CASE NOTES

SMITH v. AUCKLAND HOSPITAL BOARD

Negligent advice by doctor—Application of Hedley Byrne v. Heller *where physical injury results*

For all too long common law judges were daunted by the prospect of a vast liability for economic loss due to negligent misstatement. When therefore in 1963 such liability was for the first time acknowledged,[1] the House of Lords laid down certain limiting factors to restrict liability in such cases, namely that the representation must occur in the course of business or professional affairs, that the representor must know his judgment was being relied upon and be taken to assume responsibility, and thirdly that the person seeking the information from the representor is the only person to whom the latter will be liable.

This principle together with these limitations has now been applied by the N.Z. Court of Appeal[2] to the present case, one of negligent misstatement leading to physical injury instead of economic loss. The plaintiff, who was a patient at the defendant Board's hospital, suffered a rare surgical mishap resulting in the loss of a leg. He alleged (and the jury found as a fact) that upon his enquiry of one of the Board's surgeons before the operation, he was told there was no risk attached to it, and had he known there was any risk, he would not have undergone it. Woodhouse J.[3] ruled that notwithstanding the jury's finding of negligence, the surgeon owed no duty of care to the plaintiff to use care in answering, or if he did, his answer could not reasonably be found causative of the plaintiff's injury. In a unanimous judgment, the Court of Appeal overruled Woodhouse J., holding that the principle in *Hedley Byrne* v. *Heller* created a duty in the surgeon, and that his negligence had resulted in the plaintiff's injury. In expounding the duty owed by the surgeon Barrowclough C. J. said:[4]

> The present case relates to a professional transaction in which the appellant did seek information from a doctor possessed of a special skill . . . and in my opinion the appellant did trust the doctor to exercise due care in his answer or reply, and the doctor must have known, or ought to have known, that reliance was being placed on his skill and judgment. It follows that if the doctor did decide to answer the question he was asked, he would be under a duty to excercise care in answering it.

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1 *Hedley Byrne* v. *Heller* [1964] A.C. 465.
2 [1965] N.Z.L.R. 191.
3 [1964] N.Z.L.R. 241.
4 At 197.

It will be seen from this passage and the following four judgments[5] that in relation to the question of what duty of care was owed by the doctor, the Court was preoccupied throughout with the principle enunciated in *Hedley Byrne* v. *Heller* and in particular with the three limitations on liability mentioned above. While the conclusion that a duty of care was owed by the doctor in this case cannot be faulted, it is submitted that the *Hedley Byrne* duty was not the duty to apply in this case, and that in transplanting that principle from a case of liability for economic loss to the present case the Court imposed on cases of recovery for physical damage a much more severe restriction than is justifiable or is supported by authority.

Liability for negligent misstatements resulting in physical injury to persons or property was recognised long before 1963. In *The Appollo*,[6] where a harbourmaster invited the use of a lock for the purpose of cleaning a ship's propeller that had become fouled and assured the captain that it was safe to ground there, the House of Lords held him negligent and liable for damage to her keel due to a projecting sill at the bottom, about which he should have known.[7] Moreover such a duty was not restricted by the limitations enumerated in the first paragraph. In *Voli* v. *Inglewood Shire Council*[8] a third party who was injured when the stage of a shire hall collapsed, was allowed recovery by the High Court against the architect responsible for the submission of the faulty design to the owners of the hall. Thus the negligent misstatements need not occur in the course of business or professional affairs, an assumption of responsibility will much more readily be inferred, and anyone within Lord Atkin's duty formulation[9] will qualify. No express reference to such a wide duty was made in the present case either in argument or in the judgments and, by defining the doctor's duty as that laid down in *Hedley Byrne* v. *Heller*, the Court of Appeal may be taken to indicate that there will now exist no duty not to cause physical damage by a negligent misstatement in a case falling short of the *Hedley Byrne* situation.

Although a distinction may exist between the present case where the false statement was made in reply to a question, and the previous authorities cited, where the negligent statements were not made in reply, in view of the fact that none of the judges in the Court of Appeal adverted to this, it is fair to assume that no such distinction was intended to be drawn. In any case, since the representor who falsely replies to a question is in a better position to know his statement is being relied upon, there is no reason why the scope of his duty should be limited; rather it should be extended.

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[5] See esp. pp. 202-3, 209, 213, 219.

[6] [1891] A.C. 499.

[7] See also *Banbury* v. *Bank of Montreal* [1918] A.C. 626, 657, 689; *Barnes* v. *The Commonwealth* (1937) 37 S.R. (N.S.W.) 511.

[8] (1963) 37 A.L.J.R. 25.

[9] *Donoghue* v. *Stevenson* [1932] A.C. 562, 580.

An example will illustrate the possible effect of the course taken by the Court of Appeal. A doctor at a party assures Mrs. A, a friend of his, that X brand soap is perfectly safe for general family use. Due to his carelessness the doctor fails to inform Mrs. A that the soap can have serious effects on certain children. Mrs. A suffers no ill effects from using the soap, but when she tries it on her baby son, he contracts chronic dermatitis. It is surely unreasonable to suggest that because the child was not the person to whom the false statement was made, and because the statement did not occur in the course of professional affairs, that he owed no duty of care to the child, although the latter was clearly forseeable.

Similarly two motor cyclists A and B go for a run at night. B does not know the way but A says he does and tells B to follow him. A carelessly takes a wrong turning by mistake on to some rough ground, and B, following him on the strength of his representation, is thrown before he can stop. Again it would be unreasonable to suggest that A owed no duty of care to B merely because the representation was not made in the course of business or professional affairs.[10] Yet in New Zealand this may now be the case.

Having established that a duty of care existed in law the Court proceeded to review the jury's finding of negligence. In doing so, the learned judge emphasised that no hard and fast rule as to what a doctor should tell his patient could be laid down. Barrowclough C. J. said:

> What is a proper answer will vary according to the circumstances of each case, and it cannot always be said—especially when a patient is asking questions of his doctor—that the doctor is bound to give a full, complete and true answer.

Nevertheless on this question and on the question of causation the Court saw no reason to depart from the jury's finding.[11]

In criticising the narrowness of the duty concept in this case, it is hoped that no doubt has been cast on the correctness of the Court's decision on the facts before it, but it is suggested that this case should not be taken as authority for limiting liability for physical damage due to negligent misstatements by technical restrictions designed to protect against indeterminate liability for economic loss.

P. Griffits

RONDEL v. WORSLEY[1]

Negligence—Immunity of a barrister—Whether a solicitor acting as advocate is also immune.

The unsophisticated layman could be excused a sympathy with the concluding remark of the appellant in this case when, having unsuccessfully conducted his own case in the Court of Appeal and being refused further leave to appeal to the House of Lords, he observed:

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10 See *Sharp* v. *Avery* [1938] 4 All. E.R. 85 where however it was not the following rider who sued but the pillion passenger.

11 [1965] N.Z.L.R. 191 at 199.

1 [1966] 3 All. E.R. 657.

'If it stands like this, I still say the Law is primarily for the benefit of Lawyers'. Certainly for a suit in negligence against a lawyer to be stopped before an examination of the merits of the case,[2] on the vague if impressive ground of 'public policy', requires at least a cogent analysis of the specific evils this privilege is said to avert. Whether such analysis was given in the present case is open to doubt, not only on the specific issue of a barrister's liability *qua* advocate, but additionally with the closely related questions whether a solicitor is so liable and whether a barrister is liable in respect of preparatory and advisory work.

The appellant had brought the action claiming damages for negligence against the respondent who, as counsel, had represented him on a dock brief in certain criminal proceedings against the appellant. The original statement of claim was struck out and an appeal, commenced in chambers, was adjourned into open court for hearing before Lawton J.[3] The appellant was inarticulate and his amended statement of claim was struck out as unintelligible by Lawton J. who, however, salvaged enough of the appellant's complaints to raise the present question of law. These complaints alleged that the respondent negligently failed to adequately cross-examine prosecution witnesses and to call witnesses of his own.

Lawton J., in a judgment which began by tracing the somewhat scattered evidence of immunity from the time of the Year Books, found no residual authority compelling a decision in favour of immunity. He regarded the important case of *Swinfen* v. *Lord Chelmsford*[4] as confined to counsel's authority to conduct and compromise a case without further reference to the client. Further, earlier cases in which such immunity was asserted were merely evidence of the prevailing view at the time rather than authorities for that view. Lawton J. concluded his judgment by putting the immunity on the ground of public policy, although he neither cited authorities to support this disposition of the doctrine nor considered the general question of a court's right to invoke 'public policy' as a bar to an action either generally or specifically for compensation in tort.[5]

The Court of Appeal (Lord Denning M.R., Danckwerts and Salmon L.JJ.) agreed with Lawton J. that a barrister's immunity from action rested on grounds of public policy, advancing most of the grounds put forward by Lawton J. The first two gave long-standing usage as an additional ground for their decision. However, opinion between the four judges was divided on the extent of the immunity,

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2 Of which, perhaps unfortunately for the ruling in this case, there seemed to be none. See *per* Danckwerts L.J. at p. 668.

3 [1966] 1 All. E.R. 467.

4 (1860) 5 H. & N. 890.

5 Questions likewise inadequately considered in the Court of Appeal.

whether it applied to a barrister's out-of-court work and whether it applied to a solicitor acting as advocate. To take first the ground of long usage two things might be said: First, it represents a blurring of the normal test for the legal effect of customary practice;[6] secondly, whatever might be the relevance of usage in other areas of the law, it is disappointing to see a modern court invoking it to bar an action for compensation based on *Donaghue* v. *Stevenson*. However that may be, the bones of most contention in this case will undoubtedly be the stated grounds of public policy. These can be put under convenient headings:

1. *Dual nature of the barrister's professional obligation.*

As the Master of the Rolls put it, the barrister was a 'Minister of Justice equally with the judge';[7] his honest service to the court must take precedence over the interests of his client. Thus, 'he has time and time again to choose between his duty to his client and his duty to the court'.[8] Both the Court of Appeal and Lawton J. felt that if such immunity did not exist too much pressure would be put on a barrister to subjugate his duty to the court to that of his client. This is not realistic; the standing possibility of disciplinary action would rather make the real difficulty the prospect of facing a damages suit precisely because the client's interest had to take second place, and this seems the real consideration behind the barrister's depiction as a 'Minister of Justice'. As such the argument is not convincing and it would be a sad reflection on any law of compensation that no plaintiff could recover for an inflicted loss simply because in some instances such loss could be due to a defendant's compliance with his defined duties. Apart from anything else, no court would allow that there was evidence to support a finding of breach of duty where the alleged misconduct was thus constrained. The law of Negligence provides adequate safeguards here.

Associated with the argument based on a dual obligation but in reality quite distinct from it, was a more realistic ground, the very real fear that a barrister might be sued for errors of judgment of a kind which could not, if the profession were to continue effectively, be cited as professional negligence. This is surely the real difficulty, and one which pervades the whole field of professional negligence. Doctors, engineers and accountants might have put the same argument with even more force, for the decision whether their conduct could be (as distinct from was) negligent is a layman's decision, albeit a judge's, whereas the lawyer is at

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[6] Lawton J. at first instance considered the argument and demonstrated that no continuous usage from 'Time Immemorial' could be established on the authorities: [1966] 1 All. E.R. 467, 478, 479.

[7] P. 665.

[8] P. 665.

least judged by a senior member of his own profession. Vexatious litigants are a nuisance and professional men may require greater protection than the law presently affords them. But the questions remain first, whether a class of lawyers should have a unique protection, secondly, whether this has to be achieved by barring meritorious claims as well as frivolous or unfair ones. A barrister might prejudice his client's interests by a patently couldn't-careless attitude, drunkenness, senility, failure to read his instructions or a failure to attend,[9] and the fact that he might be disciplined for professional misbehaviour is no answer to an injured client seeking a civil remedy. Again, the existence of such disciplinary powers does not entail a risk of being struck off the Roll for an error in cross-examination. It is submitted that in this respect the Court of Appeal judgment exaggerates the difficulty in keeping such a liability, once admitted, under control.

2. *That a retrial would be intolerable.*

The second ground of public policy was that if a barrister could be sued for negligence,

> we should have a criminal court sentencing him to imprisonment on the footing that he was guilty, and a civil court awarding him damages on the footing that he was not guilty. No system of law could tolerate such a glaring inconsistency.[10]

There are two answers to this objection: first, that such inconsistencies already abound in the law,[11] secondly, that it is *prima facie* only just that compensation be available to a man imprisoned because of his counsel's negligence—in addition to his right to appeal on the ground that the initial decision could no longer stand. If the initial decision was unaffected by proof of the barrister's negligence, then 'actual damage' could not be established and the action must fail.[12] If the action threatened to turn into an enquiry as to the causative effect of forgetting to ask witness A a question, then the alleged damage might be ruled too speculative to be material, and the action again fail. On balance, this danger of indirectly prolonging the original litigation seems also exaggerated.[13] But in any case there is no reason why 'public policy' might not restrict the immunity to actions based on the conduct of a criminal action, for the reason that it must be regarded as frivolous unless it would also provide a basis for a criminal appeal

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9 See *eg.*, *Mulligan* v. *M'Donagh.* (1860) 2 L.T. 136, *Robertson* v. *Mac Donogh* (1880) 6 L.R. Ir. 433.

10 P. 666.

11 *E.g.*, a person convicted for a driving offence may bring a civil action arising out of the same facts and in effect obtain a re-trial.

12 *Cf.*, *Scudder* v. *Prothero & Prothero* (1966), *The Times,* Mar. 15, 16.

13 See also 'Professional Negligence—immunity of counsel' vol. 63, No. 12 *The Law Society's Gazette,* p. 500.

(which the present allegations, in the Court of Criminal Appeal, did not). In this way an indirect civil re-trial of a man's criminal guilt could be avoided without otherwise affecting claims for compensation.

3. *Opening the flood-gates.*

The third ground of public policy was that 'It would open the door to every disgruntled client',[14] an argument usually associated with innovations extending tort liability,[15] and a special problem where, as here, the litigation was itself about the conduct of a lawsuit. Unfortunately the evidence for this view was not forthcoming; no attempt was made to ascertain the effect in a fused profession, although both the Master of the Rolls and Danckwerts L.J. were of opinion that barristers could here be sued.[16] Neither was consideration given to the comparative rarety of actions based on the admitted liability of solicitors for negligence, although the same danger is presumably present. A fourth ground mentioned by Lawton J. was that, if barristers could be sued, then justice requires that they have a right to pick and choose their clients. But this ground lacks conviction; neither doctors, by their ethics, nor bus drivers by the exigencies of their trade, can exclude potentially vexatious litigants from purchasing their services.

Two further difficulties, which arose when the Court of Appeal considered the nature of the immunity, did nothing to aid the logic of the public policy arguments. All judges were agreed that the traditional justification, based on the technical point that a barrister cannot sue for his fees, was incorrect.[17] But after this promising start the majority (Salmon L.J. expressing doubt) disagreed with Lawton J's. view that it was an advocate's immunity, applicable to solicitors appearing as such. Both the Master of the Rolls and Danckwerts L.J. reverted to the historical division of the profession, and ruled that solicitors were not immune, although they did not say they could not be 'Ministers of Justice'. The second difficulty was whether a barrister was still immune in relation to his advisory and out-of-court work. The same majority ruled that he was; Salmon L.J., strongly dissenting, agreed with Lawton J's. intimation that *Hedley Byrne* v. *Heller* may apply to a barrister giving advice.

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14 [1966] 3 All. E.R. 657, 666, 674.

15 Cf. the 'infinity of actions' feared by Chief Baron Abinger in *Winterbottom* v. *Wright* (1842) 10 M. & N. 109, 110.

16 At pp. 667, 672 respectively.

17 Even before *Hedley Byrne* v. *Heller* [1964] A.C. 465 this should not have barred actions based on negligent conduct *e.g.*, non-appearance, as distinct from negligent advice. *Case* was available against tradesmen and professional men irrespective of contract: *Bretherton v. Wood* (1821) 3 Brod. B 54, *Pippin* v.*Sheppard* (1822), 11 Price, 400.

The consequences in a fused profession are unclear.[18] *Prima facie* the impossibility of attaching immunity by reference to status would suggest a more flexible application of the public policy doctrine, perhaps restricting the immunity to the conduct of advocacy in court. But before reaching even this stage, it is hoped that an Australian Court will reconsider the value of the immunity on the assumption that what may be public policy in England is not necessarily good policy elsewhere.

Contributed

SHEPHERD v. THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH[1]

Assignment of Royalties—Equitable assignments of legal choses in action.

Recently, both the High Court of Australia and the New Zealand Court of Appeal have grappled with a difficult problem arising out of the attempt to avoid income-tax liability. In both cases the problem which arose was this: When is an attempt to bestow portion of future income on a named beneficiary an assignment of part of a presently existing right to that income, and when is it an assignment of an expectancy? This distinction is of crucial importance in those cases where the assignees are volunteers, for equity will not grant its assistance to perfect an imperfect gift, that is, an expectancy in the present context, at the instance of those who have not provided consideration. If the assignees are to be able to successfully enforce the payment to them of income as it accrues and the assignor is to be able to deduct the amount of the gift from his total assessable income, the beneficiaries must be shown to have been invested in equity with a presently existing right to that future income. That such assignments would in any case be void at law there is no doubt for it is only possible in equity to assign portion of a chose in action.[2]

The intention of the assignor as gleaned from a proper construction of the relevant documents is of vital importance, and this principle was illustrated in the way the High Court and the New Zealand Court of Appeal came to their respective conclusions after construing the documents before them. In *Shepherd* v. *The Commissioner of Taxation* the High Court considered whether a patentee had successfully assigned portion of his right to future income in the form of royalties by purporting to 'absolutely and unconditionally' assign by deed poll to certain named beneficiaries 'all my right title and interest

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18 The Master of the Rolls and Danckwerts L.J. thought a barrister could be sued, the former associating this with the ability to contract and sue for fees. Not only does this conflict with his previous remark that this was a 'bad' ground (p. 664) it confounds the whole argument based on public policy. Salmon L.J., more consistently, would apply the immunity to an action in contract. (p. 667).

1 (1965-66) 39 A.L.J.R. 351.

2 *E.g.*, Conveyancing and Law of Property Act 1884 (Tas.) S. 86.

in and to an amount equal to 90 per centum of the income which may accrue during a period of 3 years from the date of this assignment from royalties payable by Mark Cowen . . . .' The Deputy Commissioner of Taxation assessed Shepherd's income on the basis that it included the royalties paid to the beneficiaries named in the deed poll and, when Shepherd objected to an assessment on this basis, the Taxation Board of Review referred the matter to the High Court.

All members of the High Court (Barwick C.J., Kitto & Owen JJ.) were of opinion that the question to be resolved hinged upon whether the deed poll purported to assign part of the right to royalties, in which case it would be valid, or whether it was an attempt to assign after acquired property, in which case it would be invalid for want of consideration. Barwick C.J. and Kitto J. (Owen J. dissenting) held that part of the right to future royalties had been effectively vested in the assignees, resting their respective judgments upon the key words in the deed poll, 'all my right title and interest', which words the Chief Justice stated, 'are appropriate to the assignment of a chose in action as distinct from its ultimate produce'.[3] The Chief Justice continued,

> But the full description of the subject matter of the assignment is of 'the right' to such amounts—an unlikely expression to describe the money itself. In my opinion it indicates that the taxpayer was not intending to promise that he would pay money measured by the amount of royalties that accrued or that he was intending to assign the royalties themselves. Its use rather suggests, to my mind, that he was intending to place the persons he wished to benefit in the position of being able themselves to assert a right to receive the appropriate amounts from the licensee.[4]

On the other hand, Owen J. considered that the use of the words '*an amount equal* to ninety per centum of the income which may accrue' and 'the income which may accrue' indicated an intention to undertake 'to pay to each of the persons named an amount to be measured by reference to the amount of royalties if and when they accrued to him under the licence'[5] and held that he did not assign a contractual right to receive any part of that income'.[6]

The facts of the New Zealand case, *Williams* v. *The Commissioner of Inland Revenue*,[7] may be shortly stated. A deed of assignment provided that 'the Assignor by way of gift hereby assigns to the assignee . . . for the four years commencing on the 30th June 1960 the first five hundred pounds (£500) of the net income which shall accrue to the assignor' from a trust in which the assignor had a beneficial life interest 'together with the right to receive the first five hundred pounds (£500) income in each of the said four years and all remedies and powers whatsoever for the recovery thereof . . . .' As the deed was not made for consideration the question to be answered was—did

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[3] At p. 353.
[4] *Ibid.*
[5] P. 356.
[6] P. 357.
[7] [1965] N.Z.L.R. 395.

the deed purport to assign 'an existing property right, or was it a mere expectancy, a future right not yet in existence?'[8] The Court of Appeal unanimously held that as the subject matter of the purported assignment was an expectancy, it was ineffective for want of consideration.

In the *Williams Case* North P. and Turner J.,[9] in a joint judgment, laid stress upon the fact that the assignor had quantified the amount which the beneficiaries were to receive, 'in our view, as soon as he quantified the sum in the way here attempted, the assignment became one not of a share or a part of his share, but of moneys which should arise from it'. On the other hand, the approach of McCarthy J. would seem to be less rigid,

> I wish to avoid it being thought that I am holding that it is never possible when making an assignment to quantify a share or portion of the income arising from an interest in equity stating a sum of money and that one must always specify in terms of fractions or percentages.[10]

If by this His Honour meant that other factors would legitimately be taken into account in determining the nature of the assignment, the learned judge's views derive support from the comments of Barwick C.J. in *Shepherd's Case,*

> I think it not inappropriate when seeking the intended meaning of the words to notice the consequence of not finding in the language of the deed, as a whole, an intention to make a present gift of part of the right to royalties arising under the licence to manufacture. For if the deed poll is not an equitable assignment of part of that right it must be, in my opinion, an attempted equitable assignment of the royalties as after acquired property. Equity would treat such an assignment as or as evidencing a promise to hand over the royalties when received: but the promise being voluntary would not be enforced by it. The directions given by the taxpayer to the licensee subsequent to the execution of the deed poll would then be no more than revocable mandates. As such, of course, they would not support the taxpayer's objections.[11]

It is suggested that the approach of Barwick C.J. and McCarthy J. is more commensurate with the basic precept that equity looks to the intention of the parties than the view put forward by the majority of the Court of Appeal. It is submitted that the view that an assignment must, as a matter of law, be ineffective as soon as the assignor quantifies the amount, cuts across this fundamental principle. Though in practice it would probably be wise to avoid quantifying amounts it may well be that to do so is not necessarily fatal to the effectiveness of the settlement provided sufficient other evidence of the assignor's intention can be produced.

Secondly, it appears that a draftsman should be careful so to prepare the necessary documents that it is clear that a contractual relationship for a specific period of time not determinable on the whim of the assignor has been created. In *Shepherd's Case*[12] counsel on behalf

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8 P. 399.

9 *Ibid.*

10 P. 403 ff.

11 *Shepherd's Case,* p. 354.

12 *Supra.*

of the Commissioner cited *Norman* v. *Federal Commissioner of Taxation*[13] to the Court but, in distinguishing this case, Barwick C.J. commented

> But that case did not decide anything to the contrary of what I have just said. So far as the case dealt with the attempted assignment of the promise to pay interest, it must, in my respectful opinion, depend upon the view that the promise to pay interest in that case inhered in the existence of a principal sum upon which the interest was to be calculated and payable. Consequently, there was then no promise to pay interest, if no principal remained due.[14]

Kitto J. agreed that

> To understand the ground of decision it is necessary to remember that in respect of the future year the loan agreement recorded the terms which should apply to the relationship of borrower and lender so long as such a relationship should exist, but it left the borrower free to decide whether such a relationship should exist in the relevant year. It gave the lender no right in any possible event to insist upon there being a loan in existence in that year. In the present case the situation at the date of the assignment was exactly the opposite. There existed at that time a contractual relationship which by its terms must continue throughout the ensuing three years . . . . The appellant, therefore, had a vested right in respect of those three years.[15]

Thirdly, it may well be advisable to use the word 'right', or words of similar import, in view of the stress laid upon this by Chief Justice Barwick in the passage cited above, and to avoid the use of phrases indicating that the amount payable is to be calculated by reference to the amount of future income.[16] However, unlike the deed poll in *Shepherd's Case*, the Deed of Assignment in *William's Case* also purported to be a declaration of trust—

> And the assignor hereby declares that he is trustee for the sole use and benefit of the assignee for the purpose aforesaid of so much (if any) of the said income as may not be capable of assignment (or may come to his hands) And the assignee hereby accepts this assignment and trust.

Of this North P. and Turner J. said,

> We agree that there may be circumstances in which a purported assignment, ineffective for insufficiency of form or perhaps through lack of notice may yet be given effect by equity by reason of the assignor having declared himself to be a trustee; but it is useless to seek to use this device in the circumstances of the present case. Property which is not presently owned cannot presently be impressed with a trust any more than it can be effectively assigned; property which is not yet in existence may be the subject of a present agreement to impress it with a trust when it comes into the hands of the donor; but equity will not enforce such an agreement at the instance of the *cestui que trust* in the absence of consideration.[17]

Finally, it may be said that *Shepherd's Case* and *William's Case* compliment each other in that by comparing and contrasting the two decisions many of the necessary features of a successful assignment and many of the pitfalls that can lead to the thwarting of an intending assignor's wishes are highlighted.

A. Shott

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13 (1963) 109 C.L.R. 9.

14 *Shepherd's Case*, p. 354.

15 P. 385.

16 P. 353.

17 P. 401.

ANDREWARTHA AND ORS. v. CASHMORE ET UXOR AND THE RECORDER OF TITLES[1]

Real Property—estate upon condition—restrictive covenant—construction of 'condition'—building scheme—Real Property Act, 1862, S. 115A.

This was an appeal against an order of the Registrar of Titles under S. 115A of the Real Property Act 1862 (inserted by the Real Property Act 1962) discharging a restriction on land. Detailed provision for the discharge and modification of restrictive covenants is now contained in S. 90D of the Conveyancing and Law of Property Act 1884, also enacted in 1962. This section closely follows S. 84 of the Law of Property Act 1925 (Imp.) which applies to land under the Real Property Acts as well as to land under the general law. A further method of discharge, however, is furnished by the Real Property Act S. 115A. The relevant sub-sections provide as follows—

115A—(1) The Recorder may of his own motion, and shall on the application of an interested person, call on a person appearing by the register book to have the benefit of a restriction on the enjoyment of freehold land by condition, easement, or otherwise to show cause why the restriction should not be discharged.

(2) If a person called on to show cause under this section—

(a) fails to show any cause, the Recorder may make an order declaring the restriction discharged;

(b) shows good cause, the Recorder shall take no further action, except in respect of costs: or

(c) shows doubtful cause, the Recorder may summon all persons appearing from the register book to be interested, to attend before him to show whether or not the restriction should be discharged, but if any person so summoned objects to the continuance of the proceedings he shall take no further action.

(3) The Recorder may where no cause is shown treat the matter as if doubtful cause had been shown.

(6) The Recorder shall give effect to an order to discharge a restriction under this section by entering a memorandum thereof on the appropriate folium of the register book and thereupon the order becomes binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction which is thereby discharged or dealt with, and whether such persons are parties to the proceedings or have been summoned to attend therein or not.

(7) Any interested person who is aggrieved by the decision of the Recorder to discharge or not to discharge a restriction under this section may appeal to the Supreme Court, and the Supreme Court may hear the appeal *de novo* and determine it and provide for the costs thereof and of the proceedings before the Recorder.

In this case the appellants and the respondents, Mr. and Mrs. Cashmore, derived title to certain lots in a building subdivision from a common vendor, Joseph Nichols. In the memorandum of transfer from Nichols to one Myrtle Parks, the predecessor in title to the respondents, the transfer was expressed to be 'subject to the following condition, namely . . .' (and there followed a condition for the erection and maintenance of fences)

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[1] Tas., unreported, no. 20 of 1966.

> provided always that this condition shall cease and determine when and so soon as all adjoining land of the said Joseph William Nichols shall be sold for a valuable consideration.

The condition and its proviso formed part of the printed form of memorandum. Then followed in typescript—

> and further that the said Myrtle Dorcas Waters Park shall erect no buildings on the said lots except one residence . . . costing at least one thousand five hundred pounds.

Subsequently the land passed to the personal representatives of Mrs. Park, who transferred it to X, who transferred to the respondents. In each case the transfer was made 'subject to the fencing conditions and also subject to the building conditions contained therein'.

On an application by the respondents under S. 115A of the Real Property Act 1862 for the discharge of the condition, the Registrar of Titles took the view that the building restriction was a common law condition enforceable by re-entry upon the land. This condition, he held, could only enure for the benefit of the grantor and his heirs. Accordingly he joined the personal representatives of the grantor as parties to the application, but declined to summon the appellants, since they were not persons 'appearing from the register book to be interested' within the meaning of S. 115A (2)(c). Since the grantor's personal representatives had no objection to the discharge, the Registrar made the order asked for. Against this decision the adjoining owners appealed to the Supreme Court.

Burbury C.J. held that the 'condition' was not a common law condition at all in the sense used by the Recorder of Titles.

> The proposition that a 'condition' that the transferee should maintain and repair fences and indemnify the transferor against claims under boundary fencing legislation is a qualification of the grant of the fee simple which if not performed will defeat the estate only needs to be stated to be rejected.

The same might be said of the building condition. The condition, therefore, was as a matter of construction of a contractual nature only, and amounted to a restrictive covenant. This conclusion, he said, he reached independently of authority. The fact that words apt to create a condition might sometimes have to be construed as a covenant was nevertheless clearly recognised in Sheppard's *Touchstone*[2] and in Bacon's *Abridgment*.[3]

The learned Chief Justice then went on to criticize what he termed 'this extraordinary section'; saying that it nowhere made clear upon what grounds a restriction may be discharged; and that, since if any person summoned objects to the application the proceedings must cease, it was virtually concerned only with unopposed applications. In any case, he held, whatever the ambit of the class of persons in S. 115A (2)(c) as compared with the class of person in S. 115A (1), the appellants were clearly 'persons appearing from the register book to be interested' under the first sub-section, and therefore the

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2 8th ed. pp. 117, 122.

3 Tit. 'Conditions', G.

failure to summon them invalidated the whole proceedings. He added that 'the procedure prescribed in this ineptly drafted section is entirely inappropriate for the determination of the substantial and difficult questions arising in this present matter', which could only be satisfactorily determined in an action in the Supreme Court for an injunction or declaration.

Two comments need to be made. In the first place, such is the pressure of work on parliamentary draftsmen in Tasmania, and such the consequent complexity of Real Property legislation that piecemeal and ill-considered amendments of this kind are only too frequent. The awkward numbering alone is sufficiently indicative. (The Conveyancing and Law of Property Act 1962 has such glories as section 75V (1)(c)(ii) and 75ZA (3)(b)). It is time for a recodification of the whole system. Secondly, also as a result of the complex nature of the legislation, relevant sections are too often overlooked by counsel. The rule that the benefit of a common law condition cannot be assigned, which seems to have been assumed by counsel and by the court, was of course abrogated by the Real Property Act 1845 S. 5, replaced now by the Conveyancing and Law of Property Act 1884 S. 80 (1).[4] Such an assignment would be implied, in the absence of a contrary intention, by S. 6 (1).[5] Thus even had the clause in question been held to be a common law condition, the appellants would have had the benefit of it as much as if it had been a restrictive covenant.

M. Scott

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[4] S. 80 (1) A contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments of any tenure, may be disposed of by deed, but no such disposition shall by force only of this Act defeat or enlarge an estate tail.

[5] S. 6 (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.