THE HARM PARADOX

Jonathan Edis

THE HARM PARADOX

An essay on harm affecting heritage assets

This essay does not seek to challenge the role of harm as a central component of national policy in making planning decisions affecting the significance of heritage assets. Rather, it seeks to challenge our understanding of harm. It questions whether we have adequate means of distinguishing between harm and change, whether we can calibrate harm well enough, and whether the way in which we balance harm with benefit is sufficiently rigorous. We have been aware of the potential for harm to occur to heritage assets for a relatively long time, but it is only in the last decade or so that we have been called upon to use harm as the guiding light of assessment. Harm contains paradoxes. It is not a fixed measure, and there is no agreement or formal guidance as to the spectrum or scale by which it might be described. The relationship of harm to other significant environmental impacts could be better understood. In these circumstances it is not unreasonable to ask questions about harm and its characteristics.

Jonathan Edis 27 April 2019

THE HARM PARADOX

Change to a significant place is inevitable, if only as a result of the passage of time, but can be neutral or beneficial in its effect on heritage values. It is only harmful if (and to the extent that) significance is eroded.

Conservation Principles, Policies and Guidance,

Historic England (then English Heritage) 2008

Harm is well known in human experience. I will touch on several aspects of harm in what follows, but the central thread running through this essay is that of harm affecting heritage assets in England. Harm is a component of decision making that has found its way into heritage-related planning guidance and policy with increasing volume in the past decade, so if it is to be used as a measure there is good reason for debating and understanding what it encompasses.

It is usually said, in relation to current national heritage-planning guidance, that harm will erode the significance of a heritage asset. This may be true, but it is more complicated than that. I do not propose to inquire deeply into heritage significance as a subject in its own right, but I will touch on it insofar as harm is inherently bound up with significance. By that I mean that significance can vary over time, whether as a result of natural or unavoidable change, or because of innocent or deliberate harm. Indeed, I will touch on some cases where heritage significance has in some measure derived from harm. Ruins, earthworks and archaeological remains can be of considerable significance.

We are taught, by national guidance, that harm to important heritage assets must be weighed in the balance with public benefit. In the past decade or so that has often caused us to think of harm as having within it a notional spectrum, or staircase, of degree.[1] Heritage specialists are often put on the spot, and are required to say exactly where on the spectrum the harm in question falls. It is odd, I think, that planning specialists have not found it expedient to arrive at a parallel spectrum of public benefit for the purposes of comparison when the balancing exercise is undertaken.

Harm to our shared heritage is a concept that has been growing in our national

[1] The spectrum has been in the courts, where its very existence has been questioned, but it shows no sign of disappearing.

consciousness since about 1850. It has evolved, in fits and starts, but its reach has increased and spread. Its pace is, I believe, accelerating exponentially. It is now written into national guidance almost as though it is assumed to be present rather than absent. How far will it go? Will it eventually be that harm can be caused to almost anything, even if it has virtually no heritage significance at all? Is significance the driving force in conservation, or is it now harm?

Conservation and preservation are, metaphorically, siblings. Harm is their mercurial cousin who behaves differently. Whether harm is really related to public benefit at all is a question that goes beyond the scope of this essay. For the time being I open with what I describe as the Harm Paradox – the notion that harm is an inconsistent measure or quantity that behaves differently according to the context in which it is perceived.

The Harm Paradox

In its simplest form the central thread in the Harm Paradox can be expressed as follows:

If harm occurs to the significance of a heritage asset, the asset will become, by definition, less significant and more able to absorb further change. However, experience demonstrates that heritage assets can acquire significance as a result of harm.

In planning policy terms, harm is largely thought of as something that could happen in the future, as a result of permission being granted for a proposed development. But harm plays a wider role in other aspects of managing the historic environment. The three main areas in which harm now involves itself are:

Significance: A heritage asset can be significant as a result of, or despite, harmful change that took place in the past. For example, there are some post-medieval parks and gardens, now regarded as being highly significant, which came about as the result of the clearance and demolition of medieval settlements. That clearance and demolition was inherently harmful, not least in human terms, and it may have robbed us of the experience of structures that might otherwise have been preserved. Nevertheless, the old harm does not necessarily prevent us from finding significance in the designed landscapes and residual earthworks we have inherited. Indeed, we may find ourselves more drawn to the solitude afforded by the earthworks of a deserted medieval village than to a real village of medieval origin, particularly if the real thing

is now crammed with bungalows and choked with traffic. If that example does not easily convince you, then consider why the ruins of Fountains Abbey, dissolved and seriously harmed in the 16th century, were inscribed as a World Heritage Site in 1986 - and yet the much better preserved York Minster is still waiting in vain for such recognition.

Designation: Harm finds its way into the subject of designation in two ways, so designation is something of a hybrid falling between significance (see above) and determination (see below). In essence, the designation or listing or identification of a heritage asset must result from it having a degree of significance. Sometimes, but not always, that significance might have arisen from harm that was caused in the past, as I have described above. In all cases, one presumes, the act of designation implies that we wish to preserve the asset in question – that is to say, we can imagine some form of harm happening to it in the future, and we wish to control or manage or limit that harm. There may be a specific threat to the asset, perhaps in the form of a live planning application, or a proposal that is very likely to come forward and to cause harm. In these cases it is difficult not to see designation as being very closely related to determination, which I address further below. In extreme cases, new designations made when there is known to be a threat to the asset can have dramatic effects on the determination of current planning applications, and in those circumstances decisions about harm can be made outside the normal framework of planning policy and development management.

Determination: It is in the determination of applications for planning permission and listed building consent that harm is usually considered most fully. Our greatest focus is on harm in the balancing exercise, such that it is easy to forget how it can play a role in other aspects of heritage management. If this essay were to achieve one thing, it would be to make more people question why so much emphasis is placed on harm at the point of determination, at the expense of a debate about harm as a whole.

There are some uncomfortable aspects of the Harm Paradox that we often tend to overlook, or set aside. One of these is that harm is not a constant measure. Our fear of harm, in the future, can be exaggerated. Harm tends to soften into change as the future turns into the past. In effect, our minds bend the harm according to our own model and experience of the historic environment at a given point in time. We easily persuade ourselves that the

past is about change, and that the future is about harm. Are we entitled to do so?

Archaeology can often find itself in one of the most intriguing philosophical mazes of the Harm Paradox, partly because of the generally accepted principle that preservation in situ is preferable to preservation by record.[2] That is to say, it is usually desirable to preserve buried archaeological remains undisturbed rather than to excavate and better understand them. Leaving aside conceptual difficulties that many lay observers face when first considering this proposition, and leaving aside a large part of the technical reasoning as to why preservation in situ can in fact be a reasonable starting point, there is a twist of the Harm Paradox in play here. That is because buried archaeological remains in this country are often the most degraded and abraded remnants of past human culture – sometimes no more than a few fragments of prehistoric pottery, and truncated cut features visible as subtle colour changes in the earth. Taking my distillation of the Harm Paradox, as I have expressed it above, the buried remains in question have often been subjected to considerable harm, to the point where the original structures are usually no longer visible above ground, and may even be hard to detect when excavated. Nevertheless, we accord significance to these remains, and we adapt our own concept of future harm as we do so. A buried Georgian ditch will be of little or no significance, as a rule, and its loss will not usually be thought to be harmful. However, a buried Iron Age ditch may be regarded as having quite a lot of significance, as ditches go. Yet many Iron Age ditches are totally destroyed under archaeological conditions, in advance of development, provided they are sampled and recorded and understood as best possible. The concept of preserving an archaeological site by record is an interesting one, because it is sometimes said to mitigate the harm. Exactly how that happens is complex, and to explore the consequences and benefits of archaeological recording and building recording more fully would greatly lengthen my essay. For that reason I will leave the matter there and instead inquire into the origins of harm, and its slow development from the Victorian period until today.

[2] Some interesting aspects of this twist in the Harm Paradox were explored in The Queen on the application of John Charles Hayes MBE and City of York Council and English Heritage Trust Limited [2017] EWHC 1374 (Admin).

THE HARM PARADOX

The emergence of harm

It is difficult to pinpoint the exact moment in time when harm to heritage assets became a generally accepted concept in English conversation and literature. As a broad proposition it must have been sufficiently apparent by 1857 when the Reverend William Barnes and Isambard Kingdom Brunel went head to head to decide whether the main Dorchester to Yeovil railway line should go through Poundbury Camp hillfort in a cutting, or whether it should go underneath it in a tunnel. Barnes and his supporters won, and the tunnel was built. Potential damage to an important prehistoric monument had been identified and fought off. Two decades later, in 1877, the manifesto for the Society for the Protection of Ancient Buildings took root in fertile soil at a national level. Its authors, William Morris and Philip Webb, were living at a time of accelerating change, when church restorations in particular were beginning to be perceived as a threat to archaeologically significant fabric in buildings. Their bold language seems archaic now, a far cry from the national heritage policy within which we work. But the point is that the potential for harm to heritage assets had been recognised, and that some of the essential concepts were beginning to fall into place in the decades around the time of the Crimean War.

As a concept, significance has an older ancestry than harm in this country. Antiquarians were beginning to notice and record the significance of ancient remains from the time of Robert Glover (1554-1588) and William Camden (1551-1623) both of whom were heralds. Investigations into prehistoric sites were becoming the subject of letters and publications in the lifetime of the leading antiquarian John Aubrey (1626-1697), and they were becoming well established in the era of William Stukeley (1687-1765). At various times between the 16th and 18th centuries these early antiquarians set up networking societies for the exchange of information between themselves, but they did not establish popular movements aimed at the protection of heritage assets. No doubt the occasional loss of a historic building or site would have been a matter of regret for them, but they did not perceive there to be a common threat such as to give rise to a concept of widespread harm. It was not until population growth and urbanisation took hold, in tandem with a movement for renewing places of worship, that there was a perception of harm being caused to the historic environment on a scale that needed to be regulated. That

perception was relatively slow in taking hold. Taking Thomas Rickman (1776-1841) as an example of an architect and antiquarian who stands at a broadly intermediate point in time between William Stukeley and William Morris, we think of his (Rickman's) contribution as being twofold. First, he designed and built a large number of Gothic Revival buildings, many of them churches, and second, he pioneered the archaeological classification of the Gothic style of architecture. However, Rickman is not thought of as a preservationist, first and foremost. For people like Rickman, understanding and classifying Gothic architecture was as much for its reuse in new and impressive buildings as it was for the preservation of what then survived. It seems that the 19th century was well advanced before the pace of change led to an awareness of a threat to heritage assets, and possible harm, at a general or national level. The fact that antiquarian-minded architects like Rickman were at the forefront of the restoration of churches probably slowed, rather than speeded, that process.

The emergence of an accepted concept of harm was gradual, and it was related to technological progress. Anyone who has observed the serene topographical watercolours of J.M.W. Turner, created in the 1790s, and who has compared them with his frenetic oil painting of *Rain Steam and Speed – the Great Western Railway*, exhibited at the Royal Academy in 1844, will appreciate that change had occurred over the course of a generation, and that with progress came the potential for harm. The Great Exhibition of 1851 was a nationally symbolic moment of the rapidity with which change was taking place. At any rate, the concept of harm to our heritage crystallised in the popular mind in the mid-19th century, nearly three centuries after Glover and Camden began their first investigations into what they considered to be significant in the past, and it has adapted and evolved constantly from that point onwards.

Harm in its infancy, 1882-1948

Having realised that heritage assets were increasingly vulnerable to demolition, unsympathetic adaptation, and the unregulated attentions of an ever more mobile population, it was decided that something should be done to prevent damage. The Ancient Monuments Protection Act, 1882, began the process of identifying and preserving some of what were then considered to be the most important archaeological sites in the country. A series of further Acts, in 1900, 1910, 1913, and 1931,

supplemented these early provisions. This emerging system of limiting harm was still very much in its infancy, and it was directed at a small number of readily identifiable monuments. It is ironic that church restorations, which were one of the driving forces behind the manifesto of the Society for the Protection of Ancient Buildings, were not brought into the new control system. The provisions of the Ancient Monuments Consolidation and Amendment Act of 1913 were not extended to Church of England cathedrals, and the Ecclesiastical Exemption persists to this day.

It is no accident that the emergence of the concept of harm happened in the early decades of the steam railway, which afforded the population at large much greater mobility. Another technological change occurred during the period that I describe here as the infancy of heritage-related harm. By 1910 there were more than 100,000 cars on Britain's roads, and in the three decades that followed the number increased to two million. This time, the pressure of technology was felt by the countryside as a whole. In 1926 the Campaign to Protect Rural England was formed, partly to try to limit what were described as urban sprawl and ribbon development. Within a decade there were initial responses, including the Restriction of Ribbon Development Act 1935, and in later years the Green Belt and the National Parks. This strain of harm was different from the first phase of heritage-related harm that I have described above. It was more closely allied to what we now think of as mainstream town planning, as opposed to heritage, and it had more in common with the Town and Country Planning Act 1947 than with any of the Acts relating to Ancient Monuments or Listed Buildings. In retrospect, this new type of harm had its fair claim to be addressing important aspects of the heritage of this country, but it evolved differently and it is now distinct from what we regard to be heritage-related harm in policy terms.[3]

The Second World War brought harm into sharp focus. The destruction of 70,000 buildings in London alone during the Blitz raised awareness of how historic places were vulnerable to damage. Targeted air raids on historic cities, including Coventry, Bath and Canterbury, had an effect on how people thought about their heritage. As the country

[3] If I have characterised these two different strains of harm incorrectly, or unfairly, then why else does the National Planning Policy Framework 2019 deal with harm to the Green Belt in one way (in paragraphs 143 to 147) and to heritage assets in a completely different way (paragraphs 193 to 197)?

emerged from the rubble of war, it was clear that something had changed, and that infrastructure and land use and heritage needed to be managed at a national level. Harm needed to be schooled.

Harm in its childhood, 1948-2010

Coventry Cathedral seems to me to exemplify the challenges faced by people in a post-war era when responses to harm were becoming more complex. Severely damaged by bombing in 1940, the ruins of the medieval Cathedral Church of St Michael were listed grade I in 1955. The ruins were then preserved as an external component of a new cathedral built 1951-1962 to the design of Sir Basil Spence – a building that was listed grade I in its own right in 1988. By weaving the new and old buildings together, symbolically in this case, an attempt was made to repair or mitigate the harm of bombing. This is an example of how the significance of a heritage asset can endure harm, and even rise above harm. It can even take on a new and more powerful significance. Coventry was an exceptional example, and it was a challenge that was won. Other city and town centres were less fortunate in the decades after the war, and wholesale clearance and redevelopment of historic areas took place well into the 1970s. It is surprising, in retrospect, just how long it took for the concept of the Conservation Area to crystallise in this country, finally making a formal appearance by way of the Civic Amenities Act 1967 – yet considerably closer in time to the Restriction of Ribbon Development Act 1935 than to the present day.

Post-war city centre redevelopment also drew attention to the destruction of potentially significant archaeological remains, and it was felt desirable to consolidate the Ancient Monuments Acts in order to respond to the harm. A particular feature of the Ancient Monuments and Archaeological Areas Act 1979 was the concept of Areas of Archaeological Importance. As it happened, only a handful of very important historic town centres were so designated according to the provisions of the statute, but the principle of archaeological priority areas carries on in various ways to the present day. Physical harm to archaeological sites took yet another route in policy, being regulated on a "polluter pays" principle from 1990 onwards by Planning Policy Guidance Note 16 (PPG16). The provisions of PPG16 have since been replaced by other measures. I have already alluded to the potentially paradoxical way in which buried archaeology can be thought of as significant, and yet can be preserved in situ or

destroyed and preserved by record according to what appear to a non-specialist to be quite fine distinctions.

At this stage in what I think of as a period in which harm was in its childhood, guidance on the management of the built historic environment was issued by what was then the Department for the Environment in the form of Circular 8 of 1987, Historic Buildings and Conservation Areas – Policy and Procedures, commonly referred to as Circular 8/87. This was fairly rapidly followed by the Planning (Listed Buildings and Conservation Areas) Act 1990. Three sections in the Act (sections 16(2), 66(1) and 72(1)) placed duties on the decision maker to have special regard to the desirability of preserving a Listed Building or its setting, and to pay special attention to the desirability of preserving or enhancing the character or appearance of a Conservation Area. There was no mention of harm in any of these sections. In the short term the Act contributed to a brief wobble in the courts over the meaning of preservation, in the context of preserving or enhancing Conservation Areas.

The end result, which came about as a consequence of the celebrated South Lakeland judgment in 1992,[4] was that one of the meanings of preservation is to keep safe from harm. It is important to note that harm was being used to define preservation in 1992. As of 2019 we are still waiting for an adequate definition of harm.[5]

Steady progress was then made in 1994 with the publication of Planning Policy Guidance Note 15 (PPG15) which endured for several years as the reference manual for managing change to the historic built environment. It superseded Circular 8/87 and it complemented the provisions of the Act. The language of PPG15 now seems a little dated, but it served its purpose well in an age when decision making was less fraught. Change, however, was in the air. In 2008 English Heritage (now Historic England) published Conservation Principles, Policies and Guidance, which set out a different philosophical structure for managing heritage based on the concept of significance. The stated aim of the document was "…to set out a logical approach to making

[4] South Lakeland v Secretary of State for the Environment [1992] 2 AC 141.

[5] This may be a little unfair, since I quote a definition of harm, or at least change, from Conservation Principles 2008 at the beginning of this essay. It is the best definition I know of, differing from the definition in the consultation draft of the revised Consultation Principles. Consultation on the replacement draft ended on 2 February 2018 and it has not been heard of since.

decisions and offering guidance about all aspects of the historic environment, and for reconciling its protection with the economic and social needs and aspirations of the people who live in it." It was also said that Conservation Principles was *primarily* intended to help English Heritage (as it was then) to ensure consistency of approach in carrying out its role as the government's statutory advisor on the historic environment in England. If that limited objective was in fact the intention in 2008, it gave way to mission creep within a relatively short period of time. What began as an interesting and not unreasonable series of philosophical observations soon fed into a policy framework for decision making on a grand scale.

Harm in its adolescence 2010-present

I have characterised the concept of harm, glibly some might say, as having evolved from infancy to childhood between 1882 and 2008. That is a long period of time in human terms, but heritage, it seems, moves slowly. We have all been teenagers, and we know the cocktail of hormones and emotions that are associated with those years of our lives. Harm, I think, has relatively recently entered this phase of its development. Metaphorically, it has gone into an adolescent huff, rather like Harry Enfield's Kevin,[6] and it refuses to come out of its bedroom. We are going through a difficult period. It is to be hoped that this phase of its development does not, like each of the preceding phases, last 60 years or so, otherwise we will be in for the long haul.

Things began to go funny on 23 March 2010 when Planning Policy Statement 5: Planning for the Historic Environment (generally known as PPS5) was published, setting out the government's planning policies on the conservation of the historic environment. Whatever the circumstances might have been surrounding the cancellation of PPG15 and its replacement by PPS5, the new document contained a surprise. Those of us who had been used to thinking of conservation and preservation as the guiding principles relating to the management of the historic environment had to get used to harm being central to decision making instead. Overnight, harm had become part of a balancing exercise competing with public benefit. Even when we looked back at Conservation Principles 2008,

[6] I am told Katherine Tate's Lauren will be better known to the younger generation.

published only two years before PPS5, there was not a great deal to suggest that harm had been waiting to take on a new role centre stage in heritage and planning policy. Harm was mentioned several times, and there were seven references to balanced decision making in Conservation Principles, but only one of them (in paragraph 162) came really close to what we now know of as the balancing exercise, described rather hesitantly thus: "*Ultimately, however, it may be necessary to balance the public benefit of the proposed change against the harm to the place.*" Nor did Conservation Principles give any indication that harm was about to divide into two types. PPS5 did just that – it reinvented harm as two things, substantial harm and less than substantial harm.

I assume that anyone who has read this far is reasonably familiar with the concepts of substantial and less than substantial harm, or will at least have access to an electronically archived copy of PPS5 and the current version of the NPPF (National Planning Policy Framework, 2019) so as to understand the detail if necessary. For present purposes all that really matters is that Policies HE9.2, HE9.3 and HE9.4 of PPS5 introduced the dual concepts of substantial harm and less than substantial harm, and that these dual concepts are still present in paragraphs 195 and 196 of the NPPF 2019. The language has changed, however, having been considerably streamlined and distilled. Looking back at the drafting of the three relevant policies in PPS5, which contained 281 words, there seems to have been a well intentioned attempt to provide a framework within which planning decisions could be made according to whether the harm in question (if there was harm at all) was serious or not serious. The latest wording in the NPPF 2019 has retreated into a rather clipped statement of 170 words in paragraphs 195 and 196, as if the safest thing to do is to say the least possible.

It was typical, for some time after March 2010, for any person or body objecting to a proposed development on heritage grounds, to assert that substantial harm was being caused to the significance of the heritage asset in question. This led to a widespread belief at the time that substantial harm was always unacceptable, but that less than substantial harm was normally acceptable. Whether that was a misunderstanding of what PPS5 intended, or whether it was a convenient rule of thumb that simply flowed from what everyone had been used to under PPG15 is difficult to say, but the arrangement trundled on after PPS5 had itself been replaced by the National Planning Policy

Framework (NPPF) in 2012. The fact that the same concepts of substantial harm and less than substantial harm were carried forward from PPS5 into the NPPF reinforced in the mind that this system was here to stay, so it had to be made to work. It was around this time that the infamous Barnwell Manor case found its way into the courts.

I am not going to recount the whole history of the Barnwell Manor case,[7] since it is well known and well documented for anyone who cares to read about it. Three dates help to fix the chronology relative to today. The first is a decision letter concerning an appeal against the refusal of planning permission for a wind farm development affecting heritage assets in Northamptonshire, dated March 2012, at a time when PPS5 was still in force. The second is a judgment in the High Court dated March 2013, quashing the appeal decision. The third is a judgment in the Court of Appeal dated February 2014 upholding the judgment that had been arrived at in the High Court. At the start of the court process, in 2012-2013, many people thought that the end result would be more clarity as to what was meant by substantial harm and less than substantial harm. What in fact happened was that the courts determined that any harm to the significance of a Listed Building must be given considerable importance and weight, whether it be substantial harm or less than substantial harm. This arose from the interaction, which had not hitherto been set out sufficiently clearly in policy or guidance, between the duty in section 66(1) of the Act for the decision maker to have special regard to the desirability of preserving a Listed Building or its setting, and the requirement to balance harm with public benefit in Policy HE9 of PPS5 (which now equates broadly to the same balance in paragraphs 195 and 196 of the current NPPF). The wide-reaching consequences of the Barnwell Manor judgment took some time to sink in because of the time lapse between its initial appearance in the High Court and its eventual confirmation in the Court of Appeal in 2014. There was also an initial perception amongst some people that the relevance of the Barnwell Manor judgment was in some way restricted to the setting of Listed Buildings, or to wind farms. With the passage of time, however, it became more commonly appreciated that this was not

[7] Barnwell Manor Wind Energy Limited v East Northamptonshire District Council and others [2014] EWCA Civ 137.

the case, and that far-reaching changes had occurred to harm since taking on its new central role in 2010. It was no longer necessary, or even desirable, for an objector to a planning application to invoke the spectre of substantial harm in order to kill the offending development. Rather than setting the bar as high as possible, it was preferable to lower that bar – almost to the point where it was on the ground. Now that it had been confirmed that considerable importance and weight had to be given to any harm, even small doses of harm could potentially be lethal. Harm had become more dangerous.

During the course of the Barnwell Manor case through the courts, another proposed wind farm development threw some light on the distinction between substantial harm and less than substantial harm. This was Airfield Farm, Podington, in Bedfordshire, and, like Barnwell Manor, it related to an appeal decision that was determined when PPS5 was in force. The Podington judgment[8] is still occasionally cited because it contained a definition of substantial harm as "an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced." This way of expressing it may or may not be helpful, depending on your point of view, but a by-product of the judgment was that it observed that "substantial" and "serious" may be regarded as interchangeable adjectives in the context of the discussion. Hardly a revolutionary statement, perhaps, but in circumstances where definitions are crucial, and where words have to be used precisely, knowing what "serious" means is at least something to hang onto. There is, if anything, less to hang onto in current Planning Practice Guidance issued by the Ministry of Housing, Communities and Local Government, which contains (in paragraph 016 of the advice first published online on 20 April 2014) a note on how to ascertain whether there is substantial harm. The guidance does not really grapple in enough detail with a key issue, which is how physical harm to the significance of a heritage asset relates, on our notional spectrum, to harm to the significance of the asset that might be caused by erosive change within the setting of the asset. Is it the same spectrum, but treated differently, or are there two entirely different spectrums? Paragraphs 24 and 25 of

[8] Bedford Borough Council v Secretary of State for Communities and Local Government and Nuon UK Limited [2013] EWHC 4344 (Admin).

the Podington judgment certainly suggest that there is a common yardstick. However, I am not sure that the "unified concept of significance" referred to in paragraph 25 of that judgment really encapsulates the point. It is more a question of whether there is a unified concept of harm – that is, the quantum of harm to significance, as it is expressed in paragraph 17 of the same judgment.

The concepts of substantial harm and less than substantial harm, as they were set out in the NPPF 2012, have survived unscathed and largely unaltered in two further revisions of that document, the NPPF 2018 and the NPPF 2019. There is no recognition or acceptance in the NPPF of the proposition in the Barnwell Manor judgment that considerable importance and weight should be given to harm. Instead, a sliding scale is alluded to in paragraph 193 of the NPPF in which the more important the asset, the greater the weight should be given to its conservation – and then the reader is reminded that this is the case whether the harm is substantial or less than substantial.

So, there are two types of harm – substantial harm and less than substantial harm, and in a sense the issue begins and ends there.[9] It now seems to be a generally held principle that even the smallest amounts of harm, so small as to be described as negligible or barely perceptible, still fall into the meaning of less than substantial harm in paragraph 196 of the NPPF. For all practical purposes there is generally considered to be a spectrum of harm within the meaning in paragraphs 195 and 196 of the NPPF, but there is no official recognition of it, or any national guidance as to how to deal with it, or any corresponding spectrum by which to compare public benefit in the balancing exercise. It is as though we know the spectrum exists, but we have to guess what it is made up of. We know that harm can be split into substantial harm and less than substantial harm, so the application of simple logic must predict that it can be split further, into a more sophisticated policy spectrum.[10] Whether there are gradations of harm within substantial harm as well as within less then substantial harm is unclear, but in

[9] Substantial and less than substantial harm are subjected to two different policy tests in the NPPF. It is not clear to me why there are two different tests, since one test would be perfectly adequate if it were weighted appropriately. Indeed, the test in paragraph 195 of the NPPF is wholly unsuited to some types of designated heritage asset. The notion of finding a viable use for a Protected Wreck Site, in the medium term, through appropriate marketing (paragraph 195(b)) is preposterous.

[10] This point seems not to have been made or considered in the case of The Queen on the application

reality most of the debate revolves around the spectrum within less than substantial harm as it is referenced in paragraph 196 of the NPPF.

Scalar methodologies have long been in use for the identification of significant impacts when undertaking environmental assessments for the purposes of satisfying Environmental Impact Regulations (EIA Regulations). Too many such environmental statements prepared for archaeological and heritage purposes (often given the title of a Cultural Heritage chapter or a Cultural Heritage and Archaeology chapter within the environmental statement) groan under the burden of tables that describe a range of factors intended to assist in the objective of identifying significant impacts. Whether those tables do much good is questionable. In my experience they tend to draw undue attention to the vast majority of insignificant impacts, and insufficient attention to those few impacts that were perfectly obvious anyway. Over-tabulation can certainly turn what should be a thought provoking investigation into a mechanical and soul destroying process. Fortunately, this practice has not yet spread wholesale into the preparation of heritage assessments for the everyday purposes of the NPPF, and I do not advocate that it should. In speculating whether the NPPF spectrum of harm contains three bands, or five, or how those bands might be described or compared with public benefits, I do not propose that a complex tabular approach is needed.

Since I have mentioned environmental impact assessments, I cannot let the matter rest until I have mentioned three further points on that subject. My first point is that it would be

---

of Simon Shimbles v City of Bradford Metropolitan District Council [2018] EWHC 195 (Admin). Although the judgment in that case was that the two categories of harm (substantial and less than substantial) are "adequate" to enable the weighted balancing exercise to be carried out, I cannot reconcile the "unnecessary complexity" reasoning in paragraphs 89 and 91 of the judgment. Paragraph 89 (when read with paragraph 88) describes paragraph 132 of the NPPF 2012 as having established a binary classification of significance which avoided unnecessary complexity. I think paragraph 132 was in fact more complex than that, and I believe its effective replacement, Paragraph 194 of the current NPPF 2019, is also more than a binary classification of significance. Paragraph 91 of the Shimbles judgment then stated that the subdivision of less than substantial harm into sub-categories "… leads to over-refinement, while the approach ordained by the NPPF deliberately keeps the exercise relatively straightforward, avoiding unnecessary complexity." To me, paragraphs 89 and 91 of the judgment have the potential to short-circuit the assessment of significance and the assessment of change to a degree where the exercise could become almost mechanical and unquestioning. To go in that direction would be regrettable in my view.

helpful to have clearer guidance on what is a significant impact for the purposes of the EIA Regulations and what is harm for the purposes of the NPPF. In my own experience the courts have had no hesitation in recognising that there are two separate strands at work, and for that reason I continue to prefer (when I have any say in the matter) that significant impacts are addressed in a main chapter of the environmental statement, and that harm in NPPF terms is addressed in a separate heritage assessment which can be attached as an appendix to that chapter.[11] My second point is that prior to the Barnwell Manor judgment there was sometimes a suggestion that a significant EIA impact equated to substantial harm in NPPF terms. That position seems to have softened over the years, and it is now more widely accepted that significant impacts derive from one spectrum (visible in the methodology in the Design Manual for Roads and Bridges, published by Highways England) and that harm is ruled by another spectrum - and that the two do not necessarily align with each other.[12] But I say that as an observation of current practice rather than something I have read in an authoritative policy document, and I would be interested to know whether it is a commonly held belief or not. My third point is about cumulative impacts. There is already quite a sophisticated methodological approach towards cumulative impacts for EIA purposes, led often by landscape architects, with heritage specialists following in their wake. No such rigour seems to be applied, in heritage policy, to methodologies relating to cumulative harm as it might exist in NPPF terms. Exactly how the unseen spectrum of harm would react to that degree of inquiry is a matter of conjecture at this stage.

The challenge for the decision maker is to assess the future potential for harm at a single point in time, usually the present. That can be a relatively straightforward exercise in cases that only involve harm – such as harmful demolition, or harmful extension, or harmful alteration. However, it becomes more complex when the case involves a heritage-related improvement or a heritage-related

[11] Malcolm Alexander Macarthur and others v Secretary of State for Communities and Local Government and others [2013] EWHC 3 (Admin), paragraph 26.

[12] Even if were to be accepted, as a consequence of the Shimbles judgment (footnote 10) that the spectrum of harm is only binary, it must be the case that significant EIA impacts equate either (1) to substantial harm, or (2) to both substantial and less than substantial harm, or (3) to neither. Which is it?

enhancement as well as harm. This triggers what is sometimes referred to as the "internal heritage balance", which, once completed, can be weighed in the overall balancing exercise against other non-heritage public benefits. An example of this is where a building is proposed to be demolished and redeveloped in a Conservation Area. The decision maker has to form a judgment as to potential harm in the future. The first part of this judgment is to consider whether the demolition of the building in question causes harm, in itself, to the significance of the conservation area, and, if so, how much harm. If there is harm, the decision maker has to then consider how much of that harm is outweighed in the "internal heritage balance" by the architectural or other qualities of the proposed new building. We know from paragraph 020 of National Planning Practice Guidance that, in these circumstances, the benefits can be counted as public benefits for the purposes of the balancing exercise.[13] The harm might only be partly mitigated, or it might be convincingly outweighed. Having a common system of calibrating the harm and the public benefit might well assist the decision maker in cases where there is an internal heritage balance that then feeds into a multidisciplinary planning balance involving non-heritage issues.

Those readers who are familiar with the application of heritage planning policy on a regular basis will have realised that everything I have said since the words "I have characterised the concept of harm, glibly…" relates exclusively to the seven classes of designated heritage assets as they are understood in the definition in the NPPF – namely, World Heritage Sites, Scheduled Ancient Monuments, Listed Buildings, Protected Wreck Sites, Registered Parks and Gardens, Registered Battlefields, and Conservation Areas. That is to say, the dual concepts of substantial and less than substantial harm apply only to designated heritage assets. All other heritage assets[14] (which are normally referred to by the rather cumbersome term "non-designated heritage assets") seem to be affected only by a single type of harm in which there is either no spectrum, or no particular debate about the possibility of a spectrum existing. I do not understand why this policy distinction exists. I am tempted to think of it as another quirk of

[13] I have already pointed out that there is no official spectrum of public benefit, or any detailed policy guidance on the matter. This is the same for the "internal heritage balance", where it is performed, as it is for the main balancing exercise.

[14] Including most buried archaeology.

the Harm Paradox, but the difference seems to be made on the basis of a judgment that cuts somewhere on the scale of significance, not of harm. Perhaps there is also a Significance Paradox, but I shall leave that to others to consider. Here I will merely say that it might be worth opening up the debate as to whether the spectrum of harm should be extended to include harm to non-designated heritage assets.

Concluding remarks

It is a curious thing that the less we have of something, the more we sometimes want to hold on to it. We want to hold onto the fragmentary ruins of Coventry Cathedral for good reason. Those ruins have taken on a particular significance since the harm that was caused by bombing in 1940. But in other circumstances the Harm Paradox betrays our reluctance to let go of damaged aspects of our heritage that are sometimes of little or no value. We seem to find it very difficult to accept that some conservation areas, or some townscapes or landscapes that form the setting of a heritage asset, have been so altered that they can absorb further change without causing harm to the significance of the heritage asset itself. Rather than holding to the present as our baseline, we too often allow ourselves to be influenced by Romantic impressions of the past, and then we anticipate terrible harms in the future. We must be careful we are not cheating ourselves of creativity in so doing.

There will be some people who read this essay and then tell me that my distillation of the Harm Paradox is wrong, or untrue, or that it does not exist, or that I have muddled it with something else that I should not have done. To those people I say simply this, that it is a generally held principle that the more important a heritage asset, the greater the weight that should be given to its conservation. But if harm depreciates the significance of the asset then less weight should, logically, be attached to its future conservation. The words in parentheses in paragraph 193 of the NPPF infer as much. Yet a large part of what we regard as significant is the product of past harm. Rarity, which can often be regarded as a virtue, can result from harm. Harm is a fickle and shifting value, and it contains more paradoxes than the main one to which I have drawn attention. It may not be as well understood as we like to think.

Harm has been around as a concept for 140-180 years at least, developing quite slowly for the most part. It has only very recently burst into our lives as a central measure for decision making. Whether the emphasis on harm in the

past decade is an acceleration of policy to address a changing perception of the way in which heritage assets are at risk, or whether we have simply changed the language of national policy on a whim, remains to be seen. Have we made a rod for our own backs? If past experience is anything to go by, it may be 2070 or so before we find out.

About the author: Jonathan Edis has been in continuous employment in the heritage sector since 1982. He is a director of Heritage Collective UK Limited, a multi-disciplinary company specialising in archaeological consultancy, heritage assessment and landscape masterplanning. The views expressed in this essay are his own, and should not be taken to represent the opinions or policies of any company of which he is a director, or any organisation of which he is a member.

Acknowledgements: I am grateful to friends who commented on earlier drafts of this essay, and who made helpful suggestions and corrections. Any residual errors are my own. Particular thanks go to my wife, Jane, who says she has heard enough about the Harm Paradox for now and that there are sheds to be cleared, lawns to be mown, etc.

Front image: Detail of the effigy of Sir John Mordaunt, Speaker of the House of Commons, who died about 1504-1505, in the Church of All Saints, Turvey, Bedfordshire. Photograph by Jonathan Edis 2019.

Back Image: Detail of the effigy of Edith Latymer, wife of Sir John Mordaunt, in the Church of All Saints, Turvey, Bedfordshire. Photograph by Jonathan Edis 2019.