THE FUTURE OF THE ORMROD REPORT

1. Legal education and training in England and Wales are in a state of some disarray.[1] A very small number of lawyers are very excited and argumentative; to the overwhelming majority of solicitors and barristers the whole subject is a monumental bore. And, when all is said and done, why should anyone worry? From the end of the war until 1964 the profession was starved of recruits: after six years as a Member of Parliament (1945-51) I was in practice (1951-64) and never had an articled clerk, ready and willing though I was.

Today literally thousands of young men and women are clamouring to become barristers and solicitors and recruitment has ceased to be a problem: the main question in the immediate future may well be whether some limit should be placed on the numbers entering the profession. Taking the short and superficial view, there is nothing to bother about, except that there may well be large numbers of law graduates without articles. Taking the medium and long views, the question is whether the law shall continue as a profession in itself or whether much of it shall be dispersed—some conveyancing going to the surveyors, administration of estates to the banks, tax, commercial and company work to the accountants and so on. This would leave the lawyers with a greatly reduced load apart from litigation: suppose there were an improved insurance scheme providing for compensation for injuries sustained in factory and traffic accidents? Suppose that we all get used to the idea of *de facto* divorce by consent? Some lawyers might be left with crime plus a small amount of other litigation. All this is improbable but not necessarily fanciful, and those like me who believe that it is important to preserve and strengthen an independent profession should turn our energies towards making ourselves efficient. The first question is whether our existing methods of training potential lawyers are efficient. I say they are not.

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1 Cf. Peden, *Professional Legal Education and Skills Training for Australian Lawyers* (1972) 46 A.L.J. 157; Haslam, *Some Reflections on Legal Education in New Zealand* (1970) 2 OTAGO L. REV. 113.

BASIC ORMROD:

2. The quintessence of the Ormrod Report[2] is that legal education should be planned in three stages, namely:—

2.1 The academic stage:

2.2 The professional stage, comprising both institutional training and in-training: and

2.3 Continuing education or training.[3]

To which we can properly reply that there needs no ghost to tell us this. The Ormrod Committee go on to recommend that the academic stage should be spent at a University or College and that as soon as practicable the obtaining of a law degree should become the normal mode of entry to the profession.[4]

The Committee turn to the professional stage, the objectives of which are to enable the student to adapt the legal knowledge and the intellectual skills acquired at the academic stage to the problems of legal practice, and to lay the foundations of professional skills and techniques. For this they propose a vocational course, to last for one academic year and to include:—

2.4 practical exercises in professional problems and procedures;

2.5 some additional law subjects of a practical nature; and

2.6 some introduction to certain non-legal subjects, especially elementary behavioural science and business finance.[5]

These proposals involve the complete abolition of articles. If brought into full effect they would mean that a law graduate who takes a vocational course of one year will be entitled to call himself a solicitor, although for a suggested period of three years there would be only a limited right to practise: during these three years the potential solicitor would acquire experience but would be forbidden to be a principal in a firm or to practise on his own.

3. These proposals have brought to the surface, as was predictable, all the latent antagonisms, distrusts, prejudices and fallacies, whether conscious or unconscious, which have plagued the legal profession for as long as I can remember, and some of which are patent rather than latent. The practitioner distrusts the academic: the academic despises the practitioner for cutting Gordian knots instead of unravelling them.

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2 *Report of the Committee on Legal Education.* Cmnd. 4595 (1971). Discussed at (1971) 34 M.L.R. 635, 642; (1971) 115 S.J. 598, 746; (1972) 12 J.S.P.T.L. 39; (1972) 69 L.S. Gaz. i, 8.

3 Idem para. 100.

4 Idem para. 103.

5 Idem paras. 125-137.

Many practitioners have an irrational attachment to learning the hard way: many academics gaily ignore the physical difficulties of extracting the facts from reluctant and/or stupid clients and witnesses. And let us admit that some of our reactions to intelligent and active young men and women are defence mechanisms which are designed to protect us from admitting our own inadequacies.

WHEREIN LIE THE CHANGES?

4. This brings me to the question whether the Ormrod proposals are really substantially different from what exists today. There are many cynics who take the view that to abolish articles, and consequently the title of articled clerk, is mere eyewash and that the new solicitor with a limited right to practise would be merely the old articled clerk writ large. It is my experience that much of the expertise which in the past has been assumed to be transmissible only by apprenticeship, can be learned in a very short time off-the-job by means of simulation exercises. Since 1966 the Birmingham College of Commerce (now absorbed into the Birmingham Polytechnic) has run practical exercises which are designed to provide articled clerks with the same experience which without them they obtain laboriously and inefficiently in an office.[6] I do not think that simulation exercises can effectively replace articles entirely: both the Ormrod Committee and the Law Society appear to believe that the vocational year can do so.

5. This immediately raises the question of what is wrong with the present method of educating and training potential solicitors. In no particular order I list the objections without assessing their validity:

- 5.1 The degree courses overlap the Law Society syllabus and cause unnecessary duplication of effort:
- 5.2 The Law Society examination is merely a test of memory, prefaced by a crash course:
- 5.3 Articles are frequently unsatisfactory and time-wasting:
- 5.4 Firms are reluctant to take articled clerks because they do not justify their salaries in the early stages, there is too much pressure on solicitors and their staffs to allow them to give proper time and attention and often there is not enough space in the offices.

6. The vocational year, including the practical exercises, is designed to meet these objections at least in part. The next question is to decide

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[6] There are detailed descriptions of how simulation is exercised at (1969) 66 L.S. Gaz. 442, 468, 543, 681 and 808; (1970) 67 L.S. Gaz. 773; and (1970) 74 Law Guardian 7.

who is to provide the vocational year and on this the Ormrod Committee were divided: the majority favoured the proposal that it should be provided within the university and college of higher education structure whereas a minority considered that the College of Law and the Inns of Court School of Law should do the work. This has sparked off quite an interesting little struggle for power. I do not understand why the universities should want the job: it is vocational first, last and all the time and, although I am pleased to know that universities do not despise vocational training, I think it would mean some dispersal of effort.[7] Some of the polytechnics are exhibiting a belated interest on the subject.

At the start the Law Society took the firm and uncompromising view that the vocational year for solicitors could only be done by the College of Law, but this attitude is changing and the possibility of using the universities and polytechnics is being explored. In the meantime the College of Law is going to run a pilot scheme for about 250 law graduates beginning in September 1974.

MONEY

7. One problem which has not yet been solved is how all this is to be paid for. Some optimists thought that, by giving the job to the universities and polytechnics, the University Grants Committee and the Department of Education and Science would be encouraged to pay for it, but the optimism is now very weak. Another possibility is a levy on the profession, which is received with no visible sign of enthusiasm. Yet another suggestion is that the cost should be paid by the students themselves or by their parents and that those without money should borrow it and pay it back over the first five years or so of practice. This last suggestion has produced surprisingly little opposition among those students to whom it has been informally made and the idea is familiar in the United States and elsewhere. In the end I expect that there will be some kind of compromise. Most local education authorities make grants to students preparing for the Law Society's Qualifying Examination, although they are not obliged to do so: solicitors might be induced to submit to a modest levy: students themselves might well be happy to shoulder part of the cost. My own suggestion for what it is worth is that the articles should not be abolished but merely changed in character and that practical training

[7] Cf. Payne, *Teaching the Main Subjects in the LL.B. Course,* (1971) 11 J.S.P.T.L. 125.

off-the-job should be paid for by a levy on those solicitors who do not take articled clerks. That is another story.

MODIFIED ORMROD?

8. Ever since the idea was first mooted of abolishing articles and putting the vocational year in their place, the Birmingham Law Society has taken a different view. Practical exercises were first put on at the Birmingham College of Commerce with money supplied by the Birmingham Law Society: afterwards they received the generous financial support of the (national) Law Society. About 20 Birmingham solicitors and legal executives have taken part in them. Birmingham believes that articles should be retained but that they should be supplemented and reinforced by practical training off-the-job. I think it highly likely that for some years ahead we shall choose some form of modified Ormrod and I have outlined one form which such modification could take in the Solicitors Journal.[8] Briefly, the scheme would give graduates the option of:

1. Going in to articles and undergoing no training off-the-job; or
2. Going into articles and spending some time on practical exercises either to give them a start on a subject to be developed in their offices or to provide them with some basic knowledge of subjects which they may never deal with in their officer; or
3. Going on a vocational year, avoiding articles and being placed under a limitation on practising for a specified time.

This has the merit of flexibility and I see no reason why this choice should not continue indefinitely. It might happen that one or two of the three choices turn out to be less attractive than the other or others; if so, the scheme could be modified in the light of experience but at all events we would not be groping in the dark. Certainly there should be an opportunity to qualify as solicitors for those who cannot find articles: equally it is up to the practising profession to provide training either on-the-job or off-the-job which is at least equal to the highest standards which exist in industry. What is vital is that we should abandon a rigid and doctrinaire approach and, as I have indicated, there are welcome signs that the views of the people most closely concerned are relaxing.

THE IMMEDIATE PROSPECT

9. While we are arguing and planning for the distant future we have hammering at our gates more young men and women than ever

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8 (1971) 115 S.J. 746.

before. Over 1100 aspiring solicitors attend courses at the College of Law to lead to Part II of the Qualifying Examination from August to February. Add to these those who have entered for similar courses at polytechnics. Under present arrangements they will all have to be articled before they can become solicitors. I fear that large numbers will be disappointed and the pilot scheme for avoiding articles does not begin until 1974.

In order to make a contribution towards easing the situation the Birmingham Law Society is engaged in organising a course of seven practical exercises of one week each which will follow immediately after the Part II examination in February 1973. In this venture the Society has the co-operation of the University of Birmingham, the Birmingham Polytechnic and the College of Law who are making available their exercise scripts. There is no doubt that practising solicitors and legal executives in and around Birmingham will participate as they did with the College of Commerce. The object is to relieve firms of the burden of instructing new articled clerks in the rudiments of the work of solicitors' offices and thus to encourage more firms to open their doors. It is hoped that the firms which agree to take law graduates as articled clerks will either pay outright or lend the fees which will be £15 per week.

For most of my career I have been saddened by unnecessary antagonisms, to some of which I referred in paragraph 3. Now we have the opportunity to co-operate and this opportunity, to judge by our experience up to now, is being grasped with great enthusiasm.

AND WHAT WILL BE THE ULTIMATE OUTCOME?

10. The answer to this question is that I do not know, but that I am optimistic that all of us, academics and practitioners, London-based, Birmingham-based, and Penzance-based, judges, barristers, solicitors and legal executives, will immediately recognise that it is silly to expend our energies and to fritter away the best years of our lives in arid controversy. A sensible legal system and an efficient legal profession are essential features of a civilised community: we have an opportunity now in England and Wales of ensuring both by a sensible method of education and training.

P. ASTERLEY JONES*

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RECENT CASES

WATT v. RAMA[1]

Negligence, Unborn Infants and the Duty of Care

Watt v. Rama is the first Australian case to raise the question whether a child may sue for injuries received while *en ventre sa mère*. The plaintiff alleged that her mother, while pregnant, had been seriously injured in a road accident as a result of the defendant's negligent driving. She further alleged that she herself had suffered injuries which were the result of the accident "and/or" which were the result of the injuries suffered by her mother as a result of which her mother was unable to have a normal pregnancy and labour. The question was raised as a pure point of law, whether on these facts, the plaintiff would be entitled to succeed. The Full Court of the Supreme Court of Victoria held that she was.

The decision is quite understandable and predictable. Given the present judicial sympathy for plaintiffs who have suffered personal injury as a result of a defendant's negligence—particularly an insured defendant—it would have been a matter for considerable surprise if the decision had been otherwise. And if (as has been reported) the case is taken to the Privy Council I am prepared to stick my neck out so far as to suggest that there is not the least likelihood of the decision being reversed.

The only surprising thing about the case is the heavy weather which the judges made of the issues in question. This was, of course, largely due to that anachronistic concept, the duty of care, with which the Court does not (with respect) appear to have coped very successfully.

The duty of care concept, as has often been pointed out, is nothing more than a shorthand method of referring to those situations in which the law imposes liability for negligence in fact, assuming causation to be established and no special defences to arise. To say that A owes B a duty of care in a certain situation *means and means only* that if A injures B by his negligence, A will be liable to B. Thus, to ask

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1 [1972] V.R. 353.

whether a person owes a duty of care to an unborn infant is only another way of asking whether A is liable to pay damages to an infant for pre-natal injuries caused by A's negligence. However, if the question were put in this way the nature of the issue would surely be much clearer. As it was the defendant was able to put forward the astonishing proposition that a duty of care presupposes the existence of a person owing the duty and another person with a 'correlative' right to whom the duty is owed. As was pointed out by the court (though not as forceably as might have been expected) this proposition was obviously unmaintainable. In many cases (e.g. of negligently manufactured products or of negligently constructed buildings) years may elapse between the date of the negligent conduct and the date of the injury to the plaintiff. Nobody has ever suggested that in such cases as these the plaintiff must have been in existence at the date of the negligence. Had the Court subjected the defendant's argument to any sort of juristic analysis they should also have been able to rebut it on logical grounds. The fact is that the 'duty' of care is not a legal duty in any strict analytical sense at all. There is no logical reason why this type of 'duty' should have any correlative right and there is not the slightest difficulty involved in the concept of A owing a duty of care (sc., being liable to pay damages to anyone injured by his negligence) without a correlative right.

If only Courts would recognise that the duty of care question in a negligence action is a policy question, judgments in such cases as this would surely be simpler and more to the point. In the instant case there seems a strange hesitancy to accept the policy nature of the issue. The majority judgment of Winneke C.J. and Pape J. is cast entirely in 'legalistic' terms. Although this judgment acknowledges the absence of (English or Australian) authority, the learned judges then resorted to 'basal principles involved in the tort of negligence'. Yet the whole of the ensuing discussion is in abstract, conceptual terms and no word is said about policy. And this, although it is only a few short years since the Chief Justice of the High Court declared that where there is no authority "it is not enough, nor indeed apposite, to say that the function of the Court in general is to declare what the law is and not to decide what it ought to be".[2] The judgment of Gillard J. does indeed refer to recent pronouncements about the policy nature of the duty issue but only at the conclusion of a very

2 Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt (1968) 42 A.L.J.R. 316, 318.

long (and, with respect, obscure) judgment. And then the learned judge only relies on policy arguments as to whether a duty ought to exist "[i]f this is an appropriate question to ask". *If,* forsooth! For years I (and other torts teachers) have laboured to convince students that recognition of a new 'duty' situation does not depend on foreseeability but on the Court's views as to the policy involved. But so long as judges write judgments like those in this case it will be necessary to add that it is often the judges' unconscious and inarticulated views as to policy which prevail.

One final word: the decision was hailed in some quarters as having a bearing on the abortion law reform debate. It has, of course, none at all. It only concerns (as all recognised) the right of a living plaintiff to sue after birth for injuries received prior to birth.

P. S. ATIYAH

MORRISON-KNUDSEN INTERNATIONAL v. THE COMMONWEALTH[1]

Contract—liability for negligence

In this case the plaintiffs had successfully tendered for runway construction at Tullamarine airport. The Department of Works had conducted site tests at the airport and the results of these tests had been made available to tenderers. The plaintiffs suffered a substantial loss on the contract due to the incidence of cobbles at various levels and commenced an action against the Commonwealth for breach of a duty of care in the compilation and communication of information as to the soil structure at the site. Damages of $2,500,000 were claimed.

The plaintiffs alleged in their statement of claim that the site information was false, inaccurate and misleading. The Commonwealth did not demur to the claim, but delivered a defence which denied or did not admit most of the allegations.

The Commonwealth included in its pleadings, in paragraph 15, certain clauses from the site information and from the conditions of contract.[2] The special conditions of contract had included a clause that (contractors) had acquainted (himself) with the site, the works, and any available information. The results of tests carried out by the Department of Works had carried this warning on its title page:

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1 (1972) 46 A.L.J.R. 265 (Barwick C.J., Menzies, Owen, Walsh and Gibbs JJ.).

2 Paragraphs 6 to 15 of the defence are set out in full in judgment of Gibbs J.: 46 A.L.J.R. 265 at 268 to 269.

> THIS DOCUMENT DOES NOT FORM PART OF THE CONTRACT DOCUMENTS.
> The results of investigations carried out by the Department of Works included herein are for Tenderer's information only. The results are considered to be a true record of the investigations and tests conducted . . . It shall be clearly understood by tenderers that the Commonwealth will not be responsible for any interpretation or conclusion drawn by the tenderer in regard to site conditions based on the information contained herein.

Further, in the same clause, the Commonwealth pleaded that trenches dug at the site were available for inspection by contractors. The Commonwealth had also said that cobbles would be found during excavation.

The plaintiffs, in their reply, admitted this paragraph of the pleading.

The action came on for hearing before Menzies J., who stated a question of law for the Full Court as to whether the matters pleaded by the Commonwealth in paragraph 15 provided a defence in law to the allegations in the statement of claim.

Gibbs J., with whom Owen and Walsh JJ. agreed, delivered the leading judgment. He pointed out that the claim was not in contract, or for lack of honesty.[3] He went on to say that *Hedley Byrne & Co. v. Heller and Partners,*[4] as partly clarified in *Mutual Life & Citizens, Assurance Co. Ltd. v. Evatt,*[5] had created a new field of negligence and while the plaintiffs may be able to sustain this cause on that authority, the point of law was not one of the limits of the *Hedley Byrne* decision. The question of law which had been stated required the Full Court to assume the plaintiffs claim did disclose a cause of action and then consider whether the facts stated in paragraph 15 of the defence would necessarily be fatal to the plaintiffs.

Gibbs J. went on to hold that they do not have this effect: although they may, when all the facts are known, be substantial factors in defending the action. The facts stated in paragraph 15 do not act as a disclaimer since each item can only be a fact in issue:[6]

1. The statement by the Commonwealth that cobbles would be found on excavation is not necessarily inconsistent with misleading the contractors as to the extent of these in the soil.

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3 46 A.L.J.R. 264 at 269F.
4 [1964] A.C. 464.
5 [1971] 1 All E.R. 150.
6 46 A.L.J.R. 265 at 270 D-F.

2. The availability of trenches for inspection can only be dealt with after evidence of what they in fact revealed.
3. The fact that the site information was not part of the contract documents shows that the accuracy of the information is not warranted but the claim is not in breach of warranty. Nor did the rest of the paragraph amount to a disclaimer: it cannot be read in vacuo, and in fact relates only to conclusion drawn by the tenderer and not the information itself.

   Finally, the requirement that the contractor inform himself may extend to the information supplied by the Commonwealth.

Accordingly Gibbs J. concluded that the facts stated in paragraph 15 do not show that the Commonwealth did not know or ought to have known that the information would be relied on; or that it was unreasonable for contractors to rely on it; or that there was an effective disclaimer. The effect of the facts stated can finally be determined only when all the facts have been found, but they do not by themselves show that the plaintiff has no cause of action.[7]

Barwick C.J. dealt with the isues in much the same way, looking at each of the items mentioned in paragraph 15, and concluding that (more) in itself showed that the plaintiffs had no cause of action. His Honour pointed out that the Solicitor-General had sought to have the disclaimers interpreted as if reading:

> This information is furnished for the convenience of bidders and is not part of the contract. The information is not guaranteed and any bids submitted must be based on the bidder's own investigations and determinations.[8]

However, His Honour was not prepared to give such an expanded meaning to the words.

In addition to formally examining each part of paragraph 15, Barwick C.J. supported his interpretation by reference to what appeared to be the intention of the parties; the information was highly technical, the plaintiffs neither had the time nor the opportunity to obtain for themselves and may not have been able to obtain it by their own efforts.[9]

Menzies J., in a brief judgment, simply concluded that the material in paragraph 15 does not of itself afford a defence to any claim which the plaintiff may disclose in his statement of claim; since it is neither

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7 46 A.L.J.R. 265 at 271 E-F.

8 46 A.L.J.R. 265 at 267 B. c.f. Texas Tunnelling Co. v. City of Chattanooga, Tennessee (1964), 204 F. Supp. 821.

9 46 A.L.J.R. 265 at 267 C-F.

a contract denying the plaintiff any rights at law in respect of incorrect information, nor a disclaimer such as was effective in the *Hedley Byrne* decision.

Because of the manner in which the case was stated, little light is shed on the cause of action itself. But it does provide some guidance on protection for persons letting contracts for works and for persons providing information prior to contracts for works, such as site information.

Substantial contracts for works, whether let by governmental, municipal or public and private corporations, are often accompanied by site information, feasibility studies, demographic surveys and the like, depending on the nature of the work. Customarily, this information has been excluded from the contract, if only to protect the corporation from the contractual consequences of error: an action for breach of warranty. Since the development in the *Hedley Byrne* decision of the new field of negligence based on a duty of care further protection must be provided.

While the limits of the *Hedley Byrne* principle are so nebulous, the originators of information will seek to prepare a disclaimer, which is stronger than that which protected the defendant bank in the *Hedley Byrne* decision, and perhaps that which the Chief Justice imputed to the Solicitor-General in the present case is appropriate. The disclaimer should:

(i) point out that any information is not guaranteed;
(ii) point out that any information does not constitute part of the contract;
(iii) point out that any tenderer is required to base his tender on his own investigation and not those of the corporation or of any other person.

This is particularly important since the potential liability of Professional originators of information appears to be almost limitless as to time and person. Thus a building inspector who reports incorrectly ought to have in mind subsequent purchasers of a building[10] and persons preparing site information for, say, a statutory corporation ought to have in mind subsequent contractors and sub-contractors for works.

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10 Dutton v. Bognor Regis Building Co. and Bognor Regis Urban District Council [1972] 1 All E.R. 462 per Lord Denning M.R. at 473 citing Nelson v. Union Wire Rope Ltd. (1964) 199 N.E. 2d 769 and applying Donoghue v. Stevenson [1932] A.C. at pp. 580-581.

Such a disclaimer can be supported where possible by a contractural provision which provides:

(i) that any information supplied by the corporation is supplied as a matter of grace outside the contract;

(ii) that in consideration of the contract for works the tenderer waives any right of action which he may have had arising out of information supplied by the corporation whether under the contract or otherwise;

(iii) that the tenderer is deemed to have relied on his own skill, judgment and investigations in preparing his tender and not on any information supplied by the corporation.

In summary, *Morrison-Knudsen International v. The Commonwealth* decides only one point of law in an action for a breach of duty of care, but it does show that, to effectively disclaim any duty prospectively, clear words will be necessary. Appropriate words may be available to the originator of information, although he does not have the advantage of being able to insert contractual disclaimers.

J. R. O'BRIEN

ZNATY v. MINISTER OF STATE FOR IMMIGRATION[1]

Administrative law—deportation

The Commonwealth Migration Act 1958-1966 has been the subject of several recent High Court cases concerning deportees wanting to remain in Australia.[2] Znaty did not mind leaving the country, but, contrary to the Minister's order, he did not wish to be deported to Morocco. He sought an injunction to prevent his deportation to that country. A majority, consisting of McTiernan, Owen and Walsh JJ., rejected the application. Barwick C.J. and Windeyer J. dissented.

Znaty became a prohibited immigrant under s. 7(3) of the Migration Act after the Minister for Immigration cancelled his temporary entry permit. He was ordered to be deported under s. 18. The reason for his deportation does not appear in the judgment. However, the Minister for Immigration informed the House of Representatives on 10th March 1971 that Znaty had been deported after it was discovered that he had convictions in Switzerland and France. The aircraft

1 (1972) 46 A.L.J.R. 135.

2 Louie Sing Hon v. The Commonwealth (1970) 44 A.L.J.R. 371; Ex parte Kwok Kwan Lee (1971) 45 A.L.J.R. 312; Ex parte De Braic (1971) 45 A.L.J.R. 284; Minister for Immigration v. Ng Chong Sun [1971] A.L.R. 79.

carrying Znaty landed in Rome, where Rome authorities supervised his transfer to a Morocco bound flight.[3] This suggests that extradition under another name was involved. Walsh J. said he did not think the deportation was a sham.[4] As the Court did not inquire into the reasons behind the Minister's order he could not have come to any other conclusion.

Znaty was arrested on 2nd December 1970 and placed in custody. He possessed an airline ticket and visa for Japan and he offered to leave for Japan on 4th December. He was told he would not be permitted to do so. Instead, the Commonwealth purchased an airline ticket for him on a Qantas flight, departing 6th December, which would connect with a flight to Morocco. Znaty had a Moroccan passport but he had not lived there since 1955 and he did not wish to return.

The issue before the High Court was whether the Minister had power to determine the country to which a deportee would be sent, given that the deportee was prepared to leave Australia at his own expense, to a destination of his own choice. McTiernan and Owen JJ. concurred in the judgment of Walsh J.

Walsh J. said that the question of unconstitutionality of the Migration Act was not argued before the Court.[5] He assumed that the Commonwealth had power under s. 51(xxvii) of the Constitution to deport to designated countries, so his decision dealt mainly with the question of whether the Migration Act authorized such orders. Under s. 22 of that Act the master, owner, agent or charterer of a vessel is required to receive a deportee on board for conveyance to a specified place. Walsh J. rejected the argument that this provision did not operate where the deportee is willing to leave the country.[6] He went on to discuss a statement by Barton J. in *Fernando v. Pearce*[7] to the effect that deportation involved no power to deport to a particular country though it included power to place a deportee on a ship bound for a particular destination. Counsel for Znaty had also relied upon similar dicta in English cases.[8] Walsh J. considered that whatever these statements meant they were inapplicable for two reasons. Firstly,

3 (1971) 71 Parl. Deb. H. of R. 821.
4 (1971) 46 A.L.J.R. 135, 140.
5 (1972) 46 A.L.J.R. 135, 137.
6 (1972) 46 A.L.J.R. 135, 138.
7 (1918) 25 C.L.R. 241, 248-249.
8 R. v. Secretary of State for Home Affairs; Ex parte Duke of Chateau Thierry [1917] 1 K.B. 922, 931; R. v. Superintendent of Chiswick Police Station; Ex parte Sacksteder [1918] 1 K.B. 578.

in those cases the wording of the legislation before the relevant Court was not identical with that used in the Migration Act. Secondly, if there was power to place Znaty on a particular aircraft which had the end result of deporting him to Morocco, Walsh J. could not see what scope these dicta would have. He therefore refused the application.[9]

In contrast to the majority, Barwick C.J. and Windeyer J. thought that the only relevant argument was whether the Commonwealth had power under s. 51(xxvii) to insist that a deportee be carried to some specific place. Barwick C.J. merely said that he thought that full amplitude could be given to s. 51(xxvii) without reading any such power into it.[10] Windeyer J. declined to elaborate on the reasons why he considered the Comomnwealth lacked power under s. 51(xxvii) to deport Znaty to Morocco.[11] Having dissented on a Constitutional point which Walsh J. did not take, Barwick C.J. and Windeyer J. dealt with it in a rather cavalier manner. It is submitted that their view of the problem is too narrow but that is not to say that the only alternative is to embrace the majority view that the Minister has an unreviewable discretion to send a deportee where he pleases.

If, as in the case under discussion, Courts will not look behind deportation orders or give narrower constructions to the Migration Act and s. 51(xxvii) of the Constitution, then legislative reform is needed to create confidence that the significant number[12] of people who are deported annually are being dealt with honestly. The Migration Act should not be used as a cloak to hide any deficiencies in the Extradition (Foreign States) Act 1966. If no extradition proceedings are involved then United States Federal legislation[13] provides a useful model for legislation determining the place to which deportees should be sent. The main provision is for the deportee to have first choice, subject to the overriding discretion of the Attorney-General where he thinks U.S. interests may be prejudiced. Such a provision would not involve any diminution in the power to deport but would help to remove the air of government by secrecy which hangs around the Znaty case.

KEVEN BOOKER

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9 (1972) 46 A.L.J.R. 135, 138-140.
10 (1972) 46 A.L.J.R. 135.
11 (1972) 46 A.L.J.R. 135.
12 743 deported 1970-1971; 2,643 over 1966-1971: (1971) 73 PARL. DEB. of *R.* 1148.
13 8 United States Code s. 1253(a).

RECENT LEGISLATION

THE PARLIAMENTARY COMMISSIONER ACT 1971

Western Australia has joined the Ombudsman bandwagon. It has the distinction of being the first Australian State to create this office and the Act is therefore a landmark in the legal history both of the State and the nation.

The Bill had a lively passage through both houses of the State Parliament from September to December 1971.[1] A recurrent theme was to the effect that the State as well governed and did not need an Ombudsman. The Government view was that the State was well governed but that the office would ensure that it was better governed.

Concern was expressed at the idea of giving so much authority to the Ombudsman and that it would not be worth the expense which was estimated at about $50,000 a year. Some members saw it as a measure of no confidence in Ministers, departmental heads and general officers of the public service. Some members did not like the idea of a single person examining confidential matters which were the concern of the government alone. There was considerable argument over whether the Ombudsman should conduct his investigations in public or in secret. Misgivings were expressed at the idea of the Ombudsman investigating complaints against the police on the ground that it might undermine their authority. One member in the Legislative Council likened the appointee to "God, Jesus Christ, Allah, Mahommet, and Solomon, all in one" and another member interjected with the suggestion that the heavens would open and he would descend in a golden chariot.[2]

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1 (1971) 191 W.A. PARL. DEB. 1733; 192 W.A. PARL. DEB. 124, 149, 177, 792. Both the Legislative Assembly and the Legislative Council passed the second reading without a division, but in Committee stage in the Legislative Council many amendments were made and divisions occurred on whether Parliament or the Government should appoint the Commissioner, his obligation to maintain secrecy, the inclusion of the Police Force in the departments to be investigated (finally included) and the inclusion of the Trotting Association and the Turf Club (finally excluded). An impasse between the two Houses was avoided by means of a conference on the amendments insisted on by the Council.

2 (1971) 192 W.A. PARL. DEB. 796.

Mr. Tonkin, the Premier, and Mr. Willesee, Leader of the Government in the Legislative Council, relied heavily on the New Zealand experience.[3] It was no secret that Sir Guy Powles, the New Zealand Ombudsman, had visited Western Australia earlier in the year and given the government an account of his experience. While some members did refer to the Scandinavian and British experiences[4] of the office it is clear from the debates that the government was introducing the Bill on its merits and not simply because the office had been successful or otherwise elsewhere. Nevertheless it was argued on a number of occasions that those countries which had established the office had not abolished it for lack of success. There was therefore a *prima facie* presumption that they had found the post useful. No one made mention of the Canadian provinces, some of which have appointed ombudsmen.[5] But the general idea of a public watchdog to correct bureaucratic mistakes and streamline action and to assist members of both Houses to win justice for their constituents was accepted.

The main purpose of the Parliamentary Commissioner (he is not termed an Ombudsman although it is probable that he will be known by that description) is to investigate complaints made by members of the public against a decision made by a government department.[6] In this respect the Western Australian Ombudsman is no different from any other. The principal stipulation in the Act is that the complaint be made by an aggrieved person and be made in writing.[7] This of course will be the usual way in which an investigation will commence.

There are three other important motivating agencies. First, either

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3 Powles, *The Citizen's Rights Against the Modern State* (1964) 3 ALBERTA L. REV. 164; Hewitt, *Origins of the Ombudsman in New Zealand,* [1968] N.Z.L.J. 345; Smith, *New Zealand Ombudsman—Today and Tomorrow,* [1971] N.Z.L.J. 299; Keith, *Ombudsman and "Wrong" Decisions* (1971) 4 N.Z.U.L. REV. 361.

4 Compton, *Parliamentary Commissioner for Administration,* (1968) 10 J.S.P.T.L. 101; Garner, *British Ombudsman* (1968) 18 U. TORONTO L.J. 158; Jackson, *Work of the Parliamentary Commissioner for Administration,* [1971] Public Law 39; Schwartz, *British Ombudsman,* (1970) 45 N.Y.U.L. REV. 963; Foulkes, *Discretionary Provisions of the Parliamentary Commissioner Act 1967,* (1971) 34 M.L.R. 377.

5 Sawer, *Ombudsman Comes to Alberta,* (1968) 6 ALBERTA L. REV. 95; Friedmann, *Alberta Ombudsman,* (1970) 20 U. TORONTO L.J. 48; Northey, *Manitoba Ombudsman Act,* (1970) 4 MANITOBA L.J. 206; Anderson, CANADIAN OMBUDSMAN PROPOSALS, (1966).

6 S. 14 of the Act.

7 Ss. 18 (1) and 17 (1).

House of Parliament can refer a matter to him for investigation.[8] It may well be that there is some subject which Parliament will wish to be investigated but perhaps for reasons of confidentiality or other convenience does not wish to appoint an outsider to conduct the inquiry.

Secondly, individual members may refer matters to him. Some will obviously prefer to conduct their own inquiry when one of their constituents makes a complaint to them. They will want the credit for putting the matter right. They will not want to share it with the Commissioner. But there will be occasions when a member is not satisfied with the answer given by a government department. The subject matter may not be suitable to raise in the House and he may prefer to keep the subject out of the public eye. The biggest difference between a member's power to investigate and that of the Ombudsman is that the Ombudsman can examine the files and ask questions of officials down the line, whereas the member cannot demand to see the files and may have to be content with dealing with the top brass in the department. No one could recall in the debate having asked to see a file and been refused permission. But it seems to have been accepted that it was a question to be determined by the department concerned. Some members expressed a preference for the British system of channelling complaints through members of Parliament, but it was regarded as fundamental to permit the public to have direct access to the investigator.

Thirdly, an important source of investigation is the Ombudsman himself. He does not need to receive a complaint to investigate a subject matter; he can initiate his own investigation.[9] Undoubtedly this will be an interesting aspect of the post—how creative will the Ombudsman be in examining defective machinery of his own accord? The volume of complaints may of course deluge him and the power may lie dormant.

There are of course limits to the powers of the Commissioner. He is excluded from investigating complaints against the courts and the judiciary.[10] If someone complains about court delays due to administrative ineptitude it is not a matter for the Ombudsman. Secondly, he cannot question government policy, only its application.[11] Thirdly, he cannot examine the decision of the Cabinet or a Minister.[12] He

8 S. 15.
9 S. 16.
10 S. 13.
11 S. 14.
12 S. 14.

may examine the recommendations of the civil service leading to the decision of the Minister but he cannot challenge the merits of the Minister's decision. The post is created for the purpose of ensuring that the administrative machine operates smoothly; it is not created for the purpose of providing a political check. Fourthly, his powers of investigation are limited to making a report and making recommendations.[13] He cannot overrule the decision of a department. Exposure of the problem of maladministration is the Ombudsman's main weapon. His task is to investigate subjects, not individual officers of the government. Lastly, he has no power to investigate a complaint against a department of the Commonwealth government.

The Act lists the government departments which may be the subject of an investigation.[14] The Police Department is included but the list goes far beyond those departments which are directly administered by a Minister. It includes statutory boards and agencies which have a quasi-independent status from the traditional government departments. The State Housing Commission and the State Electricity Commission, for example, are included. It is these agencies which are detached from the basic government machine over which the Commissioner may well exercise some influence. Even more important is the inclusion of local authorities and there are some observers who believe that there will be many complaints from people aggrieved by the decisions of local authorities in relation to planning and building permission. The list includes the University of Western Australia and the Western Australian Institute of Technology: who knows what sort of complaint students may see fit to lodge with the Ombudsman? After a lot of discussion in the Legislative Assembly, the Rural and Industries Bank was excluded.

The Commissioner is appointed by the government,[15] although during the debate on the Bill there was a suggestion that he should be appointed by Parliament itself. He is nevertheless the direct agent of Parliament in that he is not responsible to any Minister. He is in a similar constitutional position to the Auditor General who examines the accounts of the government departments. He has a similar tenure of office to that of a Supreme Court judge in that he may only be removed by a resolution of both Houses of Parliament.[16] But he may be suspended by the Governor for incompetence or misconduct.

13 S. 25.
14 Schedule to s. 13.
15 S. 5.
16 S. 6.

Interestingly, he may be sued for negligence although there is a substantial measure of judicial immunity accorded him.[17] This was one of the amendments made to the Bill during the Committee Stage.

The Commonwealth Administrative Review Committee[18] has recommended the creation of an Administrative Review Council simultaneously with an officer termed the General Counsel for Grievances who would be a member of the Council but be subject to the general directions and supervision of the Council. He would not have the same freedom of action as his counterpart in the West. The Committee recommends that he be a highly qualified member of the Bar but Western Australia has not restricted the appointment to such a narrow category.

The Act came into operation on 12th May, 1972.

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17 S. 30.

18 Commonwealth Parliamentary Paper No. 144 of 1971 (Canberra); See 10 WEST. AUST. L. REV. 84.

UNREPORTED CASES

R. v. NORWOOD[1]

Criminal procedure—duty of prosecution to call material witness

The accused was charged with unlawful killing. At the coronial inquest the de facto wife of the accused gave evidence. At the trial the Crown Prosecutor stated that he did not propose to call her. The counsel for the defence then stated that he would not be calling her to give evidence but submitted that the Crown Prosecutor should call her because it was only in exceptional circumstances that the prosecution should not call a witness named on the indictment.[2] He submitted that the proper way in which the matter should be approached and that the witness should be put in the witness box to allow the defence the opportunity to cross-examine her. He referred to *Adel Muhammed v. Attorney-General (Palestine)* where Lord Thankerton in the Privy Council said:

> It is consistent with the discretion of counsel for the prosecutor . . . that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence; and this practice has probably become even more general in recent years, and rightly so—but it remains a matter for the discretion of the prosecutor.[3]

He submitted that the Crown Prosecutor ought to say why it is that he did not intend to call the witness. The Prosecutor said that he did not intend to call her because he did not think she was capable of being believed. Quite simply it was his opinion from his reading of the brief and the other evidence that he could not put her forward as a witness whom he could ask the jury to believe but he agreed that she was a material witness whether or not the defence chose to call her. He referred to *R. v. Oliva* where Lord Parker C.J. examined the authorities and said:

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1 Criminal case no. 413 of 1970 in the Supreme Court of Western Australia (Jackson C.J.).

2 10 Halsbury (3rd ed.) 418.

3 [1944] 2 All E.R. 139, 144.

> The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them either calling and examining them, or calling and tendering them for cross-examination.
>
> The prosecution do not, of course, but forward every witness as a witness of truth, but where the witness's evidence is capable of belief, then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interests of justice, and at the same time be fair to the defence. If the prosecution appears to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and, if they refuse, there is the ultimate sanction in the judge himself calling the witness.[4]

In this case neither counsel wished to put the judge in the position of having to exercise his discretion and call the witness.

Further reference was made to *Ziems v. Prothnotary of the Supreme Court of New South Wales*[5] where Fullagar and Taylor JJ. discussed the discretion of a Crown prosecutor in the matter of calling material witnesses in relation to a police sergeant whose evidence was plainly material. Fullagar J. said:

> So far as appears, the only possible object of not calling him was to place the appellant under the tactical disadvantage which resulted from inability to cross-examine him. Such tactics are permissible in civil cases, but in criminal cases, in view of what is at stake, they may sometimes accord ill with the traditional notion of the functions of a prosecutor for the Crown. It is very relevant here that the witness in question was a police witness, and a senior member of the force at that.[6]

Referring to observations by Lord Hewart C.J. in *R. v. Dora Harris*[7] Taylor J. said that it was not within the province of a prosecutor to refrain from calling a witness whose evidence was plainly material.

> No doubt, in some cases, there may be special reasons which will justify the prosecution in discarding a particular witness but no such reason appears in this case.[8]

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4 (1965) 49 Cr. App. R. 298, 310; subsequently followed and applied in R. v. Tregard [1967] 1 All E.R. 989.
5 (1957) 97 C.L.R. 279.
6 Id. at 294.
7 [1927] 2 K.B. 587, 590.
8 97 C.L.R. 279 at 308.

In the light of these authorities Jackson C.J. observed that the impression he had gained was that any witness who can plainly give testimony in regard to the actual events which took place should be called by the Crown unless there is some compelling circumstance which prevents it. This was a case where the de facto wife should be called as a witness for the prosecution.

R. v. ROBINSON[1]

Criminal procedure—territorial jurisdiction

The accused was charged on two accounts—(i) wilfully and unlawfully causing an explosion likely to cause serious injury to property at Tryal Rocks off the Monte Bello Islands in the State of Western Australia under s. 454 of the Criminal Code Act 1913 (W.A.); and (ii) unlawfully and maliciously causing an explosion likely to cause serious injury to property at the same time and place under s. 2 of the Explosive Substances Act 1883 (United Kingdom). The accused maintained that the place known as Tryal Rocks is on the high seas and not within Western Australia, and accordingly that the offence was not within the court's jurisdiction.

The relevant facts on this issue were agreed. The accused was a British subject and an Australian citizen. The Monte Bello Rocks are part of Western Australia, and are situated about 100 miles west of Point Samson, and from the map appear to be about 50 miles north-west of Cape Preston which is the nearest point on the mainland. The Tryal Rocks are between 10 and 14 miles west of these islands and do not themselves form an island, being wholly submerged at high tide. They are named after the ship 'Tryal' which was wrecked there in 1622. The ship, or what remains of it, is an historic wreck vested in the Museum under s. 40 of the Museum Act 1969 (W.A.). The accused sailed to this locality at the time of the alleged offence in a fishing trawler, the "Four Aces", a British ship.

On the first count the question at issue was whether the Criminal Code applied to the place where the offence was alleged to have been committed. In *Giles v. Tumminello*[2] it was held that under a section of the Criminal Law Consolidation Act (South Australia) a larceny of craypots and floats by a fisherman resident in the state was triable

1 Criminal Case no. 112 of 1971 in the Supreme Court of Western Australia (Jackson C.J.).

2 [1963] S.A.S.R. 96 (F.C.).

in a court of summary jurisdiction. In the present case, the accused relied upon the provision in the opening paragraph of s. 12 of the Criminal Code—

> This Code applies to every person who is in Western Australia at the time of his doing any act or omission which constitutes an offence.

The Crown conceded that that place of the offence was not, geographically, in Western Australia; but it was contended that the section should not be construed in a geographical or territorial sense at all, but that the phrase "in Western Australia" was used to identify that jurisdiction which is focused and contained within the State; and that it was a reference to jurisdiction and not to territory. Jackson C.J. rejected this contention—

> In the first place, if this is the meaning of the sentence, it serves no purpose at all and is surplusage. In the second place, it is not in accordance with the plain meaning of the words themselves, "in Western Australia", read in the context which speaks of the time of doing of an act or making an omission. The sentence relates both to time and place.

He could see no reason for departing from the natural meaning of the phrase "in Western Australia" which accorded with the opinion expressed in *R. v. Hildebrandt.*[3]

On the second count it was asserted that the offence was commited on the high seas within the jurisdiction of the Admiralty of England. In order to bring the charge before a court in Western Australia, the Crown relied upon s. 1 of the Admiralty Offences (Colonial) Act 1849 (Imperial) which confers jurisdiction on a State court in respect of offences on a British ship on the high seas.[4] The accused contended that no offence can be tried in Western Australia by virtue of that Act unless the act constituting the offence under the law of the State would also be an offence under the laws of this State and could be tried under State law. Jackson C.J. held that this was not so.

> By s. 4 of the Criminal Code Act 1913, a person may be tried in this State as for an indictable offence not only under the express provisions of the Criminal Code or some other express statute law, but also under the express provisions of a statute of the United Kingdom "which authorises the trial and punishment in

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3 [1964] Qd. R. 43 (C.Cr.App.).

4 R. v. Price (1885) 6 N.S.W.R. 139 (F.C.) and William Holyman & Sons v. Eyles [1947] Tas. S.R. 11 (Morris C.J.).

> Western Australia of offenders who have, at places not in Western Australia, committed offences against the laws . . . of the United Kingdom". Section 1 of the Admiralty Offences (Colonial) Act is such a provision. It authorises the trial in a colony of any offence "of what nature or kind soever" committed upon the sea within the Admiral's jurisdiction. An offence under s. 2 of the Explosives Act committed at sea on a British ship in such an offence. The Admiralty Offences (Colonial) Act then proceeds to confer upon colonial courts power to exercise the same jurisdiction for trying the offence as they would have had if the offence had been committed upon waters within the colony. It is unnecessary to consider what the position would be if the offence charged were not an offence known to the law of the State, because s. 454 of the Criminal Code provides for the same offence as is found in s. 2 of the Explosives Act.

He rejected a contention that the Admiralty Offences (Colonial) Act applies only to offences known to the law in the year in which it was passed, 1849, and not to statutory offences created since that year[5] and a further submisison that s. 2 of the Explosive Substances Act 1883 does not extend to offences committed on the high seas. He concluded that the second count in the charge disclosed an offence cognisable by the court and within its jurisdiction.

A few days later R was acquitted by Jackson C.J. on the second count of wilfully and unlawfully causing an explosion likely to cause serious injury to property. At the close of the prosecution case the defence counsel contended that there was no case to answer. This contention was rejected and the defence led no evidence. He was then acquitted. R was not awarded costs.

At the time of the case the judgment of the Supreme Court of South Australia in *Hamdorf v. Riddle*[6] was not available. This overdue jolt to the practice of criminal procedure suggests that a criminal court should in a general way exercise its discretion as to costs in the way in which it is exercised in the trial of a civil action, but without discriminating between the costs of successful complainants and successful defendants. In *R. v. Jackson*[7] Virtue J. ruled that any

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5 Reference was made to *The Yuri Maru* [1927] A.C. 906 where the Privy Council held that the jurisdiction of a colonial court of Admiralty under the Imperial Act of 1890 was limited to the Admiralty jurisdiction of the High Court of England as it was in 1890. Jackson C.J. distinguished this decision on the ground that it depended on the construction of the 1890 Act, which conferred upon colonial courts the jurisdiction of the High Court and this did not mean the jurisdiction from time to time existing.

6 [1971] S.A.S.R. 398.

7 [1962] W.A.R. 130.

discretion to award costs against the Crown should only be exercised on criteria such as the absence of a prima facie case, the absence of reasonable cause for the prosecution, or want of good faith, oppression or wrongful motive in launching the prosecution. This judgment waits to be disturbed.

The case also drew attention to some fascinating problems in international law. Where do the boundaries of Western Australia lie in the Indian Ocean? Are the Monte Bello Islands truly part of the State? It was assumed for the purposes of the case that they were. What steps should be taken to up-date the law?

RE L (AN INFANT)[1]

Adoption—right of natural parent

L, whose natural parents, J and M, were full blood aboriginals, was born at Meekatharra, Western Australia in November 1968. At the time of L's birth, J had two wives, M and another tribal wife. M and J lacked any formal education and M had reared other children well. They had demonstrated a natural parental regard for their children and within their capabilities had given them a good upbringing and education. At the time of L's birth M had shown some lack of enthusiasm and interest for L, and L had been declared to be a neglected child. In August 1969 arrangements were made to place the child with K and Mrs. K for adoption. K and Mrs. K, who had no children, were of European race. M and J completed adoption consent forms in April 1969 but there was doubt as to whether either appreciated the nature and effect of an adoption order. Prior to the child being sent to K and Mrs. K for a three month trial period M wrote to the Child Welfare Department in October 1969 and asked to have L returned to her. The Department had replied that as the mother and husband had completed adoption consent forms, arrangements had been made for L's adoption and it was regretted that L could not be returned to them. In November 1969 L was placed with K and Mrs. K for adoption. K and Mrs. K made application in March 1970 for an adoption order under the provisions of the Adoption of Children Act 1896-1964. At the time of the application L had

[1] In the Matter of an Application by K and Mrs. K for the adoption of L, an infant, Civil Case no. 664 of 1970 in the Supreme Court of Western Australia (Burt J.).

become a ward of the Child Welfare Department within the meaning of s. 4 of the Child Welfare Act.

Refusing the application Burt J. held

(i) Because neither parent had a full understanding of the effect of the consent to adoption, the purported consent did not comply with s. 4E, Adoption of Children Act 1896-1964;

(ii) having regard to the general circumstances he was not prepared (a) to find that M was a person who had abandoned her child, and (b) to dispose of M's consent in the terms of s. 4G(1)(e) of the Act. He said in regard to the conduct of the person whose conduct is being considered:

> one would need to find some quality about the conduct of which it can be said that it is culpable—culpable in the sense of disregarding the parental responsibility that one has to the child, or culpable in the sense that it is conduct which had led to and prejudiced the position of the adopting parents—one or the other or perhaps of course both.

(iii) having regard to the welfare and interest of the child, which is specifically spoken of in s. 5(1)(iii) of the Act and the rule in *Mace v. Murray*,[2] justice

> will be better served by her growing up with her own people in the mission community into which she was born and will be better served by that happening than by growing up in a white community as a full blood aboriginal.

He expressed concern at the "patent insensitivity" of the letter by the department to M and the fact that L had not been placed in K and Mrs. K's care at the time the letter was written. He also expressed sympathy for K and Mrs. K who had lost the care of the child after it had been with them for two years.

CIPRIANI v. TAYLOR[1]

Negligence—damages

C was awarded $1,742.69 as damages for injuries sustained by him in a traffic accident which occurred in May 1967. This amount consisted of

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2 (1955) 92 C.L.R. 370, 385.

1 Appeal Case no. 125 of 1967 in the Supreme Court of Western Australia (Jackson C.J., Burt and Lavan JJ.).

agreed special damages	$487.09
loss of wages from the date of accident until 19 October 1967 (20 weeks)	£955.60
general damages	$300.00
Total	$1,742.69

C contended that upon the evidence the proper finding should have been that for the period 19 October 1967 until 19 November 1968 he was suffering a loss of earning capacity and that this was a matter which should have been and which was not taken into consideration in the assessment of general damages. The award of $300 was made upon the basis that by 19 October 1967 C had regained his pre-accident earning capacity. C submitted that this sum was outside the range of a sound discretionary judgment.

Dismissing the appeal the Full Court applied the rule that in such a case the advantages possessed by the trial judge are such that interference by an appeal court must be a rare thing.[2]

HANCOCK v. BIRSA[1]

Criminal law: rogue and vagabond—lawful excuse

B was charged with being a rogue and vagabond being on premises "without lawful excuse" contrary to section 66(13) of the Police Act 1892-1969 (W.A.). The trial magistrate found that at about 11.45 p.m. a woman, her brother and another man were sitting in the lounge room of a ground floor flat when the woman saw B standing on the verandah of the flat, close to a window, looking into the lounge room. She told the man with her and they chased B along the street and detained him until a police patrol arrived. The magistrate dismissed the charge because B lacked a "criminal purpose" and he was not persuaded that his "purpose was other than that of a peeping tom". He considered that he was bound by *Wills v. Williams*[2] where Virtue S.P.J. held that "without lawful excuse" is synonymous "with

2 See Wilson v. Pilley [1957] 1 W.L.R. 1138, 1139 per Lord Evershed; Davies v. Powell Duffryn Associated Collieries [1942] A.C. 601, 616 per Lord Wright; Miller v. Jennings (1954) 92 C.L.R. 190, 195; and Planet Fisheries Pty. Ltd. v. La Rosa (1968) 119 C.L.R. 118, 124.

1 Criminal Appeal Case no. 78 of 1971, Court of Criminal Appeal of Western Australia (Hale, Burt and Wickham JJ.).

2 [1971] W.A.R. 29.

a criminal purpose". The Court of Criminal Appeal allowed the appeal and set aside the acquittal.

The question at issue was the meaning of "lawful excuse". Hale J. thought that the comparable legislation in Victoria had a markedly different history[3] and he did not think much help could be derived from decisions there. He did not think it was permissible to treat "without lawful excuse" as meaning "for an unlawful purpose", but said that

> in the context of this section "without lawful excuse" is a compendious method of saying "without an excuse which would appear to a reasonable man to be adequate in the circumstances".

Referring then to *Wilkins v. Condell*[4] and *Roffey v. Wennerbom*[5] he concluded

> that in order to support a conviction under s. 66(13) the existence of lawful excuse can be negatived without showing that the defendant is charged with an offence punishable by imprisonment.

Distinguishing *Wills v. Williams*[6] Burt J. said that that case was not an authority for the proposition that conduct sufficient to enable one to describe the accused person as a peeping tom cannot be such as to bring that person within Part VII of Justices Act so that he might be bound over to keep the peace. He did not think he could equate the words "without lawful excuse" with the idea of "unlawful purpose".

> Proof of an unlawful purpose no doubt denies a lawful excuse. But the converse is not I think true. Proof of the absence of a lawful excuse does not require the finding of an unlawful, in the sense of a criminal, purpose. What it does require, and in my opinion all that it requires, is a judgment by the Court as to "whether the defendant's purpose on the premises is excusable in all the circumstances of the case, bearing in mind that the defendant is charged with an offence punishable by imprisonment and therefore that his conduct may well be innocent or excusable for this purpose although otherwise indefensible".[7] And the conduct may fail to satisfy that test although one is unable to say of it either that its purpose was to commit some offence known to the criminal law or that it was such as to render the accused person liable to be bound over to keep the peace.

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3 S. 72(13), Police Offences Act 1915 (Victoria) as explained in Carter v. Reaper [1920] V.L.R. 337 and Haisman v. Smelcher [1953] V.L.R. 625.

4 [1940] S.A.S.R. 139.

5 [1965] Qd. R. 42.

6 See note 2.

7 Wilkins v. Condell [1940] S.A.S.R. 139, 152 per Napier J.

Concurring, Wickham J. said that at an early date it was established that "unlawful purpose" under the Vagrants Act 1824 (U.K.) must be shown to be a purpose that was criminal and not merely immoral.[8] Nevertheless it was not necessary that the conduct should be a crime or an offence (other than by force of the subsection itself), but merely that it should be of such a kind as the tribunal of fact considers should be treated as deserving of punishment.

> That there was a criminal purpose may be relevant but not conclusive, e.g. the proposed criminal purpose may be trivial, such as a man going into the front garden of a house to "steal" a drink of water from the tap; similarly that there is no criminal purpose may be relevant but not conclusive; and again it may be relevant for the purpose of beginning a form of judgment, although not conclusive, that the conduct is such as would justify binding over. . . . Put another way, the question for the tribunal of fact will be: In all the circumstances of case, has the prosecutor shown beyond reasonable doubt that the conduct of the defendant is such that it deserves the application of the penal law and therefore ought not to be excused? The answer to this question is one of fact and of judgment and will depend upon all the circumstances of the particular case and is one for the tribunal which tries the case.

He added that the onus of proof at all times resides with the prosecutor.

WRIGHT v. BENEFICIAL FINANCE CORPORATION LTD.[1]

Contract—hire purchase non recourse agreement

W was a dealer in secondhand motor cars. In October 1967 he entered into two written agreements with B, a finance company. The general purpose of the agreements was that they should set out the basis upon which B would accept hire purchase offers made to it by W's customers and submitted to B by W. One of the two agreements was described as a 'full recourse' agreement and its effect was to be that W was to guarantee performance by the hirer of the purchase agreement and to repurchase the goods in the event of default by the hirer or other early termination of the hiring. The other agreement was described as a 'non recourse' agreement. W, when submitting an offer to B would indicate whether it was submitted on a 'full recourse' or on a 'non recourse' basis and thereafter if the offer

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8 Hayes v. Stevenson (1860) 3 T.L.R. 296.

1 Civil Appeal Case no. 75 of 1970 in the Supreme Court of Western Australia (Virtue S.P.J., Burt and Lavan JJ.).

was taken up the rights and obligations of B and W as between themselves and with reference to that particular purchase transaction would be governed by the appropriate agreement. If the business were done on a 'full recourse' basis then the risk was upon W, the dealer; if the business were done on a 'non recourse' basis B, the finance company, was to be at risk.

B alleged that W had breached a warranty in the 'non recourse' agreement in respect of two hire purchase agreements. In one case the trial judge found that the deposit in the amount shown to have been paid by the hirer had not been paid and in the other case that goods, a motor car, did not accord in all respects (specifically as to the year of the model) with the description as set out in the hire purchase offer. In each case the hirer failed to pay the instalments of hire as they fell due and B thereupon repossessed and sold the car. B sued for the net loss within the meaning of the agreement[2] and judgment was entered in B's favour for $1,474.60.

W appealed on the ground that a breach by the dealer of a warranty within the agreement if it occurred necessarily occurred upon the finance company accepting the offer to hire and then upon it occurring the finance company could immediately sue to recover its 'net loss' to be ascertained in accordance with the agreed formula. It was said not to matter that the hirer was meeting his obligations under it. In such a case the finance company would recover its 'net loss' without having suffered any loss at all and so might, in broad terms, enjoy a double recovery. This, it was said, was enough to show that the clause in the agreement was penal in its operation and in its intent. Alternatively, it was said that if upon its proper construction the clause only operated upon a breach if and when conditionally upon the hire purchase agreement being brought to an end and without the option to purchase being exercised so causing a 'net loss', it could not be said that that state of fact had in any way been caused by or was in any way related to the dealer's breach of warranty, and this being so it was said to follow that the dealer would be required to

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2 The relevant clauses read—
"We agree that in the event of a breach by us of any of the conditions or warranties . . . you may recover from us as liquidated damages your net loss . . . and we further indemnify you against any additional expense (including legal costs) or liability you may incur by reason of or arising out of any such breach or alleged breach." 'Net loss' was defined as "the difference between the total rent payable to you under a relevant hire purchase agreement and the moneys actually received by you and legally retainable by way of rent and/or by way of net proceeds."

pay a sum of money as liquidated damages (so called) for the breach of a contractual stipulation from which no damage to the finance company flowed. And if this were so, then again it was said that the clause in the agreement was penal in its operation and in its intention.

Dismissing the appeal the Full Court held that the cardinal rule in these cases is to ascertain the intention of the parties.[3] Generally in non recourse agreements the intention is that the risk would be carried by the financier if, and only if, the dealer was not in breach of any of the conditions or warranties and should be found in breach, as in this case, then the risk was to be borne by the dealer. While the finance company might recover more from the dealer than it could from the hirer this would not be enough to enable one to say that the formula was penal.

MILLARD MARINE PTY. LTD. v. BEAUFORT PROPERTIES PTY. LTD.[1]

Equity—breach of contract

The plaintiff company sought the rectification of a lease agreement. The claim failed but the company sought relief against forfeiture for breach of covenant not to part with possession. The company omitted to obtain the permission of the landlord to assign the lease. Burt J. held that the Court had no statutory discretion to grant such relief under s. 81(8)(a) of the Property Law Act 1969 (W.A.). He did not rule out the possibility that a Court of Equity could grant relief in suitable circumstances but that if it did its attention would be directed to the conduct of the landlord, the question being whether in all the circumstances it was consistent with equity and good conscience that he should be allowed to enforce the forfeiture.[2] However on the facts of the case the relief could not be granted because the plaintiff company had been forgetful. Mere forgetfulness raises no equity.[3]

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3 Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. [1915] A.C. 79, 86 per Lord Dunedin. Reference was also made by Burt J. in his judgment to Campbell Discount Co. Ltd. v. Bridge [1962] 2 W.L.R. 439, 460 per Lord Denning M.R. and to Direct Acceptance Finance Ltd. v. Cumberland Furnishing Pty. Ltd. [1965] N.S.W.R. 1504.

1 Civil case no. 2281 of 1970 in the Supreme Court of Western Australia (Burt J.).

2 See Barrow v. Isaacs & Sons [1891] 1 Q.B. 417; House Property and Investment Co. Ltd. v. James Walker, Goldsmith and Silversmith Ltd. [1947] 2 All E.R. 789, 791 per Lord Goddard C.J.; Blomley v. Ryan (1954) 99 C.L.R. 362, 402 per Fullagar J.

3 Eastern Telegraph Co. Ltd. v. Dent [1899] 1 Q.B. 835.