not actionable as it was confined to circulation areas.⁴⁵ However, in the same case, a much smaller loss in the central portion of a living room was actionable due to the “real and deleterious” effect this would have on the use of that room.⁴⁶ Although, in this case, the findings were consistent with the statistical results produced by the experts, the judgment emphasises the importance of these task lighting considerations in reaching the decisions arrived at. Similar considerations were also very much in evidence in *Regan* where the court considered the loss of light in the centre of a living room to be particularly significant.⁴⁷

Threshold of Adequate Light

Despite the courts’ scepticism about so many aspects of the methodology there has, to date, been no direct judicial challenge to the threshold level of illuminance on which it is based. Indeed, even where the courts ultimately decide to moderate the expert evidence with that

⁴⁴ Note 4, at 704.

⁴⁵ Note 2 at 193.

⁴⁶ *Ibid.*

⁴⁷ Note 11, at [72].

from other sources, they appear to be entirely comfortable with the notion that adequacy of light can be represented by 1 foot candle, or a sky factor of 0.2%.

Discussions within the judgments often treat the concept of “adequate light” as synonymous with these values and a number of the judgments contain detailed summaries of the assumptions underlying the expert evidence. The following bald restatement of the Waldram principles is taken from Smith J’s judgment in *Midtown Ltd v City of London Real Property Co Ltd* but is typical of the unquestioning acceptance by the courts of this aspect of the methodology:

“1 lumen per square foot is the amount of light that is required for someone to be able to read without artificial light on an ordinary overcast day. The whole dome of the sky produces 500 lumens, so that 1 lumen may also be described as 0.2% of the available sky.”⁴⁸

As current recommendations for office illuminance are actually 50 times greater than this stated threshold (BSI 1992) it is surprising that expert evidence continues to be presented on this basis, and that the courts have not previously been made aware of the discrepancy. In fact, the Waldram threshold is not only significantly lower than current guidance. It is also significantly lower than the guidance that was available in the 1930s when it was first proposed (Mills & Borg 1999) as well as being based on some questionable assertions by its original proponent (Chynoweth 2005).

These issues are in the public domain and courts can rightly expect expert witnesses to bring them to their attention. Individual judges are also entitled to assume that the expert evidence presented to them is consistent with current thinking and would no doubt be surprised to learn that this was not the case. In these circumstances it is perhaps unwise to take the courts’ continued reliance on the expert evidence, which they assume to have been given in good faith, as any indication of judicial approval for the methods actually employed.

Conclusions

The situation is therefore a complex one. The courts are faced with the difficult task of deciding questions of liability where an infringement of a right to light has been alleged. This involves coming to a conclusion as to whether sufficient light continues to be enjoyed by the

⁴⁸ Note 21 (*Midtown*), at [51].

affected building “according to the ordinary notions of mankind”. Not surprisingly the courts welcome the availability of quantifiable expert evidence which introduces a degree of certainty into this otherwise subjective and open-ended exercise. In many of the cases studied the expert evidence has clearly played a significant role in the court’s decision on liability. A number of the judgments record the courts’ obvious gratitude to the experts and the close correlation between the expert findings and the actual decision on liability suggests that this may be a major component of many such decisions.

But this does not amount to the judicial approval of the experts’ methodology, nor can it provide a justification for its continued use, particularly if other factors suggest that it is no longer defensible. The Waldram methodology is not a rule of law. The relevant rule of law is that described in *Colls* and this requires the courts to consider all relevant factual circumstances when reaching their decisions on liability. This includes the evidence of expert witnesses who the court relies on to use appropriate techniques within their areas of expertise. The fifty-fifty rule is such a technique. Its relevance and continued use are therefore matters for the experts which present the evidence, rather than for the courts which rely on the expertise of those who present it.

In fact, whilst having little choice but to accept the validity of expert evidence which they are unqualified to challenge, the courts have consistently expressed disquiet over aspects of the Waldram methodology. There is judicial scepticism about the ability of so simplistic a model to accurately reflect the complexity of the environment which it purports to simulate. Particular concerns have been expressed over its inability to cater for the effects of sunlight and externally reflected light, on its dependence on internal room design, and on its failure to distinguish task illumination from general room lighting. Although only occasionally feeling able to discard the only available expert evidence on account of these concerns, court attitudes to the Waldram techniques clearly fall short of the approval which is sometimes claimed.

Perhaps the most surprising finding was the absence of any judicial challenge to the use of 1 foot candle / 0.2 % sky factor as a threshold of adequate illuminance, and the extent to which this features in the judgments as a valid measure of adequacy. There was no indication that the courts had been provided with evidence as to the actual standards of adequate daylighting used in the construction industry, or about the concerns now being expressed about the inadequacy of the Waldram standards. This absence of any alternative viewpoint, as a counterbalance to the traditional expert techniques, raises concerns about the quality of decision-making by the courts in this context.

A related concern is also apparent from Table I. This reveals a finding of adequacy, according to the fifty-fifty rule, in only 3 of the 16 cases studied. One of these (*Charles Semon & Co v Bradford Corporation*) was the first reported case in which the methodology was used and was therefore presumably litigated in the absence of any preconceptions about its significance. The other two (*Smyth v Dublin Theatre Company Ltd* and *Deakins v Hookings*) were marginal cases where, although some of the affected rooms were indeed considered to be adequately lit according to the fifty-fifty, others in the subject building were not. The overwhelming impression from the findings of this study is therefore that rights to light litigation is confined to cases which either wholly or partially satisfy the Waldram definition of inadequacy.

This raises the suspicion that preliminary advice is being given to clients based on the fifty-fifty rule, and that only those cases which satisfy the test are being pursued through the courts. The Waldram methodology may therefore be being used to filter out cases in advance of them ever being considered by the courts. If, as now seems to be the case, the Waldram standard of adequacy is far too low, the effect is to deprive some of those suffering an actionable injury to their right to light of the opportunity of obtaining redress through the courts.

In conclusion, although the courts rely on the evidence of expert witnesses in rights to light cases the nature of the expert techniques used must remain a matter for the experts rather than the courts. Neither the fifty-fifty rule, nor any other aspect of the Waldram methodology has the status of a rule of law, or is otherwise approved of by the courts. On the contrary the methodology has been the subject of criticism by the courts. If the courts were aware of the discrepancies between the methodology and official guidance on daylighting, or of the published criticisms of the methodology, additional judicial criticism could be expected. According to the findings of this paper the courts' approach to the Waldram methodology does not therefore provide a justification for its continued use by surveyors, either when acting as expert witnesses, or when advising clients who may be contemplating litigation in a rights to light dispute.

	Case	Insufficient light a/c to 50/50 rule?	Actionable Injury?	Consistent with Waldram Methodology?
1.	<i>Charles Semon & Co v Bradford Corporation</i> [1922] 2 Ch 737	No	No	YES
2.	<i>Hortons' Estate Ltd v James Beattie Ltd</i> [1927] 1 Ch 75	Yes	Yes	YES
3.	<i>Price v Hilditch</i> [1930] 1 Ch 500	Yes	Yes	YES
4.	<i>Sheffield Masonic Hall Ltd v Sheffield Corporation</i> [1932] 2 Ch 17	Yes	Yes	YES
5.	<i>Smith v Evangelization Society (Incorporated) Trust</i> [1933] Ch 515	Yes	Yes	YES
6.	<i>Fishenden v Higgs and Hill Ltd</i> [1935] All ER Rep 435	Yes	Yes	YES
7.	<i>Smyth v Dublin Theatre Company Ltd</i> [1936] IR 692	Yes	Yes	NO
		No	Yes	
		No	Yes	
		No	Yes	
8.	<i>Gannon v Hughes</i> [1937] IR 284	Yes	Yes	YES
9.	<i>William Cory & Son Ltd v City of London Real Property Co Ltd</i> (1954) 163 EG 514; Judgment available online at < http://www.lawlectures.co.uk/williamcory.pdf >	Yes	Yes	YES
10.	<i>McGrath v Munster & Leinster Bank</i> [1959] IR 313	Yes	Yes	YES
11.	<i>Ough v King</i> [1967] 3 All ER 859	No	Yes	NO
12.	<i>Gamble v Doyle</i> (1971) 219 EG 310	Yes	Yes	YES
13.	<i>Carr-Saunders v Dick McNeil Associates Ltd</i> [1986] 2 All ER 888	Yes	Yes	YES
		Yes	Yes	YES
14.	<i>Deakins v Hookings</i> [1994] 1 EGLR 190	Yes	Yes	YES
		No	No	YES
15.	<i>Midtown Ltd v City of London Real Property Company Ltd</i> [2005] EWHC 33 (Ch)	Yes	Yes	YES
16.	<i>Regan v Paul Properties DPF No 1 Ltd</i> [2006] EWHC 1941 (Ch)	Yes	Yes	YES

Table I: Consistency of Judicial Decisions with the Findings of Expert Witnesses based on the Waldram Methodology

12. References

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