THE CONCEPT OF MISREPRESENTATION

That contract and tort are brothers of the same mixed parentage is an historical fact proved regularly when our law school trumpets annually proclaim the advent of *Slades Case*[1] and the rise of assumpsit. The modern dichotomy of the private civil law is a rationalization only (later it will be necessary to consider the system as being trichotomous so as to embrace the field of trusts). The essential feature is that voluntary assumption of liability in assumpsit relates to the injurious action not to the legal relationship breach. Thus in tort the 'neighbour'[2] relationship is imposed with the subsequent action assumed while in contract both relationship and action are assumed.

This distinction leads to the logical conclusion that an award of damages in tort will have a different base and may have a different value than damages in contract. In tort the defendant does not assume his legal relationship to his neighbour, but having that thrust upon him must take his plaintiff as he finds him 'eggshell skull' and all.[3] But having thrust such a relationship upon an unwilling defendant it behoves the law only to grant compensation to the plaintiff for the injury to his direct property which that plaintiff has suffered.[4] We find, therefore, that in tort the arm of remoteness of damage is relatively long while the measure of damage is relatively confined.

In contract, however, different factors apply. Both remoteness and measure of damages are susceptible of explicit agreement between the parties and thus fall within the voluntary assumption[5] but if such agreement is merely implicit the courts may be rather loath to allow the plaintiff to stretch some of his claims. If remoteness and measure

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1 (1602) 4 Coke Rep 91a, 92b.

2 Donoghue v Stevenson [1932] AC 562.

3 Liesbosch (Dredger) v SS Edison [1933] AC 449; Haley v London Electricity Board [1965] AC 778.

4 British Transport Commission v Gourlay [1956] AC 185. This of course ignores the lesser field of punitive damages which have their roots in public, not private law. Even the House of Lords in Rookes v Barnard [1964] AC 1129 and the High Court in Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 have this in common.

5 The question of *volenti non fit injuria* will be raised at a later stage.

are explicitly agreed upon the court will generally follow that agreement whether it be wider than in tort (the limit set is the distinction between liquidated damages and penalty) or narrower following upon an exemption clause. Where the damages detail is not explicit there must be a general judicial principle which assists in determining the limits applicable. At its base the compensatory principle for damages is the same in contract as in tort but it finds a different expression. Property denied to the tortious plaintiff (for example a motor car) leads to damages upon the calculation of the value of the proprietary loss to the plaintiff. A contractual plaintiff alleges exactly the same principle but the property he has lost is the value of his contractual bargain, not the sole value of his motor car. Thus remoteness in contract becomes restricted solely to contractual results but measure of damages extends to such items as anticipated profits as part of the value of the bargain rather than as value of the subject property.

'Damages' in trusts, usually taking the form of or associated with an account, have a generally liberal scope both in terms of remoteness and in terms of measure. This is so since the elements of punitive correction and precedental deterrent are strong and an account from the defendant is required not only for the plaintiff's injury but also for the defendant's improper profit.[6]

Misrepresentation and fraud

All of this simple background has a vital role to play in the modern problems of misrepresentation.

Here a suggestion with respect to langauge will be made. For the present it will be convenient to talk in terms of false statements rather than misrepresentations. Let us assume a standard and simplified contractual arrangement in which V and P first negotiate an agreement and then have that agreement reduced to writing and properly executed. Further, let us assume that during negotinations V make five erroneous statements of fact to P, these being facts A to E inclusive. At the subsequent contracting and recording stage only facts A to C inclusive appear in the document. A becomes a contractual condition, B a contractual warranty. D is a contractually collateral representation and E is a contractually unrelated statement. What is C? If it is

6 Bray v Ford [1896] AC 44; Docker v Somes (1834) 2 My & K 655; Re Emmet's Estate (1881) 17 Ch D 142.

not a condition does its transcription automatically make it a warranty or can it be a misrepresentation?

In *Kramer v McMahon*[7] Halsham, J considered the position as follows:

> If in this branch of the law it was capable of amounting to and being treated as a representation of fact, then I think it is clear that in a relevant way it induced the plaintiffs to enter into the contract, seeing that they insisted upon such a clause being inserted into the draft contract before signature by them. No doubt there could be a representation embodied in a written contract which would amount to a representation of fact and could act as an inducement. My own inclination, however, would be to assume that once a representation has been embodied in a contract as a valid and operative term of it, then upon the breach of that term by reason of the fact that it did not truly state the facts contained in it, being raised in an action between the parties to the contract, it would matter not whether its falsity was known to the promisor or not. I would have thought that the matter was then one governed by the law of contract so far as that term was concerned. The same view seems to have commended itself to the authors of the seventh edition of KERR ON FRAUD AND MISTAKE . . .
>
> The same view seems to have commended itself to Branson J in *Pennsylvania Shipping Co v Compagnie Nationale de Navigation,* [1936] 2 All ER 1167. However, my thoughts on the matter appear to be incorrect, for the Justices of the High Court in *Alati v Kruger,* (1955) 94 CLR 216, express or concur in the view that a statement in a contract may constitute a term of it and also act as a representation of fact available as a fraudulent misrepresentation at one and the same time. Therefore I proceed to decide this case on the basis that the statement as to the average weekly trade contained in cl.12 of the contract can be relied upon as a fraudulent misrepresentation . . . [8]

The crucial question to ask is 'Did the High Court in *Alati v Kruger*[9] so decide?' It is suggested that no express language is to be found therein to actually establish that a condition or warranty also may be operative as a misrepresentation *per se*[10] but the fact of the

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7 [1970] 1 NSWR 194.

8 Ibid, 204.

9 (1955) 94 CLR 216.

10 The confusing judicial crumb dropping from Lord Pearce in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 at p 539 'The true rule is that innocent misrepresentation *per se* gives no right to damages. If the misrepresentation was intended by the parties to form a warranty between two contracting parties, it gives on that ground a right to damages (Heilbutt,

decision shows that a statement of fact recorded in the contractual document and regarded as a warranty did amount to a judicially recognised fraudulent misrepresentation, albeit without equitable remedy due to the non-exercise of judicial discretion. The judgment, however, does say:

> On the footing which must be accepted, that the contract had been induced by a fraudulent representation made by the appellant to the respondent, the latter had a choice of courses open to him. He might sue for damages for breach of the warranty contined in cl 21, for the statement in that clause clearly formed one of the terms of the contract and was not only a representation; but he could not do this and rescind the contract for misrepresentation. Secondly, he might sue to recover as damages for fraud the difference between the price he had paid and the fair value of the property at the time of the contract (*Holmes v Jones* (1907) 4 CLR 1692), but that again would involve affirming the purchase. Or, thirdly, provided that he was in a position to restore to the appellant substantially that which he had received under the contract, he might avoid the purchase and sue to recover his purchase money back from the appellant, with interest and also with damages for any loss which he may have suffered through carrying on the business in the meantime: cf SALMOND AND WILLIAMS ON CONTRACTS (2nd ed) (1945) p 269.[11]

There appear to be at least three reconcilable comments upon or explanations of this decision.

Firstly, if 'contractual term' is defined to embrace only conditions and warranties it is possible that there may exist non-term statements of fact which find recording within the contractual document but which are not sufficiently fundamental to be conditions nor 'warrant' anything. As with collateral representations outside of the document they assert and induce but do not agree to guarantee.

Secondly, one can return to the explicit common law attitude of the late nineteenth century and properly treat fraud and misrepresentation as separate and distinct legal factors. Thus in 1891 Moncrieff says:

Symons & Co v Buckleton [1913] AC 30)' should be taken as indicating that damages are awarded because the misrepresentation was a warranty but because the statement was raised in contractual status from being a representation to being a warranty—the point of the case cited in support by Lord Pearce.

11 (1955) 94 CLR 216, 222.

> Much of the controversy and confusion which culminated in *Peek v Derry* arose from a neglect to distinguish the principles on which the action of deceit is founded from those upon which Courts of Equity were in use to grant relief from contracts on the ground of misrepresentation. I have therefore dealt with my subject under the two leading heads of the Action of Deceit and Rescission.[12]

And the first edition of Halsbury was able to classify its subject as 'Misrepresentation and Fraud'[13] and state that whilst they were separate factors, their bed-lying habits made it convenient to refer to fraudulent misrepresentation:

> Misrepresentation, as a cause of action, or ground of defence, forms a distinct and separate chapter of English jurisprudence. Fraudulent misrepresentation, which is one (and the larger and more important) of its two species, is also one of the infinite varieties of fraud. The legal conceptions, therefore, of misrepresentation and fraud, to a certain extent, overlap. It seems desirable to consider in the first instance, the law relating to actionable misrepresentation, both fraudulent and innocent, leaving for subsequent and separate treatment the subject of fraud as manifested in forms and by instruments other than fraudulent misrepresentation.[14]

Further:

> On proof of the several matters specified below, an action is maintainable at the suit of the representee for damages in respect of misrepresentation. Such action is founded in tort; and the same principles of law and rules of evidence are applicable in whatever court the proceedings are instituted.[51]

These matters are well-known but easily forgotten. Provided it is always kept in mind that the phrase 'fraudulent misrepresentation' is merely one of convenience and does not describe a legal gene, no harm will come but it is apt to confuse. Therefore it is suggested that the term should be dropped in favour of 'fraudulent statements' leaving misrepresentation as the term solely applicable to those fallacious contractually collateral representations upon which equity will allow its action for rescission and associated defences to be operative. If such a language distinction was followed the trunk would not be

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12 Preface to A TREATISE ON THE LAW RELATING TO FRAUD AND MISREPRESENTATION.

13 This heading has been retained in later editions—eg 3rd ed (1959).

14 THE LAWS OF ENGLAND Vol 20 (1911) para 1609.

15 Ibid at para 1721.

obscured by the verbal foliage as seems so often the case. For example Chitty says:

> Fraud is a vitiating element in a contract. It is also a tort. It follows that the plaintiff who proves fraudulent misrepresentation is entitled to rescind the contract and may in addition be entitled to recover damages. In order to prove fraudulent misrepresentation, the law requires that fraud itself shall be established, that is fraud which would ground a cause of action in deceit.[16]

And later:

> A misrepresentation is innocent when it is made without fraudulent intent. Such a misrepresentation may entitle the representee to rescind the contract; it does not as a general rule entitle him to claim damages, unless it has become a term of the contract, although it may give rise to an estoppel against the representor. Unlike fraudulent misrepresentation, it is not a tort.[17]

A further ground upon which the decision in *Alati v Kruger*[18] could be explained is to emphasize the fact that fraud was not only the basis of the comomn law action of deceit but was itself actionable in equity where there was a fiduciary relationship extant between the parties.[19] Because of this remedy being based upon fiduciary and not a neighbour relationship equitable fraud was more extensive than was the common law counterpart.[20] In *Alati v Kruger* the essence was that the statement was fraudulent and the remedy sought was equitable, thus there seems no reason why equitable fraud should not be just as active within the contract as collateral to it.[21]

Misrepresentation and negligence

When one now turns to such cases as the much travelled (if not trampled) *Hedley Byrne & Co Ltd v Heller and Partners Ltd*[22] one

16 CHITTY ON CONTRACTS 22nd ed (1961) Vol 1 para 273.

17 Ibid, para 286.

18 (1955) 94 CLR 216.

19 Nocton v Lord Ashburton [1914] AC 932; Wicks v Bennett (1921) 30 CLR 80; McKenzie v McDonald [1927] CLR 134.

20 Covering the so-called 'constructive fraud', see Nocton v Lord Ashburton [1914] AC 932; Tate v Williamson (1866) 2 Ch App 55.

21 Insofar as innocent misrepresentation is concerned, within the contract the common law actions operate exclusively and displace any equitable remedy—Pennsylvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 All ER 1167—as otherwise the common law distinction between condition and warranty would be lost but there seems no reason for such a restriction upon totally reprehensible frauds.

22 [1964] AC 465.

does so with trepidation for the considerable volume of judicial and academic shadows already cast. Before any really valuable statement can be made about the present interrelationship between misrepresentation and negligence it is necessary to establish the nature of the cause of a *Hedley Byrne* action and in conjunction therewith the nature of the relationship between plaintiff and defendant. Despite the use of *Norton v Lord Ashburton*[23] as a basic precedent case—a case which involved a total of relationships between the parties which encompassed both contract and fiduciary trust and despite the obvious references in the judgments to a fiduciary concept, it was clear that *Hedley Byrne* was not intending to establish an equitable remedy but one in a common law tort[24] which now clearly has been recognized as properly lying in negligence.[25] This means that the test of relationship essentially is that of 'neighbour', as was particularly evident in the judgments of Lords Devlin and Pearce in *Hedley Byrne,* not agreement nor trust.

In seeking to identify the *Hedley Byrne* neighbour the courts have experienced considerable definitive problems. The judgments in the High Court and the Judicial Committee of the Privy Council in *MLC v Evatt*[26] give full and sufficient proof of this and whilst Australian courts are bound to follow the restricted 'definition' (if such a description is not too grandiose apropos these attempts) given by the three judge majority in the Privy Council, at least one English judge has expressed a preference for the wider attitude of the two dissentients.[27] In this respect it must be concluded that some remarks of Barwick CJ in the *Evatt* case are insufficiently guarded:

> He must give the information to some identified or identifiable person . . . It is this seemingly 'bilateral' aspect of the necessary relationship which, it seems to me, inclines the mind to the use of the expression 'assumption of responsibility' to describe the source of the duty of care and to the employment of concepts of consensus and contract, in the explanation of the emergence of the duty of care in utterance.[28]

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23 [1914] AC 932.

24 See eg Lord Reid [1964] AC 465, 486, Lord Morris of Borth-y-Gest, ibid, 501, 502-3 and Lord Hodson, ibid, 509.

25 There can be no doubt about the subscription of Lords Devlin and Pearce to this attitude. Later cases gradually have more overtly emphasised this aspect, see eg Esso Petroleum Co Ltd v Mardon [1975] 2 WLR 147.

26 (1969) 122 CLR 556 (H Ct) and 122 CLR 628 [1971] AC 793 (J C of P C).

27 Lawson J in Esso Petroleum Co Ltd v Mardon [1975] 2 WLR 147, 155.

28 122 CLR 556, 566.

As has been pointed out earlier, in tort the assumption factor applies to responsibility for a breach of the duty of care and not to the creation of the legal relationship and, indeed, other dicta by the learned Chief Justice recognise this for he continues:

> . . . yet, in my opinion, the resulting cause of action is tortious and in no sense arises *ex contractu,* or by reason of any consensus, or any assumption of responsibility by the speaker. The duty of care, in my opinion, is imposed by law in the circumstances.[29]

Elsewhere again:

> [The duty of care in negligence] does not really derive from contract though a contractual relationship may create the relevant proximity. Indeed the person to whom the duty is owned is not necessarily in any conscious relationship to the actor.[30]

In so far as the tort of negligence finds a place beside contract there seems no logical reason why that place should not be identical to that occupied by the tort of deceit. Of course one cannot look to equity for assistance since negligence, unlike fraud, is a peculiarly common law concept. Thus one could expect to find the equivalent illustrations of offered negligent conditions and warranties as well as negligent collateral representations all of which would give rise to damages claims but not to recission *qua* negligence *per se.*

Despite the use of the term negligent misrepresentation in *Hedley Byrne* itself, notably in the leading judgment of Lord Reid,[31] it is suggested that its use is as apt to confuse as is the phrase fraudulent misrepresentation and, for similar reasons, should be discarded.

In *Clark v Kirby-Smith*[32] Plowman J concluded that negligent misrepresentation ceased where contract began but *obiter dicta* in the New South Wales Supreme Court in *Dillingham Construction Pty Ltd v Downs*[33] and the South Australian Supreme Court in *Ellul and Ellul v Oaks*[34] ran contrary. Then came the English decision of Lawson J in *Esso Petroleum Co Ltd v Mardon*[35] which concluded that at least the pre-contractual [*quaere* collateral] representations could have both contractual and tortious effects. Lastly, Cooke J in the New Zealand Supreme Court held, in *Capital Motors Ltd v*

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29 Ibid.
30 Ibid, 570.
31 [1964] AC 465, 483.
32 [1964] Ch 506.
33 [1972] 2 NSWLR 49 .
34 [1972] 3 SASR 377.
35 [1975] 2 WLR 147.

Beecham,[36] that a clearly contractual representation could also have a separate tortious operation.

So far as these cases go there is no explicit finding that this legalistic overlap goes further than collateral misrepresentations but such a restricted limit is not only inconsistent with logic, as has been pointed out, but appears implicitly inconsistent with the *Capital Motors* case. There was no explicit finding as to the contractual quality of the statement since the action for recovery was framed in tort but it seems abundantly clear that by the general law of contract the statement that the car had only two previous owners, a statement which the plaintiff required to be verified before entering into the contract and he only agreed to purchase upon the understanding that this assertion was true, was at least a warranty and possibly even a condition.

Some other comments with reference to conditions and warranties might be taken as supporting the exclusion of the negligence head therefrom but carefully read they remain ambiguous. For example, in *Hedley Byrne* itself Lord Reid remarked:

> Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty.[37]

There is a world of difference between there being no difficulty for the parties to find a remedy in breach of warranty situations and there being no coextensive tortious remedy in such cases. Again, the reporter of the Privy Council decision in *MLC v Evatt* in the All England Law Reports says in his headnote:[38]

> In the absence of contract, the maker of a statement of fact or opinion ('the advisor') owed to a person whom he could reasonably foresee would rely on it in a matter affecting his economic interest ('the advisee') a duty to be honest in making the statement, but there was no duty of care unless . . .

In that immediate context it is not clear whether he means 'Even in the absence of contract . . . ' or 'Only in the absence of contract . . . ' but it seems clear that none of the judgments themselves supports the restricted version.

Before considering the final major aspect—that of the effect of consent or exclusion clause agreement with respect to misrepresentations and other statements, a minor diversion in the *Dillingham*

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36 [1975] 1 NZLR 576.
37 [1964] AC 465, 483.
38 [1971] 1 All ER 150, 151.

Constructions Case[39] might be permitted. There the problem arose since the governmental authority, when calling tenders for harbour construction work, failed to disclose their knowledge of the existence of under-sea-floor coal mines so that the construction work itself resulted in being much more complex and costly than had been envisaged by the tenderer. While accepting that some pre-contractual representation could be actionable negligence the learned judge decided that these contractual circumstances were not sufficiently special to take the case out of the normal *laissez faire 'caveat emptor'* type of situation in a *Hedley Byrne* relationship. With respect, it seems that no other result could have been entertained since to do so would have seriously eroded the former common law restrictions imposed upon contracts *uberrimae fidei* if a duty to disclose had been imposed and, in any case, it would seem difficult to conceive of silence in this situation being capable of amounting to a misrepresentation—which, of course, was one of the purposes of restricting the *uberrimae fidei* cases.

Consent and the exclusion clause

To take the exclusion clause in its contractual setting first, there are four major judicial approaches evident. Earliest came the ticket cases and the problem of notice having been given to the plaintiff.[40] Although this approach is not dead,[41] the modern man of commerce has listened to his legal adviser and as an effective legal instrument this approach certainly is moribund. Total failure of consideration seems to have been in the mind of Birkett LJ in *Karsales (Harrow) Ltd v Wallis*[42] and Parker LJ seems to sympathize in the tenor of his judgment. This approach was raised but rejected on the facts in *Yeoman Credit Ltd v Apps*[43] but the need for a *total* failure and the difficulties in a factual finding to support such an argument make it obviously of very limited value in this context.

The third approach, that of fundamental breach as championed by Lord Denning,[44] was put down as a separate legal doctrine by the

39 [1972] 2 NSWLR 49.

40 eg Henderson v Stevenson (1875) LR 2 Sc & Div 470; Parker v The South East Railway Coy (1877) 2 CPD 416; Causer v Brown [1952] VLR 1.

41 Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163.

42 [1956] 1 WLR 936, 942.

43 [1962] 2 QB 508.

44 Although traceable back to 1907 (see S Pearson & Son Ltd v Dublin Corportion [1907] AC 351 and Thorley v Orchis SS Co [1907] 1 KB 660) this attitude rose to prominence with the judgment of Denning LJ in Karsales (Harrow) Ltd v Wallis [1956] 1 WLR 936.

High Court in *Council of the City of Sydney v West*[45] and the House of Lords in the *Suisse Atlantique Case*[46] but was soon resurrected in the English Court of Appeal in *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*[47] as explained in *Farnworth Finance Facilities Ltd v Attryde*.[48] As far as Australian courts are concerned the replacement for fundamental breach was the strict interpretatio rule provided by the High Court in *West's Case*[49] and confirmed in *TNT (Melb) Pty Ltd v May and Baker (Aust) Pty Ltd*.[50]

It is suggested that both of these current approaches are deficient. In fundamental breach the attempt is made to rewrite the agreed contract in favour of one party only and while there is perhaps room for equitable intervention of this type where the contract is flagrantly 'unconscionable' the uncertain extent of such intervention and the clearly recognized limitations[51] in application, all deny the proper legalism behind fundamental breach. On the other hand, strict interpretation is again the invidious situation in which there is a legalist tug-of-war between the commercial draftsmen and the Bench. Even if the latter enters the contest in a determined fashion[52] a quick glance at *Metrotex v Freight Investments*[53] indicates that the draftsman will win to the confusion of the judiciary. Ultimately his victory is inevitable whilst such limited approaches are pursued. Strict interpretation can have effect only if there is defective language to be strict about and only to the extent that liabiliy for the damage sustained is the crucial question; ie this means that the exclusion clause goes solely to the assumpsit, not to the basic relationship.

Jones v Vernon's Pools Ltd[54] is recognized as fitting into the contractual principle 'no intention to create legal relations may not prevent agreement but will prevent a contract'. Where the exclusion

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45 (1965) 114 CLR 481.

46 Suisse Atlantique Societe D'Armement Marine SA v NV Rotterdamsche Kolen Centrale [1967] AC 361.

47 [1970] 1 QB 447.

48 [1970] 1 WLR 1053.

49 (1965) 114 CLR 481.

50 (1966) 115 CLR 353.

51 See eg South Australian Railways Commission v Egan (1973) 47 ALJR 140; Clarke *Unequal Bargaining Power in the Law of Contract* (1975) 49 ALJ 229.

52 It is suggested that judicial fortitude in this area was not clearly demonstrated by the High Court in the relatively early case of Davis v Pearce Parking Station Pty Ltd (1954) 91 CLR 642.

53 [1969] VR 9.

54 [1938] 2 All ER 626.

clause is drafted so widely that, instead of denying responsibility for a sufficiently specified and identified act in breach of contract, it denies all liability (as was the situation in *Metrotex*) it is submitted that there is an effective indication of no intention to create that mutual legal relation called a contract. Although this approach would involve the court in a weighing of the exclusion clause to see whether it went to damage and was only strictly interpreted, or went to the basic relationship, this in fact is no innovation since the High Court performed the same function in *Placer Development Ltd v Commonwealth*,[55] albeit in a different factual context. If on this approach it was decided that the exclusion clause went too far and destroyed the apparent contract the injured plaintiff would be left to his general tortious remedies such as those in gratuitous bailment, perhaps with the assistance of detinue, conversion and quasi-contract.

As has been pointed out earlier the trust situation appears closely similar to that of contract in that, in the present context, the relationships are both consensual in origin. In trusts the 'exclusion clause' problem (although it is not called that) seems to have been attacked in two ways. Firstly, apropos the trustee-beneficiary situation, any breach of trust which the *sui juris beneficiary* has agreed to is not actionable by that beneficiary,[56] but the breach remains and is actionable by other beneficiaries who have not agreed to suffer the consequences.[57] Additionally, where the settlor authorizes specific activity which without such authorizaition would amount to a breach of trust, the simple answer is that settlor authorization prevents the activity from being a breach. Both of these attitudes relate to the damage or activity side of the general problem. What is, or is likely to be, the situation if a very broad authority from the settlor approves of any action which the trustee feels inclined to take, which action otherwise would be contrary to the totality of the fiduciary duties of a trust? If one assumes that this provision goes further than a mere discretionary trust, equity it seems would be forced into one of two avenues. Either it could be recognized that although no fiduciary obligation *to* any beneficiary was present, nevertheless there was sufficient evidence

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55 (1969) 121 CLR 353.

56 Brice v Stokes (1805) 11 Ves 319, 32 ER 1111; Fletcher v Collis [1905] 2 Ch 24.

57 Brice v Stokes (1805) 11 Ves 319; Bather v Kearsley (1844) 7 Beav 545, 49 ER 1177.

58 This is the same problem often encountered with the *donatio mortis causa*—see Re Lillington, Pembery v Pembery [1952] 2 All ER 184.

that the trustee was not intended to take the benefit personally in which case a resulting trust would operate in favour of the settlor or, if not even this element was present, there would surely be an outright and perfect gift to the trustee. In other words the clause would have effectually destroyed the alleged fiduciary relationship since there would be no evidence that such relationship was ever intended to be created.[58] It is suggested that this is exactly the same process of reasoning advanced earlier upon intention to create contractual relations.

Turning to tort, the consent element finds its base in the principle *violenti non fit injuria* and here, it is submitted, consent can only relate to the possible occurrence of the fore-shadowed damage;[59] thus, although warning notices can be effective if agreed to there must be specific agreement referable to the injury and no general agreement to all risks is effective unless there is corresponding knowledge of what damage might arise. This surely, is the problem encountered with sporting venues[60] as well as the dashboard notices in motor cars as in *Dann v Hamilton*[61] where, however, Asquith J unfortunately confused the proper *volenti*/assumpsit connection with *volenti*/neighbour: 'As a matter of strict pleading, it seems that the plea of *volenti* is a denial of any duty at all, and therefore, of any breach of duty, and an admission of negligence cannot strictly be combined with the plea.'[62] That this interpretation is wrong was indicated in language which still leaves something to be desired, by Diplock LJ in *Wooldridge v Sumner*:[63]

> In my view the maxim in the absence of expressed contract has no aplication to negligence simpliciter where the duty of care is based solely upon proximity of 'neighbourhood' in the Atkinian sense. The maxim in English law presupposes a tortious act by the defendant. The consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk . . . the maxim has in my view no application to this or any other case of negligence simpliciter.

One specific defect remaining in this statement is the reference to expressed contract and it should be understood that even with expressed contract present the effect *qua* duty is still restricted to assumed con-

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59 Letang v Ottawa Electric Rail Co [1926] AC 725.
60 Wooldridge v Summer [1963] 2 QB 43.
61 [1939] 1 KB 509.
62 Ibid, 512.
63 [1963] 2 QB 43, 69-70.

tractual duty and is not applicable to imposed tortious neighbourship. The cases in which contractual exclusion clauses have been brought in aid of defence to torts but have failed, have failed on the strict interpretation ground[64] or because they were insufficiently explicit in specifying as covered the injurious acts subsequently occurring.[65]

If one now relates this to the *Hedley Byrne* exclusion clause possibility, fully recognized in that and subsequent cases,[66] one would expect that a *volenti*/assumpsit type of exclusion notice, given and accepted, would be effective but a simple 'E & O E' endorsement would not.

It is suggested that this is exactly the point Lord Reid had in mind when referring to this question. 'If he chooses to adopt the last [excluded liability] course he must, I think, be held to have accepted some responsibility for his answer being given carefully, to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require'.[67] *Hedley Byrne* itself, of course, offers an application of the strict interpretation approach to exclusion statements, even outside a contractual context.

In the light of this a final reference back to *Capital Motors Ltd v Beecham*[68] is necessary. There the contractual exclusion clause stated, inter alia, ' . . . no warranties, representations or promises have been made by you or your servants . . . ' That this was not available in a *Hedley Byrne* action seems almost to have been assumed when Cooke J dismissed it as an unproved question of fact and said: 'In this situation counsel for the appellant relied on the condition rather faintly at the hearing of the appeal, and I think his misgivings were well-founded. On the facts of this case I do not think that the condition negated a duty of care.'[69] Again this unfortunate confusion is evident, especially so here since just before this passage the learned judge had put the point more clearly: ' . . . the relevance of such a condition in tort, as shown by *Hedley Bryne,* is that it may be part of the material from which one deduces whether a duty of care was assumed; or, put more

64 See eg TNT (Melb) Pty Ltd v May and Baker (Aust) Pty Ltd (1966) 115 CLR 353.

65 eg Canada Steamship Lines v R [1952] AC 192 and White v John Warwick Ltd [1953] 1 WLR 1285.

66 The absence of being able to gain any protection in this fashion may well be a major underlying reason for barristers being excluded from the Hedley Byrne duty—Rondel v Worsley [1969] 1 AC 191.

67 [1964] AC 465, 486.

68 [1975] 1 NZLR 576.

69 Ibid, 581.

shortly, did it operate as a disclaimer?'[70] Whatever may have been the potential tortious ramifications of this clause in the *Capital Motors* case it does seem clear that, had the action been founded in contract, the contractual effects of the clause would have been a far more difficult obstacle for the plaintiff to surmount.

Conclusions

It is suggested that the following conclusions can, and should, be drawn:

1. There are no such legal animals as fraudulent misrepresentation and negligent misrepresentation.
2. Remedies may be sought for fraud in common law deceit or in equity, for negligence in common law tort or for contractually collateral misrepresentations ('innocent') in equity.
3. These remedies are cumulative and are not mutually exclusive.
4. All exclusion clauses must be construed strictly whether arising out of contract or consensus *simpliciter*.
5. Whether in contract, tort or trust situations the exclusion clause can have the effect of denying remedial action by the injured party since that party has agreed to accept sole responsibility for foreseen damage.
6. In contract and in trusts, but not in tort, an exclusion clause may also deny any intention to create the legal relationship which, without such clause, would be held to be created. If this occurs out of 'contract' the parties are left with their tortious relationships, while if it applies out of a 'trust' situation the parties must resort to the appropriate property remedies largely at common law but possibly with the assistance of the equity of gifts.

DEREK W CHANTLER*

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70 Ibid, 580.

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PHOTOCOPYING: "FAIR DEALING" UNDER THE COPYRIGHT ACT 1968

The recently decided case of *Moorhouse and Angus & Robertson (Publishers) Pty Ltd v University of New South Wales*[1] has raised matters of general importance in relation to the large scale practice of photocopying in Australia, and especially insofar as it concerns educational institutions where photocopying is increasingly relied on as a method of extracting teaching and study materials. That the decision raises questions of importance is underlined by the announcement in July 1974 that a Copyright Law Committee under the chairmanship of Mr Justice Franki had been appointed 'to examine the question of reprographic reproduction of works protected by copyright in Australia'.[2] It is, therefore, an opportune time to examine the relevant areas of copyright law and the decision in *Moorhouse* from the point of view of reprographic reproduction in the specific area of 'fair dealing' under s 20 of the Copyright Act 1968. This section provides a statutory defence to infringement on the ground that the copying was done for the purpose of research or private study.

Copyright and copying

Copyright, as provided by s 31 of the Copyright Act, is the exclusive right to do certain things including the right to reproduce the copyright work in material form. Any reproduction of a work in which copyright subsists will be an infringement of that copyright[3] unless it is authorized[4] or is a use without piracy,[5] or a use or act covered by

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1 [1974] 3 ALR 1. (Supreme Court of NSW, Equity Division); [1975] 6 ALR 193 (High Court).

2 The terms of reference of the Committee are as follows: To examine the question of the reprographic reproduction of works protected by copyright in Australia and to recommend any alterations to the Australian copyright law and any other measures the Committee may consider necessary to effect a proper balance of interest between owners of copyright and the users of copyright materials in respect of reprographic reproduction. The term 'reprographic reproduction' includes any system of technique by which facsimile reproduction are made in any size or form.

3 See Section 31 (1) (a) (i) and 36 (1) of the Copyright Act.

4 eg by licence of the copyright owner. See Section 15 of the Copyright Act.

one of the statutory defences to infringement. Section 40 of the Copyright Act provides that—

> A fair dealing with a literary, dramatic, musical or artistic work, . . . for the purpose of research or private study does not constitute an infringement of the copyright in the work.

Difficult problems arise when a decision has to be reached as to whether the copyright in a particular work has been infringed by another work. The Courts will have to decide *inter alia* whether copyright subsists in the plaintiff's work[6] and whether the defendant's work is in fact a copy which infringes that copyright.[7] Neither of these matters, however, need be examined in this context. Rather, the question to be considered is: Assuming copyright to subsist in a work under section 31 of the Copyright Act, in what circumstances will a reprographic reproduction[8] of the work be held to infringe that copyright and who may be held liable for such infringement? This question is further narrowed down to a consideration of the effect of the defence to infringement of copyright under section 40 of the Copyright Act. The following matters require examination: What is a 'substantial part' of a work? What is a 'fair dealing' with a copyright work? What is the meaning of 'research and private study'? In what circumstances can a person be said to authorize the doing of an act comprised in copyright?

Substantiality

Section 36(1) of the Copyright Act provides—

> Subject to this Act, the copyright in a literary, dramatic, musical or dramatic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

Copyright includes the exclusive right 'to reproduce the work in a material form'[9] and Section 14(1) of the Copyright Act provides that—

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5 See COPINGER AND SKONE JAMES ON COPYRIGHT (11th edition), 173.

6 eg see Cuisenaire v Reed (1963) VLR 719.

7 See Blackie & Sons Ltd v The Lothian Book Publishing Coy Pty Ltd (1921) 29 CLR 396; Francis Day & Hunter Ltd v Bron [1963] Ch 587.

8 The advertisements announcing the appointment of the Copyright Committee referred to in footnote 2 carry the statement: 'Reproduction by processes commonly referred to as photocopying comes within the term reprographic reproduction'.

9 Section 31 (1) (a) (i), Copyright Act.

> (a) a reference to the doing of an act in relation to a work . . . shall be read as including a reference to the doing of that act in relation to a *substantial part*[10] *of the work* . . . ; and
> (b) a reference to a reproduction . . . or copy of a work . . . shall be read as including a reference to a reproduction . . . or copy of a *substantial part* of the work . . .

What is a 'substantial part'? As stated by Lord Hatherly in *Chatterton v Cave*[11] ' . . . if the quantity taken be neither substantial nor material . . . no wrong is done . . . ' In the same decision Lord Hagan in the course of his judgment said—

> . . . to render a writer liable for literary piracy, he must be shown to have taken a material portion of the publication of another:—the question as to its materiality being left to be decided by the consideration of its quantity and value, which must vary indefinitely in various circumstances. As Lord Chancellor Cottenham said in *Bramwell v Halcomb* [40 ER at 1110] 'It is useless to refer to any particular cases as to quantity'. The quantity taken may be great or small, but if it comprise a material portion of the book, it is taken illegally. The question is as to the substance of the thing . . . In all cases, the matter is dealt with as one of degree. In all, quantity and value are both the subjects of consideration, and in none of them has an infringement been established without satisfactory evidence of an appropriation, possibly involving a substantial loss to one person and a substantial gain to another; . . . The question in every case must be a question of fact: . . . there may be a taking so minute in its extent and so trifling in its nature as not to incur the statutable liability.[12]

Two points should be noted before proceeding to an examination of the criteria referred to by the courts in deciding whether an appropriation is substantial. Firstly, the problem of infringement in the case of reprographic reproduction will be different from that problem in relation to other types of infringement. For instance in a case where a court has to decide whether a book infringes the copyright in another book by appropriating material contained therein the question will be whether there has been copying and whether that copying has been substantial.[13] In other areas the test of visual similarity will

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10 Emphasis added.
11 (1878) 3 App Cas 483, 492.
12 Ibid 497-499.
13 See Blackie & Sons Ltd v The Lothian Book Publishing Coy Pty Ltd (1921) 29 CLR 396.

be employed to establish that there has been a breach of copyright.[14] In the case of reprographic reproduction the question whether there has been copying or not is foreclosed. The test of infringement rests solely on whether the copying is substantial assuming that copyright subsists in the plaintiff's work. Secondly, although some of the cases referred to fell for decision under earlier copyright legislation which did not contain a provision equivalent to section 14 of the Copyright Act, it was pointed out by Slesser LJ in *Hawkes & Son (London) Ltd v Paramount Film Services Ltd*[15] that the words 'substantial part' in the Copyright Act 1911 'had not appeared before that time in any statute, but they are words which are derived from several of the cases in which learned judges have used either those particular words or language similar'.

Returning to the question of whether a particular appropriation is 'substantial' the basic test is essentially one of fact in the light of all the circumstances.[16] The following criteria may be included within the relevant circumstances:

(a) Both the quality and the quantity of what is taken will be important but a quantity no matter how small if substantial and material, will be a piracy;[17]

(b) The quality of the appropriated material refers to its distinctiveness in a broad sense rather than to the limited idea of pecuniary value though this element will influence the court in its decision. In *Hawkes & Son (London) Ltd v Paramount Film Services Ltd*[18] the plaintiff company as owner of the copyright in the musical composition 'Colonel Bogey' sought an injunction to prevent further breaches of that copyright by the defendant companies who had made and distributed a newsreel film which included a sequence in which a band marced past playing 'Colonel Bogey'. The members of the Court of

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14 See Archer, Mortlock, Murray & Woolley and another v Hooker Homes [1971] 2 NSWLR 278 at 291 (architect's plans); Walt Disney Productions v Edwards Publishing (1954) 55 SR (NSW) 162 (comic strip characters).

15 (1934) Ch 593, 605.

16 Blackie & Sons Ltd v The Lothian Book Publishing Coy Pty Ltd (1921) 29 CLR 396, 403; Chatterton v Cave (1878) 3 App Cas 483, 498; Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 273, 283.

17 Chatterton v Cave (1878) 3 App Cas 483, 498 citing Bramwell v Halcolmb 3 My & Cr 737, 738; Leslie v J. Young & Sons (1894) AC 335, 342; Trade Auxiliary Coy v Middlesborough & District Tradesmen's Protection Association (1889) 40 Ch D 425, 429.

18 (1934) Ch 593.

Appeal attended a screening of the film and concluded that ' . . . there is an amount taken which would be recognized by any person'.[19]

Romer LJ said:[20]

> That the portion which they have taken is substantial cannot be denied. The part which has been taken consists of 28 bars, which bars contain what is the principal air of the 'Colonel Bogey' march—the air which everyone who heard the march played through would recognize as being the essential air of the 'Colonel Bogey' march.

(c) The purpose for which the defendant has used the appropriated material will also be relevant. In *Blackie & Sons Limited v Lothian Book Publishing Company Proprietary Limited*[21] Starke J, having decided that the defendant had made an appropriation from the plaintiff's book that was in the circumstances, 'substantial and material' said:

> The extracts were made, I do not doubt, for the purpose of enhancing the value of the defendants book, and I see no reason for saying that the defendant did not achieve its purpose. Further, these extracts saved the defendant and its editor some labour and research.

Again, in *Hawkes & Son (London) Ltd v Paramount Film Services Ltd*[22] Lord Hanworth referred to 'the evidence that a substantial part of the musical copyright could be reproduced apart from the actual picture film' as a 'non-synchronous interlude'. His Lordship noted that there was evidence before the court suggesting that the sound-track of the newsreel film could be used separately to provide interlude music thus increasing its appeal to cinema owners.

(d) One particular purpose to which the court will give weight is that of competition. In a case in which the defendants took extracts from the plaintiff's trade information paper and published it in a trade gazette of their own North J pointed out[23] that—

> all that is material for the defendants for the purpose of their newspaper has been taken, and that it is taken entirely—copied

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19 Ibid, 604 (Lord Hanworth MR).

20 Ibid; 608-609. See also Canadian Performing Right Society v Canadian National Exhibition Association [1934] 4 DLR 154, 157; Warne v Seebohm [1888] 39 Ch D 73.

21 (1921) 29 CLR 396, 404.

22 (1934) Ch 593, 604.

23 Cate v Devon & Exeter Constitutional Newspaper Company (1889) 40 Ch D 500, 507.

> exactly from the paper—taken regularly, systematically, every week, and published for the purpose of giving information to the very persons to whom the Plaintiffs intend their publication to give that information.

In *Scott v Stanford*[24] the Defendant's compilation of mineral statistics priced at 2s 6d included 107 pages 'taken bodily . . . by the mere use of paste and scissors' from the Plaintiff's coal statistics, priced at £3 3s. Sir W Page Wood VC said: 'The difference in price is not an important ingredient in the case'. The likelihood of competition may even be the determining factor in a case[25] and where there is direct competition there is a 'special duty of the defendant . . . to avoid the appropriation of the labour and research of its rivals'.[26]

(a) The lack of competition between two works will not however protect an appropriation. In an action for infringement of the plaintiff's copyright in a list of brood mares at stud in the United Kingdom the judge said:[27]

> . . . an unfair use may be made of one book in the preparation of another, even if there is no likelihood of competition . . . After all copyright is property, and an action to restrain the infringement of a right of property will lie even if no damage be shown.

(f) Lack of *animus furandi* and absence of actual damage will not avail a defendant if the appropriation is substantial.[28]

The question whether there has been a substantial reproduction or appropriation is thus essentially one of fact in the light of all the circumstances bearing in mind that certain criteria are obviously appropriate in different situations but will vary from case to case. In any case 'the question of substantiality is not determined solely by any process of arithmetic,'[29] and in *Ladbroke (Football) Ltd v William*

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24 (1867) LR 3 Eq 718, 723.

25 Weatherby & Son v International Horse Agency & Exchange Ltd (1910) 2 Ch 297, 305.

26 Blackie & Sons Ltd v The Lothian Book Publising Coy Pty Ltd (1921) 29 CLR 396, 403. See also Trade Auxiliary Coy v Middlesborough & District Tradesmen's Protection Association [1889] 40 Ch D 425, 429.

27 Weatherby & Son v International Horse Agency & Exchange Ltd (1910) 2 Ch 297, 305. See also BBC v Wireless Gazette Publising Coy (1926) 1 Ch 433.

28 Scott v Standford (1867) LR 3 Eq 718, 723; Hawkes & Son (London) Ltd v Paramount Film Services Ltd (1934) Ch 593, 602-603.

29 Joy Music Ltd v Sunday Pictorial Newspaper (1920) Ltd (1960) 1 AER 703, 706.

Hill (Football) Ltd[30] three of the law Lords (Lords Reid, Hodson and Pearce) referred to the 'force in the words of Peterson J in the case of *University of London Press Ltd v University Tutorial Press Ltd*[31] that 'what is worth copying is prima facie worth protecting'.

Substantiality is relevant in the case of photographic copying. As noted earlier, in distinguishing this particular type of appropriation from others the question of copying will not arise; the court will not have to decide whether there has been an actual use of the plaintiff's work in the production of the defendant's work[32] ie whether there has been copying. It is well settled that the independent production of identical or similar works by two different persons will entitle both works to copyright protection and the second will not infringe the copyright in the first.[33] This of course is not the case where photographic reproduction is concerned and it may be necessary for the legislature to lay down special rules to determine the question of substantiality in relation to this form of reproduction. In the future, it may in fact be a question of quantity 'determined solely by a process of arithmetic'. Before examining this consideration more fully in the light of the decision in *Moorhouse* there are several further judicially defined phrases which require examination.

Fair dealing

'Fair dealing' is a statutory defence[34] and does not mean the same as 'fair use' a phrase used in earlier cases[35] to indicate that although some use had been made of a copyright work it was not substantial or material use. 'Fair dealing' under section 40 of the Copyright Act, where the work is used 'for the purpose of research or private study',[36] is the relevant protective provision. An appropriation or piracy of a copyright work may be protected under section 40 even though such

30 [1964] 1 WLR 273, 279, 288, 293.

31 [1916] 2 Ch 601, 610.

32 eg see Blackie & Sons Ltd v Lothian Book Publishing Coy Ltd (1921) 29 CLR 396, 400-402 where Starke J made a detailed examination of the similarities between the two books concerned.

33 eg see Francis Day & Hunter Ltd v Bron [1963] 1 Ch 587, 617; Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 273, 276.

34 Section 40, 41 & 42 of the Copyright Act 1968. Note also the defence was available under the UK Copyright Act, 1911, Section 2(1) (i), adopted in Australia by the Copyright Act 1912.

35 eg Chatterton v Cave (1878) 3 App Cas 483, 492.

36 Sections 41 and 42 are statutory defences of 'Fair dealing' for the purposes of, respectively, 'criticism or review' and 'the reporting of news', and as such have little or no relevance to the question of photocopying.

appropriation or piracy is substantial; that is, an infringement which is an infringement of a substantial part of a copyright work will be protected if the conduct of the defendant comes within section 40.[37]

From the few cases in which the defence has been considered it would appear that a strict construction will be placed on the words 'fair dealing' and the purpose of the appropriation. In *Hawkes & Son (London) Ltd v Paramount Film Service Ltd*[38] Slesser LJ refused to hold that a newsreel film was a newspaper summary within the meaning of section 2(1) (i) of the UK Copyright Act 1911, which was similar in effect to section 42 of the Commonwealth Copyright Act 1968. 'I think this proviso must be dealt with strictly, and when it says "newspaper summary" it means newspaper summary and nothing else'.[39]

The exception for 'research and private study' does not include copying for general educational purposes. It cannot be contended 'that the mere republication of a copyright work was a "fair dealing" because it was intended for purposes of private study; nor, if an author produced a book of questions for the use of students, could another person with impunity republish the book with the answers to the questions'.[40] In the case from which the last statement is cited Peterson J, deciding that the defendant's republication of the plaintiff's exam papers with some minor criticisms and in some cases, answers, infringed the plaintiff's copyright pointed out that 'both publications are intended for educational purposes and for the use of students', and therefore the defence of 'fair dealing' failed.

One case in which the defence has succeeded is *Johnstone v Bernard Jones Publications Ltd and Beauchamp*.[41] Here the defendants published a letter in which the plaintiff's 'Reduced permutation table' which enabled football pool entrants to arrange their entries for prospects of good results was set out and criticized and compared with another table. Morton J said:

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37 Johnston v Bernard Jones Publications Ltd and Beauchamp (1938) 1 Ch 599, 603; Hawkes & Son (London) Ltd v Paramount Film Service Ltd [1934] Ch 593, 607; Hubbard v Vosper [1972] 2 WLR 389, 393.

38 [1934] Ch 593, 607.

39 Ibid, 608. See now Section 42, Copyright Act 1968 which extends the defence of 'fair dealing' to 'the reporting of news by means of broadcasting or in a cinematograph film'.

40 University of London Press Limited v University Tutorial Press Ltd [1916] 2 Ch 601, 613.

41 (1938) 1 Ch 599. The defence of 'fair dealing' was claimed under the equivalent to Section 41 Copyright Act.

> It think that [the letter] was a fair dealing with the work as far as R I H [the author of the letter] was concerned. I think that R I H honestly desired to offer certain observations by way of comparison and criticism of the two tables which he set out in his letter.[42]

Another case in which the defence succeeded is *Hubbard v Vosper*[43] a claim for an injunction to prevent the publication of the defendant's book entitled 'The Mind Benders' which was critical of the methods and philosophy of the Church of Scientology of California. Large passages from the books, letters and bulletins of the cult's founder, L Ron Hubbard, were reproduced in 'The Mind Benders'. The defendant claimed 'fair dealing' for the purposes of criticism and review under the English Copyright Act 1956 and the Court of Appeal upheld this defence. In the course of his judgment Lord Denning said:

> It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotation and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair.. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could find this to be fair dealing.[44]

It has also been doubted whether the defence of 'fair dealing' extends to unpublished liteary works.[45]

It is clear that the defence is a limited one and one which will be strictly confined to the literal meaning of the stated purposes for which the defence will operate. With some degree of hesitation the following points are suggested to indicate the limits of 'fair dealing'.

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42 Ibid, 606.

43 [1972] 2 WLR 389.

44 Ibid, 394.

45 British Oxygen Coy Ltd v Liquid Air Ltd [1925] 1 Ch 383, 393; cf Hubbard v Vosper [1972] 2 WLR 389, 394; Beloff v Pressdram Ltd [1973] 1 AER 241, 263. See also Distillers Co (Biochemicals) Ltd v Time Newspapers Ltd [1974] 3 WLR 728, 740.

(a) *Substantiality:*

' . . . the substantiality of the part reproduced is, in my view, an element which the Court will take into consideration in arriving at a conclusion whether what has been done is a fair dealing or not.'[46]

This statement also finds support in the judgment of Romer LJ in *Hawkes & Son (London) Ltd v Paramount Film Services Ltd.*[47]

(b) *Oblique motive:*

Although it was unnecessary to decide the point Morton J[48] thought there was 'much force in the contention . . . that any oblique motive . . . would render the publication . . . in question an unfair dealing . . . ' Such motives said that judge might include 'the motive of damaging the plaintiff or of taking unfair advantage of his work'.[49]

Research or private study

The interpretation given to these words is strict and literal. The decision in *University of London Press Ltd v University Tutorial Press Ltd*[50] suggests that republication of copyright material will not be a 'fair dealing' merely because it can be used for the purposes of research and private study; neither will a general educational purpose be sufficient to protect an infringement of a copyright work. To adopt the submission of one learned text[51] 'Private study' . . . only covers the case of a student copying out of a book for his own use, but not the copying by anyone else on his behalf, nor the circulation of copies among other students. The substantiality of the appropriated material will also be relevant. As suggested earlier, because of the special nature of photographic reproduction, the question of substantiality should be largely an arithmetical one.

Moorhouse and Angus & Robertson (Publishers) Pty Ltd v University of New South Wales

Photocopying is a relatively recent innovation and an unquestionable boon to students amongst others. The advantages in the situation

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46 Johnstone v Bernard Jones Publications Ltd and Beauchamp (1938) 1 Ch 599, 603; Hubbard v Vosper [1972] 2 WLR 389, 394.

47 [1934] Ch 5593, 609.

48 Johnstone v Barnard Jones Publications Ltd and Beauchamp (1938) 1 Ch 599, 607.

49 Ibid. See COPINGER AND SKONE JAMES ON COPYRIGHT (elevnth edition), 196 for the suggestion that the likelihood of competition between the two works will have to be considered; also per Lord Denning in Hubbard v Vosper [1972] 2 WLR 389, 394.

50 [1916] 2 Ch 601.

51 COPINGER AND SKONE JAMES ON COPYRIGHT (eleventh edition) 197.

where books or journals are not readily obtainable or where only a small portion of the book is relevant are apparent to everyone. However every copyright is a statutory property right[52] and the owner of the copyright in any work is entitled to protect his property by action and to seek compensation for any appropriation which causes him damage. As far as photographic reproduction is concerned the greatest damage to copyright works is the diminution of sales and therefore of royalty payments to the author.

In this country the Australian Copyright Council (ACC) amongst other organizations, has expressed concern over the abuse of photocopying facilities since the introduction of that method of reproduction. In his judgment in *Moorhouse* Hutley JA outlined the relevant facts against the background of (a) the efforts of the ACC, in protecting the rights of copyright owners, to gain evidence against the use of unrestricted photocopying facilities in order to persuade public institutions such as Universities that the provision of these facilities encouraged numerous breaches of copyright and (b) the efforts of the defendant University in particular (and one assumes all Universities and similar institutions generally) to continue the practice of unsupervised photocopying in the interests of library users.

The relationship between the University of New South Wales and the ACC was punctuated by disputes and correspondence. The University refused to allow the ACC to station an observer in the University Library's photocopy room and allegations of substantial breaches of copyright were formally denied by the University. When the ACC used statistics released by the University Librarian for propaganda purposes the release of statistics was discontinued. On the evidence before the judge it was clear that the University Librarian was deliberately concealing information to protect the interests of library users.

The evidence before the Court in *Moorhouse* disclosed that in the University Library was a photocopying room containing 8 token operated machines supervised by one or two persons. The supervisors' responsibilities extended to the duty to prevent copyright infringements, but as Hutley JA pointed out, in this respect 'there were supervisors but no supervision'. Further in 4½ years there was not one reported breach of copyright. The University issued library guides; these were misleading: the earlier ones were not intended to

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52 Section 8 Copyright Act. The only exception is Crown Copyright.

draw attention to the possibility of infringing copyright in photocopied materials. The 1973 guide referred to photocopying for the purpose of research or private study but omitted any reference to 'fair dealing'.

A notice relating to copyright was affixed to the machines but referred only to section 49 of the Copyright Act[53] which was not relevant to student copying. There was evidence to suggest strongly that large amounts of copyright material were being pirated, that numerous infringements of copyright were taking place and the machines were available without any real attempt to control the reproduction of copyright material; that special notices based on advice given by Professor Derham at the request of the Australian Vice Chancellors Conference had been forwarded to the defendant University in May 1970 but had never been affixed. Those notices referred specifically to 'fair dealing' and in fact set out in quantative terms what a fair dealing would be. In commenting generally on the actions of the Defendant University Hutley JA said that the common attitude of the University's officers from the Vice Chancellor down was the absence of any desire to acquire knowledge 'of what use was being made of photocopying machines or whether such use was consistent with the Act.'[54]

A collection of short stories written by Frank Moorhouse the first plaintiff, were collected and published in a volume titled 'The Americans Baby'. The book was recommended on a reading list issued to 450 students taking the Political Science I course offered within the Defendant University in 1974. There was one copy of the book in the University Library. Brennan, a graduate of the University, at the instigation of the ACC, made two copies of one of the short stories from 'the Americans Baby' on the University's photocopying machines. Neither of the plaintiffs had foreknowledge of Brennan's action but on learning of it commenced the present action against the University for infringement of copyright. The only ground upon which this was ultimately pressed was under section 36(1) of the Copyright Act:—' . . . copyright . . . is infringed by a person who . . . authorizes the doing in Australia of, any act comprised in the copyright'.

The alleged breach by Brennan was the only instance referred to in evidence. Had the University authorized the breach? Or in the

53 Section 49 is only marginally relevant to student copying. It provides that copying by or on behalf of a librarian of a non-profit making library will, subject to the other conditions set out in the section, not infringe copyright.

54 [1974] 3 ALR 1, 13.

wider terms under which Hutley JA appeared to consider the circumstances, would the University be held to authorizing the many infringements of copyright which the judge found were in fact taking place?

Authorization

In *Falcon v Famous Players Film Co Ltd*[55] Bankes LJ in the course of his judgment said that 'authorize . . . is to be understood in its ordinary dictionary sense of "sanction, approve and contenance" '. Hutley JA approved and applied this definition of 'authorize' referring also the decision of the High Court in *Adelaide Corporation v Australasian Performing Right Association*[56] to show that the terms 'sanction, approve and contenance' were to be read in the alternative not cumulatively.[57] Thus 'countenance is the widest of the terms and most appropriate and the term under which any liability of the University is most likely to be subsumed.'[58]

In addition the judge refered to the *Adelaide Corporation Case*[59] in support of the proposition that 'countenance can occur by reason of inactivity'. In their joint judgment in that case Gavan Duffy and Starke JJ had adopted the words of Bankes LJ from another decision.[60]

> I agree . . . that the courts may infer an authorization or permission from acts which fall short of being direct and positive. I go so far as to say that indifference, exhibited by acts of commission or omission may reach a degree from which authorization or permission may be inferred. It is a question of fact in each case . . .

Although Hutley JA was prepared to concede that inactivity and indifference, and the provision of unsupervised photocopying facilities, in short, the adoption of a completely neutral position by the University, might not amount to authorization,[61] on the facts before him however, he concluded that 'where a person has created a facility liable to be abused by users it has licensed by them committing breaches of copyright and at the same time excludes in as far as it

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55 [1926] 2 KB 474, 491.
56 (1928) 40 CLR 481.
57 Ibid at 497 (Higgins J).
58 [1974] 3 ALR 1, 11.
59 (1928) 40 CLR 481, 504.
60 Performing Right Society v Ciryl Theatrical Syndicate [1924] 1 KB 1, 9; see Also Australasian Performing Right Society v Miles (1962) 79 WN (NSW) 385, 387.
61 [1974] 3 ALR 1, 12.

can representatives of the owners of the copyright for the purpose of preventing detection of the breaches of copyright, he, in my opinion, is authorizing such breaches as occur as a result of such exclusion. He is not taking up a neutral stance'.[62]

The University however would only be liable if the evidence showed that it had authorized the breach of copyright committed by Brennan. 'The test of authorization implies that there is some causative relationship, however tenuous, between the conduct of the University and the breach of the actual operative'.[63] Because of the lack of evidence showing even a tenuous connection between the University's commissions or omissions and Brennan's breach this part of the claim failed.

There could also be no question of declaring that the University had authorized breach of copyright because 'the test of authorizing a breach of copyright is not complete until the breach which has been authorized has been committed'.[64]

The University put forward several matters by way of defence. The only one of any substance was the suggestion that in making the two copies of the short story from the plaintiff's book Brennan's action was protected under section 40 of the Copyright Act as a 'fair dealing'. The judge regarded this as 'a fanciful suggestion'.[65]

In the event Hutley JA decided that the plaintiffs were probably entitled to an injunction *quia timet* but this relief had not been sought. The Court however had a discretion to make a declaration[66] in the question raised was 'a real and not a theoretical question' raised by a person having 'a real interest' and where there was 'someone presently existing who has a true interest to oppose the declaration sought'.[67] Thus according to the trial judge a declaration should be made as to the liability of the defendant University in relation to the provision by it of photocopying facilities, but the University had 'studiously not sought any assistance from the Court; it has not sought any declarations to assist it in complying with the Copyright Act

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62 Ibid, 14.

63 Ibid, 15.

64 Ibid, 15. See Performing Right Society v Mitchell and Brooker (Palais de Danse) Ltd [1924] 1 KB 762, 773; COPINGER AND SKONE JAMES ON COPYRIGHT (11th edition) 194; *contra* Fenning Film Service v Wolverhampton, Walsall & District Cinemas [1914] 3 KB 1171.

66 Ibid, 16 citing Forster v Jododex Australia Pty Ltd [1972-73] ALR 1303.

67 Ibid quoting Lord Dunedin in Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438, 448.

1968 in relation to photocopying'.[68] Any declaration as to the future liability of the defendant University would therefore be theoretical and the declaration made was confined to the facts disclosed by the evidence before the Court in relation to the alleged breach. Hutley JA declared therefore that the University had authorized such breaches of copyright in relation to the photocopying of the whole or part of the plaintiff's book as were not protected under section 40 of the Copyright Act as fair dealings where the infringing photocopying was done in reliance upon the University's Library Guides, the notices on the machines themselves, the lack of supervision of the machines or any combination of these three matters.

The University of New South Wales appealed to the High Court which allowed the appeal and the cross-appeal by the respondents. In reversing the decision of Hutley JA as to the issue of the Declaration the court commented on the discretionary power to make declaratory orders. Gibbs J said: ' . . . The power although wide, is not unlimited'. His Honour thought that a declaration of copyright ownership and of acts of infringement could not be properly made unless some actual infringement had occurred or was likely to occur in the future. In the present case there was no evidence of any infringement of the respondent's Copyright in 'The Americans Baby' other than that committed by Brennan. Further, any alleged breach of copyright had to be considered in the context of the defence of fair dealing and the question whether the appellant University had authorized such breaches. The declaration was wrongly made and accordingly the appeal was allowed.

McTiernan ACJ concurred with Jacobs J who noted in the course of his judgment that a 'declaration of right based on facts found in the particular case can certainly be made but it is not permissible to make a declaration of right which amounts to a conclusion of fact from a hypothetical or assumed state of facts and thereby to enunciate or declare a rule of apparently general application as though it were a declaration of applicable law.'

The respondents cross-appealed on the ground that Hutley JA should have held that the breach of copyright committed by Brennan was authorized by the appellant and further that a declaration in wider terms than that originally made by the judge should be granted.

After reviewing the authorities on the issue of 'authorization' Gibbs J noted that the University had made the books and the copying

68 Ibid, 17.

machines available and 'must have known that it was likely that a person entitled to use the Library might make a copy of a substantial part of any of those books'.

He concluded that the 'various measures adopted by the University, even when considered cumulatively do not appear to me to have amounted to reasonable or effective precautions against an infringement of copyright by use of the photocopying machines'. The 'fatal weakness' was the absence of adequate notice on the machines.

The result was that the Court made a Declaration that the University had authorized the act of Brennan in making the infringing copies, but was not prepared to make any wider declaration.

Summary

After the *Moorhouse* decision the following points can be made in relation to photocopying:

(a) If Peterson J's 'rough test'[69] ('What is worth copying is prima facie worth protecting') is applied to photographic reproduction, all photocopies infringe copyright in works in which that right subsists subject to the questions whether the appropriation is substantial and whether it is a fair dealing. Questions of motive and purpose can lead to one answer only; the operator intended to make a copy.

(b) Substantiality may still rest on quality not quantity but it is true that in most cases only a small amount of photocopying would be necessary to establish an infringement. The problem is the subjectivity of the test when the other criteria of substantiality do not support a finding of infringement.

(c) The defence of fair dealing under section 40 is limited to 'research and private study' but this defence does not allow substantial copying. In *Moorhouse* Hutley JA obviously thought that taking two copies of one short story each copy amounting to ten pages of 'The Americans Baby' (a book of 220 pages) was not a fair dealing. It does not seem unreasonable to suggest that the test of 'fair dealing' should be arithmetical where photocopying is concerned.

(i) As the test of substantiality is one of fact, the special circumstances of photographic reproduction and the need for certainty require that a quantitative statutory test of fair dealing be introduced.

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69 University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601, 610.

(ii) Already the Copyright Act has quantitative tests relating to photocopying in section 49. Section 49 (2) provides that only part of a 'published literary, dramatic or musical work' may be copied under the provisions of the section, and by Section 49(5) the part copied must be a reasonable portion of the 'work'. Section 49(1) provides that an article or part of an article in a periodical journal can be copied under the provisions of section 49 but only one article from each journal can be copied unless two or more relate to the same subject matter. There are also other provisions requiring persons to satisfy the Librarian that *(inter alia)* they require the copy for purposes of research and private study and for no other purpose and that they have not been previously supplied with a copy of the article or part of the work in question.

(d) The Universities themselves have been advised that 'fair dealing' can only be resolved satisfactorily by reference to a quantitative test. The terms of advice on photocopying issued by the Vice-Chancellor of the University of NSW based on the recommendations of Professor Derham[70] included the following—not more than one copy to be produced for each purpose; no whole work by one author to be copied; single extracts not to exceed 4000 words or 3000 words where a series of extracts to a total of 8000 words is taken, in any case, the total amount copied not to exceed ten per cent of the whole work.

It is not doubted that in this area of copyright law like other areas[71] the legislation is not merely concerned with rights of property but also with the protection of large-scale and conflicting economic interests[72] relating to those property rights. The debates in the House of Representatives on the Copyright Bill 1968 give some indication of the lobbying by the various interests. The Copyright Law Committee on Reprographic Reproduction has the opportunity to clarify the uncertainties in one area of copyright law by deciding whether and to what extent the rights of authors and publishers deserve protection over and above.

(a) the public interest in the wide availability and dissemination of ideas;

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70 [1974] 3 ALR 1, 10. Notices containing this information were however never affixed to the photocopying machines provided in the library of the defendant university.

71 eg see provisions relating to royalty payments for broadcast of records, Copyright Act 1968 Part VI, Division 3.

72 Parliamentary Debates, H of R, Vol 59, 1527-1528, 1534.

(b) the interests of bodies and institutions such as Universities which claim to act in the interests of library users, and
(c) the notoriously free and unrestricted present ability of students, teachers, library users and others to photocopy copyright material in the name of research or private study relying partly on ignorance and partly on the lack of certainty in terms such as 'substantial', 'fair dealing' and 'reasonable portion'.

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SALARIED LEGAL SERVICE: THE PROFESSIONAL RELATIONSHIP WITH THE LEGAL AID CLIENT

Salaried legal service is not a new concept.[1] For many years a small section of the profession has engaged in legal practice on a salaried basis for a non-legal employer. The main example is service within an office or department of government; another is service within a private or statutory corporation. For the vast majority of the legal profession, however, practice is undertaken on a self-employed, fee-for-service basis (either alone or in partnership).[2] Not surprisingly, the laws and ethics governing the conduct of the legal profession are cast in terms of the traditional form of practice—'private practice'—as distinct from salaried legal service.

Little attention has been given to the relevance, or otherwise, of these laws and ethics to salaried legal service. Informal conventions have developed to resolve apparent conflicts between the traditional precepts and the conduct of salaried legal services.[2a] For example, the Public Solicitor in Victoria usually briefs counsel to represent an accused person for whom he is acting.[3] In companies many matters are referred to solicitors in private practice, who in turn may brief counsel.[4] Prior to 1975, there had been no serious attempt to test

1 Sackville (Commissioner for Law and Poverty) in LEGAL AID IN AUSTRALIA, a discussion paper prepared by the Australian Commission of Enquiry into Poverty, November 1974 (hereinafter, Sackville), 188-254 examines the legal aid services conducted on a salaried basis by government. See also Legal Aid Review Committee FIRST REPORT February 1974 (Aust. Govt Publishing Service Canberra 1974) and SECOND REPORT March 1975 (Aust. Govt Publishing Service Canberra 1975). Outside the legal aid context, salaried lawyers have worked for government for many years. See also n 35a, infra.

2 In the following discussion the employee solicitor within a private practice is not embraced within the field of 'salaried legal service': he is not employed by a 'non-legal' employer, such as government, and is subject to the ordinary requirements binding practitioners save those which apply to principal solicitors.

2a This tension was discussed in an article recently published: Ross & Mossman *Legal Aid in New South Wales—Politics and Policies,* (1975) 47 Australian Quarterly 6 (No 1). The dilemma as seen by these writers is between 'accountability' and 'accessibility'.

3 Willis *Legal Aid in Criminal Proceedings—the Public Solicitor's Office,* (1973) 9 MULR 241, 260 ff.

4 The development of internal 'house counsel' within United States companies has been paralleled in Australia: Edwards *Absorbing the Businessman's*

the application of the law relating to professional conduct to salaried legal service. Previous cases had been confined to narrow situations, and in all but one had ended favourably for the position of salaried legal service.[5]

The entry of the Australian Government into the provision of legal aid through salaried legal services, which commenced in May 1974 following a Ministerial announcement of July 1973,[6] has provoked the first serious attempt to test the lawfulness of salaried legal service. The focus of alarm has been the Australian Legal Aid Office (ALAO) established under the Ministerial announcement of July 1973.[7] In *Re*

Viewpoint, Australian Financial Review 13 March 1971. Note that a legal adviser employed by a public company 'cannot be said to be practising as a solicitor' per Gavan Duffy and O'Bryan JJ in Downey v O'Connell [1951] VLR 117, discussed infra pp 118 & ff.

5 Infra pp 115 & ff the exception is Re Mornane [1938] VLR 170, infra pp 117-118.

6 The Ministerial Announcement was made on 23 July 1973 by the then Attorney-General of Australia (Senator Murphy QC). It announced the establishment of the Australian Legal Aid Office and the Legal Aid Review Committee, which was to investigate the general issue of the provision of legal aid in Australia. The Ministerial Announcement was the subject of a Speech to the Senate by the Attorney-General on 13 December 1973: 28 Partl. Deb. (Senate) 2800. In relation to the Australian Legal Aid Office the Attorney-General stated: 'I [the ALAO] will provide legal advice and assistance on all matters of Federal law, including the Matrimonial Causes Act, to everyone in need, and on matters of both Federal and State law, to persons for whom the Australian Government has a special responsibility, for example: pensioners, ex-servicemen and newcomers to Australia. The Offices will provide a referral service in other cases'. On legal aid schemes in Australia see Australian Legal Aid Review Committee, FIRST REPORT, February 1974 (AGPS Canberra 1974).

7 The grounds of objection to the ALAO are varied. Most appear to have a patently political hue. On 20 February 1975 an extraordinary general meeting of the members of the Law Institute of Victoria, the professional body of solicitors in that State, considered motions which condemned the ALAO and the Australian Government for its attempt to 'nationalise' the legal profession and, in particular, called on the Council of the Institute to challenge the Constitutionality of the establishment of the ALAO. References to Marxism and socialism were frequently made by the supporters of the motions. A subsequent postal ballot of members passed the motions, the crucial motion for a constitutional challenge being passed on a 54%-46% split (1031-899 votes). See further (1975) 49 Law Institute Journal 149 and (1975) 1 Legal Service Bulletin 164. Proceedings have been issued out of the High Court in that action: Attorney-General for Victoria (at relation of Law Institute of Victoria) v Commonwealth and K E Enderby, writ issued 12 August 1975. An example of the concern felt over the ALAO is the official statement of the Law Council of Australia in June 1975: '[T]he greatest issue confronting the Law Council of Australia is that of legal aid' (Law Council Newsletter, vol 10 no 1, 1).

Bannister; ex parte Hartstein[8] decided in March 1975, the Full Court of the Supreme Court of the Australian Capital Territory held that any person admitted to practice as a barrister and solicitor of that Court, while performing duty as an officer of the Australian Legal Office was not entitled to act as a solicitor for members of the public.

The subject of this article is the basis of the decision, the effect of the decision on other forms of salaried legal service in Australia (especially those concerned with the provision of legal aid) and legislative solutions, in particular the relevant provisions of the *Legal Aid Bill* 1975 (Aust), which have been devised to meet the objections raised in the decision.

THE CHALLENGE TO THE CANBERRA OFFICE OF THE ALAO

The genesis of the *ALAO* case[9] was itself highly unusual: the action was commenced at the direction of the Supreme Court by its Registrar. The Registrar took out a motion to show cause addressed to the director of the Canberra office of the ALAO. The local Law Society was joined and appeared at the hearing; the Attorney-General of Australia appeared, through counsel, as *amicus curiae.*

The Canberra office of the ALAO was opened in November 1974. Its function, as defined by the Ministerial statement establishing the ALAO, was to provide legal assistance in all matters to persons for whom the Australian government has a special responsibility (students, migrants, pensioners and others) and to provide legal assistance in matters of Federal law for all persons in need. In all other cases, the ALAO is required to provide a referral service.[10]

The director of the Canberra office (Bannister) was entitled to practise before the Supreme Court of the Australian Capital Territory. However he had not applied for a practising certificate under the local legal practitioners ordinance as he took the view that it did not

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8 Re Bannister: ex parte Hartstein (1975) 5 ACTR 100 (Supreme Court of the Australian Capital Territory; Fox, Blackburn and Connor JJ) referred to herein as the ALAO case. Note also that Sangster J of the South Australian Supreme Court refused to hear an ALAO lawyer in September 1974 (Advertiser, Adelaide, 28 September 1974).

9 Re Bannister; ex parte Hartstein (1975) 5 ACTR 100.

10 In the Territories the Australian Government is not subject to constitutional restrictions in respect of its powers (Commonwealth Constitution, s 122). Thus it could, if it wished, run an unrestricted legal aid service. But it appears to have elected to run its Canberra office on the same basis as those operating in the States.

bind the Crown.[11] (A feature of the case, which troubled the Court but does not appear to have affected the ultimate decision, is that Bannister was not eligible for an 'unrestricted' [or 'full'] practising certificate at the time of the action.[12])

Like other officers employed by the Australian government to staff the ALAO, the director's employment was regulated by the usual terms and conditions attaching to public servants.

In concluding that the director of the Canberra office was not entitled to act on behalf of the public, the Full Court relied on general principles of the law relating to the solicitor-client relationship. These principles related to, first, the nature of the solicitor-client relationship and, secondly, the conflict between the duty owed by a salaried lawyer to his non-legal employer and the duty owed by him to his 'client'. Another matter canvassed by the Court was the application of the Legal Practitioners Ordinance 1970-1974 to the Canberra office of the ALAO. These matters will be considered separately.

(i) *Nature of the Solicitor-Client relationship*

Fox J puts the issue as follows:

> Whether . . . every arrangement made between a person who has been admitted as a solicitor and a person seeking legal advice from him results in a solicitor-client relationship between those two.[13]

In order to answer this question it is necessary to establish in what circumstances a retainer can exist between an admitted person and a member of the public.[14] The first consideration is whether the terms of the salaried lawyer's employment permit the provision of advice and assistance to members of the public. Fox J was prepared to concede that this was permissible in the present case (though not without

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11 This appears to be correct. Blackall v Trotter (No. 1) [1969] VR 939, *infra* pp 115-117 took a similar view of the Victorian legislation (Legal Profession Practice Act 1958 (Vic)). However it is understood that it is the practice of the ALAO in Victoria to instruct its employees to take out a 'full' certificate (infra n 12). Note that Blackburn J in the ALAO case at 113 points out that the Court is not concerned with what the crown can do but rather with 'the activities of persons attempting to act as solicitors'. Note also that the Crown in right of the State of Victoria is bound in respect of Parts IV to VII of the Victorian Act: infra n 35a.

12 Legal Practitioners Ordinance 1970-1974 (ACT) s 23; cf Legal Profession Practice Act 1958 (Vic s 83. See also (1975) 49 Law Institute Journal 76.

13 Re Bannister; ex parte Hartstein (1975) ACTR 100 at 103 per Fox J.

14 It is not necessary for the existence of a retainer that a fee be paid to a solicitor by the client: ibid 103.

misgivings). The second consideration then becomes crucial: the nature of the solicitor-client relationship. In the view of Fox J the office of solicitor, created by statute, is characterized by 'individual, personal responsibility to his client'.[15] This involves personal trust and confidence, a fiduciary relationship and freedom from conflicting obligations and pressures. These are absent in the case of the salaried legal service because it is impossible for a salaried lawyer to render himself completely immune from control and direction by his employer in relation to dealings with persons outside the employment relationship such as ordinary members of the public. Another reason is that such a lawyer, being an employee, is incapable of holding himself out as a principal which is another 'special feature' of the office of solicitor. Fox J states:

> The fact that Mr Bannister was not a principal meant in the circumstances that he did not accept the complete personal responsibility which a solicitor must assume, it meant that he did not have the independence which a solicitor is expected to have, it meant that the personal relationship of trust and confidence was at least incomplete and it meant that he did not have the power to do those things that only a principal can do.[16]

From the court's viewpoint it is necessary that the record disclose an appearance by a properly admitted principal solicitor; from the client's viewpoint it is necessary that he know with whom he is dealing, not simply the name of an office with which he is dealing.

Blackburn J characterizes the solicitor-client relationship as involving 'personal, undelegable responsibility'.[17] This 'basic principle' was breached in the instant case; thus it was impossible to conduct the practice of a solicitor.

(ii) *Conflict of Duties*

In the opinion of Fox J it is almost unavoidable that situations will arise where the interest of the member of the public, and thus the duty owed by a solicitor to his client, will conflict with the interest of the Australian Government (or Commonwealth) and thus the duty owed by the employee to his employer. These situations are all criminal

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15 Ibid 104. Nowhere in the case does the Court advert to the role which law society legal aid committees play in the conduct of assisted matters by private practitioners. It is not even true of private practitioners that they are totally free from direction in legal aid cases: see Sackville, supra n 1, 7-9, 14-188, esp 117 ff (Victoria).

16 Re Banister; ex parte Hartstein (1975) 5 ACTR 100 at 105.

17 Ibid 110 per Blackburn J.

matters where the Commonwealth is the prosecutor and all civil cases where the government or one of its agencies is a party. The ALAO should therefore 'regard itself as absolutely barred from acting in a wide range of cases'.[18] And in other cases 'each client will have to be informed of the various interests of the Commonwealth which may possibly conflict with his own'.[19] The public defender and duty solicitor roles of the ALAO significantly conflict with the interests of the Australian Government. His Honour states: '[t]he concentration of power involved is constitutionally unsound and inimical to the proper administration of justice';[20] it is a situation 'fraught with the potential for injustice'.[21] In conclusion his Honour notes that the respondent had through the Attorney-General's Department been represented by a private firm of solicitors and senior counsel and adds: '[t]his is the way the system should work . . . '[22]

Blackburn J is more muted in his approach to this matter. His Honour states specifically that this ground alone would not have warranted an order against the respondent but astonishment is expressed at the failure of the government to provide 'any statutory precepts designed to offset the public servant's existing duty, both statutory and at common law, to obey the orders of their superiors, and his natural and proper loyalty to the interest of the Commonwealth'.[23]

(iii) *Scope of the Legal Profession Practice legislation*

Blackburn and Fox JJ, by posing the general issues of professional conduct, necessarily consider that the local professional practice ordinance[24] does not cover the position of the ALAO. Blackburn J does discuss the ordinance briefly and considers untenable the argument that it was not meant to govern the whole question of the nature of professional practice.[25]

Connor J rests his judgment on a scrutiny of the provisions of the ordinance. In his opinion the only form of practice as a solicitor, other than those referred to in the provisions, which is permitted is that

18 Ibid 107 per Fox J.
19 Loc cit.
20 Ibid 108.
21 Loc cit.
22 Ibid 109.
23 Ibid 113.
24 Legal Practitioners Ordinance 1970-1974 (ACT); also infra pp 122 and ff.
25 *Re Bannister; ex parte Hartstein* (1975) 5 ACTR 100, 110 per Blackburn J; cf 106-7 per Fox J.

undertaken by the Crown Solicitor (whose authority derives from the *Judiciary Act* 1903-1966 [Aust] and the range of persons and bodies for whom he can act is there defined).[26]

OTHER FORMS OF SALARIED LEGAL SERVICE

(i) *The Cases Cited*

Counsel for the Director of the ALAO cited several cases concerning salaried legal service in which the courts had ruled that the officer sued had been lawfully carrying on practice as a solicitor.[27] The Full Court distinguished these on several bases, the most important being that none of the cases cited involved a situation where the solicitor in the employment of a non-legal employer purported to act on behalf of the 'general public'.[28] Other bases suggested were that in each of the cases cited the solicitor was holding an office created by statute, or was acting on behalf of a statutory office-holder;[29] and that an 'accepted practice' was being followed which was in the nature of a 'public duty'.[30]

Clearly some of the cases cited dealt with situations where the salaried lawyer was acting solely on behalf of his employer; however others do not readily admit of this analysis. These are cases where, as part of the duties of his employment, the salaried lawyer did act on behalf of a member of the public.

In the *Archbishop of Canterbury* case,[31] the Archbishop was provided with representation in litigation by the Treasury Solicitor, an employee of the Crown, as a result of a direction from the Crown pursuant to a statutory power to provide litigation in cases where the public interest was affected. This was held to be lawful by the court. The *Archbishop of Canterbury* case was considered by the Supreme Court of Victoria in 1969 in *Blackall v Trotter* (No. 1).[32] In this case the Solicitor to the Insurance Commissioner, an employee of the

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26 Ibid 116-8 per Connor J; cf 110-1 per Blackburn J.

27 Cases cited, other than those dealt with herein, were Way v Bishop [1928] Ch 647; Galloway v Corporation of London (1867) 4 LR 4 Eq 90; Crompton Ltd v Customs & Excise Commrs [1972] 2 QB 102; Ex parte Brown (1913) 13 SR (NSW) 593.

28 Re Bannister; ex parte Hartstein (1975) 5 ACTR 100, 104-5 per Fox J; 110-1 per Blackburn J.

29 Ibid 111 per Blackburn J.

30 Loc cit.

31 R v Archbishop of Canterbury [1903] 1 KB 289.

32 [1969] VR 939 (Full Court; Winneke CJ, Little and Menhennitt JJ).

Crown, represented a customer of the Commissioner as a result of subrogation. It was contended that the Solicitor to the Insurance Commissioner was not entitled to costs on the ordinary scale as he was not engaged in ordinary practice, which was identical to the contention unsuccessfully raised in respect of the Treasury Solicitor in the *Archbishop of Canterbury* case. The English case and a later South Australian decision[33] were followed by the Supreme Court. These cases decided that:

> in the circumstances the Crown by virtue of its interest in the subject matter of a litigation was entitled to make its solicitor available to act for the party on the record, and that as the Crown incurred the expense of his employment the party he represented was entitled to recover the costs awarded to him.[34]

These cases certainly strain the general principles enunciated by Fox and Blackburn JJ in the *ALAO* case. They involve 'tripartite' situations: a salaried lawyer, a member of the public for whom the salaried lawyer is required to act as part of his employment, and a non-legal employer. Even if 'special situations', they do present the basic difficulties considered to be fatal in the *ALAO* case: the possibility of intereference in the fiduciary relationship with the 'client' by the employer; and a possibility of conflict between the duties owed to each of these by the salaried lawyer (this latter point is particularly acute in the analagous situation of private practitioners handling insurance claims).[35]

Event if the A.C.T. Supreme Court's distinction in respect of these cases is accepted, where does that leave situations of a normally tripartite character, such as that of the Solicitor to the Public Trustee in Victoria and the Public Solicitor in Victoria?[35a]

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33 Lenthall v Hillson [1939] SASR 31 (where it was held that it was lawful for a Crown-employed lawyer to appear for police informants).

34 Blackall v Trotter (No 1) [1969] VR 939, 941.

35 Most Australian motor vehicle insurance policies provide that an insurer may defend actions commenced against its insured. If the insurer elects to defend the action on behalf of its insured it may engage a private practitioner (or in some cases, its own salaried solicitor) to handle the matter. Thus the interest of the insurer in settling the claim (eg under a 'knock-for-knock' agreement) may conflict with the interest of the insured in not settling (eg because he might lose his no-claim bonus). This does not appear to trouble the courts. Cf Distillers Co Bio-Chemical (Australia) Pty Ltd v Ajax Insurance Co (1974) 48 ALJR 136; Anglo-African Merchants Ltd and Exmouth Clothing Co Ltd v Bailey [1969] 1 Ll Rep 268, 280 per Megaw LJ.

35a A salaried lawyer employed by a non-legal employer in Victoria is bound by Parts IV to VII of the Legal Profession Practice Act 1958 (Vic), if he has

The Solicitor to the Public Trustee regularly acts for ordinary members of the general public in addition to his work on behalf of the Public Trustee in respect of persons whose affairs are committed to the care of the Public Trustee. The drafting of wills and the giving of advice are the main aspects of this work.[36] The Public Solicitor, who is employed within the State Law Department, is responsible for the provision of legal aid to persons charged with indictable offences who have insufficient means to defend themselves.[37] Is there any rational distinction that can be drawn between the case of the Public Solicitor and that of the ALAO?

The status of the Public Solicitor was in issue in *Re Mornane* in 1938.[38] It is the only decision prior to the *ALAO* case which resulted

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been delcared a 'solicitor' by the Council of the Law Institute pursuant to s 51 (1). In Victoria Government Gazette, 1947, no 427, (cited by Heymanson and Gifford, THE VICTORIAN SOLICITOR 2nd ed 1963, 59) the Council made the following declaration:

(1) 'Legal work' means any work usually performed by a solicitor in the course of his practice as such. 'Person' includes any firm or corporation and the Crown in the right of the State of Victoria.

(2) Any practitoner who is employed as a servant of any person other than a solicitor within the meaning of the Legal Profession Practice Act 1946 and who in the course of such employment does any legal work for his employer shall be a solicitor for the purpose of Parts IV to VII of the said Act.

Thus the Solicitor to the Public Trustee and the Public Solicitor as well as salaried lawyers in corporations are required to take out practising certificates. As the ALAO lawyer is employed by the Crown in right of the Commonwealth he is not subject to the declaration.

36 A general picture of his work, which would still appear to be accurate, is given in Downey v O'Connell [1951] VLR 117.

It is understood that in relation to drafting of wills for members of the public (which is done without fee by the Solicitor) it is normally required that the Public Trustee be named as executor. There appears to be no legislative basis for this practice.

The Solicitor to the Public Trustee is not mentioned in the Public Trustee Act 1958 (Vic). It appears that his appointment is made pursuant to the general power to appoint staff conferred on the Public Trustee, a body corporate and statutory officeholder (Public Trustee Act 1958, s 7; and see Downey v O'Connell per Smith J at 126).

37 It is noteworthy that since the commencement of the Legal Aid Act 1969 (Vic) which *inter alia* repealed the Poor Persons Legal Assistance Act 1958 (Vic), there is no statutory basis for the office of Public Solicitor. Formerly a specific provision for his appointment existed (Poor Persons Legal Assistance Act 1958, s 7). The new governing legislation, Legal Aid Act 1969, simply makes passing reference to the Public Solicitor. The power to grant or deny legal aid in indictable offences is expressed to be exercisable by the Attorney-General.

38 [1938] VLR 170.

adversely to salaried legal service. There a person who had undertaken articles of clerkship with the Public Solicitor was denied approval of the articles by the Board of Examiners because the Public Solicitor was not 'practising and entitled to practise' within the meaning of the relevant rules[39] and therefore could not provide articles. The Full Bench upheld the Board's decision. In their joint judgment Mann CJ, McFarlane, Gavan Duffy and Martin JJ held that the words used in the rules implied that proper practice must be such as to expose the articled clerk to a wide range of legal matters. Their Honours stated:

> In the case of the Public Solicitor not only are his activities in fact limited to a very small part of the multifarious matters in which legal assistance may commonly be required, but he is not 'authorized to practise' in any wider field. His position is analagous to the somewhat common case of a lawyer who advises a sole employer upon matters incidental to the employer's particular busines.[40]

The court distinguished the earlier Victorian case, *Re Ross,*[41] which held that the Crown Solicitor engaged in proper practice for the purposes of admission of a managing clerk. The suggestion of the court in *Re Mornane* is simply that the nature of the Public Solicitor's practice is insufficient for the purposes of articles; it is *not* improper in the wider sense of being incapable of recognition by the court. The Public Solicitor is regularly shown as the solicitor on the record in proceedings and no objection has been raised to his acting on behalf of a member of the general public.[42]

In 1951 the Supreme Court of Victoria considered the position of the Solicitor to the Public Trustee. In *Downey v O'Connell*[43] it was

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39 Rules of the Council of Legal Education 1932-1936, R 23 (3) (b).

40 Re Mornane [1938] VLR 170, 171-2. Rules of the Council of Legal Education 1972 (Vic) maintained the exception established in Re Mornane. Rule 38 provided that service under articles with a salaried lawyer could only be undertaken with the Crown Solicitor or Deputy Crown Solicitor for the Commonwealth and the Crown Solicitor for Victoria or the Solicitor to the Public Trustee. In November 1974, Rule 38 was amended to permit such service with a solicitor employed by or retained by any Commonwealth or Victorian statutory corporation or any officer appointed under an Act establishing such a corporation. Therefore when the ALAO becomes incorporated it will fall within these provisions; however articles with the Public Solicitor are still prohibited.

41 [1913] VLR 291.

42 But note comments adverse to role of Public Solicitor by a private firm in (1975) 49 Law Institute Journal 12.

43 [1951] VLR 117.

argued that for the purposes of determining whether he had practised for the prescribed period for appointment as a stipendiary magistrate, the Solicitor to the Public Trustee could not include his years in that office as it did not amount to 'practice', on the basis of *Re Mornane*. The court (Gavan Duffy, O'Bryan JJ; Smith J dissenting) held that the Solicitor to the Public Trustee was engaged in practice on the basis that his duties were of a wider variety than those of the Public Solicitor. In a striking statement Gavan Duffy and O'Bryan JJ remark that although Downey's work had 'not touched the criminal law or certain kinds of litigious business', nevertheless 'a solicitor in private practice might have conducted a profitable and extensive business without entering these fields'.[44] If this is the appropriate test for whether one is 'in practice' then there can be little doubt that an ALAO lawyer meets the requirement. As noted by Fox J in the *ALAO* case,[45] Gavan Duffy and O'Bryan JJ state that:

> a person may be described as practising as a barrister and solictor although he is an employee of the Crown and does not hold himself out, and is not capable of holding himself out, as ready and willing to do legal work for the public at large.[46]

Despite this unequivocal statement Gavan Duffy and O'Bryan JJ fail to explain how the Public Solicitor and the Solicitor to the Public Trustee escape the criticism of holding out to the 'public at large'. Their honours simply refer to the Public Solicitor's 'limited clientele' and add that the Solicitor to the Public Trustee was 'not confined by the terms of his appointment' to the same limited clientele.[47] It is submitted that it is not at all clear (contrary to the suggestion of Blackburn and Fox JJ in the *ALAO* case) that an ALAO lawyer would be considered to have gone beyond these constraints: the ALAO lawyer's clientele is, despite the Canberra court's unexplained assumption to the contrary, limited to certain persons—though admittedly a fairly large group—and his work is within his 'terms of appointment'.

Downey v O'Connell is also pertinent in respect of the second matter of general principle which vexed the A.C.T. Supreme Court—conflict of duties. Gavan Duffy and O'Bryan JJ were prepared to adopt a pragmatic approach to the difficulty which arises in the tripartite situation in this respect. Their Honours considered that

44 Ibid 121.
45 Re Bannister; ex parte Hartstein (1975) 5 ACTR 100, 104.
46 Downey v O'Connell [1951] VLR 117, 123.
47 Ibid 121.

Downey acted 'quite independently of any superior control in the conduct of his work';[48] the constraints which affected him as a public servant did not interfere with his ability to carry on his work for his client, who was the Public Trustee.

Smith J dissented. His Honour's argument closely resembles that which was put by Fox and Blackburn JJ in the *ALAO* case. Smith J understood 'practice' as occurring where a person 'acts as a principal dealing on a basis of independence and equality with such members of the public as may desire to engage his services' and thereby creates between himself and such clients 'the relation of solicitor and client or counsel and client'.[49] His Honour disagrees regarding the conflict of duties problem, preferring to stress the formal prescription governing public servants.

Smith J takes the view that the day-to-day realities are not conclusive in this regard but simply demonstrate that Downey is 'an experienced and highly competent officer who has the full confidence of the Public Trustee'.[50] Smith J explains *Re Ross* on the basis that there the Crown Solicitor in fact 'acts as the solicitor, not only for the government as such, but for a large number of departments in government instrumentalities which are in a practical sense, if not always in law, separate clients; that he in fact deals with them and with the profession on a footing of independence and equality of status; and that he in fact has a substantially independent status in the Public Service and controls a large office which in organization and functioning is similar to the office of any large private firm of solicitors'.[51] So, in contrast to his assessment of the position of the Solicitor to the Public Trustee, Smith J is prepared to have regard to the day-to-day realities of the situation in regard to the conduct of the office of the Crown Solicitor.

In general, it would seem that the judgments of Fox and Blackburn JJ in the *ALAO* case have much in common with the dissent of Smith J in *Downey v O'Connell.* But it is to be noted that their Honours did rely on the *dictum* of Gavan Duffy and O'Bryan JJ that the Solicitor to the Public Trustee 'is not capable of holding himself out, as ready and willing to do legal work for the public at large'.[52] Certainly the Solicitor to the Public Trustee does not

48 Ibid 123.
49 Ibid 125-6.
50 Ibid 131.
51 Ibid 131-2.
52 Supra n 46 and accompanying text.

hold himself out to the general public as ready and willing to do all kinds of legal work, but he does hold himself out as capable of undertaking one significant kind of legal work at least, drafting wills.[53] None of the judges consider this point. Further, the statement that the Solicitor to the Public Trustee 'is not capable of holding himself out' to the general public does not necessarily support the conclusion reached by Fox and Blackburn JJ. Gavan Duffy and O'Bryan JJ may well have been referring to the terms of the solicitor's appointment. These *dicta* do not resolve a situation, such as arose in the *ALAO* case, where the terms of the salaried lawyer's appointment (either express or implied) require him to act on behalf of the general public.

(ii) *Summary*

It is submitted that the cases cited by counsel in the *ALAO* case did not provide scope for a ruling favourable to the position of the Director of the Canberra office of the ALAO. In several earlier cases which ***in reality*** concerned a tripartite situation of non-legal employer, salaried lawyer and member of the public as client, the courts had not been disturbed by the matters which were considered to be fatal in the *ALAO* case.

It is submitted that the effect of the *ALAO* decision is to render unlawful any salaried legal service which engages in the conduct of a wide legal practice on behalf of members of the general public. In this regard it does not matter that some members of the general public could not receive service because they do not conform to criteria governing eligibility for assistance. The ALAO, as constituted at the time of the decision, was clearly acting unlawfully. It is submitted that the decision would similarly affect the Public Solicitor in Victoria and his counterparts in other States. The situation of the Solicitor to the Public Trustee and his counterparts in other States would appear to be more equivocal. However, where State legislation

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53 Text accompanying note 36. Note that in Downey v O'Connell [1951] VLR 117, Smith J (dissenting) at 129 examines the *ordinary* situation of the Solicitor to the Public Trustee:

> A relation of solicitor and client was established between [the solicitor] and the patient or infirm person. But in all cases his instructions were received from the Public Trustee so that in a sense he had only one client.

Smith J stresses that the existence of Solicitor-client relationships does not necessarily establish 'practise' under the Act relevant to the case. In the ALAO case it is submitted that the two matters were seen as coterminous.

creating such solicitors adequately deals with the difficulties raised in the *ALAO* case (as would appear to be the case in New South Wales in respect of the Public Defender and the Public Solicitor[54]), then their practice is lawful.

AFTERMATH: LEGISLATIVE SOLUTIONS

Within three weeks of the decision in the *ALAO* case, an amending ordinance was enacted in the Australian Capital Territory which purported to ratify the operation of the Canberra Office of the ALAO. The Legal Practitioners Ordinance 1970-1974 (A.C.T.), which the Supreme Court had considered did not permit the form of practice carried on by he ALAO, was amended to state the Director of Legal Aid for the Australian Capital Territory was a 'barrister and solicitor' within the meaning of the legislation.[55] This and other provisions[56] clearly place the Director within the framework of the legislation; thus the A.C.T. Supreme Court's view that the legislation did not contemplate the form of practice carried on by the Director of the ALAO appears to have been met.

Whether the amending ordinance satisfies the difficulties of general principle raised by Fox and Blackburn JJ is less clear. The approach adopted in the ordinance on the issue of whether a solicitor-client relationship can exist between the Director (or one of his staff) and a member of the general public is to state that the Director has 'all the rights and privileges of a barrister and solicitor practising in the Territory as a solicitor'[57] and to state that the Director and his staff shall be subject to any law of the Territory 'relating to solicitors or the rights, privileges or duties of solicitors and persons dealing with solicitors'.[58] The functions of the Director in relation to the provision of legal services are clearly spelt out and the ordinance unequivocally

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54 The New South Wales Parliament enacted legislation in 1973, after almost 30 years during which the office of the Public Solicitor and the office of the Public Defender had operated without any legislative bases. See Sackville, supra n 1, 188-240. The legislation, the Public Defenders Act 1969 and the Legal Aid (Miscellaneous Provisions) Act 1974, is discussed there.

55 Legal Practitioners Ordinance (No 2) 1975 (ACT) s 3 amending s 5 of the principal Ordinance, Legal Practitioners Ordinance 1970-1974 (ACT).

56 Legal Practitioners Ordinance (No. 2) 1975, s 4 sets out the provisions of a new Part ID entitled *The Director of Legal Aid* to be inserted in the principal Ordinance. (Subsequent references are to the section numbers of the principal Ordinance, as amended).

57 Legal Practitioners Ordinance 1970-1975 (ACT) s 6F(3).

58 S 6K.

states that he is entitled to act in any proceeding or matter in which a 'barrister and solicitor practising as a solicitor may act'[59] and that he 'has a right of audience in any court of the Territory'.[60] On the issue of conflict of duties, the ordinance provides that the Director may act on behalf of a person where that person's interests are, or may be, adverse to those of the Commonwealth of Australia;[61] and it is stated that the Director shall be appointed by the Governor-General[62] (which may not confer complete immunity from interference since that decision is made on the advice of the government of the day).

The intention of the legislation is plain and on its face it would appear to meet the objections of Fox and Blackburn JJ. The only lingering doubt is whether the Director has been rendered sufficiently immune from direction by his employer, that is, whether the Director exercises 'complete, personal responsibility'.[63]

The basic approach of the A.C.T. Ordinance is to establish a 'legal aid law firm' paralleling the structure of a private practice: the Director is the sole principal, all proceedings (and correspondence?) are to issue in his name[64] and he is to be subject to the ordinary law governing professional conduct,[65] subject to certain special exemptions: first, where the Commonwealth of Australia is adversely affected;[66] and, secondly, permitting advertising of the service offered by the ALAO.[67]

The same 'law firm' model underlies the Legal Aid Bill 1975 (Aust) introduced into the Australian Parliament in June 1975.[68] If enacted, the legislation will place the ALAO on a statutory basis. Certain provisions of the Bill attempt to meet the objections raised in the *ALAO* case, thereby conferring the protections given to the Canberra ALAO by the A.C.T. Ordinance on branch offices of the ALAO in the

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59 S 6F (1) (b).
60 S 6F (1) (c).
61 S 6G.
62 S 6C (2).
63 Supra n 16 and accompanying text.
64 Legal Practitioners Ordinance 1970-1975 (ACT) ss 6D and 6F.
65 S 6K.
66 S 6G.
67 S 6H. The President of the Law Council of Australia has criticised ALAO advertising (Law Council Newsletter, vol 10, no 1, 4-5).
68 Introduced into the House of Representatives on 5 June 1975. In his Second Reading Speech the Attorney-General (Mr Enderby QC) stated that it is intended to invite comment on the Bill during the Winter recess prior to its debate during the Budget session, commencing August 1975 (Speech, 8).

States and elsewhere. The approach adopted is a little different to that of the A.C.T. Ordinance. Clause 9(1) provides that any ALAO lawyer:

> (a) shall observe the same rules and standards of professional conduct and ethics as those that a private legal practitioner is, by law or the custom of the legal profession, required to observe in the practice of his profession; and
> (b) is subject to the same professional duties as those to which a private legal practitioner is subject, by law or the custom of the legal profession, in the practice of his profession.

Clause 9(2) extends the privileges of the ordinary solicitor-client relationship to the relationship between the ALAO lawyer and any person seeking or being provided with legal assistance. Clause 9(3) carries the 'private practice' model of an ALAO office to the extreme of stating that the Deputy Director of a State or Territory (i.e. the 'principal' or 'senior partner' in the area) shall together with the National Director and the Assistance National Directors 'be deemed to be a firm of solicitors practising in partnership in that State or Territory' and all ALAO lawyers subordinate to the Deputy Director 'shall be deemed to be employed by that firm'.

In this writer's opinion the Australian Government's ready acceptance of the views expressed in the ALAO case (and outside the courts, by a large number of private practitioners) on the professional conduct issue, which is revealed by Clause 9, assumes that there are not significant distinctions between the precepts relevant to private practice and those which ought to be relevant to salaried legal service, especially in the legal aid area. Very much of the discussion of salaried legal service in recent years has not made that assumption;[69] furthermore, very much of the discussion of private practice in recent years

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[69] eg Tapp J and Levine F *Legal Socialization: strategies for an ethical legality* (1974) 27 Stanford Law Review 1; Turney J and Frank J *Federal Roles in Lawyer Reform* 27 Stanford Law Review 333; Comments (1973) 8 Harvard Civil Liberties and Civil Rights Law Review 77 and 104. Also Sackville supra n 1, 347-353. Sackville sees independence from both governmental interference and withdrawal of funds by government as vital. He cites favourably the US Legal Services Corporation Act 1974, which in general terms resembles the new Australian legislation. For debate on US Act, see (1973) 93 Cong. Record 5067 & ff. (HR)
On the issue of the relationship between lawyers and the poor, see the recently-published Australian Commission of Inquiry into Poverty discussion paper: Fitzgerald J M Poverty and the Legal Profession in Victoria, June 1975 (a sociological study).

has been harshly critical of its governing precepts.[70] The Bill ignores these issues. And in the zeal to stave off criticism by the devotees of private practice (such as Fox J[71]), the Bill creates a salaried legal service more bureaucratic and hierarchial—in each State or Territory all but one of the ALAO lawyers is an 'employee'—than any private practice. This seems to be the very antithesis of the neighbourhood law office concept.[72] The views expressed in the *ALAO* case have been answered at a high cost to legal aid in Australia.

In relation to the issue of conflict of duties, a clause has been included to permit the ALAO to act in matters which may be adverse to the interest of Australia.[73] Further, the Bill provides for the establishment of an ALAO Board of Management and an Australian Legal Aid Commission which are to be interposed between the ALAO (which will be a body corporate in its own right)[74] and the Attorney-General.[75] By this means the ALAO will be protected from political interference, which is at the heart of the views expressed in the ALAO case on this issue.

The Board of Management is likely to be headed by a Judge.[76] It would appear that a majority of the members of the Commission (a research, consultative and advisory body) will be lawyers.[77] Here it seems that the price of meeting the objections has again been high: in order to gain immunity from control by the government, the

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70 On the wider issues from an English viewpoint see Zander LAWYERS AND THE PUBLIC INTEREST (1968); Abel-Smith & Stevens IN SEARCH OF JUSTICE (1968); Arthurs & Verge, *The Future of Legal Services* (1973) 51 Canadian Bar Review 15.

71 Supra n 22 and accompanying text.

72 The concept first expounded by Cahn and Cahn in the seminal article *The War on Poverty: a Civilian Perspective* (1964) 73 Yale Law Journal 1317.

73 Legal Aid Bill 1975 (Cth) cl 30.

74 Cl 5.

75 Cll 10-14 (ALAO Board of Management); Cll 14-19 (Australian Legal Aid Commission).

76 Cl 11 provides that the Board of Management shall have three members: a chairman, the national director of the ALAO, and one other person. The chairman shall be a judge, ex-judge or private legal practitioner of 'high standing' (cl 12(1); and the third member shall be appointed after consultation with the Law Council of Australia (thus, almost certainly he will be a lawyer) cl 11 (3)). The Board is charged with 'the general direction of the ALAO' (cl 10(2)).

77 The Commission will clearly be the body responsible for the future direction of Federal legal aid programmes. Its functions are broad (cl 17(1)). For instance cl 17(1) (c) charges the Commission with the responsibility of reporting to the Attorney-General on the vexed question of the 'respective roles' of private practitioners, salaried lawyers employed by government and

ALAO has been placed under the control of bodies dominated by lawyers among whom members of the private profession are the largest single group.

CONCLUSION

The professional conduct problems presented by the decision in the *ALAO* case would appear to have been surmounted by the subsequent legislation in the Australian Capital Territory and by the proposed legislation of the Australian Parliament to reconstitute the ALAO, which will affect the whole of Australia,[78] though, as stated, the price has been high for the future conduct of legal aid in Austnalia.

'other bodies providing legal services' (such as the voluntary services). The composition of the Commission therefore will affect perception of such vital matters. The Commission shall comprise a Chairman, a Commissioner to represent the Attorney-General and 6 to 11 other Commissioners. Its size therefore is between 8 and 13. The Chairman shall be a judge, ex-judge or barrister and solicitor of at least 5 years standing (cl 16 (1)); note here there is no reference to 'high standing'. The ordinary members shall fall into one of four classes: private practitioners; administrators of legal aid schemes (including officers of ALAO); person interested in the provision of legal services; persons of experience and in 'any other field'. The Bill is on its face quite flexible as to the background and experience of members of the Commission, which is in accordance with the general philosophy of the proposals of Sackville (supra n 1, 372 ff and the Legal Aid Review Committee in its SECOND REPORT (Aust. Govt Publishing Service March 1975)). But the actual composition of the Commission has been foreshadowed by the Attorney-General in his Second Reading Speech (pp 7-8). It will be. (i) a Chairman of 'high standing' in the profession'; (ii) a representative of the Attorney-General; (iii) two private practitioners; (iv) one lawyer from a Law Society legal aid scheme; (v) a lawyer from ALAO; (vi) one lawyer from State salaried legal aid service; (vii) one social worker; (viii) three persons from other organizations interested in legal aid; (ix) one with expertise in law reform. Thus the breakup would appear to be a minimum of 8 lawyers and a maximum of 4 non-lawyers. Of the 15 members of the two bodies, at least 11 will be lawyers, 6 from private practice (2 on Board and 4 on Commission). The radical suggestion of Sackville that legal aid be run by a body composed primarily of non-lawyers, ie persons such as social workers and those who are consumers of legal services has been rejected. For Sackville's views on the Bill, see (1975) 1 Legal Service Bulletin 235.

78 An issue which has been avoided in this article is the constitutionality of the ALAO. The Law Institute challenge (supra n 7) is concerned with the manner of the initial establishment of the ALAO. If the ALAO is placed on a statutory basis then some of these grounds of objection will disappear. However the broader issue of the Commonwealth's power to provide legal aid in this way remains undefined. It would seem that the Commonwealth is basically relying on the incidental power (s 51 (xxxix) in conjunction

However the professional conduct issues raised in the *ALAO* case continue to affect other forms of salaried legal service concerned with legal aid, the most important instance being the Public Solicitor in Victoria and offices constituted on a similar basis elsewhere in the country. Until State Parliaments legislate to protect such services, they are open to challenge on the basis of the *ALAO* case.

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with specific heads of power (eg s 51 (xxii) which permits the Commonwealth to make laws with respect to dissolution of marriage) and possibly its social services power (s 51 (xxiii) and (xxxiii)). Much of the previous debate was concerned with its use of the appropriations power to found the ALAO (s 81). Obviously questions will arise in the States if the ALAO purports to give legal assistance in relation to ordinary matters governed by State legislation and State 'common law' (which would appear to exist as a separate species, Renard, 4 Federal Law Review 87). Can this be embraced within the Commonwealth power? Consider for instance the duty solicitor role at suburban courts presently undertaken by ALAO lawyers. If the ALAO lawyers right to appear is challenged, could he say that he was acting in his own right and point to his full practising certificate (or would this be outside the scope of his employment)? If a State purported to regulate salaried legal lawyers would its legislation bind the ALAO in respect of its extra-constitutional activities, ie is s 109 only effective to displant inconsistent State legislation within the zone of 'constitutionality'?

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