COMMENT

COMPARATIVE LAW

THE COUR DE CASSATION[1]

The origin of this famous tribunal is to be found in the *Conseil des parties,* a section of the *Conseil du Roi,* created by the Constituent Assembly (Law of 27 November-1 December 1790). The Assembly was concerned to bring about a complete reorganization of the administration of justice. Under the Revolution it was known as the *Tribunal de cassation* but its present title was later adopted under the Empire. The original purpose of the Court was to annul judicial decisions which contravened the Codes (art. 3, Law of 27 November 1790). A strict application of the principle of the separation of powers seemed to imply that the interpretation of the law was within the province of the legislature and not that of the judiciary. However, this narrow construction was soon abandoned when it became obvious that in order to apply the law a tribunal must also interpret the law. It is often said that the main purpose of the Court is to preserve the unity of *jurisprudence* (case law) in France. It deals only with matters of law and considers appeals based on the violation of law, whether in point of substance or of form. It must accept the facts as found by the lower courts. Thus, when the Court is of opinion that the decision of the lower court has violated the law, it is said to break (*casser*) or annul the decision without having the right to substitute one of its own choosing. The matter is forthwith sent down for retrial before another tribunal of the same rank. Nevertheless, there is no obligation on the latter (*tribunal de renvoi*) to adopt the opinion of the *Cour de cassation* for the reason that such a duty would compromise the independence of each judge. However, if the *tribunal de renvoi* delivers a judgment contrary to the opinion of the *Cour de cassation* all the chambers of the *Cour de cassation* must be united (*en audience solennelle*) to re-examine the matter and their judgment will constitute what is called an affirmation of principle.[2] Many basic principles of the law have been forged in this way. As violations of the law affect also the public interest, in certain cases in which the

---

1 The *Cour de cassation* comprises 1 *Premier Président* (the highest judge in France), 5 *Présidents de Chambre,* 77 *Conseillers* (puisne judges), 1 *Procureur Général* (attorney-general), 17 *Avocats Généraux* (solicitors-general), 7 *Greffiers* (registrars). The Court is divided into 5 chambers, one of which is criminal and the others civil. Cases are conducted by a body of 60 *avocats* (barristers) attached to the Court who alone are authorized to plead.

2 Each chamber must consist of at least 7 judges (*audience ordinaire*). In solemn audience (*toutes chambres réunies*) the Court must be composed of at least 35 judges.

parties themselves have not done so, the *Procureur-Général* of the *Cour de cassation* may appeal of his own accord. There is no provision in the Codes to regulate the organization and procedure of the Court.

Four reforms were introduced in 1938, 1947, 1952 and 1956 respectively. A Decree-Law of 12 November 1938 created the *chambre sociale*. A Decree-Law of 23 July 1947 abolished the *chambre des requêtes* and established in its place a *chambre commerciale*. The *chambre des requêtes* allowed only the plaintiff to appear and argue his case, which was then either rejected by a reasoned judgment, from which there was no appeal, or accepted by a judgment devoid of reasoning. In the latter event, the case went before the *chambre civile* for argument by both sides. However, this procedure was considered to be too slow. The problem was how to maintain a unity of judicial interpretation when several *chambres civiles* were functioning concurrently. The legislation of 1947 attempted to achieve this desirable objective in three ways.

(a) At the beginning of the legal year the Registry, composed of senior judges (*Bureau de la Cour*), the *Procureur-Général*, and the most senior *avocat-général*, carefully determine what particular kind of cases will be assigned to each of the three *chambres civiles*.

(b) As the foregoing procedure is not foolproof it was also decided to adopt what is called the *renvoi de l'affaire à l'assemblée plénière civile* (art. 41, Law of 1947). If an important question of legal principle is involved the *Premier Président* may call together at least fifteen of the judges who are addressed by the *Procureur-Général*. This step (the *renvoiQ* is proposed by the *président* of the chamber concerned with the case acting on the advice of the *conseiller rapporteur* (the judge designated by the court to act as *rapporteur*) and of the *avocat général*. The *renvoi* is mandatory if requested in writing by the *Procureur-Général* or in the event of the judges of the *chambre civile* being equally divided in their views.

(c) In addition, a central card index was instituted. This index contains a summary of all judgments given by the Court (art. 11, Law of 1947), thereby reducing the danger of a fortuitous contradictory judgment.

The old *chambre des requêtes* had the merit of rejecting more than half of the applications brought before it, a considerable saving of time. Its preliminary examination of the case also helped to particularize the issues for the *chambre civile*. However, the tendency developed for the *chambre des requêtes* to usurp the functions of the *chambre civile* by examining the application in depth.

The Law of 21 July 1952 added a fourth *chambre civile*.[3] The Law of 4 August 1956 augmented the number of judges assigned to each of the four *chambres civiles* from twelve to fifteen, and to seventeen for the *chambre criminelle*. It also increased legal fees and introduced *amendes de cassation* (fines) in the hope of discouraging abusive and useless appeals. The Court was unaffected by the important 1958 reforms.

Since the Court is concerned only with decisions of the lower tribunals its procedure is extremely simple. The duties of *avoué* (a kind of solicitor) are performed by a special body of ministerial officers called *avocats au·Conseil d'État et à la Cour de cassation*. The judges of the Court do not rotate between chambers as in the lower tribunals, a practice which favours the stability of the *jurisprudence* (case law).

For *audiences ordinaires* the requisite number of judges has varied over the years but is at present fixed at seven for each *chambre*. In the *Cour de cassation* it is not necessary that the number of judges be uneven. Decisions are arrived at by an absolute majority of votes, each judge pronouncing his opinion in order of seniority following that of the *rapporteur*, who is first, and concluding with the opinion of the *président*. According to old custom the deliberation of the judges usually takes place in open court (*salle d'audience*) and, until recent years, it was held in *le rondeau, i.e.*, with the judges standing round the *président*. However, in complicated cases requiring prolonged deliberation the conferences of the judges take place in the *chambre du conseil*. In such circumstances, the fact is usually noted in the published reports of the case, which serves to indicate that the judgment has not been formulated without difficulty.

A consequence of the doctrine of the separation of powers[4] is that the Court is expressly forbidden by Article 5 of the *Code Civil* to legislate indirectly, by general disposition or rule, as was the practice under the *ancien régime* with *arrêts de règlement*. The Court must confine itself to the particular matter before it. Such a prohibition naturally militates against the development of a doctrine of judicial precedent. Thus, even a judgment of the Court in solemn audience (*toutes chambres réunies*) has no legal or genreal binding force in the future, either in respect of the *Cour de cassation* itself or of any inferior tribunal. There is no rule of law in France which obliges a tribunal

---

[3] In 1946-7 the Court dealt with 3,167 appeals, and in 1951-2 with 4,094 appeals. However, the number of appeals pending rose from 5,000 in 1947 to 12,000 in 1952. To achieve economy the number of judges composing each *chambre civile* was reduced from 15 to 12. But in 1955 there remained 16,000 appeals still unheard.

[4] Montesquieu, influenced by Locke's *Essay on Civil Government*, formulated the doctrine in his *De l'esprit des lois*, Bk. xi, ch. iv: '*pour qu'on ne puisse abuser du pouvoir il faut que, par la disposition des choses, le pouvoir arrête le pouvoir.*' See the Law of 16-24 August 1790 and the Constitutions of 1791 and 1848.

to give the same decision in the event of two identical legal problems.[5] However, it is clear that a judgment of the Court assembled in solemn audience does in fact constitute what is called a judgment *de principe*, one which exerts much influence on the formulation (*fixer*) of legal principle. Inferior tribunals will scarcely fail to treat the judgment with circumspection if only because they have learnt from experience that a decision which is contrary to that of the *Cour de cassation* will almost inevitably be exposed to the risk of *cassation* (quashing).

It has been pointed out[6] that the *Cour de cassation* tends increasingly to abstain from delivering judgments *de principe*, the consequences of which cannot always be perceived. It prefers to limit the reasoning (*motifs*) in its judgment to the particular matter of which it is seized (*arrêts d'espèce*).[7] Nevertheless, it is widely believed that the Court has exercized its influence and power during more than 150 years with much wisdom and thereby serving well the cause of legal progress.[8] It has quite often been able to fill in the ever increasing gaps which appear in the text of the old Codes, and so to interpret them that they can be made to serve the needs of society which evolve without pause.[9]

A court in France must state its reasons (*motifs*) for the judgment. '*Le jugement doit être suffisament motivé.*' It can refer to previous judgments delivered in the same matter, but it is controversial whether a tribunal should in its reasons cite the decision of another court in which the facts were analogous.

Only exceptionally is there *cassation sans renvoi, i.e.*, the annulment of a decision of the lower court without sending it down for retrial before another tribunal of the same rank (*tribunal de renvoi*). The *tribunal de renvoi* is entirely free to decide contrary to the *Cour de cassation* and, for example, to adopt the decision of the tribunal from which the appeal was taken. This applies equally to criminal cases. If the *tribunal de renvoi* follows the judgment of the *Cour de cassation* the matter is finished. But in the event of a decision contrary to that of the *Cour de cassation* the case goes on appeal a second time to the

---

5 H. Solus and R. Perrot, *Droit Judiciaire Privé* (1961), vol. i, p. 617.

6 R. Japiot, *Traité élémentaire de procédure civile et commerciale* (1935), para. 393.

7 On the distinction between *arrêts d'espèce* and *arrêts de principe* see Japiot, *op. cit.*, para. 393; Faye, *La Cour de cassation* (1903), p. 12; Perreau, *Technique de la Jurisprudence* (1923), p. 36.

8 Solus and Perrot, *op. cit.*, p. 618.

9 See for example, the judgments in solemn audience of 1930 relating to the application of art. 1384, *Code Civil*, to responsibility for automobile accidents: R. Morel, *Traité élémentaire de procédure civile* (1949), para. 101; Glasson, Tissier and Morel, *Traité théorique et pratique d'organisation judiciaire, etc.* (1925-1936), vol. i, para. 106. It is interesting to note that in Italy, until 1923, there were five *Cours de cassation* in Rome, Florence, Naples, Palermo and Turin, each one having a defined territorial jurisdiction. In consequence, the interpretation of the law varied between the jurisdictions since all the judgments, even if contradictory, had the same legal standing. The French system was adopted by Decree of 24 January 1923. There is now only one Supreme Court situated in Rome.

Cour de cassation in solemn audience (*toutes chambres réunies*).[10] This Court is also free to reject the judgment of the first *Cour de cassation.* If it follows the judgment of the first *Cour de cassation* and the case is sent down once again for retrial before a different and second *tribunal de renvoi* (*juridiction de second renvoi*) the latter must conform to the decision of the *Cour de cassation* in respect of the point of law in question. However, the *tribunal de renvoi* can thwart the *Cour de cassation* by finding that the facts are different from those before the *Cour de cassation.* There are not many cases of *second renvoi* and the system has been criticized on the ground of expense and delay. On the other hand, it is said to be conducive to better administration of justice because it allows the *juridictions de renvoi,* which are in closer contact with reality and with the facts of the case, to resist a judgment at the highest level so that in appealing a second time to the *Cour de cassation* in solemn audience an interpretation of the law more deep and solid is likely to be assured.

As a final comment, the following quotation taken from the Preface of a case book compiled by one of France's leading jurists may bring a smile to the lips of the Common lawyer. 'The jurist of today cannot claim to understand the law unless he completes and animates the study of the texts by that of the case law. How many young men terminate their study of the law without ever having opened a collection of cases and without knowing how to make use of them! It is an enormous gap in their instruction. How many jurists, even those of experience, are content to read the summary of the decision given by the judges without taking the trouble to read the judgment itself. A pernicious method which can only lead to grievous mistakes. On the other hand, it is not necessary to bow before the case law as before the Codes. Doubtless the cases are a source of law only when crowned by a long line of decisions and, even if well-established, they are still liable to be reversed. The jurist must not only read, but also criticize, if he considers the decision is ill-founded.[11]

*N. C. H. Dunbar**

CRIMINAL LAW

THE INDETERMINATE SENTENCE IN TASMANIA†

The subject of this paper is one that is much debated, not only in Tasmania, but throughout the world. Here I would like to deal with some of the arguments used in support of an indeterminate sentence, then go on to examine the provisions in this State in relation to the

---

10 Law of 1 April 1837, reproduced in art. 58, Law of 23 July 1947.

11 Henri Capitant, *Les Grands Arrêts de la Jurisprudence Civile* (1950), Preface, p. viii.

* LL.M. (Sheff.), J.S.D. (Yale), Professor of Law, University of Tasmania.

† A paper given at a Symposium on 'Alternatives to Punishment' under the auspices of the Law School of the University of Tasmania.

indeterminate sentence. The bulk of the paper will be concerned with an analysis of the type of people dealt with under our provisions over the last ten years, and the results such a sentence has achieved. In conclusion I will attempt to provide some alternatives to an indeterminate sentence.

There are various types of indeterminate sentence. These are discussed in great detail in an illuminating survey conducted under the auspices of the United Nations' Department of Social Affairs by Mr Marc Ancel. The survey covers the sentencing provisions of many countries, and concludes that, apart from the United States, most countries have provisions for an indeterminate sentence but these are used as a supplement to the normal sentencing provisions. In the United States the indeterminate sentence is being used more and more. This follows on from a view widely held in that country that treatment should replace punishment. In order to treat a person he must be detained for an indeterminate period until his treatment is complete. Miss Daunton-Fear of the Adelaide University Law School has recently published an article in the Adelaide Law Review entitled 'Habitual Criminals and the Indeterminate Sentence'.[1] In this article there is a survey of comparative legislation in the various States to deal with the problem of the habitual offender.

Broadly speaking we must distinguish between an indefinite sentence, and an indeterminate one. An indefinite sentence is one in which the boundaries are well defined, but the exact date of release is in the hands of the prisoner. In this State this is the most common form of prison sentence. An offender is sentenced say to three years imprisonment. Three years is the maximum time that he can serve for that offence. However, his exact release date may be varied by remission, or parole. To this extent the sentence is indefinite.

On the other hand an indeterminate sentence does not have defined boundaries. There is no maximum time limit. There is no certainty as to the date of release.

In order to secure his release under an indeterminate sentence, the prisoner must satisfy the Indeterminate Sentences Board that he has sufficiently reformed, or the Board may recommend his release if it is satisfied that there is a good and sufficient reason to do so. The indeterminate sentence is known to judges and prisoners as the 'key'. However, when the judge refers to the key he means that the prisoner now holds the key to his own future. To the prisoner the 'key' means that he is locked up and the key thrown away. This difference in the use of the word 'key' highlights the problems and conflicts inherent in an indeterminate sentence.

There are three main reasons given in support of an indeterminate sentence. They are the protection of the community, and deterrence,

[1] Adelaide Law Review, Vol. 3 No. 3, p. 335.

both of the would-be offender and the offender actually sentenced. The third reason given is the reform of the individual offender so sentenced. It may be said that these are three distinct though kindred concepts, but for the purposes of analysis they must be treated separately for they are used as separate ideas by supporters of the indeterminate sentence.

It is said that in order to protect the community from the serious and dangerous offender, a sentencer must have wide powers to incarcerate the person who has shown that he is a threat to the safety of the community, until such times as he will no longer present such a threat. In order to protect the community the normal rights afforded to a person guilty of anti-social conduct must be put in abeyance and the deviant incarcerated for an uncertain period. This is after he has served his time for the offence for which he is in the Court. In other words he is punished twice for the one offence.

It is also said in support of an indeterminate sentence that it has a deterrent value. Now deterrence is of two types, individual and general. It is thought that if the power to sentence a man to an indeterminate sentence is available to a judge this will deter members of the community tempted to deviant behaviour. This is general deterrence. Again it is thought that if an individual offender knows that if he offends again he will be given an indeterminate sentence, this fear will deter him from further deviant behaviour. This theory cannot be proved nor disproved. However, it is submitted that in order to be a deterrent the people to be deterred must have the capacity to refrain from deviant behaviour. Also there must be the certainty that this type of sentence will be applied when well-defined conditions are met.

The most forceful justification for an indeterminate sentence, and incidentally the one used in the United States where this type of sentence is most prevalent, is the reform of the individual. The nature of the sentence here is not to punish, but to treat. The reform of the individual is the paramount consideration. This concept of the indeterminate sentence follows on from a view that the criminal law is designed to protect the individual. One of the means of protection is punishment, but it is punishment within the well-defined limits. In other words it is punishment to ensure and encourage respect for the law, and not to bring the law into disrepute. Thus punishment must always conform to the ordinary man's sense of fair-play. Once punishment goes outside these limits it ceases to protect the rights of the individual. The rights of individuals cannot be bought at the expense of an individual's rights. It is submitted that an indeterminate sentence as applied in Tasmania as a punishment contravenes the individual's rights to a fair punishment because of its uncertainty. Again most indeterminate sentences in this State follow on from a definite period of punishment, and result in the man being punished twice and sometimes three times for the same offence.

However, if an indeterminate sentence is seen not as a punishment but as a means whereby the individual's right to treatment is ensured and safeguarded a lot of the obvious objections are removed. However, in Tasmania there is no reformatory prison. A man sentenced to an indeterminate sentence in a reformatory prison is incarcerated in the Risdon gaol. His punishment is no different from his treatment. Hence the prisoner's view that the key has been thrown away.

In my opinion only when we in fact provide opportunities for reform could an indeterminate sentence be employed not as a punishment but as a treatment.

In Tasmania very wide powers are vested in our judges to impose an indeterminate sentence, not only on habitual offenders but also on the first offender. In order to be declared a habitual criminal under Section 392 of the Tasmanian Criminal Code Act of 1924 (hereinafter referred to as the 'Code') the person before the Court must be apparently seventeen years of age or above, and have been convicted at least twice for indictable offences. If such a declaration is made then the judge making the declaration is empowered to order that such a person to be detained under the provisions of the Indeterminate Sentences Act 1921 upon the expiration of the sentence fixed to be served for the offence for which the offender is before him in the Court.

The Code by section 393 goes even further than this and provides that a judge is empowered to impose an indeterminate sentence on an offender who is apparently of the age of seventeen and above, and who is convicted of an indictable offence, if the said judge thinks fit having regard to the antecedents, character, associates, age, health, or mental condition of the person convicted or any special circumstance. If the judge so decides he may impose a fixed sentence to be followed by an indeterminate sentence or he may impose an indeterminate sentence in lieu of a fixed period of imprisonment.

Again the Court of Petty Sessions is empowered to commit a man to the Supreme Court to be dealt with under the provisions of the Indeterminate Sentences Act 1921. Section 6 of this Act creates this power. The Supreme Court then deals with him by virtue of Section 394 of the Code. In order to come within Section 6 of the Indeterminate Sentences Act 1921 the offender must be apparently 17 years of age or above and he must have been sentenced by the Court of Petty Sessions to a term of at least three months imprisonment in respect of one or more of a variety of summary offences ranging from vagrancy to loitering. However, these summary offences do not include drunkenness. The offender must have had at least two previous convictions for summary offences or convictions on indictment.

These provisions are designed to cover not only the habitual offender under the Code, but also the petty thief and social nuisance. Even a first offender can be given an indeterminate sentence.

I have already mentioned that there is no separate reformatory prison in this State. Those people sentenced to a reformatory prison are incarcerated in the Risdon gaol which, for the purposes of the Indeterminate Sentences Act, has been declared a reformatory prison. However, there is no special provision in the gaol for the indeterminate prisoner. He is treated like any other prisoner being punished.

In order to secure his release on licence the indeterminate detainee must satisfy a Board set up by the Indeterminate Sentences Act 1921 that he has reformed, or that there is other good and sufficient reason for his release. The Board is made up of five members including the Director of Mental Health Services. The other members of the Board are usually the Solicitor-General and three members from the community. The Controller of Prisons does not now sit on the Board but is an adviser to it. The Board meets aproximately six times a year and reviews each person then undergoing an indeterminate sentence. In Tasmania there is no minimum time to be served before being eligible for release to licence.

If the Board decide the offender has either reformed or that there is a good and sufficient reason for his release they may so recommend to the Governor of the State who has the power to release the offender to be at large on licence. The period of the licence is two years. During those two years his licence to be at large may be revoked for any breach of the conditions of that licence. These conditions are usually that he be of good behaviour, avoid bad company and not to use alcohol to excess. Perhaps the most important condition of the licence is that the licensee place himself under the care of a probation officer for the period of the licence. On a breach of a condition of the licence the licence may be revoked and the offender apprehended by warrant and returned to the reformatory prison and the care of the Board. If during the licence period he is convicted of another offence he is automatically returned to an indeterminate sentence after the expiration of any fixed sentence that may have been imposed for the offence.

I would now like to examine in some detail the operations of our indeterminate sentence over the last ten years. In this period 140 people have been sentenced to an indeterminate sentence. There have been 139 males and 1 female. Of those sentenced 107 have been single and the rest were either legally married or had de facto relationships. The majority of the cases studied were unskilled labourers and usually had only a primary school education. There was not sufficient information available to draw any conclusions as to the geographical distribution of the subjects of the survey. However, it was abundantly clear that the majority of people studied were of a rather itinerant disposition.

It is very difficult for one untrained in statistics or pyschology to categorise people into groups. This, added to my personal acquaintance with a number of the men involved in this study, made it difficult for

me to define any concrete groupings. The groupings that follow are therefore by no means exhaustive or definitive but merely indicative of the patterns that emerged to me as a result of my study.

There are broadly speaking five groups of people sentenced indeterminately. They are what I have called the mentally inadequate, the socially inadequte, the alcoholic, the serious and violent offender, and finally the first offender. The first offender is a category on his own and will be dealt with in detail later. The other four groups are what we would identify in Tasmania as our habitual criminal population. It is with this group, our habitual offenders, that I will now deal.

Amongst the group that I have called the socially inadequate are to be found the petty thief, the illegal user, and the offender who confronts the authority of the police by abusive language and obstruction etc. This group was arrived at mainly by a process of elimination. They were not suffering from any organic mental disease or deficiency. They were not suffering from alcoholism nor had they committed any serious offences. They constituted a nuisance rather than a danger to the community. The interesting feature about this group is that they were all social outcasts. There was always a history of early delinquency usually following a breakdown in the family situation, then placement in a State Institution. In the cases where there was no family background at all it was noticeable that appearances in the Children's Court started at an even earlier age.

Nearly 50% of the members of this group had spent some time in the Ashley Boys' Home. The feature of this group was that they responded best to supervision. It is my opinion that the real problem of this group is not criminal intent but institutionalisation. Prison and especially an indeterminate sentence only confounds this problem. This group made up 43 of the cases studied. Of this group 10 have successfully survived their licence period and there is no record of further conviction. The maximum completion of the licence period and no further recorded convictions for any of the other three groups is five. Out of the 43 cases studied 27 members had been in the Children's Court and convicted between the ages of 10 and 17. Two members of this group were in the Court before they were ten.

The second significant grouping are those whom I have called the mentally inadequate. This is by far the largest grouping studied. There were 62 members of this group. Included in this group are people who were certified as mental defectives under the old Mental Defectives Act, the feeble-minded, the border-line defectives, and those diagnosed as psychopaths or demonstrating psychopathic traits. Quite a number of members of this group alternated between the mental hospital and the prison.

To identify this group I relied upon the psychiatrist's report usually made at the request of the Board. There was very little evidence of this type of report being available to a judge at the time of sentence.

The offences committed by the members of this group are similar to those of the socially inadequate. There were no crimes of violence or serious stealing. Illegal use and breaking and entering were the most prevalent. A lot of the offences were of a positively trivial nature, for example the man who stole a box of handkerchiefs valued at $1.20 from a large department store. He was returned to the key and spent some months in prison.

This group shared with the socially inadequate group the institutional factor. Thirty members of this group had spent some time in the Ashley Boys' Home or some other government institution during their early years. Forty members of this group had convictions in the Children's Court between the ages of 10 and 17. Two were in the Court and convicted under 10 years of age.

Five members of this group have successfully completed their licence period and no further convictions have been recorded. Five members of this group are dead and seven are at present on licence.

The third group is the alcoholic. This group is the hardest to identify for most of the crimes committed by the mentally and socially inadequate were committed while they were under the influence of drink. Those I have grouped here as alcoholics are those who have been diagnosed by the psychiatrists to be suffering from the disease alcoholism. I have distinguished this group both from the mentally inadequate and the serious offender for there is a special type of treatment necessary for this sort of offender. If a serious crime of violence or theft has been committed by a man subsequently diagnosed to be an alcoholic I have not included him in this category and have included him in my final group.

There were 13 men in this group. Five had appeared in the Children's Court and had their first conviction recorded between the ages of 10 and 17. Three had been in Ashley and four were from broken or inadequate homes. One has successfully completed his licence and no further convictions recorded. One is at the moment on licence.

The final group is the serious or violent offender who made up 12 of the 140 cases studied. This group is the real threat to the community and not just a nuisance. The offences of the members of this group range from rape and attempted murder to robbery with violence. I have included here those diagnosed as alcoholics or as psychopaths, because the serious nature of their offences warrants it. All of them had substantial records. The indeterminate sentence has thus been applied to protect the community from serious crime 12 times over the last ten years. A feature of this group was that 8 out of the 12

had been before the Courts between the ages of 10 and 17. Four had been to Ashley and two came from broken or inadequate homes. Only one over the last ten years has managed to complete his licence and is now well settled in this community.

Those then are roughly the types of people to whom an indeterminate sentence has been applied. I think it is interesting for I am sure that this grouping could be extended to the majority of the people in the prison today. I have no research to support this conclusion but I think that most of you here would agree that these are the main groupings into which the delinquent portion of our community would fall. The majority of our so-called criminals are mentally inadequate or socially inadequate, either due to youthful instability or institutionalisation. Only a small proportion of our offenders present a real threat to the security of the community. I think that this study of our indeterminate sentence indicates in miniature the nature and extent of our overall correctional problems.

This is supported by the fact that there is no *pattern* to be discerned as to the type of offender to whom an indeterminate sentence is applied. The number of previous convictions before the first indeterminate sentence is given does not indicate any definite judicial policy. 14% of the total number sentenced had five or less previous convictions, approximately 30% had between 6 and 10, approximately 35% had between 11 and 20, and approximately 21% had over twenty previous convictions. All the offenders so sentenced were persistent offenders, but there are a lot of prisoners in gaol who have records equally as bad but who have never served an indeterminate sentence. It seems to be a random decision on the part of the sentencer to impose an indeterminate sentence.

Some interesting overall factors that came to light as a result of the survey are that approximately 67% of those sentenced to an indeterminate sentence were sentenced to a fixed term of imprisonment first. In other words the sentencer imposed a penalty to be followed by a period of treatment in a reformatory prison. Now as there is here no reformatory prison the policy behind the imposition of such a sentence can only be guessed at.

Again the age at which an offender was given his first indeterminate sentence was significant. Seventy-seven of the cases studied were under the age of 25, 14 were over 40 and the rest were between 26 and 40. This is roughly in keeping with the overall figures for the prison population. It is estimated that well over 80% of the people in prison at the moment are under the age of 25.

From the cases studied it is apparent that nearly 58% are only given an indeterminate sentence once, approximately 27% twice, and the remaining 15% three or more times. There were two cases where an offender had been on the key more than six times.

The time spent on the first indeterminate sentence varied between 6 months or less, to two years or more. The most noticeable factor here is that the time spent on the key varied according to the length of the fixed sentence imposed by the Court. It was usual for an offender to spend between 7 and 12 months on the key and this time category made up approximately 43% of the total cases studied. Nearly 30% were released after 6 months or less, 23% between 13 and 24 months and the remaining 5% over 2 years. This pattern was maintained on successive indeterminate sentences. However, there was a marked decrease in the percentage who were released after six months.

Some general observations as to the operation of the sentence in relation to the habitual offender may now be made. Although it is difficult to assess the success of any particular penal provision certain negative criteria may be adopted in order to at least give some general indications. I have here adopted four such criteria, the completion of the licence period, the non-completion of the licence period, the completion of the licence period but subsequent conviction for further offences, or transfer to another institution for further treatment.

At the time of writing seven of the cases studied are on licence and five have died. There was only information on 112 of the remaining cases. Of these 22 had successfully completed their licence period and there was no record of any further convictions in this State. Six were receiving further treatment in other institutions, 15 managed to complete the licence period, but have since been convicted of further offences. The remaining 69 did not complete the period of their licence.

In most cases the reason for the non-completion of the licence was the disappearance of the licensee inter-State while under licence. Another prevalent reason was the commission of further offences. In relatively few cases was the licence revoked at the request of the probation officer entrusted with the licensee's supervision. In the majority of cases warrants have been issued for the arrest of the licensee, but sometimes the Board makes the decision not to reclaim the offender.

Another significant conclusion is that of all the persistent offenders 50% had been at Ashley Boys' Home or some other State institution such as Wybra Hall. Information was not available on all the cases studied as to their early history; however, of those where the information was available it was obvious that as a result of the breakdown or inadequacy of the family structure anti-social behaviour started at an early age. It is my opinion that the institutionalisation which is the result of early delinquency aggravates a behavioural pattern which, because of the age and flexibility of the offender when he first comes before the law enforcement agencies of this State, could be dealt with in a much more realistic and effective way.

Perhaps the most outstanding feature of the Tasmanian indeterminate sentencing legislation is that over the last ten years it has

been used on 105 mentally or socially inadequate offenders, 13 alcoholics, and 12 serious or violent offenders.

Over the last ten years *ten* people have been given an indeterminate sentence upon their first conviction for an indictable offence. All these offenders were under 25 years of age. At the time of writing five have successfully completed their licence period and no further convictions have been recorded. One is receiving further treatment, in another institution. One completed the licence period but has been convicted subsequently, one did not complete his licence and a warrant is out for his arrest. One is at present still undergoing his sentence, and the last case is still on licence. The sentencer who imposes the sentence usually in this case writes to the Chairman of the Board stating his intentions in imposing such a sentence. Usually the reason given is so that the offender may have the benefit of supervision on his release from prison. Another reason sometimes given is that the offender may have the opportunity of treatment. In these cases there is usually no fixed sentence given.

CONCLUSION

I would advocate the abolition of the indeterminate sentence in this State for it appears to me that its disadvantages far outweigh its advantages.

If in Tasmania we had a reform prison, and the sentence was used to secure the right to treatment and not viewed as a punishment then perhaps there might be some merit in its application. However, notwithstanding the provision of these conditions I think that there are alternatives which are far more wide-reaching and more suitable to needs of this particular State, bearing in mind not only the nature of our persistent offender problem, but also the financial resources of the State.

It seems imperative that we concentrate more and more of our efforts towards prevention. The anti-social behavioural pattern is discernible at a very early age. It seems that those from inadequate or no home background are the most susceptible to deviation. It does not seem to me that an appearance before an impersonal magistrate at an early age is conducive to the promotion of the desire to live a socially acceptable life. It certainly does nothing to solve the child's problems. I agree that it is not the purpose of the court to take on the responsibilities of the Social Welfare Department, but I do think that there is obviously a need to exercise caution in the use of the Children's Courts. A court appearance only increases the anti-social feelings of the child. If, as I think is the case in a lot of child delinquency, the reason to break the law is to get the attention that is not given in the home, then a Court appearance goes a long way to satisfying that desire for attention. It does nothing to arrest it.

In order to facilitate prevention it is necessary to have greater liaison between the various law enforcement agencies. Seminars such as this go some of the way but this is surely not enough. In order to get a fuller perspective of the problems of crime in this community it is essential that there be regular meetings of this type. The value of this would be that the experience and training of all those involved in these problems could be pooled, given new direction and made so much more effective. We would be able to go some of the way to getting a total picture of the problem rather than the disjointed focus under which all of us are working at the moment.

As the results of this survey show, the main problem in Tasmania, as I believe it to be elsewhere, is the young offender. We have built a prison for men, which at the moment contains well over 70% boys. The bulk of the persistent offenders are sentenced indeterminately under the age of 25. It is also obvious that the present facilities at Ashley are not adequate to the task. If these were improved we could reduce greatly our persistent offender problem. The scope of this paper will not permit me to elaborate on this point.

However, no matter how good our prevention, there will always be the persistent offender. It would seem apparent that greater use must be made of psychiatric and pre-sentence reports, so that the most effective sentencing measures may be adapted to the needs of the individual offender before the Court.

The provisions of the Mental Health Act 1963 could be utilised more frequently in relation to the mentally inadequate persistent offender. However, it appears from a recent report of a symposium on the mentally abnormal offender[2] that normal mental hospitals are not equipped to deal with this type of patient. It is also obvious from the cases that I have studied that there is a reluctance on the part of those in charge of our hospitals to admit the mentally abnormal offender. The main objection would appear to be the need to provide security measures. It is quite rightly thought, in my opinion, that it is not in keeping with the concept of a hospital to provide guards and other security measures. In Tasmania as in England it has been the experience that re-conviction rates are high and that discharge and absconding are both very prevalent with this type of patient. It is clear that in England hospital orders have not been very effective when they are executed in normal hospitals. What is needed is a security hospital which must be a completely separate establishment, not a part of a prison nor a part of a mental hospital. It is proposed in Tasmania to build a unit for the mentally abnormal offender, and when this is done a large section of those now dealt with under the Indeterminate sentenc coulud be dealt with under the Mental Health

[2] The Mentally Abnormal Offender (A C.I.B.A. Foundation Symposium) Edited by A. U. S. De Rueck and R. Porter (J. & A. Churchill Ltd 1968).

Act 1963. This would remove the bulk of the recipients of the indeterminate sentence.

The socially inadequate are in need of a supportive environment. Largely as a result of their institutionalisation they are incapable of surviving alone in the community. The prison offers a measure of security for them, but it is in a destructive and unproductive environment. It is certainly not the answer to this type of persistent offender's problem. In England more and more use is being made of supervision and supportive or rehabilitation centres. I have been in contact with one such centre which claims that well over 700 to 800 persistent offenders have been successfully returned to the community since about 1960. They have noted two failures. The methods employed at this Centre are group counselling and the development of community reponsibility by definite projects. For this reason such a centre is also suited to the alcoholic offender outlined above. The cost of such a centre would soon be defrayed by the saving of the expense involved in a prison term. Also the would-be prisoner goes out to work and supports himself.

This then leaves only one group to deal with; that is the serious or violent offender. It is submitted that the normal sentencing powers of a judge under the Code are quite adequate to protect the community from this type of offender. There is no need to use the indeterminate sentence as a means of preventive detention. If more attention were paid to parole all the advantages of the Board as at present constituted would be retained without any of the harshness of an uncertain period of detention. The demoralising features of the indeterminate sentence would be done away with, if a lengthy sentence was imposed which set the maximum limits but still gave access to parole so that hope on the part of the offender might be retained. Towards this end it is suggested that the Indeterminate Sentences Board be replaced by a parole board.

Release on parole has all the advantages of the licence as provided for under the indeterminate sentence. The main objection to conditional release in this State is that there are not sufficient probation and parole officers to allow for the increased use of parole. It is submitted that the use of voluntary probation and parole officers could quite easily overcome this objection. Parole would also alleviate the use of the indeterminate sentence in order to secure supervision on discharge from prison.

For these reasons I maintain that there is no need in Tasmania to retain the indeterminate sentence.

I would like to thank the Controller of Prisons for his assistance and co-operation in the preparation of this paper, also members of

the judiciary, and the probation and parole service who made their time and wide experience so freely available to me.

Dirk Meure[*]

THE VIEW FROM THE JURY BOX

A Layman's Experience of Jury Operation

This year I had the opportunity to examine the process of trial-by-jury from a box-seat. I was selected, along with some forty others, for a period of jury service. It must be said that I approached this activity with mixed feelings. As I had not previously had the opportunity, I was interested to see the law at work; at the same time I must admit that I had a relatively cynical outlook on the question of the value of a jury in the twentieth century criminal court. How I came by this attitude I do not know; I can only suggest that besides a natural pessimism concerning human nature, it may have been generated by the mass media ('Twelve Angry Men,' and etc.). The performance of the first jury in which I was empanelled did much to erode this view, and by the time I had been empanelled for five of the seven cases heard in the session, it had been entirely dispelled.

In the jury-room the jury at all times addressed itself to the question of fact with encouraging application. By reason of the range of backgrounds and social conditions from which the jurymen were drawn, the discussion was at times diffuse; but it was also remarkably free from extraneous supposition and judgments based on personal bias. In the matter of 'reasonable doubt', there was little difficulty in arriving at a distinction between a fantastic and a reasonable doubt, given the evidence at our disposal. This was particularly demonstrated in the process of arriving at an evaluation of unsworn statements made from the dock. In this connection, and perhaps more so with regard to courtroom rhetoric by either prosecution or defence, the jury was remarkably hard-headed. Unexpected as it was to me, the jury collectively was able to judge rhetoric both as a performance and as to its bearing on the evidence, and was able to distinguish between these two judgments in its deliberations. The examination of the evidence on both sides was at all times thorough—even exhaustive; even though, on those occasions when the foreman was inexperienced, the discussions were very circuitous. As a generalization, the performance of the jury was remarkably good, considering the disabilities under which it operated. As far as I could see I had little ground for my previous cynicism.

The disabilities were several; the chief one being physical discomfort. The jury-box in the Campbell Street Criminal Court must have been designed by someone with a thorough understanding of the more refined forms of torture. Besides having been constructed in an age

---

[*] LL.B. (Tas.), Tutor in Law, University of Tasmania.

when the height of the average male must have been at least a foot less that it is now, the box is equipped with a set of electric heaters which would not be out of place in a Museum of Technology. It also possesses a bench cushion which appears to be endowed with a demonic desire to descend to the floor. After ten minutes any occupant with a stature greater than four feet six inches is either paralyzed from the waist down, or has sustained scorches to the shins. The jury-room itself probably contravenes a number of Health regulations; its major deficiency is ventilation—it gives every evidence of being hermetically sealed. The jury's return to court to deliver their verdict is usually accompanied by a pall of tobacco smoke, which may be dramatic but hardly healthy.

The next most serious problem is related to deficiencies in the method by which jurymen are selected for a particular case. Although more than forty were called for service, less than half of this number heard cases during the session. Apart from a few who were always challenged, either by prosecution or defence (a circumstance which in itself raises a number of interesting questions), the procedure used for calling jurors definitely involved a non-random element. I suspect the problem to be basically a mechanical one: the cards which bear the jurors' names may not shuffle in a completely random fashion in the box from which they are drawn, regardless of how vigorously it is shaken. In any event, about eight of us together saw service in all the cases heard; as luck (?) would have it I achieved the record for the session. This meant that as the session (which, incidentally, was extended by a week) drew towards its close, the effects of discomfort became compounded by mental exhaustion. This had a noticeable effect both on the morale of the jurymen concerned and the quality of their deliberations. Had the session been extended further it would undoubtedly have had a deleterious effect.

The final pont concerns the matter of instruction. The majority of jurymen, like myself, have not had previous experience of either jury service or courtroom procedure. Consequently, matters which are so familiar to the everyday servants of the courts as to be second nature, cause jurymen some difficulties. These include the proprietry of jurors taking notes during the course of a trial, the appropriate form and time for questions to be directed from the jury to witnesses, the matter of requests for a view 'of the scene of the alleged crime' and the possibility of alternative verdicts. The course of justice would be better served if positive instruction on these and allied matters could be given before the session commences.

However, I would reiterate that, contrary to my expectations, the jury-room deliberations of the juries of which I was a member correspond very closely to those implied by the identification in the layman's mind of the terms 'fair trial' and 'trial by jury'.

This account would be incomplete without stating my appreciation of the clarity with which we were directed in matters of Law and the courtesy which was extended to us from the Bench during this session.

*A. J. T. Finney**

COPYRIGHT

THE RIGHT TO COPY

In this present era of increasing emphasis on technological advances, the printed book is fast losing its ranking in society as a weapon of power and, more important for my purposes, as a basis for a property right. In the first place, the book is suffering the inevitable effects of competition from radio, screens both large and small and various other forms of mass media. And secondly, the ease and cheapness with which material can be duplicated and reproduced tends to discount the very real rights attached to the material itself. 'Copright,' it was suggested at the Textbook Publishers' Conference in New York in 1964, 'is a valid property right and essential for the furtherance of education and knowledge'.[1] If the latter part of this statement is debatable, under present legislation the former part is unarguable.

In the refined context of a University library the problem resolves itself into the demands, on the one hand of readers looking for cheap and unobtainable material (such demands being so often and so easily met by cheap photocopying processes) and on the other hand, the demands of author and publisher, which if not met may cause the cessation of the very material so assiduously sought by the first group.

Without being sidetracked into the practical problems of paying royalties on every xeroxed copy of an article, or the production of books in microfilm straight from the publisher, let us take a brief look at the relevant parts of the latest Australian compromise, the 1968 Copyright Act.

This Act is based largely on its English predecessor, the 1956 Act, with amendments suggested by a committee appointed for the purpose by the Commonwealth Attorney-General. Thus the section on Copying of Works in Libraries, (Section 7 in the English Act) has found its way with little change, into the Australian Act as Division 5. The important distinctions are:

(a) Libraries forming part of a concern that is conducted for profit, provided the library itself is non-profit-making may benefit under s.49.

---

* Senior Demonstrator in Chemistry, University of Tasmania.

1 (1965) 58 Law Library Journal 167.

(b) A library may copy more than one article from the same periodical provided the articles relate to the same subject matter. [s.49 (4)].

The concept of special provisions for copying in libraries is an innovation in both English and Australian law, and was introduced in the respective Acts following representations from the Library Associations in each country. The provisions, together with the general protection offered under s.42 of the Australian Act, are designed to cover librarians (in libraries not conducted for profit) who are asked to make copies of copyright material for students or other libraries.

The Australian librarian is treated a little more liberally than his English colleague in that though he may know, or be able to ascertain by reasonable enquiry, the name and address of the copyright holder, he may still copy the material for the purposes laid down in s.49. It is the interpretation of these purposes, together with the statement in Division 3, of the acts not constituting infringements of the copyright that has caused some concern among (inter alia) University library staff.

The Australian Copyright Council is in the course of publishing a pamphlet on Photocopying and the Law in an effort to reach a working relationship between copyright holders and the seekers of cheap material. This pamphlet endeavours to deal with some of the vaguer expressions used in the Act, and also to make some suggestions that may conceivably be acceptable by both sides.

Section 49 (2) of the Act states that copyright is not infringed 'by the making of a copy of part of the work', which subsection does not apply 'unless the copy contains only a *reasonable* portion of the work'.

Section 14 (a) of the Act states: 'a reference to the doing of an act in relation to a work or other subject matter shall be read as including a reference to the doing of that act in relation to a *substantial* part of the work or other subject matter'.

Based mainly on the suggestions put forward by the Society of Authors and Publishers' Association in the United Kingdom, the Australian Copyright Council has suggested that the following extracts may be made from copyright works without being regarded as 'unfair,' i.e., reasonable, without being substantial:

(a) A single extract not exceeding 4,000 words; or

(b) A series of extracts of which none exceeds 3,000 words to a total of 8,000 words,

provided that in no case the total exceeds 10% of the whole work, poems, essays and other short literary works to be regarded as whole works in themselves.

In discussing the possible interpretation of the phrase 'substantial part', the pamphlet points out, quite correctly, that the importance of the extracts as well as their length, must be taken into account. Generally speaking, judicial decisions involving a consideration of the word 'substantial' have regarded it as involving a smaller rather than a larger part of the material concerned. Thus in *Hawkes & Son (London) Ltd v. Paramount Film Service Ltd,*[2] 28 bars of '*Colonel Bogey*', not more than 50 secs out of 4 minutes was regarded on appeal as 'substantial' because it was the most easily recognisable portion of the whole march. Even more relevant is *Johnston v. Bernard Jones Publications Ltd.,*[3] where one table which occurred in two different books both of which comprised a number of other tables as well as text, was held to be a 'substantial part' of each book.

Even more confusing are the judicial remarks on 'reasonable'. The essence however appears to be that all relevant circumstances must be considered. (Who can blame Latham C.J. for remarking that the real question is to determine the circumstances that are relevant!).[4] But obviously such matters as the nature of the work, the position of copyright holder, infringer, method and nature of infringement, perhaps even time and place of infringement and reason for infringement could be relevant.

As therefore a proportionately small part of the total work, provided it does not fall within the maxim 'de minimus non curat lex'[5] could be held to be a 'substantial portion' thereby giving rise to an action for infringement, it is submitted that in suggesting single copies of up to 10% of a given work as 'fair', the Australian Copyright Council has gone more than half-way to meet the demands of students, teachers and librarians in reaching a working agreement in the matter of photocopying. The latter class should, perhaps, remember that, in the event of an action, the court is not bound to consider such an agreement.

The pamphlet points out that fair dealing in relation to research or private study does not constitute an infringement of copyright under s.40 of the Act, and that such fair dealing must be exercised by the individual for himself, and not on behalf of another. This was established in *University of London Press Ltd v. University Tutorial Press Ltd.*[6] The defendant company published three examination papers, the copyright in which was held by the plaintiffs. The papers were published in two cases, with the answers, and in the third, with some criticism. It was alleged that they were published for the purposes of private study, and held that publishing the answers, and/or criticism

2 [1934] Ch. 593.
3 [1938] Ch. 599.
4 *Opera House Investment Pty Ltd v. Devon Buildings Pty Ltd* (1936) 55 C.L.R. 110 p. 116.
5 *Maclay v. Dixon* [1944] 1 All E.R. 22.
6 [1916] 2 Ch. 601.

did not in this case amount to fair dealing; nor was it fair dealing merely because such publication was intended for private study. Literally to publish copyright material then, even though one may accompany the publication with the statement that the material is for the purposes of private study would appear an infringement under the Act. But it is interesting to consider whether or not this case applies to the classroom situation where each individual student in the class makes a copy of the material under discussion in the course of a lecture or seminar. This I submit may be distinguished from the Press case where the examination papers were on sale to any purchaser. It may even be argued that such lecture or seminar is in fact 'private study': It was suggested in *McMillan v. Western Scottish Motor Traction Co. Ltd*[7] that a 'private party is one brought together by some kind of delectus personarum and not by an appeal to public or general sympathy'. It could therefore be argued that study in a class situation, lecture, seminar or tutorial, is 'private', for in all these situations are groups of people brought together indeed by a delectus personarum, and to which no member of the general public is admissible.

Where the words 'private' and 'public' have occurred for judicial consideration, the test has generally been concerned with any relationship to a public body, local authorty,[8] support by public funds,[9] accessibility of the general public,[10] etc. It would seem to me that had the legislature not intended the word 'private' to be defined in this sense, had the legislature intended it to mean one person by himself, alone, it would have substituted a word such as 'individual'. Thus by employing 'private' opportunity is given for making and using copies of material without first obtaining permission from the copyright holder, in a group study situation.

Finally, there is the problem of displaying a slide in a classroom situation, unobjectionable apparently to publishers, although there seems to be little difference between displaying a page of a text or illustration through an overhead projector, and distributing copies of the same page or illustration around the classroom. If however the classroom may be regarded as 'private study' such problems of course immediately lose their importance.

Rhoda O'Shea[*]

---

7 [1933] S.C. (J) 51, 56 per Lord Justice-General (Clyde).

8 *Blake v. London Corporation* (1887) 19 Q.B.D. 79.
Metropolitan Water Board v. Berton [1921] 1 Ch. 299.

9 *Dilworth v. Stamps Commissioners* [1899] A.C. 99.

10 *R. v. Leitch* (1916) 36 O.L.R. 1.

* B.A., LL.B. (Auckland), Law Librarian, University of Tasmania.

MATRIMONIAL LAW

DIVORCE REFORM IN ENGLAND

On January the First 1971, the Divorce Reform Act 1969 came into force in England. This Act, which is specifically not applicable to Scotland[1] and Northern Ireland, alters the grounds for Divorce and Judicial Separation. Section 1, which purports to abolish the much criticised notion of the matrimonial offence, provides that, '... the sole ground on which a petition for divorce may be presented to the court by either party to a marriage shall be that the marriage has irretrievably broken down.' One wonders, however, how far the matrimonial offence has, in fact, disappeared from the English scene, particularly in view of the recent decision of the Court of Appeal in *Tumath v. Tumath.*[2] In that case, it was held that where a marriage had irretrievably broken down, there was no principle of public policy which inhibited the right of the parties to bring to light all matters relevant to the conduct of the parties in maintenance proceedings, whether they had been raised at the trial suit or not. It, therefore, seems that the question of culpability will still be an important factor in the, albeit secondary, question of assessment of maintenance.

Doubts as to whether the criterion of culpability has really disappeared are increased by section 2 (1), which provides that proof of such breakdown will only be afforded if one or more of the conditions is satisfied. The first three of these closely approximate to matrimonial offences under the Matrimonial Causes Act 1965, whilst the other two are, in England at any rate, a new departure. Section 2 (1) (a) provides that it will be evidence of breakdown if '... the respondent has committed adultery and that the petitioner finds it intolerable to live with the respondent.' The important word in this particular provision would appear to be 'intolerable.' This probably means that the court must look at the whole conduct of both parties, in addition to the respondent's adultery, which results in further complication. First, the Act uses the expression 'finds it intolerable ...', which suggests that the test is to be subjective, which, in turn, makes it difficult for the court to investigate the entire situation. Second, since the Act uses a conjunctive rather than a relative, it is suggested that there need be no causal connection between the adultery and the petitioner's finding it intolerable to live with the respondent. Therefore, it seems that the petitioner will be entitled to a decree where the respondent's adultery was the effect, rather than the cause, of the breakdown. However, what is certainly true is that one act

---

1 See the Report of the Scottish Law Commission 'Divorce—The Grounds Considered', which affirms a belief in the idea of the Matrimonial Offence. Although at present, a bill is being drafted by Mr Donald Dewar M.P. which may well turn out altogether differently.

2 [1970] 1 All E.R. 111. This case also suggests that the courts were breaking the ice prior to reception of the Act in 1971.

of adultery, without more, will not constitute sufficient evidence of breakdown.

Section 2(1)(b) provides that there will be evidence of breakdown if, '... the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with respondent'. Thus section 2 (1) (b) is wider in scope than the matrimonial offence of cruelty in that the requirement of injury to health, which has been a part of the law since 1897,[3] is no longer necessary. The applicable test is objective and, in fact, is similar to that proposed by Lord Pearce in the leading case of *Gollins v. Gollins*,[4] who said that the test was '... whether the cumulative conduct was sufficiently weighty to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that this petitioner ought not to be called on to endure it.' However, the Law Commission, in their report 'Reform of the Grounds of Divorce: The Field of Choice' point out that the personality of the particular petitioner must be taken into account, when they say,[5] '... in testing the gravity of the respondent's conduct, the judge must consider its effect on the particular petitioner and not on some hypothetical 'average husband or wife'. Section 2(1)(b) will also cover situations which, under the old law, would have amounted to 'rape, sodomy and bestiality.'[6] Since the Act says that the respondent 'has behaved' it may also be that it applies to acts committed by the respondent prior to the marriage. For example, the husband's having been notoriously immoral or having led a life of crime before being married.

Section 2 (1) (c) provides that there will be evidence of breakdown if the respondent ' . . . has deserted the petitioner for a continuous period of two years immediately preceding the presentation of the petition.' The requisite period is thus reduced from three to two years. It is suggested that this is the only change of substance which the Act makes in the concept of desertion, even though the expression 'without cause', which occurs in the 1965 Act is omitted. Mr G. Brown has suggested[7] that section 2(1)(c) only applies to cases of simple desertion, but, although section 2(1)(b) will normally be used in constructive desertion situations, there seems to be no evidence that the Divorce Reform Act has specifically abolished constructive desertion.

Probably what will prove to be the most common evidence of breakdown of marriage is contained in section 2 (1) (d). This section provides that there will be evidence of breakdown if '... the parties

[3] *Russell v. Russell* [1897] A.C. 395.
[4] [1964] A.C. 644 at p. 695.
[5] Appendix III *Law Com.* No. 15 note 3.
[6] Matrimonial Causes Act 1965 s. 1 (1) (b).
[7] 1970 N.L.J. 341 at p. 342.

to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted.' The expression 'livng apart' is described in section 2(5) where the Act states that, '. . . a husband and wife shall be treated as living apart unless they are living with each other in the same household.' Therefore, the parties will be deemed to be living apart if they have been separated by erroneous circumstances, such as the husband's absence on business or on military service. Nor does section 2(5) make clear the position where the parties are living in the same house and having nothing to do with each other.[8] In addition, section 2 (6) provides that rules of court shall be made for the purpose of ensuring that '. . . the respondent has been given such information as will enable him to understand the consequences to him of consenting to a decree being granted and the steps which he must take to indicate that he consents to a decree being granted.' Therefore, it seems probable that the respondent may withdraw his consent at any time prior to the pronunciation of the decree nisi. Furthermore, section 5 provides a further safeguard for the position of the respondent when it states that, where the only ground is two years separation, the court may, '. . . on an application made by the respondent at any time before the decree is made absolute, rescind the decree if it is satisfied that the petitioner misled the respondent (whether intentionally or unintentionally) about any matter which the respondent took into account in deciding to consent to the grant of a decree.' This partcular safeguard is very much an immediate and personal one. First, the misleading words or conduct must have been on the part of the petitioner and no one else. Section 5 will not apply if the respondent had been misled by, say, a member of either his or the petitioner's family. The test to be applied in such cases will be a subjective one, so that as long as the respondent is able to show that the matter did influence *his* behaviour, it is immaterial whether it would have influenced a reasonable person.

Finally, by section 2 (1) (e), the Act provides that there will be evidence of breakdown if '. . . the parties have lived apart for a continuous period of five years immediately preceding the presentation of the petition.' It may be seen, at the outset, that this provision operates irrespective of the respondent's consent and could, in effect, lead to a deserting spouse obtaining a decree as against an innocent partner. The Act, therefore, provides a number of safeguards for the respondent. First, section 4 (1) states that a decree may be refused, if based on the sole ground of five years separation, if it will, '. . . result in grave financial or other hardship to him [i.e. the respondent] and it would in all the circumstances be wrong to dissolve the marriage'. In deciding whether to pronounce a decree the court must

[8] See, for example, *Hopes* v. *Hopes* [1949] P. 227 and *Naylor* v. *Naylor* [1962] P. 253.

take in to account ' . . . all the circumstances including the conduct of the parties to the marriage and of the interests of those parties and of any children or other persons concerned . . .'.[9] The question of what constitutes 'some financial hardship' was considered by Lord Denning M.R. in the case of *Nowotnik v. Nowotnik*,[10] albeit in another context, when he said, 'If . . . his finances are so nicely balanced that in order to meet his costs, he has to restrict his activities considerably or seriously deplete his capital, then we think he would suffer severe financial hardship'. As regards other hardship, it seems likely that intangible hardship such as religious objection to divorce or loss of social position would not be taken into account.[11] It is essential, too, that the court finds both hardship and that it would be wrong to dissolve the marriage. Hence, even though the court feels that it would be wrong to dissolve the marriage, it must still do so if there is no financial or other hardship.[12] For the purposes of the Act, 'hardship' shall be taken to include[13] ' . . . the loss of the chance of any benefit which the respondent might acquire if the marriage were not dissolved', thus, the Act contemplates the loss of intangible benefits such as widows' pensions.

Section 6 considers the question of financial provision and lays down that where a decree nisi is pronounced solely on the grounds of separation, the respondent may apply to the court to consider her financial position. The court, then, may not make the decree absolute unless it is satisfied either that the petitioner should not be required to make financial arrangement for the petitioner or that any provision which is made is reasonable and fair. On the other hand, the Act enables[14] the court to make the decree absolute if it is desrable, in all the circumstances, that it be done without delay and that the petitioner gives a satisfactory undertaking to make such financial provision as the court may approve.

Measures designed to facilitate reconciliation are contained in section 3 of the Act. Under section 3 (1) the solicitor acting for the petitioner is required to certify that he has discussed the possibility of a reconciliation with the petitioner and has given him or her the names and addresses of persons qualified to help effect a reconciliation. The court is empowered, by section 3 (2), to adjourn the proceedings at any stage for such periods as it thinks fit, if it considers that there is a reasonable possibility of a reconciliation. In assessing periods of separation, no regard is to be had of any period or periods not exceeding six months in the aggregate during which the parties have

---

[9] Section 4 (2) (b).

[10] [1965] 3 All E.R. 167 at p. 172.

[11] See the South Australian case of *Painter v. Painter* (1963) 4 F.L.R. 216.

[12] As Lord Reid has said (H.L. vol. 304 col. 176), 'The judge has no power to refuse a decree because the petitioner was scandalous in his behaviour, unless he can also find that the divorce will cause grave financial or other hardship.'

[13] Section 4 (3).

[14] Section 6 (3).

lived together.[15] On the other hand, adultery[16] and the revised cruelty concept[17] cannot be relied upon if the parties have lived together for an aggregate period exceeding six months after the respondent's conduct became known to the petitioner. As a general comment, these provisions extend considerably those in the Matrimonial Causes Act 1965 and are to be welcomed.

Other features of the Act are, first, that section 9 (3) abolishes all the bars to divorce in so far as they apply to section 3 and to proceedings in Magistrates Courts, where the Act does not apply. The rule prohibiting the presentation of petitions[18] within the first three years of marriage, however, still remains. Second, section 8 makes the situations which evidence breakdown of marriage the grounds for judicial separation, although, in this case, the court is not concerned with whether the marriage has broken down irretrievably. Third, section 7 provides for rules to be made to enable agreements or arrangements between the parties to be referred to the court for its opinions and directions.

It is in its most fundamental respects, it is suggested, where the Divorce Reform Act 1969 fails most obviously. The changes in the law effected by sections 1 and 2 seem to be a most unhappy compromise between the ideas of irretrievable breakdown and the matrimonial offence. The legislature have re-enacted, in section 2 (1) (b) and 2 (1) (c), in effect, the provisions whch have given rise to some of the most thorny case law problems in matrimonial law. Furthermore, it is suggested that the way in which these sections have been drafted is unlikely to encourage the judiciary to abandon the matrimonial offence, which has been a part of English law for so long. On the other hand, the introduction of the periods of separation as evidence of breakdown does, at least, mark a step forward and ought to go some distance towards reducing the bitterness which is so often attendant on divorce proceedings. But it is in the provisions which are concerned with safeguardng the position of spouses and the facilitation of reconciliation that the Act seems to succeed best. However, much will depend on the attitude of the judges and one can only wait to see how things will turn out in its application.

*Frank Bates**

THE RIGHT OF PROCREATION IN MARRIAGE

During the past decade, the population explosion and the related topics of contraception and female emancipation have assumed ever increasing importance. These topics have already affected the nature of the marriage relationship and, it is safe to assume, will continue

15 Section 3 (5).
16 Section 3 (3).
17 Section 3 (4).
18 Matrimonial Causes Act 1965 s. 3.
* LL.M. (Sheff.), Lecturer in Law, University of Tasmania.

to play a role of continuing importance.[1] Professor Bromley[2] has stated that it is one of the major incidents of the marital relationship that a wife is entitled to fulfil her natural desire to bear children, and it may, conversely, be that a husband may also have rights of a similar nature.[3] It is, therefore, the purpose of this note to examine how far one spouse is entitled to prevent the other from fulfilling a desire to procreate, with particular reference to ss.28(c) and 28(d)[4] of the Matrimonial Causes Act 1959-66 and to the nature of the marriage relationship itself. Clearly, in different contexts, different emphases will be placed on the nature and purpose of marriage. In strictly legal terms, the classic definition of marriage was enunciated by Lord Penzance in the case of *Hyde* v. *Hyde*,[5] who said that marriage was " . . . the voluntary union for life of one man and one woman to the exclusion of all others".[6] On the other hand, the Anglican marriage service clearly specifies the purposes of the relationship, "First, it was ordained for the procreation of children . . . Secondly, it was ordained for a remedy against sin, and to avoid fornication . . . Thirdly, it was ordained for the mutual society, help, and comfort that one ought to have of the other, both in prosperity and adversity." Again, the strict Roman Catholic view considers that the only justification for sexual intercourse is the procreation of children.

1. *Contraception*

The first case in which contraception was considered in relation to the wilful refusal of consummation was *Cowen* v. *Cowen*.[7] There, the English Court of Appeal, reversing the decision of Pilcher J., held that, because of the husband's insistence on the use of contraceptives there had never been true sexual intercourse within the true meaning of the term and that, therefore, the marriage had never been consummated. As du Parcq L.J. put it,[8] "We are of the opinion that sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination or when he artificially prevents that natural

1 In the United States, particularly, these topics have given rise to decisions of fundamental importance, and not only in the field of Family Law. See Brodie 49 Oregon L.R. 245.

2 Family Law (3rd ed) p. 161.

3 See *Forbes* v. *Forbes* [1956] P. 16 discussed below.

4 Section 28(c) provides that dissolution of marriage will be granted where " . . . the other party to the marriage has wilfully refused to consummate the marriage". Section 28(d) provides that it will be granted if, " . . . the other party to the marriage has, during a period of not less than one year, habitually been guilty of cruelty to the petitioner". Although the English statutory provisions are different, the fairly well established body of case law is immediately applicable to the Australian situation.

5 (1866) L.R. 1 P D 130 at p. 133.

6 For an explanation of the word "life" in Lord Penzance's definition see *Nachimson* v. *Nachimson* [1930] P. 217.

7 [1946] p. 36.

8 At p. 40.

termination which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends, if not the principal end, of marriage is intentionally frustrated".[9] *Cowen* v. *Cowen* was overruled in the leading case of *Baxter* v. *Baxter*.[10] As regards the nature of the marriage relationship Viscount Jowitt L.C. said,[11] "Again the insistence on the procreation of children as one of the principal ends, if not the principal end, of marriage requires examination. It is indisputable that the institution of marriage generally is not necessary for the procreation of children; nor does it appear to be the principal end of marriage as it is understood in Christendom . . . In any view of Christian marriage the essence of the matter as it seems to me, is that the children, if there be any, should be born into a family . . . But this is not the same thing as saying that a marriage is not consummated unless children are procreated or that procreation is the principal end of marriage". Viscount Jowitt went on[12] to adopt the words of Viscount Stair[13] "So then, it is not the consent of marriage as it relates to the procreation of children that is requisite; for it may consist, though the woman be far beyond that date; but it is the consent, whereby ariseth that conjugal society, which may have the conjunction of bodies as well as minds, as the general end of the institution of marriage, is the solace and satisfaction of man". From a point of view of social policy, there can be no doubt that *Baxter* was a decision to be welcomed, and, furthermore, the remarks of Viscount Jowitt, with regard to the nature of marriage itself, are a clear advance from those expressed by du Parcq L.J. in *Cowen*. In the present situation, seeking to hold that the use of contraceptives in the sexual act will amount to non-consummation would seem to be flying in the face of marital reality.

On the other hand, the persistent frustration of the parental instinct may well have deleterious effects on both the marriage relationship and on a particular spouse, and it is clearly unjust that such a spouse should be left without a remedy. In *Fowler* v. *Fowler*,[14] the Court of Appeal held that where a wife refuses to have children and refuses to have sexual intercourse, except on the understanding that the husband prevents conception, with a consequent injury to his health, the wife is not guilty of cruelty unless her conduct was calculated to

[9] du Parcq L.J. went on (also at p. 40) to consider the position of the wife who refused to permit intercourse which involved either contraceptives or coitus interruptus, whom he considered, if the converse view were taken, to be ". . . subject to what seems . . . to be an obvious and intolerable injustice".

[10] [1948] A.C. 274. See also L. C. B. Gower, "*Baxter* v. *Baxter* in Perspective" 11 M.L.R. 176.

[11] At p. 286.

[12] At p. 289.

[13] Institutions (1681 ed.) 1, 4, 6.

[14] [1952] 2 T.L.R. 143.

inflict misery on the husband. In relation to this case, it is important to note, first, that the wife was motivated by fear of childbirth as the result of an earlier operation. Second, that *Fowler*, as with all the other relevant authority, was decided prior to the important House of Lords decision in *Gollins* v. *Gollins*,[15] which decided that intention was no longer a relevant issue with regard to cruelty. This last may well cast doubts on the validity of the application of the *ratio* of *Fowler* today and also on the remarks of Denning L.J., who differentiated between conduct by the wife and by the husband, when he said,[16] "If a man takes contraceptive measures against the will of his wife whether by means of an appliance or by withdrawal before completion so as to prevent her having children without reasonable excuse for so doing, then it is easy to infer that he does it with intent to inflict misery on her . . . But when a wife herself takes contraceptive measures or asks her husband to take them, her conduct can often be attributed to fear of the consequences to herself, without any intention of injuring him". *Fowler* was distinguished in the case of *Forbes* v. *Forbes*,[17] by Mr Commisioner Latey. In that case, the wife, during the eight years of the marriage, refused to allow her husband to have free intercourse and insisted on precautions which were obnoxious to him, with the object of avoiding conception. On her own admission, she had no fear of childbirth. As a result of her attitude, the husband's health was affected. It was held that the wife, who was well aware of the effect of her conduct on her husband, was guilty of cruelty. *Fowler* was distinguished on the grounds that in *Forbes* the husband had consistently complained to the wife about her conduct. Mr Commissioner Latey considered the effect of the wife's conduct on the husband and on the marriage,[18] "Quite apart from the exhortation in the solemnisation of matrimony that, first Christian marriage was ordained for the procreation of children, I cannot ignore the fact that it is a natural instinct in most married men to propagate the species and to bear the responsibilities, and enjoy the comforts of their own children. If a wife deliberately and consistently refuses to satisfy this natural and legitimate craving, and the deprivation reduces the husband to despair, and affects his mental health, I entertain no doubt that she is guilty of cruelty . . . " Thus, the remarks of the learned commissioner seem to be more forward looking than those of Denning L.J. in *Fowler*, in the sense that the intention of the spouse is directed towards her acts rather than towards their consequences. It is fundamental to the concept of cruelty that the proclivities of the particular spouse be taken into account when assessing the effect of a respondent's conduct, hence, there is no logical reason why such conduct persisted in by a wife should not amount to habitual cruelty in the terms of s.28(d).

---

15 [1964] A.C. 644.
16 At p. 148.
17 [1956] P. 16.
18 At p. 23.

Many of the same considerations apply to the practice of coitus interruptus, which is a more frustrating and less efficient form of contraception. The House of Lords in *Baxter* v. *Baxter* deliberately left open[19] the question of whether coitus interruptus would amount to wilful refusal to consummate, and the first case in which the point was considered was *Grimes* v. *Grimes*.[20] There, Finnemore J. held that where a husband, who is able to perform the sexual functions of penetration and emission, practices coitus interruptus against the wishes of his wife, the conduct will amount to a wilful refusal to consummate the marriage. Finnemore J. based his decision on the view that intercourse which did not result in emission within the body of the wife could not be said to be complete.[21] On the other hand, two other first instance decisions, *White* v. *White*[22] and *Cackett* v. *Cackett*,[23] are authority for the view that, once full entry and penetration have been achieved, the marriage has been consummated, and, hence the practice of coitus interruptus against the wishes of the other spouse will not amount to wilful refusal to consummate.

However, in both *White* and *Cackett*, it was held that the persistent practice of coitus interruptus which caused injury to the health of the wife would amount to cruelty. As Willmer J. put it in *White*,[24] "I feel that a husband must take his wife as he finds her and if she is a woman of a type who needs the full and natural completion of the act, then to persist in with-holding it from her in the face of her repeated complaints and objections is in itself an act of cruelty, of cold calculated cruelty . . . " *White* was followed in *Walsham* v. *Walsham*,[25] where Wallington J. based his decision on the importance of procreation,[26] " . . . other women—perhaps of a more normal constitution and outlook—enter in the marriage state hoping to fulfil the main function, or at least one of the main functions of matrimony viz, the bearing of children. When the latter class of women are denied the normal means of child bearing . . . their health (both bodily and mental) is likely to be affected".

2. *Sterilisation*

It is clear that sterility will not, of itself, give rise to any action for the dissolution of marriage.[27] However, in the case of *J.* v. *J.*,[28]

19 At p. 283.
20 [1948] P. 323.
21 At p. 328. As Finnemore J. put it, "It is difficult to see how a coitus which is interruptus can be said to be complete".
22 [1948] P. 330.
23 [1950] P. 253.
24 At p. 340..
25 [1959] P. 350, where it was also held that refusal of sexual intercourse would not amount to cruelty even though the husband's health was affected. But see e.g. *Evans* v. *Evans* [1965] 2 All E.R. 789.
26 At p. 352.
27 D-E v. A-G (1845) 1 Rob Eccl 279 and see the comments of Dr Lushington therein.
28 [1947] P. 158.

the question of whether the husband's undergoing an operation which would render him sterile would amount to non-consummation. There, the husband had promised the wife, before their marriage, to renounce his intention of submitting himself to such an operation. Six weeks before the marriage, the wife learned that, in breach of his promise, the husband had undergone the operation. After two to three years, the marriage became unhappy owing to the impossibility of having children. The Court of Appeal, applying *Cowen* v. *Cowen,* held the husband was deemed to be incapable of consummating the marriage, though the Court considered that the question of wilful refusal to consummate did not arise in the particular situation. In turn *J.* v. *J.* was overruled by the House of Lords in *Baxter.* So there is no direct authority on the question of wilful refusal and voluntary sterilisation. It is suggested, however, that when the problem is considered in conjunction with the case law on contraception, voluntary sterilisation will not amount to wilful refusal to consummate.

The relationship between voluntary sterilisation and cruelty was considered by the English Court of Appeal in *Bravery* v. *Bravery.*[29] In that case, the parties were married in 1934, when the wife was aged 21, and the only child of the marriage was born in 1936. In 1938, the husband submitted to a sterilisation operation with the wife's knowledge. The spouses continued to live together although there was increasing discord and there were quarrels in the home until 1951 when the wife left. Sexual intercourse had continued throughout the period. The wife petitioned on the grounds of cruelty. It was held[30] that, on the facts,[31] the wife had not made out a case of cruelty. The majority went to suggest that, in general, for a husband to submit himself to an operation for sterilisation, without good medical excuse, would amount to a cruel act if it could be shown to have injured the wife's health, provided that she had not consented. Denning L.J., in a dissenting judgment,[32] considered that, in the particular circumstances, the wife's consent was irrelevant, for, "An operation for sterilisation when done without just cause or excuse is illegal, even though a man consents to it. If a man undergoes such an operation, he strikes at the very root of the marriage relationship. It is severe cruelty. Even if the wife consents to it when young and inexperiencd she ought not to be bound by it when she suffers in later years". Despite the difference in the statutory provisions, it is suggested that such conduct might well amount to cruelty under s.28(d) of the Comonwealth Matrimonial Causes Act.

---

29 [1954] 1 W.L.R. 1169.

30 Denning L.J. dissenting.

31 i.e., there was no injury to her health.

32 At p. 1177. Lord Evershed M.R. and Hodson L.J. dissociated themselves from Denning L.J.'s remarks.

3. *Abortion*

Abortion is by far the most emotive of the topics relevant to marital procreation. It is clear that there can be no question that it is concerned in any way with wilful refusal to consummate, and also that, in Australia, it is very much the particular province of the criminal law.[33] Although two recent United States decisions, *People* v. *Belous*[34] and *U.S.* v. *Vuitch,*[35] are authority for the view that the right of deciding whether to have an abortion lies solely with the wife, it is suggested that if a wife submits to an illegal abortion this may, if coupled with other factors, amount to cruelty under s.28(d). The remarks of Mr Commissioner Latey in *Forbes* v. *Forbes*[36] would seem to be directly applicable.

Conclusions

It would, therefore, seem that a general right to enjoy the society of one's children exists as an incident of the marriage relationship and, as such, will be protected by the Matrimonial Causes Act. This statement of principle is, however, subject to the exception that use of contraceptive methods will not amount to wilful refusal to consummate, an exception which is, with regard to social conditions, a reasonable one.

Frank Bates[*]

TORT

THE PERSPECTIVES OF INEVITABLE ACCIDENT

Over the years, the term 'inevitable accident' has been variously described. In 1872, Sir James Colville in *The Marpesia,*[1] described an inevitable accident as ' . . . that which the party charged with the offence could not possible prevent by the exercise of ordinary care, caution and maritime skill', Sir Frederick Pollock defined it as[2] '[An accident] not avoidable by any such precautions as a reasonable man doing such an act then and there, could be expected to take'. Most recently, the learned editor of *Salmond on Torts* has taken a wider view of the notion when he says,[3] 'The plea of inevitable accident is that the consequences complained of a wrong were not intended by the defendant and could not have been foreseen and avoided by the use of ordinary care and skill'.[4] It is also, in some indefinite manner, related to the similar concept of 'Act of God'. Salmond speaks of act

---

33 See Howard "Australian Criminal Law" p. 132.

34 8 Cal. Reptr. 354 (1969).

35 305 F Supp. 1032 (DDc 1969).

36 Ante.

* LL.M. (Sheffield), Lecturer in Law, University of Tasmania.

1 (1872) L.R. 4 P.C. 212 at p. 220.

2 *Pollock on Torts* (15th Ed.) at p. 97.

3 15th Ed. at p. 40.

4 Taken from the Northern Irish case of *McBride v. Stitt* [1944] N.I. 7. See also admiralty cases quoted by Pape J. in ' The Burden of Proof of Inevitable Accident in Actions for Negligence' (1965) 38 A.L.J. 395, at pp. 396-400.

of God being a 'special form' of inevitable accident,[5] and, in the notoriously difficult case of *River Wear Commissioners v. Adamson*,[6] Lorth Hatherly seemed to regard the terms as synonymous, when he said,[7] 'I cannot concur in the views expressed in the court below by some of the learned judges, on the one hand that the damage which was done in this particular case having been caused by what is commonly said to be an accident, but is called in the language technically used in the law courts, the act of God . . . ' On the other hand, Lord Mansfield in *Trent and Mersey Navigation Co. v. Wood*[8] said that, 'The act of God is natural necessity such as wind and storms, which arise from natural causes, and is distinct from inevitable accident'. Professor Fleming distinguishes the two notions on two grounds[9] ' . . . both in the degree of unexpectability and the exclusion of events having a causal link with human activity'. Perhaps the simplest view is to regard them as pertaining to different fact situations, act of God to *Rylands v. Fletcher*,[10] while inevitable accident is particularly concerned with actions in trespass and negligence.[11]

It has clearly shown that to speak of inevitable accident as being a defence to an action in negligence is erroneous.[12] In *Greene v. DeLuxe Gas. Services Ltd*,[13] in 1941, Lord Green M.R. commented,[14] 'I do not find myself assisted in considering the meaning of the phrase 'inevitable accident'. I prefer to put the problem in a more simple way, namely, has it been established that the driver of the car was guilty of negligence'.[15] Pape J., in an important article, expressed the same view more strongly,[16] ' . . . the cases do establish that, in negligence cases at any rate, the defence of inevitable accident does not constitute an independent defence, that it does not require the proof of any factors other than those necessary to show that all reasonable care failed to avoid the plaintiff's injuries and loss, and that in substance the plea of inevitable accident is but a denial of

---

5 Op. cit. p. 41.

6 (1877) 2 App. Cas. 743.

7 At p. 752.

8 (1785) 4 Doug K.B. 286 at p. 290.

9 '*The Law of Torts*' (3rd Ed.) at p. 311.

10 The only situation where it has been successfully pleaded viz. *Nichols v. Marsland* (1876) 2 Ex. D.1. Though text writers have suggested that it might be applicable to actions for Cattle Trespass and under the *Scienter* principle. See, e.g. Street on Torts. (4th Ed) at pp. 262 and 268.

11 There is also marginal English authority for the view that act of God may be a defence to negligence. See *Ryan v. Youngs* [1938] 1 All E.R. 522 (a decision of the Court of Appeal) and *Radley v. L.P.T.B.* [1942] 1 All E.R. 433. However, it is submitted that Slesser L.J., in the former case, and Humphreys J., in the latter, have confused the terms as did Lord Hatherly in *River Wear Commissioners v. Adamson* (supra).

12 Pape J. op. cit.

13 [1941] 1 K.B. 549.

14 At p. 522.

15 Though this does not, of course, mean that the defendant ought not to adduce in his defences. See the remarks of Lord Denning M.R. in *Brown v. Rolls Royce* [1960] 1 W.L.R. 210 at p. 215.

16 Op. cit. p. 401.

negligence accompanied in a proper case by particulars sufficient to avoid taking the plantlff by surprise'. Similarly, the current editors of *Winfield on Tort* state,[17] 'In an ordinary action for negligence, for example, it is for the plantiff to prove the defendant's lack of care, not for the defendant to disprove it, and the defence of inevitable accident is accordingly irrelevant'. However, the admiralty case of *The Merchant Prince*[18] did suggest that inevitable accident might be relevant in connection with the maxim *res ipsa loquitur.* In that case, the plaintiff's vessel was at anchor in the Mersey, when she was run into by the defendant's ship in broad daylight. The Court of Appeal held that the defendant was liable as he had failed to satisfy the burden of proof, since, in order to support the defence of inevitable accident, and disprove the *prima facie* evidence of negligence, it was necessary for him to show that the cause of the accident was not produced by him and that he could not avoid the result. The Court of Appeal followed the reasoning of *The Merchant Prince* in the well-known case of *Southport Corporation v. Esso Petroleum.*[19] There, an oil tanker belonging to the defendants became stranded in the estuary of a river owing to a defect in her steering gear. In order to prevent the ship from breaking her back, the master jettisoned 400 tons of oil, which was carried by the tide to a foreshore belonging to the plaintiff corporation and caused considerable damage. The plaintiffs brought an action *inter alia* in negligence and contended that the stranding of the tanker was caused by the faulty navigation of the master, for which the defendants were vicariously responsible. In defence it was claimed that the faulty steering was due to the stern frame being cracked or broken, but no evidence was called by them to show how the condition had been brought about. The Court of Appeal, with Morris L.J. dissenting, held that the maxim *res ipsa loquitur* applied and that the onus was on the defendants to explain why the steering gear of the ship went wrong and that they had failed to do so. As Lord Denning M.R. put it,[20] 'The ship seeks to escape from this charge by saying that the steering gear had failed and she was out of control. But that is no answer unless she proves—and the legal burden is on her to prove—that it was no fault of hers that the steering gear had failed'. The House of Lords[21] reversed the decision of the Court of Appeal, Earl Jowitt refuted the remarks of Lord Denning M.R. when he said,[22] 'No one has ever suggested that the fracture of the steel frame which caused the steering . . . to become defective, was in any way caused or contributed to by the negligence of those in charge of the navigation of the ship. There was, and there could be, nothing analogous to the improper

[17] (8th Ed.) at p. 758.
[18] [1892] P. 179.
[19] [1954] 2 Q.B. 182.
[20] At p. 201.
[21] [1956] A.C. 218.
[22] At p. 237.

adjustment of the claim . . . ' It would appear, therefore, that inevitable accident is, as a state of affairs to be proved by the defendant, totally irrelevant to actions brought in negligence.[23]

The position is, however, rather more complex with regard to trespass and is inextricably connected with the nature of the tort itself and with the question of burden of proof. In addition, different jurisdictions have, apparently, taken up different attitudes, towards it. In *Holmes v. Mather*[24] the defendant's horses, while being driven by his servant in the public highway, became so unmanageable that the servant could not stop them, but, to some extent, could guide them. The defendant, who sat beside his servant, was requested by him not to interfere. While unsuccessfully trying to turn a corner safely, the servant guided them so that, without his intending it, they knocked down and injured the plaintiff. The plaintiff sued the defendant in trespass and negligence. The jury found that no one had been negligent. It was held that the defendant was not liable in trespass as the servant had done his best under the circumstances. Bramwell B. considered the nature of the tort of trespass, but did not specifically consider the burden of proof nor discuss inevitable accident as such, which tends to suggest that it does not exist as an independent defence to trespass either. As Bramwell B. put it,[25] ' . . . if the act that does an injury is an act of direct force *vi et armis,* trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the action is not wrongful for either of these reasons, no action is maintainable'. Neither the particular defence nor the problem of burden of proof was specifically intentioned either in *Stanley v. Powell*[26] or *N.C.B. v. Evans,*[27] the two cases which followed from *Holmes v. Mather.* In the former, the defendant was a member of a shooting party and fired at a pheasant. One of the pellets glanced off the branch of a tree and accidentally wounded the plaintiff, who was engaged in carrying game and cartridges for the party. The jury found that the defendant was not guilty of any negligence in firing as he did. Derman J. held that the defendant was not liable in trespass. Derman J. discussed the nature of the tort of trespass in a passage which, it is suggested, has been the cause of much misunderstanding,[28] '. . . if on the other hand it is turned into an action for trespass and the

---

[23] In England, it may, however, be that inevitable accident may apply as a defence to actions brought under the *Highways (Miscellaneous Provisions) Act 1961,* which deals with the responsibility of local authorities to repair the highway. As Diplock L.J. suggested in *Griffiths v. Liverpool Corporation* [1967] 1 Q.B. 374 at p. 391, 'It may be that if the highway authority could show that no amount of reasonable care on its part could have prevented the danger the common law defence of inevitable accident would be available to it . . . ' Though this is clearly a special case.

[24] (1875) L.R. 10 Exch. 261.

[25] At p. 268.

[26] [1891] 1 Q.B. 86. See also (1933) L.Q.R. 356.

[27] [1951] 2 K.B. 861.

[28] At p. 94. See the Australian cases cited infra.

defendant (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental . . . the verdict of the jury is equally fatal to the action'. There is no question here of the defendant's *actually* proving that he was not negligent, the dictum is essentially suppositional, and cannot be taken as authority for the proposition that the onus of proof in such cases lies on the defendant. In *N.C.B. v. Evans* the position was even more clear cut, for the defendants would have been able to prove that their act was neither intentional nor negligent, but there was never any question of their being required to do so. In that case, an electrical cable had been placed under the land of a county council by the plaintiffs (or their predecessors) without, so far as was known, either the knowledge or consent of the county council who, so far as a negative proposition could be satisfied, did not, at the relevant time, know of its existence on their land. The council contracted with the first defendants to excavate a trench on their land, the proposed line of which passed across that of the cable, and handed them a plan which did not show the cable. The first defendants subcontracted with the second defendants to excavate the trench and their driver, in the course of doing so with a mechanical excavator, struck and damaged the cable. The Court of Appeal held that the defendants were not liable in trespass since the act of the driver was neither wilful nor negligent. As Singleton L. J. said,[29] 'The defendants in my view are utterly without fault', while Cohen L. J. stated,[30] ' . . . I cannot imagine a clearer instance of an accident which occured utterly without fault on the part of the defendants'.

In England, Canada and New Zealand, it has been decided, albeit only at first instance, that the burden of proof of negligence or intention now rests on the plaintiff. In *Walmsley v. Humenick,*[31] two five year old boys, P and R, were playing with R's eight year old brother, M. R shot an arrow from a bow belonging to M, striking P in the eye and blinding him. Their parents had forbidden the boys to play with bows and arrows and did not know that M had a bow. P and his parents sued in both negligence and trespass. It was accepted that R did not intend to injure P. Clyne J., in the Supreme Court of British Columbia, held that an action in trespass must either be based on intention or negligence, both of which were absent in this case and, therefore, the action would fail. Clyne J. stated that the defendants were entitled to succeed because ' . . . the plaintiffs have been unable to prove that the infant defendant was negligent in view of his age'.[32] The learned judge came to the conclusion that it would have lead to the same result had the onus rested on the defendant since negligence had been disproved and it was admitted that the act was unintentional. Clyne J., however, introduced some confusion into the case when he

29 At p. 879.

30 At p. 874.

31 [1954] 2 D.L.R. 232. Followed in *Joyce v. Bartlett* [1955] 1 D.L.R. 615.

32 At p. 252.

said,[33] 'A much heavier onus is cast upon a defendant seeking to set up a defence of inevitable accident', thus suggesting that *Walmsley v. Humenick* did not involve inevitable accident. This is difficult to follow, if an act is neither intentional nor negligent it can hardly be said to be other than an accident. For all intents and purposes, the word 'inevitable' is irrevalent, for although it might be argued that there was nothing inevitable in the strict sense, about the accident in *Walmsley v. Humenick,* there was equally nothing inevitable about that which occurred in *Stanley v. Powell,* a case which is frequently used to illustrate the expression.[34]

In *Fowler v. Lanning,*[35] the plaintiff's statement of claim in an action for trespass to the person, alleged that on a certain date and at a certain place, 'the defendant shot the plaintiff', and as a result the plaintiff had sustained personal injuries. The defendant objected that the statement of claim disclosed no cause of action, on the ground that the plaintiff did not allege that the shooting was intentional or negligent. Diplock J. held, *inter alia,* that an action in trespass to the person would not lie if the injury to the plaintiff was caused unintentionally and without negligence on the defendant's part. Further, that the onus of proving negligence, where the trespass was unintentional, lay on the plaintiff, who should plead and give particulars of such negligence. Since the plaintiff had failed to do so, his action would fail. After reviewing the authorities, Diplock J. said,[36] 'If, as I have held, the onus of proof of intention or negligence on the part of the defendant lies upon the plaintiff, then under the modern rules of pleading, he must allege either intention on the part of the defendant, or, if he relies upon negligence, he must state the facts which he alleges constitute negligence'.

In *Beals v. Heyward,*[37] the defendant had discharged a shotgun at boys playing in a tree outside his house and struck the infant plaintiff in the eye with a pellet. McGregor J. held that the plaintiff's action would not succeed as the injury had been caused unintentionally and without negligence on the part of the defendant. With regard to the question of proof, McGregor J. said,[38] 'In my opinion . . . to sustain a claim in trespass it must be shown that the act which caused the injury to the plaintiff was intentional on the part of the defendant; and the onus of such proof lies on the plantiff'.

The current editor of *Salmond on Torts* has criticised these cases[39] on the grounds that they confuse the distinction between trespass and case. He goes further, in fact, and claims that, in actions for trespass,

---

[33] Ibid.
[34] See e.g. *Salmond* op. cit. p. 176.
[35] [1959] 1 Q.B. 426.
[36] At p. 440.
[37] [1960] N.Z.L.R. 131. See also a note by Davis at 23 M.L.R. 674.
[38] At p. 145.
[39] At p. 177.

inevitable accident must be specifically pleaded[40] and adduces support from the northern Irish case of *MacKnight v. McLaughlin.*[41] However, the distinction between trespass and cases, " . . . which has been part of the common law 'from time whereof the memory of man runneth not to the contrary,' " was well and truly confused by the English Court of Appeal in Letang v. Cooper.[42] In that case, which turned on an interpretation of the Limitation Act 1959 s. 2.[43] Lord Denning M.R. considered that the distinction between trespass case was obsolete[44] and went on to say, 'Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another the plaintiff has a cause of action in assualt and battery or, if you so please to describe it, trespass to the person . . . If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action in trespass. His only cause of action is in negligence, and then only on prof of want of reasonable care. If the plaintiff cannot prove want of reasonable care, he may have no action at all!' Lord Denning's view has been variously received. Professor Dworkin[45] commented that he had gone further than previous authority and might well be wrong whilst Mr Millner[46] seems to accept it. Diplock L.J. was rather more circumspect when he said,[47] 'If A by failing to exercise reasonable care, inflicts direct personal injuries upon B, it is permissible today to describe this factual situation indifferently either as a cause of action in negligence or as a cause of action in trespass, and the action brought to obtain a remedy for this factual situation as an action for negligence or an action for trespass to the person'—though I agree with Lord Denning M.R. that today negligence is the expression to be preferred. But no procedural consequences flow from the choice of description by the pleader . . . They are simply alternative ways of describing the same factual situation! There is much to be said for the view expressed by Lord Denning M.R., and, if it is accepted considerably simplifies the situation with regard to trespass, inevitable accident and the burden of proof. Just as the so-called defence of inevitable accident is merely the failure of the plantiff to prove negligence, so in cases of trespass it is merely the failure of the plaintiff to prove the requisite intent.

[40] At p. 41.

[41] [1963] N.I. 34. See also a note at 15 N.I.L.Q. 571. *MacKnight v. McLaughlin* is a case on evidence, can be restricted to Northern Ireland as it seems to run counter to the general line of authority, no reasons were given for the view and no authorities cited. But see the Australian cases discussed infra.

[42] [1965] 1 Q.B. 232. Followed by Cooke J. in *Long v. Hepworth* [1968] 3 All E.R. 248.

[43] As amended by the Law Reform (Limitation of Actions etc.) Act 1954 s. 2 (1).

[44] At p. 239.

[45] 28 M.L.R. 92 at p. 93.

[46] 'Negligence in Modern Law' at p. 206.

[47] At p. 243.

However, the Australian cases on burden of proof in trespass present some difficult problems, as their general approach would, at first sight, appear to be contrary to that adopted in other jurisdictions. The first case in which the point was considered was *Blacker v. Waters,*[48] where the plaintiff had been struck in the eye by the fragment of a bullet fired by the defendant in a shooting gallery. The New South Wales Court of Appeal held that the plaintiff had established a *prima facie* case of trespass by proving that the fragment which had injured him had come from a bullet fired by the defendant, and that the burden of proving that the act was neither negligent nor intentional fell upon the defendant. As Street C.J. put it,[49] ' . . . the case was conducted on the assumption that in the absence of negligence the defendant was not liable. The trespass to the plaintiff's person was complete, on proof that the lead which entered his eye came from the bullet fired by the defendant at the target, and that the defence was that it was not actionable as it was neither intentional nor the result of negligence. See *Stanley v. Powell.* The burden of establishing that it was neither intentional nor the result of negligence lay, in my opinion, on the defendant'. In no way can this case be said to be strong authority, as Professor Davis has said,[50] it is ' . . . at best, inconsensive'. Street C.J. cited no authority for the proposition which, in the particular fact situation, seems most unsatisfactory. In the circumstances of Blacker v. Waters, it is surely more reasonable that the plaintiff should prove intention or negligent than that the defendant should disprove it. Negative proof is often not easy, and in fact situations like *Blacker v. Waters* is almost impossible.

Reed J., of the Supreme Court of South Australia, took a different view in the case of *Exchange Hotel v. Murphy.*[51] There, Murphy had been drinking in the hotel bar, when requested to leave the premises at closing time he refused and became quarrelsome and disorderly. A barman employed by the licensee ejected him from the premises. Murphy resisted ejection and as he was being pushed through the doorway of the hotel, clung with one hand to the door frame. The barman failed to notice his hand on the door frame and, thinking that Murphy had been completely ejected, slammed the door shut, thereby severing the top of one of Murphy's fingers. It was held that the barman and the licensee were liable in trespass as the barman was negligent in not observing the hand on the door frame. In giving judgment, Reed J. quoted[52] *Salmond on Torts* (9th Ed.) which stated that, ' . . . in case of injuries to the person generally the plaintiff must affirmatively prove intent or negligence in the defendant'.

---

[48] (1928) 28 S.R. (N.S.W.) 406.

[49] At p. 409.

[50] 23 M.L.R. 674 at p. 676.

[51] [1947] S.A.S.R. 112.

[52] At p. 117.

The relationship of trespass and negligence was considered by the High Court of Australia in *Williams* v. *Milotin.*[53] The Court took a different view from that expressed by Lord Denning M.R. in *Letang v. Cooper,* when their Lordships said,[54] 'The two causes of action are not the same now and they never were . . . The essential ingredients in an action of negligence for personal injuries include the special or particular damage—it is the gist of the action—and the want of due care. Trespass to the person includes neither. But it does include direct violation of the protection which the law throws round the person. It is true that in the absence of intention of some kind or want of due care, a violation occurring in the course of traffic in a thoroughfare is not actionable as a trespass. It is unnecessary to enquire how that comes about. It is perhaps a modification of trespass to the person. But it does not mean that trespass is the same as actionable negligence occasioning injury. It happens in this case that the actual facts will or may fulfil the requirements of each cause of action'. The High Court did not specifically consider the question of burden of proof, except, perhaps, at the beginning of the judgment, when it was said,[55] There is no suggestion that the defendant intended to strike him. If that had been the allegation the action could only have been brought in trespass. But as only negligence is relied on . . . ' Since the court held that actions in both trespass and negligence may be maintained, it may be that *Williams v. Milotin* can be regarded as supporting the view that the onus lies on the plaintiff to prove negligence or intention.[56] It was, in general, probably unfortunate that the High Court saw fit however, to perpetuate the outmoded distinction between negligence and negligent trespass, rather than accept the reasoning of the judge at first instance, which was to prove to be the precursor of the elegant solution proposed by Lord Denning M.R. in *Letang v. Cooper.*[57]

The problem of burden of proof was next considered by Adam J. of the Supreme Court of Victoria in *Kruber v. Grzesiak*[58] who said, ' . . . if the proposition is accepted, as I do accept it, that negligence must be distinctly pleaded if the trespass alleged is unintentional'. On the other hand, the case of *McHale v. Watson*[59] provides the strongest authority for the contrary proposition. There, the infant plaintiff was struck in the eye by a dart thrown by the infant defendant. Windeyer J. cited *Blacker v. Waters, Williams v. Milotin* and *N.C.B. v. Evans.* He did not advert to *Exchange Hotel v. Murphy* or *Kruber v. Grzesiak.*

---

53 (1957) 97 C.L.R. 465. A running-down case which involved the interpretation of the Limitation of Actions Act 1936-48 (S.A.).

54 Consisting of Dixon C.J., McTiernan, Williams, Webb and Kitto J.J. At p. 474.

55 At p. 470.

56 cf. Higgins 'Elements of Torts in Australia' p. 70.

57 Supra *Williams v. Milotin* was cited in argument in *Letang v. Cooper,* although not referred to in the course of judgment.

58 [1963] V.R. 621 at p. 623.

59 (1964) 38 A.L.J.R. 267.

As has been observed, *Blacker v. Waters* and *Williams v. Milotin* are by no means strong authorities for any proposition, and the point was not specifically considered in *N.C.B. v. Evans.*[60] However, despite all this, *McHale v. Watson* was applied in *Tsouvalla v. Bini,*[61] where the infant defendant, aged fourteen, threw a handful of lime in the face of the plaintiff, aged eight, thereby causing injury to the latter's eyes. Walters A.J. held that the plaintiff's action in assault would succeed as the burden rested on the defendant to show that he had no intent to hit the younger boy or that he had nor been negligent and that he had failed to discharge it. As the learned judge said,[62] 'There is no onus upon the plaintiff to establish that the defendant threw the lime with intent to hit him, or so negligently that it did so. The burden rests upon the defendant to show absence of intent and negligence on his part . . . '

It is by no means easy to draw a conclusion from this line of Australian cases, as one, such as *Blacker* v. *Waters* and *Williams* v. *Milotin,* are by no means clear as to their meaning. Others, such as *McHale v. Watson,* seem to be based on a misreading of earlier cases. Whilst, in two others, *Exchange Hotel v. Murphy* and *Kruber v. Grzesiak* point in precisely the opposite direction. Furthermore, the statement of law which has been deduced from them[63] seems to run contrary to authority in other jurisdictions. It is suggested that should the opportunity arise for the High Court of Australia to replace the burden of proof of intention on the shoulders of the plaintiff, where it properly belongs, it should do so. This would emphatically prove to the end of inevitable accident as an independent defence to actions in trespass in the Commonwealth, just as it has become irrelevant to actions in negligence.

*Frank Bates**

SALSBURY v. WOODLAND:[1] NO INHERENT DANGER NEAR THE HIGHWAY

A large hawthorn tree stood in the garden of a Mr Woodland who lived at Caterham in the County of Surrey. The tree, which was 25 feet or more in height, stood at the side of the drive about 12 feet from the house and 28 feet from the road. Two telephone wires were strung diagonally across the front garden from a pole on the other side of the road to the eaves of the house. One day in the summer of 1963 Mr Woodland decided that the tree was to come

---

60 Although (at p. 268) Windeyer J. said, 'But, where the elements on which liability depends are not in dispute and evidence relating to them is given on both sides it seems to me that ajudication is not likely to depend on which side has the onus of proof'.

61 [1966] S.A.S.R. 157.

62 At p. 158.

63 Higgins op. cit. p. 71.

* LL.M. (Sheffield), Lecturer in Law, University of Tasmania.

1 [1970] 1 Q.B. 324.

down and, appreciating that the felling of the tree was not a job for an amateur like himself, he employed a contractor to do the job. During the course of the work the contractor was being watched with interest and apprehension by Mrs Woodland who feared that the tree might damage the house and by the plaintiff Michael Salsbury, a visitor to the house next door. The method adopted by the tree-feller was one which gave him no real control over the direction in which the tree was to fall for, after having lopped a few side branches, he used a tractor to push and pull the tree out by its roots. When the tree eventually came down it snapped both telephone wires, causing them to be draped across the road. The plaintiff went onto the road and was about to gather up the wires when a Morris Cooper appeared from the direction of Caterham being driven at between 40 and 50 miles per hour. In an attempt to avoid injury by the wires which were about to be struck by the car the plaintiff threw himself down onto the grass verge. This action caused a small tumour in his spine to bleed, which resulted in paralysis of the legs. These were the material facts of the recent case of *Salsbury* v. *Woodland.*

An action was brought by the plaintiff, in negligence, against the employer Mr Woodland, the contractor and the driver, for damages in respect of his injuries. Paull J. in the court of first instance held that the driver was negligent and that the employer was responsible for the contractor's negligence. The driver's appeal on the ground that the judge's private view of the scene of the accident was improper need not concern us here. It was the employer's appeal which raised the interesting questions in connection with an employer's liability for the torts of his independent contractor.

In the Court of Appeal Widgery L.J. outlined the broad legal principle applicable in these words:

> "The whole question here is whether the occupier is to be judged by the general rule which would result in no liability, or whether he comes within one of the somewhat special exceptions—cases in which a direct duty to see that care is taken rests upon the employer throughout the operation."[2]

The two exceptions which were particularly relevant for consideration in *Salsbury* v. *Woodland* were firstly, inherently dangerous or extra-hazardous acts—"acts commissioned by an employer which are so hazardous in their character that the law has thought it proper to impose this direct obligation on the employer to see that care is taken,"[3] and secondly, danger created in the highway.

---

[2] *Ibid,* p. 337.

[3] *Ibid,* p. 338.

INHERENTLY DANGEROUS ACTIVITIES

With regard to the first of these, Paull J. in the High Court founded the liability of the employer in these terms: "[The employer] is liable if the very act he orders to be done contains in it a risk of injury to others, and someone is injured as a result of the contractor's negligence as a consequence of that risk."[4] For authority the judge relied on Romer L.J. in *Penny* v. *Wimbledon U.D.C.*[5] who said that "when a person through a contractor does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take those precautions."[6]

Unfortunately, both statements appear to be open to the same objection that if "taken literally it would mean that the fare who hired a taxi-cab to drive him down the Strand would be responsible for negligence of the driver en route because the negligence would be negligence 'in the very thing which the contractor had been employed to do".[7] In other words there is always a risk of injury to others in the very work given to a contractor to do because there is always the risk of his negligence in its performance. The difficulty lies in formulating a rule which will impose liability on the employer in respect of dangerous operations negligently performed by his contractor without also holding him liable simply because it was dangerous given the risk of the contractor's negligence. In order to achieve this the concept of inherently dangerous operations was developed which emphasises the intrinsically dangerous character of the work.

Almost a century ago in *Bower* v. *Peate*[8] Cockburn C.J. formulated the principle "that a man who orders a work to be executed from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."[9]

Although *Bower* v. *Peate* was approved by the House of Lords, in *Dalton* v. *Angus*,[10] Lord Blackburn saw fit to criticise this principle

4 *Ibid*, p. 337.
5 [1899] 2 Q.B. 72.
6 *Ibid*, p. 78.
7 *Salsbury* v. *Woodland* [1970] 1 Q.B. 324, 337-8, *per* Widgery L.J.
8 (1876) 1 Q.B.D. 321.
9 *Ibid*, p. 326.
10 (1881) 6 App. Cas. 740.

as too wide in the later case of *Hughes* v. *Percival.*[11] The critical example used by him reveals the obstinate role played by the taxi driver and his predecessors in the development of this area of the law. Lord Blackburn's words were:

> "If taken in the full sense of the words it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers."[12]

This criticism has been re-echoed through the cases down to *Salsbury* v. *Woodland* whenever there has been an attempt to formulate the employer's liability in terms wider than the inherent danger of the activity which the contractor is engaged to perform. However, this concept is extremely unsatisfactory in practice. It is capable of almost limitless judicial manipulation in cases other than those where the work entails the use of fire or explosives and it is submitted that the leading cases decided after *Bower* v. *Peate,* especially those before the turn of the century, have placed a wrong interpretation on the principle enunciated by Cockburn C.J. although purporting to follow it. In *Dalton* v. *Angus,*[13] five years after *Bower* v. *Peate,* Lord Watson stated the rule in these words: "When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases *where the work is necessarily attended with risk,* he cannot free himself from liability by binding the contractor to take effectual precautions."[14] This seems to represent a very slight change in emphasis. Cockburn C.J. speaks of injurious consequences which must be expected to arise in the natural course of things, whereas Lord Watson refers to work which is necessarily attended with risk. The distinction is that there is a difference between an operation which is dangerous because in its particular situation injury may be expected in the natural course of things and an operation which is dangerous in itself. The inherent nature of the work is only one factor to be borne in mind in considering whether the injury must be expected to arise in the natural course of things. Other more important considerations stem from the location or situation of the activity in each particular case.

The failure of the courts to develop the principle in *Bower* v. *Peate* in a more realistic direction by emphasising the location of the operation may perhaps be ascribed to the narrowing interpretation of it by Lord Watson in *Dalton* and to the criticism levelled at it

---

[11] (1883) 8 App. Cas. 443.
[12] *Ibid,* p. 447.
[13] (1881) 6 App. Cas. 740.
[14] *Ibid,* p. 831. Italics supplied.

by Lord Blackburn in *Hughes.* With regard to the latter, A. L. Smith L.J. in *Hardaker* v. *Idle D.C.*[15] revealed the false assumption on which the criticism was made and incidentally cast a true light on the words of Cockburn C.J. when he said: "It is not for me to criticise this statement of Lord Blackburn, but, with all respect, I would point out that it seems to me that it is not in the natural course of things to be expected, when a man hires post-horses and a coachman from an innkeeper, that unless means are adopted to prevent them, injurious consequences will arise to his neighbour. In such a case, in the ordinary course of events, no injuries would occur to any one."[16] This is, of course, not to deny that it is foreseeable that an accident might occur in such circumstances. The highway has always been a source of accidents but it was not until the 1870's that the idea arose that there was a certain amount of risk in using the public roads.[17] That risk has undoubtedly increased but it is still not such that injury must be expected in the ordinary course of taking a taxi. Cockburn C.J. obviously had in mind a risk of injurious consequences which is higher than a foreseeable risk of injury. Consequently, the argument that this principle would cause liability to be placed on the employer simply because he could foresee injurious consequences if his contractor were negligent is ill-founded. For example, anyone can foresee that if a taxi is driven carelessly then some harm is likely to occur. But it is suggested that it is only where there is a higher risk, a special danger, rising primarily from the situation of the activity that a non-delegable duty should arise. Such a situation might occur where a fare asks a cab-driver to speed up through crowded streets to get him to the station in time to catch a train. If the driver is negligent and causes injury in carrying out these instructions the passenger will be vicariously liable, not because he is deemed to have taken control over the way in which the driver operates the taxi so as to make him a servant but because a speeding car increases the risk of injury in certain situations and constitutes a special danger to other road users. The taxi driver remains an independent contractor throughout. Driving at speed should not be described as an inherently dangerous operation. It does not in itself connote negligence and would not in itself constitute a special danger. But speed in the particular setting of a busy thoroughfare does amount to a special danger to those in the vicinity. It is the particular location or situation which is important given the character of the activity. The precautions which should be taken by the contractor are dictated not by any inherent danger in the activity but by the other circumstances or setting or the activity. If the situation does not give rise to a special danger then the employer should not

---

15 [1896] 1 Q.B. 335.

16 *Ibid,* p. 347.

17 See Mazengarb: *The Law and Practice Relating to Actions for Negligence on the Highway.* 3rd ed. 1957, at p. 7.

be liable for damage flowing merely from the contractor's failure to take precautions.

Lord Watson's interpretation of Cockburn C.J. was such that it started to focus attention more on the dangerous nature of the work. It is this concept which has been drawn through the cases, rightly out of *Dalton* v. *Angus,* but wrongly from *Bower* v. *Peate.* In *Hughes* v. *Percival,* Lord Watson speaks of "hazardous operations";[18] Lord Shand in *Black* v. *Christchurch Finance Co.* refers to an "operation necessarily attended with great danger";[19] "work which from its nature is likely to cause danger" is the phrase used in *Penny* v. *Wimbledon U.D.C.* by Romer L.J.[20] In *Brooke* v. *Bool* Talbot J. refers to "work . . . which involves danger";[21] Slesser L.J. in *Honeywill & Stein* v. *Larkin Bros* speaks of "extra-hazardous acts, that is, acts which in their very nature involve . . . special danger"[22] and in *Salsbury* v. *Woodland* Sachs L.J. refers to work which is "inherently dangerous or . . . extra-hazardous".[23] This list is by no means exhaustive.

The idea of inherently dangerous operations is one which allegedly underlies some but not all of the exceptions to the general rule of non-liability where the duty of the employer arises at common law. The acceptance of this concept by the courts as explaining, for example, the removal of support from adjoining houses, dangerous work on the highway and work involving the creation of fire or explosion,[24] has led the law into three difficulties.

The first arises in attempting to determine whether the activity is in itself dangerous. It seems that if the activity comes within one of the judicially recognised categories of inherently dangerous activities then the employer will be liable if the contractor is negligent with regard to the very work to be done.[25] No account must be taken of normal precautions in deciding the inherent nature of the work. To do so would let in the argument that an employer would then become liable simply because the work was risky in the light of the contractor's possible failure to take those precautions. In *Honeywill & Stein* v. *Larkin Bros*[26] Slesser L.J. criticised the trial judge's approach in these words: "The learned judge has found for the respondents because he has held (founding himself on the words of Lord Watson in *Dalton* v. *Angus* . . .) that the work to be done

[18] (1883) 8 App. Cas. 443, 449.
[19] [1894] A.C. 48, 54.
[20] [1899] 2 Q.B. 72, 78.
[21] [1928] 2 K.B. 578, 587.
[22] [1934] 1 K.B. 191, 197.
[23] [1970] 1 Q.B. 324, 348.
[24] See *Honeywill & Stein* v. *Larkin Bros.* [1934] 1 K.B. 191, 200-201, *per* Slesser L.J.
[25] As distinct from any collateral or casual negligence on the part of the contractor for which the employer will not be liable.
[26] [1934] 1 K.B. 191.

by the respondents for the appellants 'was not necessarily attended with risk. It was work which, as a general rule, would seem to be of quite a harmless nature.' But, with respect, he is ignoring the special rules which apply to extra-hazardous or dangerous operations. Even of these it may be predicated that if carefully and skilfully performed no harm will follow; as instances of such operations may be given those of removing support from adjoining houses, doing dangerous work on the highway or creating fire or explosion; hence it may be said, in one sense, that such operations are not necessarily attended with risk. But the rule of liability for independent contractors' acts attaches to these operations, because they are inherently dangerous, and hence are done at the principal employers' peril."[27]

The activity thus becomes divorced from the realities of its setting. The same approach to chattels dangerous *per se* was to be seen in pre-1932 cases,[28] but judicial recognition of the unreal affects of such a classification seems to have been more acute even before *Donoghue* v. *Stevenson*[29] than is the case with inherently dangerous activities in 1970. Viscount Dunedin in *Oliver* v. *Saddler & Co.*[30] remarked that: "There is nothing which is at all times and in all circumstances dangerous; there is an element of danger in every chattel."[31] The same argument is, of course, applicable to work undertaken by an independent contractor. The danger lies not in the nature of the work alone but is dictated primarily by its setting.

The second difficulty which is immanent in the concept arises where the judge is faced with an activity which does not fit into any of the judicially recognised categories of inherently dangerous operations. In these cases he finds that he is forced to look at any precautions which could have been taken by the contractor in order to justify his conclusion one way or the other. This was the position in *Salsbury* v. *Woodland* where the act of tree-felling was held not to come within the existing categories. Widgery, L.J. argued that "the evidence makes it perfectly clear that the tree could have been felled by a competent contractor using proper care without any risk of injury to anyone. The undisputed evidence of an expert was that the proper way to fell it, in its confined situation, was to lop the branches respectively until there was left a stump of only eight to ten feet in height. All that could be done without any danger to anyone, if, at any rate all appropriate precautions were taken, and the resultant stump eight to

---

27 *Ibid*, p. 200.

28 See Stallybrass, 'Dangerous Things and Non Natural Use of Land,' (1929) 3 C.L.J. 376. And even after 1932 *e.g. Wray* v. *Essex C.C.* [1936] 3 All E.R. 97; *Burfitt* v. *Kille* [1939] 2 K.B. 743; *Watson* v. *Buckley* [1940] 1 All E.R. 174; *Ricketts* v. *Erith B.C.* [1943] 2 All E.R. 629; *Glasgow Corporation* v. *Muir* [1943] A.C. 448, *Donaldson* v. *McNiven* [1952] 1 All E.R. 1213, 1216 *per* Pearson J., 463-4 *per* Lord Wright.

29 [1932] A.C. 562.

30 [1929] A.C. 584.

31 *Ibid*, p. 599.

ten feet high could then have been winched out of the ground, again without risk to anyone".[32] This approach is clearly inconsistent with that of Slesser L.J. in *Honeywill.* Harman L.J. argues along the same lines[33] whereas Sachs L.J. draws a distinction between "tree-felling" and cutting down a hawthorn tree. He points out that: "The whole position as regards 'inherent danger' might be very different if the case was concerned with the removal of a 60-foot tree."[34] With respect, it seems clear that although Sachs L.J. is paying lip-service to the idea that the abstract character of the operation will determine the employers' duty, his reason for the distinction is not solely in terms of inherent danger. His statement simply amounts to the proposition that in normal circumstances one is likely to lead to less harm than the other. It follows that there may be abnormal circumstances where the cutting down of a tree whether hawthorn or otherwise can give rise to an abnormal danger. The only significance of the tree being taller is that when it comes down it will fall further, and it therefore involves a greater area of risk of injury. The hawthorn tree as it stood brought within its area of risk not only the telephone wires, the Woodland's house, and the property next door but also, since its exact height was not known at the time, passers-by in the road. The location of the activity was such that there was a special danger with a need to take special precautions. If precedent had not wrongly emphasised the inherently dangerous character of the operation, this more realistic approach would have achieved a more satisfactory result on the facts of *Salsbury.*

Some strong judicial support for this view is to be found in *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co.*[35] where Lords Buckmaster and Parmoor considered whether the employment of an independent contractor to make explosives on his premises would involve the employer in liability if in the course of manufacture there was an explosion causing damage to adjacent persons and property. In the words of Lord Buckmaster: "the mere fact of entering into a contract to make munitions does not, in my opinion, impose any general duty on the contractors."

"The circumstances in which a contractor is liable for a sub-contractor's act may not be capable of a definition which can be applied to test every variety of circumstance, but I do not think any circumstances establishing liability under this head are proved to exist in the present case."

"Having contracted for the manufacture of munitions, which in itself involves the possibility of explosion, it does not appear to me

32 [1970] 1 Q.B. 324, 337.
33 *Ibid,* p. 345.
34 *Ibid,* p. 348.
35 [1921] 2 A.C. 465.

that liability could not be displaced by the introduction of an independent contractor."[36]

Professor Glanville Williams[37] has interpreted this to mean that the undertaking of extra-hazardous activities by the independent contractor cannot be the basis for placing liability on the shoulders of the employer. He argues that the concept of extra-hazardous acts is not only an unsuitable one for legal rules but is clearly applied wrongly in cases such as *Honeywill* and that generally the foundation which supports the edifice of the employer's common law liability for the acts of his contractor is so unsure that the whole structure ought to be pulled down. However, it is submitted that Lord Buckmaster was merely stating that the concept of inherently dangerous acts is incapable of providing the solution to his problem on its own and that it is always a question of circumstance or setting as to whether a non-delegable duty is owed in any given case.

The third objection to the concept is that, quite apart from extra-hazardous operations, it is doubtful whether it really does underlie the other two classes of case mentioned by Slesser L.J. in *Honeywill.*

Operations involving the removal of support from adjoining property, although not relevant to *Salsbury,* are difficult to explain in terms of inherent danger. The act of pulling down a wall, for example, is one which can be performed without the operation being regarded as particularly dangerous but when that wall in its physical setting supports the house of a neighbour the employer will be liable for any damage caused by his contractor to the adjoining property through the latter's failure to take care. The intrinsic nature of the activity is the same as if the wall stood alone in the middle of a field. It is the position of the wall as a support which makes the operation dangerous.

Jolowicz has indicated that it is the value placed by the law on a man's proprietary interest in his land which primarily explains the employer's duty here.[38] He also explains the employer's duty in the highway cases as dependent on a man's personal interest in the safe condition of the highway. Both are valued highly and therefore specially protected by the law. However, this analysis is subject to the criticism that despite the law's regard for a man's property and his person the employer will only owe a non-delegable duty if the harm caused by the contractor's failure to take care in the work occurs in one of the accepted categories. It follows that the employer's non-delegable duty is determined primarily by factors other than the value placed by the law on the interest affected. Moreover, Jolowicz[39] is forced back by the case of *Honeywill and Stein* v. *Larkin Bros.*

---

36 *Ibid,* p. 477, 490.
37 'Liability for Independent Contractors,' (1956) Vol. No. C.L.J. 180, 192.
38 'Liability for Independent Contractors in the English Common Law—A Suggestion,' (1957) 9 *Stanford Law Review* 690, 698-699.
39 *Ibid,* pp. 705, 706.

from interests endangered to a consideration of the dangerous character of the activity itself, a position which is equally untenable.

OPERATIONS IN THE HIGHWAY

Returning to matters more relevant to *Salsbury* v. *Woodland*, it is not at all certain that operations in the highway can be rationalised in terms of inherent danger. The judicial confusion is very apparent in *Honeywill* where Slesser L.J. commenting on *Holliday* v. *National Telephone Co.*[40] said: "The decision in this case, in our judgement, does not depend merely on the fact that the defendants were doing work on the highway, but primarily on its dangerous character, which imposes on the ultimate employers an obligation to take special precautions, and they cannot delegate this obligation by having the work carried out by independent contractors."[41] In *Holliday*[42] a pedestrian was injured when a plumber, employed as an independent contractor by the defendants to solder tubes together in a trench under the pavement, negligently dipped a blow lamp into a pot of molten solder, causing an explosion. The two argued judgments in this case appear to arrive at the defendant's liability in two different ways. A. L. Smith L.J. commenced with the proposition that the dependants were a telephone company who were engaged in the execution on a highway of dangerous works[43] whereas Lord Halsbury L.C. took the view that as the defendants were authorised by statute to interfere with a public highway they were bound to see that the public lawfully using the highway were protected against their contractor's negligence.[44]

It would seem therefore that, on the facts of *Holliday*, Slesser L.J. in *Honeywill* was correct in assuming that liability was imposed on the basis of the inherently dangerous nature of the operation, at any rate if regard is paid to the judgment of A. L. Smith L.J. However, that judgment is not authority for the proposition that the employer is liable for his independent contractor's acts only where inherently dangerous or extra-hazardous activities are being carried out on the highway. It is not necessary that the work itself be inherently dangerous. The highway is dangerous because it inevitably supports a large transient population. The highway cases are illustrations of the special protection given by the law in a particularly dangerous situation. Thus in cases such as *Penny* v. *Wimbledon U.D.C.*[45] where the operation involved digging a trench and heaping soil up on one side without taking the precaution of a warning light and *Hardaker* v. *Idle D.C.*[46] where the contractor was employed to

40 [1899] 2 Q.B. 392.
41 [1934] 1 K.B. 191, 199.
42 [1899] 2 Q.B. 392.
43 *Ibid*, p. 399.
44 *Ibid*, pp. 398-9.
45 [1899] 2 Q.B. 72.
46 [1896] 1 Q.B. 335.

construct a sewer and failed to pack soil properly around a gas main causing it to fracture, it is clear that it is the setting of the work which is important and not its inherent character, which in both cases could not be described as dangerous.[47]

In *Salsbury* v. *Woodland*, Widgery L.J. took the view expressed by Lord Halsbury in *Holliday* and treated the highway cases as instances of work which would have been a nuisance unless authorised by statute.[48] He thus confined the employer's liability within the boundaries of work being done *in or upon* the highway. Counsel for the plaintiff submitted that the principle applies also to those cases where the employer commissions work to be done *near* the highway in circumstances in which, if due care is not taken, injury to passers-by on the highway may be caused. Three authorities were relied on to support this proposition.

The first was *Holliday's* case where Lord Halsbury referred to works "executed in proximity to a highway."[49] This was rejected by Widgery L.J. partly on the grounds that the source of the danger in *Holliday* was itself on the highway and more generally because "I can find nothing in Lord Halsbury's use of the word 'proximity' to justify the view that there is therefore, a special class of case"[50] of operations near the highway. Perhaps if A. L. Smith L.J.'s judgment in *Holliday* had also been cited to the court the decision on this point might have been different. The relevant passage runs as follows: "In my opinion since the decision of the House of Lords in *Hughes* v. *Percival* and that of the Privy Council in *Black* v. *Christchurch Finance Co.* it is very difficult for a person who is engaged in the execution of dangerous works *near a highway* to avoid liability by saying that he has employed an independent contractor because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway."[51] *Hughes* v. *Percival*[52] involved a building operation which caused the partial collapse of the respondent's house next door. In *Black* v. *Christchurch Finance Co.*[53] the operation was the lighting of a bush fire which damaged the property of the appellant. In neither case were there any arguments relating to operations in the highway because the facts did not call for such arguments. A. L. Smith L.J. could only have meant in relating these cases to the phrase "near the highway" that such

[47] In *Penny* v. *Wimbledon U.D.C.*, A. L. Smith L.J. and Vaughan Williams L.J. both emphasised the dangerous situation of the work rather than any inherent dangers in the work although Romer L.J. did refer to its dangerous nature. See [1899] 2 Q.B. 72, 76, 77, 78.

[48] [1970] 1 Q.B. 324, 338.

[49] [1899] 2 Q.B. 392, 399.

[50] [1970] 1 Q.B. 324, 339.

[51] [1899] 2 Q.B. 392, 400. Italics supplied.

[52] (1883) 8 App. Cas. 443.

[53] [1894] A.C. 48.

dangerous situations as were disclosed in the two cases were analogous to operations not only "in" but "in proximity to" the highway. Thus, although the facts of *Holliday* disclose an operation in the highway. the authorities cited by A. L. Smith L.J. and relied on by the court reveal that the principle stated was intended to be somewhat wider than the interpretation of Lord Halsbury's judgment by Widgery L.J. in *Salsbury*. Once this is accepted, the admittedly ridiculous distinction[54] drawn by the latter, between injury from a pot of solder on the highway which results in liability and injury from a pot two feet off the highway which does not, is avoided.[55]

The second case relied on in *Salsbury* to support a category of operations near the highway was *Tarry* v. *Ashton*[56] where an employer was held liable for injury caused to a passer-by through the failure of an independent contractor to put in good repair a lamp which projected over the highway. Widgery L.J. rejected this case as authority for the plaintiff's argument on the ground that there the employer was under a positive and continuing duty, before and after the contractor came, to see that the lamp was kept in good repair, which was not true of the case in hand.[57] But, with respect, this argument is a failure to appreciate the fundamental purpose underlying the imposition of a duty to see that care is taken with regard to highway operations. The position of the lamp in overhanging the highway is of vital importance. Lush J. in *Tarry* emphasised that a "person who puts up or continues a lamp in that position, puts the public safety in peril, and it is his duty to keep it in such a state as not to be dangerous."[58] It might be added that the same duty applies not just to the activity of putting it up or the inactivity in leaving it there but also to the activity of taking it down. Given its location and the operation of the law of gravity it constitutes a danger to passers-by in all three cases. The duty is continuous because the lamp is permanently there but that does not mean that there is no duty owed by an employer when his contractor is putting up the lamp or when he is taking it down. In *Salsbury*, if the height of the tree had been subtracted from its distance from the road (both measurements only accurately known after the felling), the

---

54 [1970] 1 Q.B. 324, 339.

55 Another clear authority on this point, which was not cited to the Court of Appeal in *Salsbury*, is that of *Brooke* v. *Bool* [1928] 2 K.B. 578. In the course of his judgment Talbot J. said at p. 587:

> "The principle is that if a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owners of that property for damage resulting to it from a failure to take proper care and is equally liable if, instead of doing the work himself he procures another whether agent, servant or otherwise to do it for him. *A like principle applies to work done in or near a highway involving danger to those who use it.*" Italics supplied.

56 (1876) 1 Q.B. 314.

57 [1970] 1 Q.B. 324, 339.

58 (1876) 1 Q.B.D. 314, 320.

resultant figure was not enough to negative the submission that, as it stood, the tree was a danger to the public. The judgments in *Salsbury* are remarkably inconsistent with the general tenor of judicial pronouncements as expressed by Denning L.J. in *Mint* v. *Good*[59] that "the law of England has always taken particular care to protect those who use a highway and puts on the occupier of adjoining premises a special responsibility for the structures which he keeps beside the highway. Thus, if a shopkeeper chooses to have a lamp overhanging his shop door he is himself under a duty to his customers to use reasonable care to see that it is safe and does not escape that duty by employing an independent contractor to do it."[60]

The third case relied on by the plaintiff in *Salsbury* was *Walsh* v. *Holst & Co. Ltd.*[61] Here the occupier of premises adjoining the highway employed an independent contractor to knock out large portions of the front wall. The danger to passers-by was realised and extensive precautions were taken to prevent bricks from falling into the road. However, on a day when the only workman employed was a servant of a sub-contractor engaged to brick-up the jagged holes made by the breaking out operations, a brick fell and hit the plaintiff on the head. In the course of his judgment Sellers L.J. said: "As the Electricity Board had authorised work to be done adjoining the highway which might without due precautions cause injury to anyone on the highway, the authorities already cited by my Lords show that the board would be liable for the negligence of the contractors or sub-contractors in failing to take due precautions. Likewise, the contractors would be liable for any negligence in the performance of their duties delegated to sub-contractors."[62]

Once again this proposition in so far as it showed the relevance of operations near the highway was rejected by Widgery L.J., for two reasons. Firstly, he could find nothing in the authorities to which Sellers L.J. referred which would justify such a conclusion. However, two cases cited by Morris L.J. in *Walsh* will support Sellers L.J.'s contention in the context of work adjoining a highway. One is *Tarry* v. *Ashton* which has already been discussed. The other is *Byrne* v. *Boadle*[63] where a barrel of flour fell from a building occupied by the defendants and hit the plaintiff passing by in the street below. Admittedly, here the negligence was that of the defendant's servant but "where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation

---

59 [1951] 1 K.B. 517.

60 *Ibid*, p. 526.

61 [1958] 1 W.L.R. 800.

62 *Ibid*, p. 812.

63 (1863) 2 H. & C. 722.

be to a servant under a contract of service or to an independent contractor under a contract for services."[64]

The second reason given by Widgery L.J. for rejecting Sellers L.J.'s proposition in *Walsh* was that " . . . this decision was *obiter* because the case turned on the absence of negligence and not upon any nice question of which of the defendants might have been liable if negligence had been proved."[65] Two points may be made in relation to this statement. Firstly, the *dictum* of Sellers L.J. was *obiter* because the majority of the court thought that the precautions taken were reasonable and rebutted the presumption of negligence raised by the doctrine of *res ipsa loquitur*. Furthermore, Sellers L.J. formed half of that majority, Hodson L.J. constituting the other half. But that does not mean that the *dictum* is without any foundation at all. In *Byrne* v. *Boadle,* negligence certainly was established by the operation of *res ipsa loquitur* in the absence of proof by the defendants that precautions had been taken and this was one of the implied authorities relating to operations near the highway on which Sellers L.J. relied. Secondly, Morris L.J., dissenting, came to the conclusion that there was negligence by the contractors Walsh & Co. and that the employer was responsible for his failure to discharge his duty to see that care was taken. He said: "When the board decided to have work done which involved cutting away parts of a wall *abutting the highway,* which might mean that some of the bricks in the wall would be insecure in positions above the highway, they became in my judgment under a clear duty to take care to avoid the risks of injuring passers-by."[66] Again this *dictum* must be regarded as *obiter* because Morris L.J. formed the minority. However, since he thought that negligence had been proved, his statement could not have been criticised on the ground that it was based on supposition. It is therefore unfortunate that the judgment of Morris L.J. was not cited to the Court of Appeal in *Salsbury.*

The reasons given by the Court of Appeal in dismissing the proposition that an employer's liability extends to his independent contractor's operations near the highway are clearly untenable. The arguments of the court are the result of treating the highway cases only as instances of breach of a statutory duty where the liability "is not a vicarious liability at all but a direct one."[67] On this view the dangerous situation of the work need not be emphasised, for

[64] *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343, 363 *per* Denning L.J. Lord Justice Denning was presumably referring to the duty to see that care is taken and not to a personal duty of care which may be performed by the selection of a reasonably competent contractor.

[65] [1970] 1 Q.B. 324, 340.

[66] [1958] 1 W.L.R. 800, 807. Italics supplied.

[67] *Salsbury* v. *Woodland* [1970] 1 Q.B. 324, 345 *per* Harman L.J. This distinction is probably incorrect. As to the nature of the employer's common law liability see Barak, "Mixed and Vicarious Liability—A Suggested Distinction" (1966) 29 M.L.R. 160.

the employer's liability will depend on a construction of the particular statute. However, a closer look at the cases where such a statutory duty has been found to exist will reveal that another, common law duty, which is non-delegable, is formulated which does depend on the danger attending operations on the highway.[68] It is therefore wrong to suggest that the exercise of statutory powers makes the common law duty of care a non-delegable one.[69] That duty is owed independently of the statutory duty although both may be broken by the same set of facts. The essential difference between the two duties in the highway cases is that one is created by legislation, the other by an especially dangerous situation. Thus, if the circumstances of a case disclose a danger to the passing public, the fact that the works were being conducted off the highway should not prevent the non-delegable duty from arising at common law. Whether there is also a statutory duty owed is a completely different matter.

It is interesting to note, in conclusion, the remarks of Sholl J, in *Witham* v. *Shire of Bright;*[70] a decision of the Victorian Supreme Court. In that case the plaintiff was injured, through the negligence of an independent contractor employed by the defendant, whilst helping to fell a tree which was on the highway. On the question as to whether the felling of the tree was an extra-hazardous activity Sholl J. said:

"I think also that the felling of the tree is capable of being regarded as a dangerous operation in the circumstances, within the meaning of the authorities. It was work being done on a public highway whereon the shire was carrying out its statutory powers and duties. I have felt some doubt about that matter, because some take the view that it is only such acts as can be called extra-hazardous, as involving the use of dangerous substances or instruments, which the employer does at his peril. It may be argued that neither a tree nor the equipment used to fell it whether singly or in combination should be described as dangerous in that sense. Yet it is difficult to say that felling a tree on a highway may not be a hazardous operation. Suppose a passer-by was seriously injured by a crashing tree, it may well be asked why the principle of liability which I have been discussing should not render liable in such a case the employer of an independent contractor responsible for the accident."[71]

---

68 *e.g. Hardaker* v. *Idle D.C.* [1896] 1 Q.B. 335, 346 *per* A. L. Smith L.J.; *Penny* v. *Wimbledon U.D.C.* [1899] 2 Q.B. 72 *per* A. L. Smith L.J. at p. 76 and *per* Romer L.J. at p. 78. At p. 77 Vaughan Williams L.J. appears to confuse the two duties; *Holliday* v. *National Telephone Co.* [1899] 2 Q.B. 392, 398-9 *per* Lord Halsbury L.C. and *per* A. L. Smith L.J. at pp. 399-400; *Pickard* v. *Smith* (1861) 10 C.B. (N.S.) 470, 477-480 *per* Williams L.J.; *Daniel* v. *Rickett* etc. [1938] 2 K.B. 322, 324-5 *per* Hilbery J. The non-delegable duty construed in the last two cases was obviously a common law duty based on the dangerous situation created because no statutory authority was involved.

69 See Glanville Williams, "Liability for Independent Contractors" [1956] C.L.J. 180, 181.

70 [1959] V.R. 790.

71 *Ibid*, pp. 792-3.

These words amount to more than just a statement that operations in the highway need not be inherently dangerous to incur the common law non-delegable duty. The learned judge is emphasising that the operation need not be dangerous in itself but should be regarded as dangerous by reference to its situation. The high risk to a passer-by arises because the tree is where it is, but there is no good reason why the employer's common law duty should depend on the tree being actually in the highway when the same high risk to the public on the highway is present when felling trees off it. Highways are obviously dangerous places for a contractor to be employed to carry out work and, it is suggested, they have been recognised as such by the common law independently of any statutory duty. Yet the Court of Appeal in *Salsbury* v. *Woodland* was unable to see why it is that in such circumstances the law does not insist on the operations being inherently dangerous and to apply the principle of a dangerous situation to operations near the highway.

*Alan Davidson**

* LL.B. (Exe.), Lecturer in Law, University of Tasmania.