

**VIDEO APPEALS COMMITTEE**  
**APPEALS NUMBERS 15 & 16**

**Sheptonhurst Ltd**

**-and-**

**Prime Time (Shifnal) Ltd**

**Appellants**

**And**

**British Board of Film Classification**

**Respondent**

---

**J U D G M E N T**

---

**Appearances**

For Sheptonhurst Ltd: David Pannick QC and Jane Mulcahy

For Prime time (Shifnal) Ltd: Greg Hurlstone (Director)

For the Board: Lord Lester of Herne Hill QC and Andrew Hunter

**Sheptonhurst Ltd**  
**-and-**  
**Prime Time (Shifnal) Ltd**  
**And**  
**British Board of Film Classification**

---

**J U D G M E N T**

---

**Parties**

These are consolidated appeals by Sheptonhurst Limited (Sheptonhurst) and Prime time Promotions (Shifnal) Limited (Prime Time) against refusals by the British Board of film Classification to grant R.18. Certificates to video works known as:

**Horny Catbabe**  
**Nympho Nurse Nancy**  
**T.V. Sex**  
**Office Tart**  
**Carnival International Version (Trailer)**  
**Wet Nurses 2 Continental Version**  
**Miss Nude International Continental Version**

The first four video works were produced by Sheptonhurst, the remaining three by Prime Time. It should be noted that a Certificate has been granted for the video feature of ‘Carnival’ but not the trailer. The Board declined to grant Certificates unless “all shots of penetration by penis, hand or dildo as well as shots of a penis being masturbated or taken into a woman’s mouth” were removed.

### **Written Grounds of Appeal - Sheptonhurst**

The written grounds in the notice of appeal are short and to the point. Reliance is placed upon the Committee's decision in Appeal Number 14, "Makin' Whoopee"; it is asserted the content of the video work in that case is not dissimilar to the content of the works under appeal. The Appellants say that the Board should follow the decision in "Makin' Whoopee" and that consistency is an important element of fair and reasonable decision-making. Plainly, producers of video works should know what the standards are and that they should be applied with consistency but we would observe that no two video works are alike and it is for this Committee to decide each and every appeal on the content of the video.

### **Written Grounds of Appeal - Prime Time**

Prime time reiterates the Sheptonhurst grounds but goes further. In respect of 'Carnival' complaint is made that the trailer is refused a Certificate whereas the video feature has been granted an R18 Certificate and that the content is identical. In 'Miss Nude International', the Board issued an interim clearance form on 7 January 1999 indicating an intention to classify the video work in the R18 Category without the need for cuts. In 'Wet Nurses 2', a cuts list requiring 21 cuts was issued on 22 December 1998. The cuts were made and the work was re-submitted only to be met by a requirement for further cuts.

At paragraph 3(J) of the notice, Prime Time says that the Board has been developing new guidelines for the R18 classification but asserts it should follow the standards set out in our judgment in "Makin' Whoopee".

## **Board's Responses**

The Board's written responses are virtually the same in relation to the two appeals. The Board rightly says that it must consider the prospective audience and must have special regard to the likelihood of the work being viewed in the home, by young persons and children and by those who are not well adjusted, and to harm that may be caused to potential viewers. The Board repeats and confirms what is said in the notice of appeal as to its attitude towards shots showing graphic sex.

The Board states that the shots of graphic sex are "... plainly contrary to the Board's published guidelines for R18 which state .. <there must be no explicit sight of penetration, oral (or) vaginal', and which may not be amended other than by the Board". We observe that in "Makin' Whoopee", the basis of the Board's opposition was that the content of that video was such that it might have been unlawful and that the Board's guidelines should run parallel to those of the Customs & Excise and the Police. However, the Board states -

*"It is correct that the Board for a short period relaxed the guidelines for material classified as R18; ... At the prompting of the Home Office, the guidelines have been reconsidered in the light of consultation with Customs & Excise, the Police and the Crown Prosecution Services. The more stringent guidelines have been re-introduced to ensure that the Board's guidelines run parallel with the guidelines and practice of Customs & Excise and the Police (in relation to Section 3 forfeitures)."*

The Board in this appeal reiterates that it must not grant Certificates to works that may be held to be unlawful, that is to say contrary to the Obscene Publications Acts.

## **Appellants' Written Replies**

We propose to take these together because, for the most part, they are in very similar terms. They expand the submissions made in the notices of appeal and draw extensively upon our judgment in "Makin' Whoopee".

The Appellants submit we should give little or no weight to the Board's concern that video works of this type may damage under age viewers and that the argument is inconsistent with the purpose of the R18 classification. They also say that the images in these video works are very similar to those in "Makin' Whoopee" and that the granting of Certificates to works such as this have not led to the adverse consequences feared by the Board. Such works are freely available in other European countries; indeed many foreign hotels show such works on a pay channel.

So far as the Board's submission that we should have regard to poorly adjusted or sexually dysfunctional persons the Appellants say that the applicable standards for society cannot depend on the actions of abnormal people, particularly as none of the video works involves physical violence.

The Appellants go on to discuss whether the videos could be held to be unlawful and refer to the Obscene Publications Act 1959 and to a number of important cases on the meaning of deprave and corrupt; that the law says it is necessary that a significant proportion of persons who would be likely to see the work would tend to be depraved or corrupted and this is especially important when considering material sold in a licensed sex shop. Finally, the Appellants assert that the refusal to grant Certificates to these works is wholly inconsistent with our judgment in "Makin' Whoopee".

Prime Time goes further and says that in relation to another work of a similar type the Board issued a cuts list requiring all sight of vaginal penetration by a vibrator should be cut but after representations cancelled the list. Prime Time goes on to say that it is a falsity for the Board to assert that present guidelines are being contravened and says that the Board has been influenced by third parties.

Although not put in these terms, Prime Time submits that it had a legitimate expectation that the Board would certify the trailer to 'Carnival International' having granted an R18 Certificate to the video work and that having granted an interim clearance for 'Miss Nude International' there was no reason later to refuse a Certificate.

### **The Videos**

Although the Board did not really seek to distinguish these videos from 'Makin' Whoopee', our collective view is that they are stronger. The latter did have a story, albeit a weak one, and did have quite extensive periods where there was no sexual activity. These works contained explicit sex including group sex and lesbian sex as well as normal heterosexual sex. There is very little of a story in any of them and they are clearly vehicles designed to show as much sexual activity as possible.

Lord Lester described the material as hard porn. Mr Hurlstone disagreed; if there were to be a description he would, perhaps, apply the term medium porn. He did give us a helpful description of the classification of works in the United States as follows:

### **Soft Porn**

- No sight of penetration
- No explicit sight of genitals
- No violence
- Similar to an 18 Certificate

XX

No ejaculation  
No anal penetration  
No close ups  
Medium to long range shots

XXX

Full blown hardcore

Mr Hurlstone said that in most of Europe the equivalent of XXX was allowed but that his tapes were XX with medium to long shots. Nevertheless, the videos were highly explicit although not to such an extent as the magazines that were shown to us and which a jury at Southwark Crown Court recently has acquitted. There was some dispute over what is permitted in Germany but we do not believe that we should concern ourselves with what is allowed or disallowed in other countries. Support for this is had from the Judgment of the European Court of Human Rights in Handyside -v- United Kingdom (1976) 1E.H.R.R.737 at page 753, paragraph 48 where it was said -

*“In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far reaching evolution of opinions on the subject.”*

We do not consider it is necessary to describe the content of the videos save that there is nothing in them which appears to meet the extremes of the XXX Category as described by Mr Hurlstone. As Mr Pannick pointed out, the video works would not win Oscars for script, direction or acting. Indeed, they lack artistic merit and the soundtrack is not easy to follow.

## The Video Recordings Act 1984

The Video Recordings Act 1984 has been amended and extended by the Criminal Justice and Public Order Act 1994.

Under Section 4(1) (a), the Secretary of State for Home Affairs, by letter dated 26 July 1985, designated the then President and Vice-Presidents of the British Board of Film Classification as the appropriate persons to exercise the function of -

*“... determining for the purposes of this Act whether or not video works are suitable for classification Certificates to be issued in respect of them, having special regard to the likelihood of video works in respect of which such Certificates having been issued being viewed in the home.”*

In his letter, the Home Secretary said he understood that the arrangements for classification would be carried out by the Board itself. He also made it clear that the Board should not classify works which are obscene within the meaning of the Obscene Publications Acts 1959 and 1964.

The 1984 Act, which was introduced principally for the purpose of meeting the harm caused by what are known as “Video Nasties”, that is video works attractive to children and young persons which depict scenes of violence, did not provide any guidance to the Board other than in Section 4(1)(a), no doubt because the Board already had many years experience in classifying films for showing in public cinemas.

Section 4(3) of the Act states -

*“The Secretary of State shall not make any designation under this Section unless he is satisfied that adequate arrangements will be made for an appeal by any person against a determination that a video work submitted by him for the issue of a classification Certificate -*

- (a) *is not suitable for a classification Certificate to be issued in respect of it or,*
- (b) *is not suitable for viewing by persons who have not attained a particular age,*

*or against a determination that no video recording containing the work is to be supplied other than in a licensed sex shop.”*

There are no other provisions relating to appeals save that with the agreement of the Home Secretary the Video Appeals Committee Provisions 1985 were made dealing with the manner in which appeals are to be made to the Video Appeals Committee.

The Committee from the outset of its existence has taken the view that its remit is to hear appeals *de novo* and not to exercise functions similar to those of the Divisional Court in judicial review proceedings. There has been no challenge to this interpretation of the Committee’s remit nor was there in this case. As Mr Pannick put it in his skeleton argument, the Committee must “form its own judgment on the issues in dispute.”

Greater assistance can be obtained by Section 4A which was introduced into the Statute by Section 90 of the Criminal Justice and Public Order Act 1994.

The Board - and this Committee - must have special regard in making a determination (among other relevant factors) to any harm that may be caused to potential viewers or, through their behaviour, to society by the manner in which the video work deals with, among other things, human sexual activity (Section 4A(1)(e)).

Subsection (2) defines “potential viewer” as -

*“... Any person (including a child or young person) who is likely to view the video work in question if a classification Certificate or a classification Certificate of a particular description were issued.”*

Sections 7(2)(b) and (c) require that the classification Certificate must contain a statement that the video work is suitable for viewing by persons of a particular age and, where appropriate, that the video shall be supplied in a sex shop.

Lord Lester, appearing for the Board, argued that Section 4A means that the Board must have regard to any harm that may be caused to any person, including a child, likely to view the video work. He relied upon a statement by Earl Ferrers, a Home Office Minister, when introducing the clause in the House of Lords in June 1994 -

*“The criteria mean that the British Board of Film Classification, must consider who in fact is likely to see a particular video, regardless of the classification, so that if it knows that a particular video is likely to appeal to children and is likely to be seen by them, despite its classification being for an older group, then the Board must consider those children as potential viewers. That does not mean that the Board must ban the video altogether. The Board will still have discretion on how, or whether, to classify it; but it must bear in mind the effect which it might have on children who may be potential viewers.”*

Lord Lester did not read the preceding paragraph but we consider it to be important -

*“... it leaves the British Board of Film Classification with discretion to decide what to do once it has considered a work on the basis of the criteria which will be laid down in the Bill. If it concludes for example, that the work will set a bad example to very young children, it need not ban the video altogether but it can place it in an age restricted Category. There may be some works which the Board believes would have such a devastating effect on individuals or on society if they were released that there should be the possibility of their being refused a video classification altogether, and the clause leaves the Board free to do that.”*

No doubt Lord Lester would say that these video works would have such a devastating effect on children that not even an R18 Certificate should be issued.

Mr Pannick says that Section 4A should be given a much narrower construction. The section makes it clear that the risk of harm to potential child viewers is one relevant factor to be taken into consideration. Harm to a child is not a ground for refusing a Certificate, it is not of over-riding weight. It is not a fact of potential harm to potential child viewers and there must be a balance of all relevant factors. Mr Pannick went on to quote from the speech of Home Office Minister, Mr Norman Baker, when introducing what was to become Section 4A in the House of Commons in October 1994. The words used by Mr Baker are nearly identical to those used by Earl Ferrers - hardly surprising - but he did go on to say -

*“It is very important to bear it in mind that those statutory criteria are not intended to be exhaustive and the amendment states only that the Board is to consider them.”*

It goes without saying that we should be very circumspect in construing a statute by referring to what Ministers say in Parliament. It is, of course, the wording of the Statute which one needs to consider. We have visited the construction of Section 4A on previous occasions and in *‘Boy Meets Girl’* Appeal number 10, we said -

*“We think that the intention of Parliament was that the Board must have regard to the persons who are likely to view the video. If it is likely to be viewed by children the Board must take that into account by attaching the appropriate restriction or by ordering cuts or both.”*

We should add to those words, *“or by refusing a Certificate altogether.”* We shall return to those who are likely viewers later.

## **Sex Shops**

The Appellants seek R18 Certificates for these video works to enable them to be sold in sex shops. Section 12 of the Video Recordings Act 1984 states that certain video recordings may be supplied only in licensed sex shops. Under Section 2 of the Local Government (Miscellaneous Provisions) Act 1982 a Local Authority may resolve that Schedule 3 is to apply to its area. The Schedule is headed “Control of Sex Establishments” and paragraph 6 deals with the requirements for their licensing. It is, however, paragraph 4 which is of relevance to this case -

Meaning of “*sex shop*” and “*sex article*”

*4(1) In this Schedule “sex shop” means any premises ... used for a business which consists to a significant degree of selling, hiring, exchanging, lending, displaying or demonstrating -*

- (a) sex articles; or*
- (b) other things intended for use in connection with, or for the purpose of stimulating or encouraging -*
  - (i) sexual activity; or*
  - (ii) acts of force or restraint which are associated with sexual activity.”*

*4(3) In this Schedule “sex article” means -*

- (a) anything made for use in connection with, or for the purpose of stimulating or encouraging -*
  - (i) sexual activity; or*
  - (ii) acts of force or restraint which are associated with sexual activity.*

It is plain that “*sex articles*” such as these video works are wholly unsuitable for viewing by children. Mr Pannick rightly conceded as much but went further and said they are unsuitable for persons under 18 years of age. No doubt he was making his

concession in the context of the legislation but we observe that young persons nowadays have a greater awareness of sex and sexual matters and research indicates that some 50% of girls of 17 years of age have had sexual intercourse. In these circumstances we take the view that there must be a number of persons who are approaching 18 who would not be harmed by watching videos such as these. On the other hand, and to use the words of Earl Ferrers, we agree that they might have a “devastating effect” on children of a young age. In *Handyside* at page 746, paragraph 29, the European Court of Human Rights cites part of the judgment of Inner London Quarter Sessions which “*pointed out that there was an almost infinite variation in the relevant background of the children who would be in one way or another affected by the book ...*” Quarter Sessions also stressed that the book, *The Little Red Schoolbook*, was specifically intended for children passing through a critical age of their development, which is not the case here where the producers and distributors of the video works have no intention or wish for them to be seen by anyone under 18 years of age.

Mr Clive Sullivan, who gave evidence on behalf of Sheptonhurst, told us that his company is a subsidiary of Darker Enterprises Limited which owns more than 50 sex shops in the United Kingdom, all of which are strictly controlled. No-one under the age of 18 is allowed in the shops and there are notices that the videos on sale are intended for adults only and should not be allowed to fall into the hands of minors. He said the chances of a child seeing this material are remote. However, he did accept that they can be loaned or sold on. A very good sale would be of 10,000 copies but that even if his company were to win its appeal it would not lead to a flood of titles as the market is small and would not stand this.

The Board, however, contends that were we to grant Certificates it would open the floodgates and there would be a dramatic increase in circulation.

## **Magazines**

Sheptonhurst, in support of its appeal, produced some magazines. Some half a dozen, had been acquitted - if we may put it that way - by a jury at Southwark Crown Court, the others had either been deemed not obscene by Magistrates or the Crown Prosecution Service had decided not to ask for forfeiture under the Obscene Publications Act 1959, Section 3. The Magazines had not been sold in a sex shop.

We are not greatly assisted by these magazines. As Lord Lester pointed out and Mr Clive Sullivan agreed, albeit half-heartedly, moving images have a greater effect upon the viewer than magazines but some of us feel that there is now little difference between moving pictures and photographs in magazines. A magazine is, to some extent, a frozen frame of a video. The magazines were put to the Courts and to the Crown Prosecution Service on the basis of obscenity, which was not in issue in this case as the Board has specifically discarded obscenity as a ground of its defence shortly before the hearing.

## **Human Rights**

Article 10 of the European Convention on Human Rights reads -

- “(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.*
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... the protection of health or morals ...”*

It is only recently that this country has incorporated the Convention and the jurisprudence of the European Court of Human Rights into our law and even so, the Human Rights Act 1998 will not come into force until 2 October 2000. Nevertheless, the Board has always had regard to Article 10 in reaching its decisions and this Committee has also done so.

We refer once again to Handyside on page 753, paragraph 48. We have already cited part of this paragraph dealing with the view taken by domestic laws of the requirements of morals. The paragraph continues -

*“State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them .... Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.”*

Then at page 753 paragraph 49 -

*“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic requirements for its progress and the development of every man. Subject to Article 10(2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no ‘democratic society’. This means, among other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.”*

Mr Pannick made much of this last sentence. He submitted that we must decide whether there is a pressing social need for this restriction and that the failure of the

Board to grant an R18 classification fails to satisfy any pressing social need and that it is plainly disproportionate to the concerns to which the Board draws attention.

On the other hand, Lord Lester submitted that as every contracting state has a “margin of appreciation” in determining whether a restriction of freedom of expression is necessary it was perfectly proper for the Board to do so in this case and that its decision was proportionate and necessary to meet the pressing social need to refuse Certificates.

Apart from referring to Handyside Lord Lester cited other authorities. We need refer only to Muller -v- Switzerland (1988) 13 E.H.R.R. 212 at page 229. A decision of the European Court of Human Rights.

*“The Court recognises, as did the Swiss Courts, that conceptions of sexual morality have changed in recent years. Nevertheless, having inspected the original paintings, the Court does not find unreasonable the view taken by the Swiss Courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity.’ In the circumstances, having regard to the margin of appreciation left to them under Article 10(2) the Swiss courts were entitled to consider it necessary’ for the protection of morals to impose a fine on the applicants for publishing obscene material.”*

To summarise, the Board says that for less explicit videos, the risk of harm to children may be proportionately dealt with by granting an R18 classification but that in respect of very explicit works the risk of harm to children is so serious that it is not enough to reduce the risk by classifying with an R18 Certificate. We now turn to the Board’s justification for refusing Certificates, the substantial risk of harm to children.

### **Risk of Harm to Children**

Lord Lester identified four key issues -

1. What is the meaning of “potential viewers” in the Video Recordings Act 1984? We have already dealt with this when discussing Section 4A but it is convenient to summarise briefly the submissions. Lord Lester says that “potential viewers” are those who are likely to see the video should it be classified and these persons include children. The R18 classification is not a sufficient safeguard because the videos which are purchased from sex shops are intended to be used in the home.

Not so, submits Mr Pannick. Potential viewers of the videos before us are only adults even if children see the videos. To be potential viewers the number of children who view must be a significant portion of the whole. In this respect Mr Pannick is adopting the Obscene Publications Acts test put forward by Salmon L J in R -v- Calder & Boyars [1968] 3 All ER at page 648 -

*“The Court is of the opinion that the jury should have been directed to consider whether the effect of the book was to tend to deprave and corrupt a significant proportion of those persons likely to read it.”*

It is interesting to compare Section 1 of the Obscene Publications Act 1959 with Section 4A of the Video Recordings Act 1984.

#### Section 1

*“ ... an article shall be deemed to be obscene if its effect ... is to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.”*

#### Section 4A

*“ ‘Potential Viewer’ means any person (including a child or young person) who is likely to view the video work in question ...”*

Both sections refer to likely viewers and it would not be difficult for us to say that what is good law for the Obscene Publications Act as set out by the Court of Appeal in 1968 should apply also to the Video Recordings Act. But we hesitate to do so. The court in *Calder* was considering the obscenity of a book in 1968, we are considering whether a number of video works is likely to cause harm to children in 1999 and we are by no means certain that, compelling though the judgment is - and it was confirmed in another case by the House of Lords - the courts would maintain this interpretation at the present day. As the European Court of Human Rights has observed, pornography is a moving scene, so can we give a numerical test if we do not adopt “significant”? If we cannot give a numerical test, what test can we adopt? It would be easy to observe that each case must depend on its special facts and, to some extent, that is true, but we must do better than that. Clearly it would not be enough if only one person under 18 were harmed but where do we draw the line? In DPP -v- Whyte [1972] AC.849, Lord Cross said -

*“In this passage the Justices have clearly used the words ‘significant proportion’ inaccurately. A significant proportion of a class means a part which is not numerically negligible but which may be less than half ...”*

We suspect that, in practice, it would not be difficult to recognise in a particular case what is a significant proportion. We do not believe for one moment, especially where children are concerned, that it amounts to 50%, it must be considerably less than that.

We also note that the Obscene Publications Act contains the words, “... *having regard to all relevant circumstances ...*” but that the Video Recordings Act

does not. Nevertheless, we believe that in relation to the latter Act we must have regard to all relevant circumstances.

2. **Who are the likely viewers of these videos if classified R18?**

The Board produced statistics of the number of video recorders in the home as follows -

(a)	video recorders in all homes	85%
(b)	video recorders in homes with children	92%
(c)	video recorders in all children's bedrooms	14%
(d)	video recorders in bedrooms of children aged 12 - 15	27%
(e)	video recorders in bedrooms of working class (C2 DE) children	26%
(f)	number of children aged 6 - 17 watching videos regularly (Average 2 hours 2 - 3 days a week)	81%

There can be no doubt that videos are a principal source of entertainment for adults and children and most children from a young age have no difficulty in operating a video recorder. During the hearing various calculations were made as to the number of videos that would be viewed. Lord Lester suggested that if 'Office Tart', for example, were classified some 10,000 copies would be sold, probably half to adults living in houses with children. It would follow that some of these videos inevitably would be watched by children but it is impossible to say by how many and how many would be harmed. Indeed, interesting though this exercise may be, it is speculative and, in truth, without cogent research it is not possible to put a figure on the number of child viewers. We cannot even say whether the proportion would be significant.

Mr Pannick said there was no evidence that R18 videos are viewed by children or even likely to be viewed by them. There was no evidence that they are left out for children or that there was even a minor social problem. It is true there is no evidence videos are left around the house by careless or irresponsible adults, but common sense tells us that this must happen from time to time. Mr Pannick pointed out that as a result of a relaxation by the Board of its guidelines in February 1997, videos similar to those the subject of this appeal have been available without evidence of complaint and there have been no representations that video works of this type were falling into the hands of children. He conceded that it must happen that children will see those videos on occasions but it must be on rare occasions and the competing interests must be balanced.

It would have greatly assisted us had there been research on this issue. We hasten to say we make no criticism of either party for not producing any, as it would appear that none has been made, and that there may be ethical considerations against doing so but we invite the Board to use its best endeavours to see whether such research is possible.

Our view is that although there must be times when children very unfortunately see these videos it happens infrequently and that the percentage who view them is very small.

3. **What is the risk of harm to potential viewers**

It is likely in our view that some young children would be harmed by watching these videos. We add that we believe that children would be harmed by some of the video works granted an 18 Certificate.

Lord Lester submits that the evidence shows there is a real prospect of harm. We had the advantage of hearing evidence from Dr Gordana Milavic, who is a Consultant Child and Adolescent Psychiatrist and a Fellow of the Royal

College of Psychiatrists. She has 22 years' experience, nearly all of it with children. She has been treating children for 19 years and said it was rare to deal with cases of children affected by pornography. Other factors may arise such as abusive or neglectful parents and she has seen fewer than half a dozen cases where there were direct links to pornography.

Dr Milavic could not say whether pornography was attractive or repulsive to a child, it depended on the child but a natural response would be repulsion to seeing genitalia. Dr Milavic was good enough to share her experiences with us but she had not seen any case where it could be said that a child had been exposed to and affected by pornography on sale in a sex shop in Britain.

We are satisfied after listening to Dr Milavic and applying our own collective common sense that at least a small number of young children can be affected by pornography, some quite seriously. Mr Pannick did not seek to challenge this. The real problem lies in numbers. It is entirely reasonable to assume that other child psychiatrists see children damaged by pornography from time to time, it is equally reasonable to make the assumption that children do not tell their parents what they have seen and how they have been affected and thus are not taken to their family doctors or child psychiatrists for treatment.

4. **Should there be classification even if there is real risk?**

Mr Hurlstone pointed out that other harmful products such as tobacco and alcohol are not banned to adults because of a risk that lawfully bought items might find their way into the mouths of children. Lord Lester replied that the reason is that Parliament has decided to regulate video and broadcasting in a different manner. The further argument that if videos are banned from sex shops they will appear on the Black Market is not a reasonable argument - some of us agree. The ban of these videos, he says, is not disproportionate. The Board does not wish to ban all pornography but it wishes to place

reasonable limits on those that would be harmful should they find their way into the home.

Our attention was drawn to R -v- Secretary of State for the National Heritage ex parte Continental Television B.V. and Others [1993] 2 C.M.L.R. 333 which is a decision of the Divisional Court in England. It is more familiarly known as the “Red Hot Dutch” case.

This is a very important case for us to consider. It concerns television programmes transmitted by satellite from the Netherlands and later from Denmark of hardcore pornography, what Mr Hurlstone has described as XXX, to subscribers in Britain. Programmes were transmitted between midnight and 4.00 a.m. to those who had purchased or hired a special decoder. The Secretary of State issued a banning order and Continental Television applied for judicial review. The judgment of the court was given by Leggatt, L.J. and it is clear from it that the material transmitted was far stronger than that which we have here.

The Judge made reference to Article 22 of the European Community’s Broadcasting Standards Directive 89/552 which provides -

*“Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.”*

Mr Pannick appeared for Continental Television and made a number of submissions. At page 344, Leggatt L J said this -

*“It is convenient at this stage, before proceeding further to evaluate the arguments on the first issue, to mention those relating to the second, that is as to the true construction of Article 22 of the Directive. Mr Pannick argues that the closing words of the first part of Article 22, which refer to ensuring ‘by selecting the time of broadcast ... that minors in the area of transmission will not normally hear or see such broadcasts’, in effect govern the opening sentence which, as will be recalled, provides that ‘Member States shall take appropriate measures to ensure that television broadcasts .... do not include programmes which might seriously impair the ... moral development of minors’ in particular those that involve pornography.*

*He contends that the result of that method of construction is that the moral development of minors is not to be regarded as seriously impaired if, by reason of the transmission, they will not normally see it. I am bound to say that, as a matter of construction, had the Article been reproduced in an English statute, I should have thought it too plain for argument that the Article is divided, for present purposes into two distinct parts. The first, which is free-standing, is concerned with the serious impairment of moral development of minors, in particular by those broadcasts which involve pornography. But, by contrast, the second part, as it says, extends to other programmes and, in relation to them but not to those in the first part, there is engrafted the exception clause relating to ensuring by selecting the time of the broadcast that minors will not normally see them.”*

Later in the judgment -

*“Mr Pannick next contends that, assuming Article 2(2) is applicable, Article 22 cannot apply because the time of reception is in any event such as would make it unlikely for the broadcast to be seen by minors. His argument that the development of minors cannot be affected by what they are unlikely to see is, I suppose, a truism. Unfortunately, the timing of transmission and the need to purchase decoding equipment cannot, in reality, ensure that minors are unlikely to see the transmissions. The very fact that they occur in the small hours of the morning makes it likely that the programmes will be recorded by prospective viewers, there is no prohibition on the sale of decoding equipment to minors, except insofar as there may be by virtue of the Secretary of State’s order a general prohibition, nor can minors necessarily be prevented from viewing recordings made by others or, indeed, using equipment belonging to others.”*

And further on page 345 -

*“Finally, under this head, Mr Pannick argues that the principle of proportionality is a fundamental provision of Community law. He submits that it is inconsistent with the principle of proportionality for the Secretary of State to use such powers as he may possess under the Broadcasting Directive, in circumstances where such concerns as he has about minors have not been put to the applicants, and any suggestions they might have for preventing access by minors to such broadcasts have not been entertained. If the broadcasts do, indeed fall within the first part of Article 22, it seems to me there is nothing about the principle of proportionality which renders disproportionate the use by the Secretary of State of his statutory powers to prevent such risk of access to the programmes by minors as the applicants have created.”*

And finally on page 348 -

*“First, the programmes such as we have been previously shown have included acts which in themselves are contrary to English law, and such programmes have also contained material which if broadcast domestically would constitute a criminal offence. Secondly, and perhaps most importantly, when the moral welfare of minors is weighed against the applicants’ profits there can only be one side upon which the scales come down.”*

Mr Pannick points out that the case concerns the European Broadcasting Directive and has no application to this case. He says we are concerned with a statute to allow persons to purchase R18 material and the Red Hot Dutch case is entirely different. He is, of course, absolutely right that the facts are different and we must look at previous cases to help us understand the law and not to make a comparison of the facts. Nevertheless, both cases are concerned with pornography, both cases have restrictions on the distribution of that pornography and both cases are concerned with harm to children.

There are some vivid distinctions of fact. The Dutch videos are much stronger. It seems that Leggatt L.J. is suggesting that because there is no restriction of the purchase of decoding equipment by minors they could use it for the direct receipt of programmes. But of greater moment is his concern that programmes would be recorded and the videos would not be locked away from the eyes of minors. In the appeals we are considering there is no suggestion of direct purchase by children but a strong submission that some will undoubtedly be seen by some children. The importance of Leggatt L.J.’s judgment is the emphasis he gives to the protection of children, hence the somewhat emotive remark about putting children before profits.

We have anxiously considered this case and we do find that there are sufficient factual differences to enable us to look at it merely for the principles of law. R18 material is on sale only in sex shops to adults; sex shops are subject to the control of the local authority and, as Mr Sullivan has said, the local authority

would not hesitate to close the shop if videos were sold to under 18s. Because the material is for the purpose of stimulating sex it is axiomatic that the material is unsuitable for children and, says Mr Pannick, it is impossible to design criteria to avoid harm to children without destroying the utility of the R18 Category. If videos of this nature will be seen in the home, why have an R18 Category?

### **Dysfunctional persons**

We were urged to consider the effect upon dysfunctional persons that the material the subject of this appeal would have. The arguments as to lack of information and seeming lack of a problem for children apply also to this class of person.

Lord Lester took the view that the potential harm was not as great as that to children but he was concerned that the availability of pornography to those who are maladjusted might harm them and lead to social misbehaviour. Of course, a dysfunctional person has access to sex shops; he can buy what he likes there; he may also see 18 classified films in the cinema and R18 in special cinemas.

### **The Board's Guidelines**

Between July 1985 and January 1997, the Board applied internal guidelines to R18 material. However, from 29 January 1997 to October 1997, the guidelines were relaxed and stronger material was given classification Certificates. These more relaxed guidelines were suspended and the original guidelines were reinstated on 5 November 1997.

At the beginning of 1998, the Boards' examiners redrafted the guidelines and put them out for consultation. Nine public meetings were held and the guidelines discussed. However, it was not until 16 November 1998 that the guidelines in the form now presented to us, were issued. It was not until 22 January 1999 that R18 suppliers were told that the new guidelines would be applied. By that time a number of titles similar

to those under appeal had been R18 Certificated, including *‘Carnival International’*, the feature work. One of the videos to fall foul of the Board’s new attitude is the trailer of *‘Carnival’* which contains nothing which is not in the feature video.

Lord Lester fairly said the Board has not been consistent. The Appellants put it more strongly and say the Board has been unfair. We consider that in a field as sensitive as this it is important that those who distribute the videos know where they stand otherwise they are likely to sustain unnecessary financial damage.

The Board submits that its guidelines are fair and reasonable, they are not too vague and not too broad; they distinguish in a fair and measured way the distinction between hardcore pornography and pornography which is acceptable. The Board says its concern is with the protection of children but the stance now adopted by the Board will keep out of the hands of adults material that was permitted for some time without any manifestation of a real problem or a pressing social need to revert to previous standards.

We have to say that we do find the rationale of the guidelines difficult to follow as well as the practical distinction between 18 and R18. In the 18 Category scenes of simulated sex are permitted but sex scenes may be limited because of length or strength. Images of real sex must be brief and shown in context. Of course, we accept that the intention is that R18 material may be stronger and, in practice, is stronger, but if the Board is concerned about harm to children by material such as we have here, we offer the comment that children can be upset by simulated sex and by the violence permitted by the 18 Category. Is it to be suggested that videos should be withheld from the 18 Category because of the possibility that children may see them?

We recognise that the task of the Board is an exceedingly difficult and sensitive one. Whatever it does it will receive criticism from one side of the community or another. We also recognise it is easy for us to dissect the guidelines and pick over them in a legalistic rather than a practical way. For example, the Board was taken to task in respect of the sentence, *“There is no limit on length or strength apart from those of*

*the criminal law.*” This said, Mr Pannick showed that the only criterion for refusal of Certificate is breach of the criminal law and the guidelines can certainly be read in that way. But we do not think that was the Board’s intention. We think this particular sentence is infelicitously drafted and that the Board never had any intention of confirming its limits to the criminal law.

There is no doubt, and the Board admits as much, that it has changed its ground. There is nothing to stop the Board changing its mind but it should not do so arbitrarily. It is true there was consultation with the public but although advice was sought from prosecutors no advice was obtained from the industry, whatever the reason for failure to do so. The result is that those who sell this material did not have the opportunity to put forward their point of view and, so far as we are aware, no effort was made to obtain such expert assistance as there is on the extent to which there are problems of child access to material of this kind.

We were invited to set out our own guidance. We respectfully decline to do so. We do not consider a judgment such as this is the proper place to do so and we should be doing what we are criticising the Board for doing; laying down guidelines without full consultation with everyone concerned.

## **Decision**

We are divided in our views. It is the view of all of us that R18 material in the hands of children - and perhaps also the maladjusted - can be harmful. It is the view of the majority that the Board has been inconsistent, demonstrated by the fact that the issue of harm to children was not pursued in *‘Makin’Whoopee’*. The Board says that the possibility of harm, even though not quantified is such that we should not take any risk of allowing these works to fall into the hands of children. The Appellants say that we must look at the scale of the problem and that if we have regard to evidence the scale of it is negligible. That being so, are there pressing social needs to ban these video works; children are properly protected by local authority licensing of sex shops

and we should not assume that a large number of parents will not exercise their parental authority and duties.

The R18 Category is available for what Mr Hurlestone has described as XX material. For several months the Board allowed it without any demonstrable problem. If the R18 Category is to be softened, much of the material will still upset children should it fall into their hands. Furthermore, there could also be some doubt about the 18 Category.

Parliament established sex shops to make available material that was not suitable for children. As recently as 1994, when videos were already almost universally available to children, legislation was enacted which assumed it would be possible for children to be adequately protected by the restrictiveness with which such material would be available.

Even in these circumstances, refusal to grant any certificate would be justified if there was any evidence of devastating damage to more than a small minority of children or indeed other members of the population. There is not. It is clear from the evidence of Dr Milavic that at least a very small number of children do develop incapacitating symptoms of anxiety for several weeks as a result of seeing sexually pornographic films. Any calculations on the numbers of such children based on the experience of Dr Milavic would be unsafe, bearing in mind the possibility this is atypical, one way or the other. So far as we are aware, there have been no complaints by psychiatrists or other health professionals about this matter, and, regrettably, in contrast to the situation with violent images, there is no systematic evidence from the research literature. Thus there is no evidence either of the numbers of children who might be affected or of the extent to which affected children are damaged. Bearing in mind our knowledge about the extent to which young children are upset by material generally regarded as innocuous, and indeed specifically made for them, such as Disney films (The Lion King, Snow White), it is not really “common sense” to assume that sexually pornographic films would have a specially harmful effect.

The distinctions the Board makes between material that is acceptable for 18 classification and for R18 classification seem somewhat insignificant, as indeed do distinctions between material which is and is not acceptable for R18 films. The distinctions seem unlikely to relate to possible damage to children. Is an erect penis in the hands of a woman masturbating a man likely to be less upsetting than an erect penis entering a mouth or vagina?

In relation to violent images, there is a mass of evidence suggesting that repeated exposure is damaging to vulnerable children and young people. This is, at least in part, accompanied by evidence that such images, whether they occur in films, videos or computer games, are found very attractive to children. Such evidence is lacking in relation to sexually pornographic material. In any case, such material is presumably likely to be less damaging to young people who have already had full sexual intercourse. Median age for first intercourse for men and women aged between 16 and 24, and born between 1966 and 1975 was 17 years. For those born between 1931 and 1935 it was 21 years. (Sexual Behaviour in Britain. Wellings K et al 1994, Penguin Books). This means that half the young people in Britain have had full sexual intercourse before the age of 17 years.

It is relevant that paedophiles use sexually pornographic images to 'soften up' children. We think the evidence they do this is reasonably solid. However, it is very likely they would obtain such material from elsewhere even if it were not available from sex shops and, indeed, it is quite likely they do not get the videos from sex shops even at the present time.

We accept the argument that we do not, in general, prevent adults having access to material just because it might be harmful to children if it fell into their hands. We might have taken a different view if there was evidence that the effects were affecting more than a small minority of children or were devastating if this did happen.

We think the Board has been precipitate in introducing new regulations without adequate consultation or adequate research or adequate warning to the industry.

At the end of his cross-examination by Mr Hurlstone, Mr Duval, the Board's director, agreed that it was a reasonable proposition to ease the R18 criteria slightly but there would have to be consultation. He said the Board could shift its position. We are entitled to ask that if the Board may shift its position, what does that do to the Board's concern that children may be damaged?

The majority believe that all the video works and the trailer under appeal are suitable for sale uncut solely to adults in sex shops, and that the risk of any so sold being viewed by and causing harm to children or young persons is, on present evidence, insignificant but we do emphasize that the sale is limited to adults who visit sex shops.

The majority, therefore, would allow these appeals and grant R18 Certificates to all the videos and the trailer.

It is necessary to set out the viewpoint of the minority.

The opinion of the minority is that the videos in these appeals are all cheap imports from the United States which are sold in sex shops of which there are eighty in the United Kingdom, fifty of them owned by Sheptonhurst which is one of the Appellants. The other Appellant is a dealer. None of the videos has the slightest artistic merit, only a minimal narrative, and little dialogue. They all consist of seemingly endless sequences of explicit, energetic and joyless sex, vaginal, oral, and heterosexual. The sex appears consensual but no one expresses pleasure unless the occasional feral grunt can be so construed. The general effect of all these videos is dehumanising and mechanistic and they are unacceptable within the current guidelines for a classification of R18.

Part of the Appellant's case is that the videos in the appeal are similar to 'Makin' Whoopee'. It is true that the sex scenes in 'Makin' Whoopee' are explicit but the context is different. That video does have a story line, even if it is fairly vestigial, and the dialogue and some of the visual content, one of our number considers, is quite

witty. However, the minority does not think the fact that 'Makin' Whoopee' was given a classification on appeal, can be regarded as setting a precedent. The videos we are now considering are not 'Makin' Whoopee'.

It seems that the chief argument against abandoning the BBFC's guidelines (which we should clearly be doing if we allowed these appeals) is the widespread use of videos in the home and the availability to children and other vulnerable people of this kind of pornography. There has been a considerable increase in the availability and use of videos since the Video Recording Act was passed in 1984. Very young children are perfectly capable of operating videos, and operating videos, in a good many families, is the main entertainment. Adolescents spend evenings at each others' houses specifically to watch certain videos and it would be naive to imagine they would choose on these occasions to view 'Bambi'. It follows that the risk of harm is greater now than it was in 1984.

It is immaterial whether other countries have more liberal laws, or that the sale and consumption of, say, tobacco and alcohol are less strictly regulated. In this country we have chosen to regulate films and videos in order to protect the more vulnerable members of our society. The classification R18 was established in order that people who wanted them could buy pornographic videos for pleasure and stimulation but it set up what are reasonable and common sense restrictions; a barricade, if you like. The videos that are the subject of these appeals are on the wrong side of that barricade. And the minority agrees with Leggatt L.J.,

*'When the moral welfare of minors is weighed against the applicant's profits, there can only be one side upon which the scales come down.'*

## **Ruling**

Accordingly, these appeals are allowed, by four votes to one.

## **Costs**

We have been asked to consider costs. The Video Appeals Provisions 1985 have some specialised provisions about costs but we are uncertain as to the vires of these provisions. We are uncertain whether we have a power to award costs and in the circumstances we do not do so. However, the Appellants' fees for these appeals should be returned to them.

**16 August 1999**

**John Wood  
President**