potential as a means of communication between already existing places of public access are ascertainable by instant examination. The public benefit to be gained by the use of the means made available by the work of nature needs in such a case no demonstration by reference to actual use.

This is not a statement of Scots Law. It is a clear exposition of my understanding of English law.

In this Part I first clarify some misunderstandings which Mr Hart has of my work. Then I look at his response to the reasons why I think that such a right existed. Finally I look at the relationship between English law and Scots Law.

2.2 Misunderstandings

2.2.1 The type of river

Mr Hart wrote 'Even if Dr Caffyn's conclusions lead to the general rights which he asserts (which they do not), they could not in any event apply to every river of every size, as Dr Caffyn suggests.' (Underlining Mr Hart's.) My thesis applies only to usable, natural rivers as defined above.

It is to be noted that Mr Hart's concept of the 'great rivers', on which it is agreed there is a public right of navigation, is at least as wide as my concept of 'usable' rivers. Mr Hart wrote 'both statutes [relating to the great rivers] had in mind rivers of similar magnitude to the Thames and the Medway named in Magna Carta.'

Appendix A of my thesis for the University of Sussex lists all the known occasions when boats used the Medway in the medieval period. This shows that while boats may have carried loads of up to 4 tonnes, most of the loads were closer to one tonne. The medieval Medway is an excellent example of the type of river to which my thesis applies. Some sections usable at some times of year by vessels carrying 4 tonnes but most sections being used by vessels being loaded, unloaded and propelled by one man. The sections above Balls Green are often not passable now.

In medieval times the Thames rose at 'The Source of the Thames' which is marked by a stone. Today normally the water first flows from 'Thames Head'. This is at the end of the blue line on the Ordnance Survey maps marking the Thames. The section 800 metres long between 'the Source' and 'the Head' is now normally a damp ditch. Historically, this section may well have been used for the transport of reeds from the marshy area at the Source of the river to the villages downstream. We are agreed that there is a public right of navigation when the water is wide enough and deep enough for small vessels.

2.2.2 The origin of the right

Mr Hart wrote 'This PRN is said by Dr Caffyn to have originated between 1189 and 1500 in all usable rivers…' My opinion is that there was a public right of navigation on all natural usable rivers in 1189 and this right still existed in 1500. The legal commentators and the legal community have been obsessed by the question as to how a right of navigation was created. They fail to realise that the right has existed since the rivers were created. Certainly the right existed during the Roman occupation.

I understand that Mr Hart considers that there was a public right of navigation on all perennial rivers in the Roman period. I also understand that Mr Hart considers that this right was lost between c.450 and 1189. I have seen no evidence of this change nor have I seen any reason why the change should have been made.

'For anything to be created it must previously have not existed.' There is no evidence that at any time before 1189 the public right of navigation on usable rivers did not exist.

Mr Hart wrote 'I have no difficulty with the general proposition that there was considerable use of many rivers for commerce in mediaeval times, and insofar as that could be shown to have occurred for a considerable period, then PRN could be established for the part of the rivers so used.' Mr Hart considers that these rivers were private before the 'considerable use' was established. Yet there is no record of any dispute between a landowner and a navigator about the right to passage on an unobstructed river.

Mr Hart wrote 'A PRN can only be established…' I consider the use of the word 'established' to be misleading. On the one hand it may be taken as meaning 'established historically', that is 'established at some time in history'. On the other hand it may be taken to mean 'established in a court', that is 'recognised by a court'. This the same as the difference between 'what happened' and 'recorded history.' The evidence which I collected for my thesis for the University of Sussex is clearly incomplete. Estate accounts have not been searched. The Historical Society archives have been searched for only two counties.

But much more serious, most journeys were never recorded. Thus from other evidence it seems likely that stone for Winchester Castle, Winchester Cathedral, Wye College and the marble for Salisbury Cathedral were transported by river but the accounts for these buildings are not available. The use of river transport cannot now be 'established at a court hearing'.

Roger de Hovenden wrote that 'Protection of the lesser roads and lesser rivers which carried loads were subject to the laws of the county.' Almost none of these journeys were recorded. Corn, chicken and firewood were taken by boat to many of the markets but the journeys were not recorded. The corn and chicken have been eaten, the firewood burnt, the boats have rotted and 'boats leave no footprints'. There is no archaeological evidence.

No court can now decide on which of these rivers there was in the medieval period 'regular, habitual and substantial use'. To give an example: at Fittleworth on the Western Rother in 1615 'stood a Rough Wharf supported by timber piles'. Arthur Telling and Rosemary Smith, a barrister and a solicitor, concluded from this information that 'there was a common law right of navigation up to Fittleworth.' But this evidence clearly falls far short of Mr Hart's requirement for 'regular, habitual and substantial use'.

In 1714 an Act was passed requiring that the navigation passage on the Grant, Nean, Welland and Glean should be preserved. There is no record of substantial use of these rivers before that time.

On the Trent a commission held that there was a public right of navigation to Biddulph Moor, the source. The limit of recorded historical use is Swerkeston, 80 miles downstream.

There is a public right of navigation on Waller's Haven because it was tidal and the right of navigation has not been extinguished. There is no record of substantial use of the river.

On sections of each of these rivers there was at one time a right to navigate; that right has not been extinguished yet Mr Hart writes 'in the absence of a PRN established by use, … canoeists will be trespassing when they paddle on the river.' (DHQC.1.9)

We are told that there can be a right to use a river but a person who does so is trespassing. Someone has gone wrong somewhere.

2.3 Mr Hart's response to the evidence

2.3.1 Evidence of the medieval use of rivers

Mr Hart does not challenge the records in Appendix A of my thesis for the University of Sussex.

The problem of establishing the extent of the use of rivers during the medieval period is well illustrated by the rivers of Sussex. There is evidence of the use of the Eastern Rother from 1272 to 1600, the Brede from 1300 to 1574, the Reading Sewer in the 15th century, Combe Haven in the 13th and 14th centuries, Waller's Haven, the Ashbourne Stream in the 16th century, Pevensey Haven in the 13th and 15th centuries, Middle Sewer in the 13th century, Cuckmere in the 15th century, Sussex Ouse in the 16th century and the Adur and Arun.

Yet in 1586 Camden wrote 'It has many little rivers; but those that come from the north-side of the county, presently bend their course to the sea, and are therefore unable to carry vessels of burden.'

2.3.2 Bracton

Mr Hart wrote 'Other than its appearance in Bracton, and Best J's 19th century observations in *Blundell* to which I will turn, what evidence is there that Bracton's views on the ubiquity of water rights represented the 13th century common law on the subject? In truth there is none.'

There were four Justinian rights which are included in the 'ubiquity of water rights' which Bracton wrote about:

1. That fishing in ports and rivers was public.
2. That the shore was public.
3. That the banks of rivers were public.
4. That the perennial rivers were public.

As stated above Bracton wrote that the first right, the right of fishing in rivers, had been extinguished in England before or during his time.

The fact that the other three rights were not challenged for over three hundred years is evidence that he correctly stated the law at his time and that any change, if there has been a change, occurred after his time.

The evidence for the second right, the shore is public, is that it still exists. It exists in the Law Courts. It exists on the beaches. Mr Hart claims that in *Blundell v Caterall* 'Blundell alleged a right of access to the beach to bathe' and that this right was dismissed. This is incorrect.