caused by the method of work used, especially when, as in this case, what the employer knew or 'ought to have known' assumed such weight. The facts appearing in the judgment do not conclusively determine this issue one way or the other, and the learned Chief Justice did not directly refer to it. It is true that

> [t]he learned trial judge found that Mr Leach told the appellant to use either the press or the oil, and that the appellant chose to use his own inherently dangerous method in disregard of the foreman's instructions.[20]

However, there is an obvious distinction between pre-work instruction and subsequent supervision whilst that work is being actually carried on. One may assume that if such supervision had occurred then the foreman, or other appropriate staff member, may have had a chance to prevent the appellant using his inherently dangerous method. Just what degree of supervison is 'effective' or reasonable must, of course, depend on the circumstances, but the High Court in this case declined to direct any attention to this issue.

Secondly, as a broader policy issue, one can ask whether it is legally and socially desirable to use as the yardstick for injury compensation the compliance or otherwise with statutory or regulatory provisions directed primarily at the prevention of such injuries rather than at the remedies available when such injuries occur. This question is part of the much larger question concerning the merits of the present state of the law relating to compensation for personal injuries. This question extends beyond the scope of this case note and the author therefore declines to embark upon any consideration of it.

PETER ICKERINGILL*

DEPUTY COMMISSIONER OF TAXATION v. STEWART[1]

Sales Tax Assessment Act — exemption for public benevolent institution — definition of goods.

The respondents (R) conducted a business of selling lottery tickets to sporting and charitable bodies. From September, 1977 R also supplied these bodies, free of charge, with a small machine which dispensed the tickets mechanically upon the insertion of a twenty cent coin. The machines were supplied on condition that only tickets supplied by R would be dispensed from them. The machines tended to increase the demand for lottery tickets which R sold at a profit to the bodies using those machines, and this explained R's willingness to supply them free of charge. However, twenty-four such machines were supplied to the Adelaide Children's Hospital and the tickets used in those machines were supplied free of charge by R, as a charitable gift.

The applicant (A) claimed sales tax and additional tax in respect of all the machines supplied by R between September, 1977 and November, 1979. The Court at first instance held that such tax was assessable on all the machines supplied. On appeal to the Full Court of the Supreme Court of South Australia it was held that the machines supplied to public benevolent institutions were exempt from the tax. A appealed from that decision to the High Court.

It was held by Gibbs C.J., Brennan, Deane and Dawson JJ. (Murphy J. dissenting), that sales tax was not payable in respect of the machines supplied to the abovementioned Hospital, and thus the appeal was dismissed.

Section 17(1) of the Sales Tax Assessment Act (No. 1) 1930 (Cth) provides that:

> Subject to, and in accordance with, the provisions of this Act, the sales tax imposed by the Sales Tax Act (No. 1) 1930 shall be levied and paid upon the sale value of goods manufactured in Australia by a taxpayer and sold by him or treated by him as stock for sale by retail or applied to his own use.

[20] *Ibid.* 346.

* B. Comm. (Hons); LL.B. (Hons).

[1] (1984) 58 A.L.J.R. 191, Full Court of the High Court of Australia, Gibbs C.J., Murphy, Brennan, Deane and Dawson JJ.

Section 19 indicates the person liable to pay the tax, providing that:

> Sales tax shall be paid by the manufacturer of goods manufactured in Australia and–
> (a) sold by the manufacturer to an unregistered person or to a registered person who has not quoted his certificate in respect of the sale;
> (b) treated by the manufacturer as stock for sale by retail; or
> (c) applied by the manufacturer to his own use.

However, general exemptions from sales tax apply in certain cases, and Section 20 provides that:

> Notwithstanding anything contained in Section 19, sales tax shall not be payable under this Act by the person specified in that section upon the sale value of goods the sale value of which is, by virtue of the Sales Tax (Exemptions and Classifications) Act 1935-1973, exempt from sales tax under this Act.

By section 5(1) of the Sales Tax (Exemptions and Classifications) Act 1935 sales tax is not payable upon the sale value of any goods mentioned, *inter alia*, in the First Schedule to that Act. Item 81 in the first column of the First Schedule provides that:

> (1) Goods for use (whether as goods or in some other form), and not for sale, by–
> (a) a public hospital;
> (b) a hospital which is carried on by a society or association otherwise than for the purpose of profit or gain to the individual members of the society or association;
> (c) a public benevolent institution; or
> (d) a public organisation which the Commissioner is satisfied is established and maintained for the relief of unemployed persons
> . . .
> (3) Goods for use (whether as goods or in some other form), and not for sale, by a society, institution or organisation established and maintained for the purpose of obtaining money exclusively or principally for donation towards the establishment or maintenance of hospitals or public benevolent institutions referred to in sub-item (1).

The second column of the First Schedule makes it clear that the exemption in item 81 applies to the Sales Tax Assessment Act (No. 1) 1930. Section 3(1) of that Act defines 'goods' as follows:

> 'Goods' includes commodities, but does not include–
> (a) goods which have, either through a process of retailing or otherwise, gone into use or consumption in Australia . . .,

and that definition applies to the Sales Tax (Exemptions and Classifications) Act by section 3(1) of that Act.

Murphy J., who dissented, was of the opinion that:

> The Sales Tax (Exemptions and Classifications) Act 1935 discloses no intention to exempt from sales tax goods used by a manufacturer or wholesaler for its own purposes and in circumstances where it retains ownership of the goods. This can be seen from the use of the words 'and not for sale' in item 81(1), words which in the context contemplate that property will pass to the public benevolent institution, before the exemption is applicable.[2]

His Honour also believed that the contrary view enables easy avoidance, that it could not have been intended by Parliament, and that the provisions should be read in the light of section 15AA(1) of the Acts Interpretation Act 1901 (Cth).

Gibbs C.J., with whom Dawson J. concurred, delivered the leading majority judgment. His Honour commenced by noting that once a machine had been supplied to a public benevolent institution, it would come within the description in item 81 unless it had first ceased to be 'goods'. Now the First Schedule describes exempted goods in two main ways:

(i) by reference to the nature of the goods themselves; and
(ii) by reference to the use to which it is intended to put them.

In relation to (ii), Gibbs C.J. made two observations in relation to the words 'for use'–

(a) for many goods in the First Schedule, including those in item 81(1), it is the purpose to which it is intended the goods shall be put, rather than the use for which the goods were designed; and
(b) 'use' does not connote exclusive use, but rather the goods must be for a particular use 'to a significant degree' — see *F.C.T. v. Hamersley Iron Pty Ltd*[3].

[2] *Ibid.* 196.
[3] (1981) 37 A.L.R. 595, 605.

Thus the use to which the goods are to be put by the hospital or institution must be substantial, not transient or insubstantial.

On these bases Gibbs C.J. held that the machines fell within the exemption in item 81, notwithstanding that (i) their inherent character was not of goods designed for use by a public benevolent institution and (ii) they were not exclusively used by the institution, but were applied to R's use as well. This was so unless it could be said that each machine was applied to R's use at the time when it was manufactured and had at that time gone into use, and so ceased to be 'goods' for the purposes of item 81. His Honour's conclusion here was based on the fact that the machines were used substantially for the profit and fund raising activities of the institution. Brennan J. followed a similar analysis of 'use', holding that:

> The use by a public benevolent institution referred to in item 81 is not necessarily exclusive of the use of the goods by others. Indeed, the use of particular goods by others is often the use intended for them by public benevolent institutions — hospital beds, for example. But the proposed use by a public benevolent institution must be sufficiently substantial in extent and time that it is right to regard that proposed use of the goods as giving a character to the goods. That is a question of fact and degree. Among the material circumstances which reveal a characteristic use, regard may be had to the nature of the goods, the activity of the institution which is to be advanced by using the goods, the terms upon which the goods are to be acquired by the institution or upon which the institution is to be entitled to use them, the power of others to determine or qualify that use, and the likelihood of the use being changed by the decision of the institution, by the decision of another person having power to determine or qualify the use or by the decision of both the institution and that person. As the question whether goods were goods for use by a public benevolent institution is likely to arise for determination after the institution has begun to use them, evidence of the actual use to which the goods have been put will be relevant and admissable.[4]

His Honour proceeded to say that, on the facts, the characteristic use of the machine was dispensing tickets for the mutual advantage of the Hospital and R, and the machine was devoted to this use at the time it was bailed. Deane J. also applied this reasoning[5]. His Honour observed that item 81 does not require the goods to be used 'exclusively' or 'primarily and principally' by a public benevolent institution, as the First Schedule specifically expresses this requirement in relation to other items but does not do so with respect to item 81. Thus it is sufficient that the goods can be characterised as 'goods for use' by the institution, in that the intended or planned or possible subsequent use of the goods by the institution is not transient or insignificant or uncertain. His Honour held that:

> The projected use by the institution must be such as would warrant characterisation of the goods by reference to it. Ordinarily, that would involve definite commitment to a use by the institution as the main projected use of them. In other words, the question whether particular goods satisfy the description of being goods for use by a public benevolent institution will ordinarily fall to be answered by identifying the relevant projected use of the goods and by ascertaining whether that use answers the description of a use of the goods by a public benevolent institution.[6]

He then concluded on the facts that as each machine was used in the Hospital for its fund raising, then their intended, actual and direct use was for the sale of tickets to the public, and that use was the intended indefinite use of the machines at and from the time that their manufacture was completed.

As the goods were 'used' by a public benevolent institution, Gibbs C.J. next considered at what time the goods went into use. A argued that the machines were applied by R to its own use — the machines were applied to R's use when they were manufactured and before they were supplied to the institutions so that as soon as a machine was manufactured it had 'gone into use' in Australia, thus ceased to be 'goods' and so not falling within the exemption in item 81.

It was accepted that all the machines manufactured, except those supplied to the hospital, were applied by R to its own use — to promote the sale of its tickets, and therefore to promote its own business; see *Max Factor and Co. Inc. v. F.C.T.*[7]. However, the question is whether the machines were applied to R's use immediately on manufacture and were not 'for use' by any public benevolent institution until later. Gibbs C.J. rejected this argument.

[4] (1984) 58 A.L.J.R. 191, 197.
[5] *Ibid.* 198-9.
[6] *Ibid.* 199.
[7] (1971) 124 C.L.R. 353, 362.

A produced a certificate under section 10 of the Sales Tax Procedure Act 1934 (Cth) certifying the amount due for sales tax, casting on R the onus of proving that the tax was not payable. A then contended that R failed in discharging this onus as it did not satisfactorily establish whether a machine was only manufactured on receipt of an order from an institution, or whether a number were manufactured and then the stock of machines were drawn on when an institution requested a machine. Gibbs C.J. felt that the evidence suggested that each machine was manufactured on request by the institution to which it was supplied — this was reflected in the answer to a leading question and also in the fact that most machines had the logo of the organisation for which the machine was intended and which was applied by R to the face of the machine. If this was the case, then the machines could not attract sales tax before they qualified for the exemption, because the purpose that the goods should be used by an institution mentioned in item 81 would have existed from the very moment when R formed an intention to apply the goods for its own use. However, Gibbs C.J. did not find it necessary to resolve this factual issue in order to uphold the decision in favour of R. Brennan J. did not find it necessary to even refer to this factual issue and Deane J.[8] agreed with the views expressed on the point by Gibbs C.J.

A argued that once a manufacturer has made goods which he intends will be used for his own purposes and has evidenced his intention, as for example by putting and keeping the goods on a shelf (as distinct from manufacturing them in response to a specific order), he has applied the goods to his own use — the goods have 'gone into use'. A relied on the decision in *Federal Commissioner of Taxation v. York Motors Pty Ltd*[9] where it was held that the taxpayer treated goods as stock for sale by retail when the goods were so appropriated in the books of the company, showing an intention that the goods shall there and then be retail stock. However, Gibbs C.J. held that that case was concerned with the meaning of the word 'treated', not of 'applied', 'gone into use' or 'goods'. In line with the *Max Factor* case[10] it was held that the word 'applied' means 'devoted to' or 'employed for the special purposes of' and that in this case the application of the machines to R's use occurred when they were devoted to R's purposes by supplying them to the institutions. On this point Gibbs C.J. held that:

> In other words, the respondents did not apply the machines to their own use, and the machines did not go into use, when they were made and kept ready for subsequent delivery to one of the institutions. While the machines were so held, they were only of potential use to the respondents, and they were not in fact used at all. This can be illustrated by the fact that a machine taken from stock and supplied to the Children's Hospital would have been of no benefit to the respondents, since the lottery tickets were supplied free by them to that hospital. (I do not consider that the fact that the machines carried, in addition to the logo, a small plate showing the name of the maker, meant that to supply them was for the benefit of the respondents.) In other words, until a machine was supplied, it could not be said whether or not the supply would amount to an application to the use of the respondents. When a machine was supplied to an institution which was or would become the purchaser of the respondents' tickets it was so applied.[11]

This conclusion was consistent with previous High Court authority[12]. Brennan J. reached a similar conclusion, holding that the machine was not 'applied by the manufacturer to his own use' until it was bailed to the institution. His Honour held that:

> What is required is the employment of goods for some purpose of the manufacturer. Until that occurs, the goods are not applied to the manufacturer's own use: *Max Factor & Co. Inc. v. Federal Commissioner of Taxation*[13]. . . In ascertaining whether a manufacturer in dealing with goods in a particular way has thereby applied the goods to his own use, regard must be had to the nature of the goods and the manufacturer's purpose in dealing with them in that way. The respondents' business was the supply and sale to institutions of lottery tickets, and the respondents' sole use for the machines was as a means of selling to the public the tickets supplied and sold by the respondents to the institutions. A machine was not applied to the manufacturer's own use as it emerged from the

[8] (1984) 58 A.L.J.R. 191, 198.
[9] (1946) 73 C.L.R. 459.
[10] (1971) 124 C.L.R. 353, 362.
[11] (1984) 58 A.L.J.R. 191, 195.
[12] *Deputy F.C.T v. Taubmans (N.S.W.) Pty Ltd* (1966) 115 C.L.R. 570, where it was held that the defendant applied the colour cards to its own use either when it used them directly or when it made them available to the storekeepers who stocked its goods; see at p. 574; and the *Max Factor* case (1971) 124 C.L.R. 353 where it was held that the company applied the cosmetics to its own use when it gave them to its own employees or to buyers employed by departmental stores: see at 365.
[13] (1971) 124 C.L.R. 353, 361-2.

> manufacturing process and was placed in storage; in my opinion, it was not so applied until it was bailed to an institution which took the machine in order to sell the tickets supplied by the respondents. When each machine was bailed to an institution which was or was expected by the respondents to become a customer to whom the respondents supplied or expected to supply tickets, the machine was applied by the manufacturer 'to his own use'; see *Deputy Federal Commissioner of Taxation v. Taubmans (N.S.W.) Pty Ltd*[14].[15]

Thus, whilst the time when the goods are first 'applied by the manufacturer to his own use' is the time when sales tax is levied, unless the sale value is exempt, it is also the time after which a machine, having 'gone into use', is excluded from the definition of 'goods' and is thus incapable of being exempted by item 81. Once sales tax is levied on a manufacturer (or anyone, for that purpose) a subsequent use of the goods by a public benevolent institution does not extinguish the liability. None of this is relevant to these facts as the machines were not applied for R's use until they were bailed to an institution (and an institution to which R sold its tickets, not merely gave them). Due to the view Deane J. took of the characterisation of the goods, as previously discussed, he did not find it necessary to consider whether or not, in any event, the machines supplied to the Hospital were applied by R to its own use (given that R did not charge the Hospital for the tickets it supplied). Only Gibbs C.J. and Brennan J. considered this question although they, for the same reason as Deane J., did not strictly need to to do so in order to reach their respective decisions.

Gibbs C.J. concluded this part of his judgment by stating that:

> The distinction which the Deputy Commissioner seeks to draw between the time at which the respondents formed an intention to apply the goods to their own use, and the time at which they formed an intention to supply the goods for use by a public benevolent institution, seems artificial in fact, but the basic answer to his contentions is that something more than mere manufacture is necessary before the manufacturer can be said to have applied the manufactured goods to his own use.[16]

In response to an argument that item 81 is only intended to benefit public benevolent institutions by the amount they save in sales tax when goods are sold or leased to them, Gibbs C.J. held that whilst item 81 was intended to benefit the user, not the manufacturer, it cannot be assumed that this object was not achieved in the present case, since if sales tax had been payable R would have been expected to pass it on to the institutions in one way or another. When it is sought to ultimately benefit benevolent institutions indirect as well as direct savings are obviously just as crucial, and thus it is suggested, with respect, that the opinion and consequent assumption of the learned Chief Justice here is well founded.

Finally, Gibbs C.J. did not ignore the tax avoidance issue which troubled Murphy J.; he simply took a more pragmatic approach in holding that:

> It was said also that to accept the respondents' contentions might open the way to tax avoidance schemes; for example, it might be possible for a taxpayer to supply goods for use to a public benevolent institution for a very short period, and then recover the goods and apply them to his own purposes. Nothing like that occurred in the present case, and the fact that item 81 contemplates a real and significant use may be enough to prevent any such scheme from succeeding. However, that question may be left until it arises.[17]

Thus is seems that any practitioners considering tax saving schemes based upon the decision in *Stewart*[18] would need to be at least aware not only of the view of Murphy J. but of Gibbs C.J.'s reference to 'a real and significant use' in the passage quoted above, and of His Honour's suggestive warning that:

> that question may be left until it arises.[19]

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[14] (1966) 115 C.L.R. 570, 574.
[15] (1984) 58 A.L.J.R. 191, 196-7.
[16] *Ibid.* 195.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*

* B. Comm. (Hons); LL.B. (Hons).