False Imprisonment, Fare Dodging and Federation — Mr Robertson's Evening Out

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Abstract

The decisions of the High Court and the Privy Council in *Robertson v The Balmain New Ferry Company Ltd* retain their place in modern tort texts discussing false imprisonment. This is surprising because the reasoning is frequently considered unclear at best or incorrect as worst. This article considers the case in two historical contexts to evaluate these views. The first context considers contemporary legal doctrine by exploring the significance of the pre-*Judicature Act* pleading rules applicable in New South Wales and the gap in the contemporary law that made the company's method of enforcing fare collection problematic. Despite these impediments, the commercial pressures to uphold the system of fare collection proved sufficient to overcome these objections. The second, broader, historical context explores the reaction to the decision of the High Court as an aspect of lingering anti-federal sentiment in New South Wales. The analysis reveals a uniquely Australian context to the decision and reveals the potential of studies of the history of private law to contribute to the history of Australian law more generally.

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1. Introduction

The decision of the Privy Council in the case of *Robinson v Balmain New Ferry Co Ltd*[1] remains a part of many tort courses and tort textbooks in common law countries.[2] Yet the reason for including it tends to be to dismiss it as out of line with general principle, as non-representative rather than paradigmatic. It is explained away as an aberration,[3] a task made easier by the eccentricity of its facts.[4] Whilst for explanatory purposes this is a perfectly satisfactory way of dealing with the case as part of the modern law of tort, it leaves open a number of questions. First, if the case was considered contrary to general principle, why did the decisions of both the High Court of Australia and the Privy Council find comprehensively in favour of the ferry company? Analysis of contemporary legal doctrine suggests a lacuna in the law relating to the operation of the system of collecting fares adopted by the ferry company. The matter was of enormous importance to ferry companies: a result in favour of Robertson would have mandated significant change in ferry companies' practices. The way that the legal lacuna was filled by both the High Court and the Privy Council avoided this commercially undesirable result — albeit with reasoning that gave short shrift to the pleading rules that operated in New South Wales — and ignored well-established limitations on the circumstances in which a person's imprisonment could be justified.

The emphasis that Robertson placed on pleading rules in his argument may reveal a subtler context. In the High Court and in the petition for leave to appeal to the Privy Council, Robertson stressed the importance of respecting the pleading rules of New South Wales. The concern that State law might be ignored by the federal High Court needs to be viewed in the context of a High Court that was barely three years old and a federation that had been formed less than a decade before. The reaction to the decision of the High Court demonstrates that anti-Federation sentiment had not simply gone away after 1901. Given the status of the plaintiff, Archibald Nugent Robertson, the decision of the High Court provided a suitable focus for some of that sentiment, in terms of specific criticism of the High Court, as well as for more general expressions of dissatisfaction with Federation. In short, the case demonstrates the potential significance of Australian legal history, in particular the history of private law, to explanations of wider historical trends in Australia, an area that deserves far greater attention than it has thus far received.

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1 [1910] AC 295. For a discussion of the error in Robertson's name in the authorised report of the Privy Council decision, see below Part Eight.

2 See, eg, Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th ed, 2007) 60; Sir Henry Percy Winfield and J A Jolowicz, *Winfield and Jolowicz on Tort* (17th ed, 2006) [4-18].

3 R P Balkin and J L R Davis, *Law of Torts* (3rd ed, 2004) [3.31]; Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (5th ed, 2003) 427.

4 Which prompted Professor Tony Blackshield to write a ditty about the case: ABC Radio National, 'The Balmain Ferry Case of 1905', *The Law Report*, 23 January 1996 <http://www.abc.net.au/rn/talks/8.30/lawrpt/lstories/lr230104.htm> at 11 October 2009.

2. A Cause Célèbre?

The facts of the case are well known in outline but are more complicated than is usually recognised.[5] It was the Monday of a long weekend (Bank Holiday) in June 1905. At 7.45 pm Archibald Nugent Robertson[6] went to Circular Quay in Sydney, at the bottom end of Erskine Street,[7] and entered the wharf of the Balmain New Ferry Company Ltd with Miss Mercia Murray, a well-known speech and elocution teacher in the area.[8] The couple wanted to go on one of the company's ferries but both boats had just left. When Miss Murray indicated that she wanted to catch another boat from another wharf nearby, she and Robertson proceeded to leave. Here the problems began. The difficulty was that entry and exit to the wharf was via turnstiles above which was a notice stating that entry and exit to the wharf was conditional upon the payment of one penny. This was because the company collected fares only at Circular Quay. When they attempted to leave, the attendant at the entry turnstile told them they needed to leave by the other turnstile, and when they went to that exit, the attendant there asked for payment of one penny. Robertson pointed out that he had not, in fact, travelled on the ferry and wanted to leave the wharf to go about his lawful and proper business. At this point, there was a dispute in the evidence: Robertson and Miss Murray stated that, when Robertson tried to exit from the turnstiles, he was thrown back with great force by one of the attendants and that he was threatened with a fist; perhaps unsurprisingly, the attendants alleged that it was Robertson who had provoked matters by advancing on one of the attendants with a blackthorn stick, catching him under the lapel of his jacket. They alleged that Robertson was throughout this encounter calling out, 'Don't use force, don't use force!'. As the case was decided by a civil jury, this

5 The description of the facts is distilled from a number of sources including the notes of the trial judge, Darley CJ (the manuscript is held by the State Records Office of New South Wales: State Records NSW (SRNSW): NRS 5818, Notebooks: Civil Causes [Chief Justice F M Darley], 1886–1908; [2/2854]; a printed version is present in the court file held by the Judicial Committee of the Privy Council) and contemporary newspaper accounts from *The Sydney Morning Herald*, *The Daily Telegraph*, *The Australian Star* and *The Evening News* (newspapers published in Sydney contemporaneously with the litigation).

6 Robertson was born in London in either 1856 or 1857, the son of an expatriate Indian civil servant. It seems he came to Sydney sometime during 1881. A retrospective report of the case in *The Daily Mirror* in the 1970s refers to him as 'barrister, poet, novelist and the most brilliant conversationalist at the Athenaeum Club': 'Fight over Penny Ferry Fare Ended before UK Court', *The Daily Mirror* (Sydney), 7 July 1975, 14. However, it should be noted that several other details in this report — such as that he was born in Sydney and attended Sydney University — are incorrect. The report also states that he wrote several novels, one of which was serialised in a Sydney paper, but I have found only one such book (see below n 79).

7 The configuration of Circular Quay is probably not the same today as it was in 1905 as present-day Erskine Street is some distance from the Quay.

8 Mercia Murray BA advertised her services in the *Balmain Observer* during 1905 and 1906, and there are reports in the paper of concerts given by her students. One such report commented that: 'The high reputation the lady holds in this locality is sufficient guarantee of the excellence of the performance proposed' (*Balmain Observer* (Balmain), 2 December 1905, 2). Professor Tony Blackshield says she was his fiancée: ABC Radio National, above n 4. It is certainly true that they later married on 17 October 1907 at St John's Bishopthorpe, Glebe.

evidential conflict was never explicitly resolved, but it seems very unlikely that the 49-year-old Robertson would have been as aggressive as was indicated. Indeed, at one point it seems that one of the attendants got the story wrong and had to be corrected by counsel.[9] During the exchange between Robertson and the attendants, which lasted about five minutes, Robertson asked the crowd that had now gathered (estimated variously at between 20 and 200 onlookers, who were hostile to Robertson, asking him, 'Why don't you pay the fare?')[10] to call a constable, but no one did. At this point, Robertson paid for Miss Murray to leave, telling her that he would now have to stay and see it out. She fetched a constable, who told Robertson that his course of action should be to pay under protest and complain to the company, but this advice was refused, Robertson pointing out he was a lawyer and that this was not what he needed to do. Finally, he said that he would not be detained any longer and pushed through the gap between the turnstile and the bulkhead despite the efforts of one of the attendants to stop him (somewhat half-heartedly, according to the evidence; no doubt everyone was keen to end the stand-off). The couple then went off to see Miss Murray's parents, after which Robertson, undeterred, returned on the Balmain New Ferry Company's boat to Circular Quay, where the same attendants were still on duty. One told Robertson that he had not paid the penny from previously; further exchanges followed but the attendant was unable to recall further what he had said at the time.

3. Robertson's Legal Action

As a result of his experiences, Robertson brought an action against the company for assault and false imprisonment. On one level, it is perfectly obvious how the company wanted to defend the action. This is apparent from an affidavit filed by the company's manager in support of the application for leave to appeal to the High Court of Australia. It noted that 10000 people a day travelled on the company's ferries, and in his later petition to the Privy Council Robertson himself said that 50000 people a day used Sydney ferries.[11] What the company wanted to argue was

9 See SRNSW: NRS 5818, [2/2854], Page 51.

10 It seems that Erskine Street was a very busy place and a popular promenade for the working class. A retrospective news report in 1975 ('Romantic Ferry Trip was Barrister's Downfall', *The Sun* (Sydney), 18 November 1975, 12) suggests that the turnstile operators gave the crowd the impression that a toff had enjoyed a ride on the Balmain ferry and was now refusing to pay his fare like any ordinary passenger and that this was why the crowd responded as they did. Certainly, the ferry company attempted to give the dispute a class base. A letter to the editor of the *Balmain Observer*, a newspaper owned by a director of the ferry company, contains statements such as that the writer is 'only a common person', 'had he [Robertson] been a common person like myself' and 'then, as I said, he [Robertson] not being a common person': The Scout, 'Correspondence: The Robertson-Ferry Case Fiasco', *Balmain Observer* (Balmain), 26 January 1907, 6.

11 National Archives of Australia (NAA): High Court of Australia, Office of the Registry, Sydney; A10071 Full Court case records (NSW), annual single number series, 1903–73; 1906/12, Balmain New Ferry Company Limited versus ROBERTSON Archibald Nugent, 1906–10. Robertson's petition for leave to appeal to the Privy Council can be found in Judicial Committee of the Privy Council, *Printed Papers on Appeal* (1909) vol 17, Judgment Nos 55–60.

that this very large transport business simply could not operate if people were allowed to leave the wharf without paying; the only workable practice was to charge everyone.

The difficulty was how this argument might be framed in terms of a defence to an action for false imprisonment (the assault action fell or succeeded with the false imprisonment action). This difficulty was particularly acute in New South Wales, which did not introduce the *Judicature Act* reforms in full until 1972.[12] Old-style pleading was the norm, so the plaintiff pleaded a standard count in his declaration. To this pleading, the ferry company responded with the general issue, that is, not guilty. This original choice of plea needs some analysis. If the ferry company had wanted to plead that it had good cause to detain Robertson, the general issue might not have been the correct plea; generally, pleas of confession and avoidance — what a modern lawyer might call excuse — needed to be specially pleaded, and the general issue would be an incorrect plea. The reason for the general issue plea, however, becomes clear when one looks at the way the ferry company argued the case at trial. Here the primary defence of the company was that the actions of the attendants went outside the course of their employment with the result that the company was not vicariously liable for their actions.[13] The general issue was the appropriate plea to raise this kind of defence.[14]

The company was clearly confident in this line of argument — it took only two days to respond to the declaration — and at the end of Robertson's case the ferry company's counsel applied for a nonsuit. This was rejected by the trial judge, Darley CJ, who stated that he would not nonsuit in the face of the notice (meaning, most probably, that the attendants took the notice that entry and exit was conditional on payment of one penny as their instructions — as they later testified — so that there was at least some evidence that their conduct in restraining Robertson was in the course of their employment).[15] The ferry company appeared to have no fallback argument. Although evidence was led from the attendants, it seems that the ferry company's counsel admitted in summing up that the conduct could not be justified and that the question was one of damages.[16] This was

12 In England and Wales, the main reforms were introduced by the *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66. These were implemented by the *Supreme Court Act 1970* (NSW) and the *Law Reform (Law and Equity) Act 1972* (NSW).

13 As is clear from Chief Justice Darley's notebook all the evidence led by the defence went to this issue: SRNSW: NRS 5818, [2/2854].

14 E Bullen and S M Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law* (3rd ed, 1868) 702, citing *Mitchell v Crassweller* (1853) 13 CB 237; 138 ER 1189; A A Rath, *Principles and Precedents of Pleading in the Supreme Court of New South Wales at Common Law* (1961) refers readers to Bullen and Leake's third edition for NSW practice in this period. I am grateful to Geoff Lindsay SC for this reference.

15 SRNSW: NRS 5818, [2/2854], Page 50 (evidence of Penson, one of the turnstile operators on the wharf).

16 Robertson certainly stated this in his petition to the Privy Council; Darley CJ was more equivocal, stating simply that Rolin (the ferry company's counsel) addressed the jury saying that: 'The question is what damages should the defendant pay' (SRNSW: NRS 5818, [2/2854]). I have not found any authority on the point of whether the scope of authority question was one that could not be left to the jury. Presumably, if it could not, then Rolin's approach simply reflected the limited question that could be determined by the jury.

certainly the view of Darley CJ, who correctly noted that there was no justification on file, and that the question was solely one of damages. Nor was this result forced on him by the course of proceedings: he pointed out that it was important that companies knew that they could not behave in this way.[17] Almost belatedly, after the jury had retired, counsel for the ferry company asked that the jury be directed that Robertson was bound by the notice. This was rejected, as the Chief Justice said that there was no evidence of knowledge of the notice. It is not clear why this was thought important, although the issue arose a number of times in the future progression of the case.

Almost immediately thereafter the ferry company sought to overturn the jury verdict of £100 in favour of Robertson by seeking a rule nisi, which was granted on three grounds. The first related to the decision on vicarious liability whilst the latter two concerned the failure of Darley CJ to direct the jury that Robertson was bound by the notice. Again, the pleadings are vague as to why the notice was thought important, but it is clear from the official report of counsels' oral arguments before the Full Court of the Supreme Court of New South Wales that the ferry company saw it as relevant only to the question of damages.[18] This was also the view of the Full Court.[19] This approach suggests that no one saw the existence of the contract or any obligation imposed by it as providing any justification for the ferry company's action. However, there was good authority, bearing the imprimatur of Bullen and Leake's *Precedents of Pleading*, that conduct that did not amount to a justification could be led in evidence in mitigation of damages; conversely, if the conduct was in effect a justification, it needed to be specially pleaded.[20] By a majority, the Full Court held that there should be no new trial on the question of damages, effectively saying that the condition was of no importance at all in determining liability and quantum.[21]

These decisions spawned little interest in the press. However, there is comment on these cases in *The Mirror of Justice*, a book published in 1906 and comprised of a collection of entries originally published as short commentaries in *The Daily Telegraph*. The author was H R Curlewis, barrister-at-law and lecturer at the law school at Sydney University. Although Curlewis thought the case was curious, he evidently did not think the result at all out of the ordinary. Whilst he pointed out the case left undecided whether Robertson was liable for breach of contract, he explained why damages of £100 could be justified:

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17 'The State Courts – Banco Jury – (Before the Chief Justice and a Jury of Four) – Vindicating a Presumed Right – *Robertson v The Balmain Ferry Company* –Verdict for £100', *The Daily Telegraph* (Sydney), 2 December 1905, 18.

18 *Robertson v Balmain New Ferry Co Ltd* (1906) 6 SR (NSW) 195, 197. Counsel for the ferry company is recorded as submitting that: 'The second and third grounds are directed to the question of damages'.

19 Ibid 204 (Owen J), 205–8 (Cohen J), 213–214 (Pring J).

20 Bullen and Leake, above n 14, 792, citing *Linford v Lake* (1858) 3 Hurl & N 276; 157 ER 475. The case is cited by Cohen J in his judgment: *Robertson v Balmain New Ferry Co Ltd* (1906) 6 SR (NSW) 195, 206.

21 Cohen J dissented only on the ground that a new trial limited to damages should be ordered: *Robertson v Balmain New Ferry Co Ltd* (1906) 6 SR (NSW) 195, 208.

> But where there is a deliberate infringement of the rights of another, an attempt to enforce what may or may not be your rights by the law of the stronger hand, juries are encouraged to remind the defendant of his duties by awarding damages out of all proportion to the actual injury sustained.[22]

This is consistent with the report in *The Daily Telegraph* of comments made by Darley CJ when summing up to the jury:

> These companies should know that they had no right to detain any person. It was not a case of cheating. No doubt the plaintiff suffered a good deal of annoyance by being placed in a position which caused people to think that he was trying to evade the payment of his fare.[23]

A comment in *The Daily Telegraph* after the Full Court's decision was to the same effect: no one is allowed by the law of England to collect one's debts by seizing the debtor and imprisoning him until he pays. It noted: 'This law is so clear that the company did not even argue the point'.[24]

The key change in the ferry company's tack came in oral argument before the High Court of Australia. Its written application for special leave to appeal to the High Court focused on errors in the trial judge's directions to the jury. It argued that Robertson was bound by the notice, and that the ferry company had the right to demand payment of one penny. Nothing was said about detention. But before the High Court, the ferry company's lead counsel, Rolin, put the argument somewhat differently:

> The meaning of the notice was clear, viz, that any person who entered the wharf, whether through the turnstile or from a boat, would be prevented from leaving through the turnstile unless he paid a penny. That was a reasonable condition to impose under the circumstances, because it would be impossible for the appellants to carry on their business if it were necessary to inquire of each person whether he had actually travelled by boat or not. The respondent [Robertson], therefore, when he entered the wharf, knew, and accepted as an implied term of the contract of carriage, *that he would have to submit to such detention if he failed to carry out his part of the contract*.[25] (emphasis added)

4. Contracts and False Imprisonment

It is now necessary to look at the two ways in which it might be said that the contract between the parties might have affected liability for false imprisonment. First, it might have operated as a justification — lawful authority — to detain a person who was in breach of the ferry company's conditions. Second, and importantly, in the context of false imprisonment, it might operate by implying that

22 H R Curlewis, *The Mirror of Justice* (1906) 167–8.

23 'The State Courts', above n 17.

24 H R Curlewis, 'The Mirror of Justice', *The Daily Telegraph* (Sydney), 8 May 1906, 5.

25 *Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379, 383. Perhaps conscious of the implications of such an argument, Rolin immediately added: 'There was no imprisonment because he could have left the wharf by water: *Bird v Jones* (1845) 7 QB 742'.

the plaintiff consented to any imprisonment. There are difficulties with each of these arguments. At the time of the case, there was longstanding authority that a person could not imprison another to enforce a breach of contract in the absence of some independent lawful authority (that is, a statute or judicial process).[26] Moreover, it is absolutely clear from looking at the leading tort texts of the time — Clerk and Lindsell, Pollock, Salmond, Addison — that these justifications went to making lawful that which was otherwise unlawful.[27] Thus, they were defences, which under pre-*Judicature Act* civil procedure needed to be specially pleaded. No such defence had been pleaded by the company. Superficially, the 'consent' argument was more appealing. In particular, this defence, which was alternatively described in some texts by its old pleading name of leave and licence,[28] could in certain cases be put forward under the general issue. In modern terms, it went to the commission of the tort rather than to excuse. This was not, however, a general rule: it was clear that the appropriate plea for leave and licence in assault and battery was the general issue, but it was equally clear that it needed to be specially pleaded in trespass to land.[29] The view was expressed in Bullen and Leake that it should be raised under the general issue in false imprisonment.[30]

Assuming that this was correct, there was a more fundamental problem in applying the defence. As Robertson pointed out in a letter to *The Daily Telegraph* after the High Court decision[31] (more convincingly than was argued in the High Court), any argument of leave and licence had to contend with the leading case of *Wood v Leadbitter*,[32] where it was made clear that any such licence could be revoked, and, if wrongfully revoked, the innocent party was left to its remedy in damages. Of course, *Wood v Leadbitter* was a case involving a licence to be on land. Indeed, from a review of the leading texts, it is clear that consent or *volenti non fit injuria* or leave and licence, however it was described, was considered primarily relevant in the context of assault and battery (at least among the

26 *Sunbolf v Alford* (1838) 3 M & W 248, 252; 150 ER 1135, 1138 (Lord Abinger CB).

27 Wyatt Pain, *Clerk and Lindsell on The Law of Torts* (4th ed, 1906) 204–5; William E Gordon and Walter H Griffith, *Addison's Treatise on the Law of Torts* (8th ed, 1906) 167–87; Sir Frederick Pollock, *The Law of Torts; A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law, to Which Is Added the Draft of a Code of Civil Wrongs Prepared for the Government of India* (8th ed, 1908) 221–5; Sir John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (1st ed, 1907) 344.

28 See, eg, Pollock, above n 27, 159.

29 Bullen and Leake, above n 14, 699 (general issue the correct plea for leave and licence in assault and battery), 740 (leave and licence to be specially pleaded in trespass to land and realty).

30 Ibid. But this was based on obiter in *Christopherson v Bare* (1848) 11 QBD 473; 116 ER 554 and, in this field, drawing analogies was fraught with uncertainty, eg, the distinction between conversion and trespass to chattels: in the former, even pleas that looked like justification could be raised under the general issue (eg, execution levied under a writ of *fieri facias*), whereas in trespass to goods they needed to be specially pleaded (thus, execution under *fieri facias* needed to be specially pleaded in trespass to chattels). See Bullen and Leake, above n 14, 699, 716.

31 Nugent Robertson, 'To the Editor: The Ferry Case', *The Daily Telegraph* (Sydney), 28 December 1906, 5.

32 (1845) 13 M & W 837; 153 ER 351. For a discussion of the case in its historical context, see Patrick Polden, 'A Day at the Races: *Wood v Leadbitter* in Context' (1993) 14 *Journal of Legal History* 28.

intentional torts).[33] There is no reference to consent and false imprisonment in any of the texts of the period. The uncertainty over the scope of leave and licence/consent in false imprisonment is reflected in the company's pleadings on the effect of the notice. The company thought it was important but was not sure why this was so or how it related to an argument of commercial necessity. It is not until oral argument in the High Court that an embryonic version of the ferry company's final case appears. Robertson had entered into a contract to leave the wharf by the ferry, and the ferry company asserted that, as Robertson had entered the wharf knowing of the condition upon which entry was granted, he was obliged to pay one penny and, crucially, that he could be restrained if he did not. But this was not the end of the story — for the first time the ferry company argued, presumably as a result of this contract of carriage, that Robertson had not actually been imprisoned, the ground on which many modern writers justify the result. Whatever one thinks of the merits of this latter argument, it certainly needed contemporary explanation, as the questions of how long one must be imprisoned for the tort to be committed and whether imprisonment occurred if the means of escape involved placing the plaintiff in peril remained relatively unexplored.[34]

5. Commercial Realities in the High Court

On analysis, the ferry company's argument before the High Court was a strange mix of consent and lawful authority: consent, because the original basis for the restraint came from Robertson's voluntary agreement; but perhaps also lawful authority, because it seemed clear that Robertson had revoked the agreement and so some other ground justifying the detention needed to be found. These nice distinctions, however, found no favour in the High Court. Robertson had entered the wharf on the condition that he would leave by another exit and could not complain if immediate freedom was not granted when that contract was repudiated.[35] The notice was now considered irrelevant; it mattered not that Robertson did not know of the precise terms on which he entered the wharf. Rather, what was important was that he knew that there would be some charge or condition to exit the wharf.[36]

In hindsight, the decision of the High Court raised an important point about the relationship between consent and lawful authority in false imprisonment, a novel

33 Pain, above n 27, 189; Gordon and Griffith, above n 27, 160; Pollock, above n 27, 218; Salmond, above n 27, 46. Pollock and Salmond also mention leave and licence in the context of trespass to land.

34 A Underhill and J Gerald Pease, *A Summary of the Law of Torts; or, Wrongs Independent of Contract* (9th ed 1911) 253 states that '[a]ctual restraint for however short a time constitutes false imprisonment'. Through various editions, Pollock noted — picking up on comments made in dissent by Lord Denman CJ in *Bird v Jones* (1845) 7 QB 742, 744; 115 ER 668, 669 — that restraint would not constitute imprisonment only when alternative means of escape could be used by a man of ordinary ability without peril to life or limb (eg, Sir Frederick Pollock, *The Law of Torts* (7th ed, 1904) 217; (12th ed, 1923) 220).

35 *Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379, 386 (Griffith CJ), 389–91 (O'Connor J).

36 Ibid 390 (O'Connor J).

point that contemporary discussions simply did not consider. The defence that was recognised was a strange hybrid and very fact specific. It was either a form of lawful authority deriving from an initially implied contractual consent to a deprivation of liberty or a limited irrevocable contractual consent, the irrevocability flowing from the nature of the original agreement. Why this consent should be irrevocable on legal, as opposed to commercial, grounds was not clear;[37] perhaps the consent was only irrevocable where there was the possibility of exit through the ferry, but this is certainly not explicit in the judgments. Moreover, the analogies drawn by O'Connor J as to the inconvenience to railway operators if Robertson's case succeeded (for example, if passengers could then demand immediate release from contracted railway journeys at points where the train was not scheduled to stop) are entirely unconvincing.[38] Robertson was not asking for the ferry company to delay its boats or change its routes, and it would have presented no practical difficulty to let Robertson go immediately;[39] he managed it himself in the end by doing something he could have done immediately (squeezing between the turnstile and bulkhead).[40]

Whatever one thinks of the ultimate merits of these arguments, there are grounds for having some sympathy for Robertson. Throughout the trial and appeal, the ferry company's arguments changed fundamentally whilst remaining vague. The contract was legally relevant and important, but we are not sure exactly why. Moreover, although both parties played by the rules of the pleading game in the lower courts, the High Court was simply not interested in pleading issues. O'Connor J said that the case had not been conducted on the basis of any pleading point;[41] to the extent that this was true, it was because such a point had not been raised previously. Such arguments were not to bother the High Court: both Griffith CJ and O'Connor J thought any pleading deficiencies could be rectified by amendment,[42] an unusual course to take by the time the case had reached the highest appellate court within Australia. And to cap it off, the High

37 Perhaps an analogy could be drawn with the cases dealing with contractual licences held to be irrevocable for a certain period (see *Hurst v Picture Theatres Ltd* [1915] 1 KB 1), where consent was given for a particular purpose. The context was quite different, however; the question in these cases was whether the licence could be revoked. If it could, the licensee would become a trespasser. *Wood v Leadbitter* (1845) 13 M & W 837; 153 ER 351 was distinguished by creating some kind of limited proprietary right to be on the land for the particular purpose for which the licence to enter had been granted (in *Hurst*, the right to view a moving picture). It was clear that Robertson had no proprietary interest, even as broadly as that defined in *Hurst*, to which the 'licence' to restrain him related. Nor would a court of equity have specifically enforced the contract of carriage in *Robertson*, the other ground on which *Hurst* was decided.

38 *Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379, 389 (O'Connor J).

39 On this point, see further Keng Feng Tan, 'A Misconceived Issue in the Tort of False Imprisonment' (1981) 44 *Modern Law Review* 166.

40 The 'commercial convenience' argument surfaces in O'Connor J's dismissal of the suggestion that Robertson had the right to force his way out: 'it was a necessary part of their system of collecting fares on entry and exit that the turnstile should be an effective barrier against entry and exit of any person except on the company's conditions' (*Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379, 392).

41 Ibid.

42 Ibid 387 (Griffith CJ), 392 (O'Connor J).

Court went further than the ferry company's notice of appeal, which had only asked for a retrial, by directing a verdict for the ferry company.[43] One reason for the reluctance of the Court to engage in any discussion of the pleading issues may have been that New South Wales civil procedure was already seen as archaic: Pollock, after commenting on the cases dealing with how to plead leave and licence, noted with evident satisfaction that this had long ceased to be of any importance in England.[44]

Whatever the doctrinal difficulties the case presented, however, it is clear that the commercial context also played an important role in the decision of the High Court. It might be thought that the decision is representative of an age where sanctity of contract was thought to prevail over principles of liberty and freedom. This may well be part of the story, but it must be remembered that the great debates on freedom of contract focused primarily on a number of discrete areas: disputes between employers and workmen (in the tort context, usually involving the trilogy of defences of contributory negligence, *volenti non fit injuria* and common employment),[45] labour disputes and disputes between rival traders over the boundaries of conduct that interfered with economic interests.[46] Even in these areas, the heyday of freedom of contract as a political ideal was, at the very least, in decline by the time of the case.[47] Moreover, as Kostal has pointed out for an earlier era, actions by passengers against railway companies in negligence had a better track record of success than those brought by the companies' employees. Whilst freedom-of-contract reasoning was frequently employed to prevent employees from suing railway companies, it was strikingly absent in actions by

43 Robertson raised this issue after the judgment was handed down, pointing out that he had not dealt with the issue of whether a verdict should be entered, as it was outside the notice of appeal. Griffith CJ held that the case had already been fully argued and that the order for leave could be extended now if necessary: see 'Trouble Over a Penny Fare — Barrister and Ferry Company — Important High Court Decision — A Lively Breeze', *The Australian Star* (Sydney), 18 December 1906, 1; 'The Tally of the Turnstile — Barrister and Ferry Company — An Excited Litigant', *The Evening News* (Sydney), 18 December 1906, 5; 'Law Report: An Appeal Sustained — The Turnstile Case', *The Sydney Morning Herald* (Sydney), 19 December 1906, 7. I discuss the context of this exchange in more detail below.

44 Pollock, above n 27, 218.

45 See generally Michael Ashley Stein, 'Victorian Tort Liability for Workplace Injuries' (2008) *University of Illinois Law Review* 933.

46 A classic example is *Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25.

47 Dicey saw 'collectivism' replacing 'individualism' as the dominant political ideology from the 1870s: Albert Venn Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (2nd ed, 1914) 201. The same point was chosen by Patrick Atiyah as the the commencement of the fall of freedom of contract (Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 571–626). Whilst Dicey's classification has been criticised (see, eg, José Harris, *Private Lives, Public Spirit: Britain 1870–1914* (1993) 11–13; compare W R Cornish and G de N Clark, *Law and Society in England 1750–1950* (1989) 64), there is agreement that some changes did occur in the latter part of the nineteenth century. As Cornish and Clark put it (at 111), '[n]o longer was there so easy an acceptance of that rather blinkered calculation of human affairs which put its faith in functioning of free markets'. See also Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800–1976* (1978) 159, arguing that the newer law lords in the Edwardian era 'had gone some way to undermine the strong laissez-faire influence of Halsbury, Blackburn and Bramwell'.

passengers, at least where they sued for personal injury.[48] Robertson was not the typical plaintiff against whom freedom-of-contract arguments were routinely employed: he was a barrister, a literary figure,[49] the chairman of the Board of Official Visitors to the Hospital of the Insane at Parramatta and a member of the boards of visitors to similar institutions at Callan Park, Gladesville and Cooks River.[50] He was akin to the middle-class passengers who enjoyed great success against railway companies up to the 1870s, the period of Kostal's study. Moreover, Robertson was suing for an infringement of his liberty interest, an interest that had been strenuously protected by the common law from its earliest times. It would have been quite a leap to allow the freedom-of-contract reasoning embodied in decisions on personal injury claims by workers against employers, or in decisions involving claims for economic loss in labour disputes and disputes between traders, to apply to Robertson's action.[51] Robertson's contract with the ferry company was clearly important, but the commercial imperative that influenced the case was of a different, and narrower, order from the traditional political economy concerns of freedom of contract: the efficient operation of ferry transport on Sydney Harbour, a point made clear by the ferry company's pleading in the High Court. The importance to the company of winning the action is evident from the actions of one of its directors, Walter Cummin McDougall, whose newspaper, the *Balmain Observer*, went to some lengths to downplay and discredit Robertson's action.[52] During the High Court hearing, the paper reported that '[t]he judge spoke greatly in favour of the Ferry Co., and smiled at any idea of an assault on Robertson having taken place'.[53] Robertson felt sufficiently aggrieved to bring this reference formally before the High Court by deposition, but nothing appears to have transpired from it. However, it does explain the *Balmain Observer*'s sardonic comment on the High Court decision:

> It was neither the judge, nor the staff of the 'Observer,' nor Mr Nugent Robertson that smiled on Tuesday when the High Court delivered its judgment in the

48 Rande Kostal, *Law and English Railway Capitalism* (1994) 315–21. The same point has been made in the American context where it has been said that '[p]assengers received solicitous treatment from judges and legislators, a fact that seemingly contradicts the contention that the negligence standard was employed to hold down the operating costs of railroads': James W Ely Jr, *Railroads and American Law* (2001) 221. See also Tony A Freyer, 'Legal Innovation and Market Capitalism, 1790–1920' in Michael Grossberg and Christopher Tomlins (eds), *The Cambridge History of Law in America* (2008) vol 2, 449, 464–5.

49 A later newspaper report described him as the most brilliant conversationalist at the Athenaeum Club: 'Fight over Penny Fare Ended before UK Court', *The Daily Mirror* (Sydney), 7 July 1975, 14.

50 On Robertson's role as official visitor and his interaction with William James Chidley, see Mark Finnane, 'Sexuality and Social Order: the State versus Chidley' in Sydney Labour History Group (ed), *What Rough Beast? The State and Social Order in Australian History* (1982) 204.

51 As noted below, the reasoning was controversial even when it was applied to an employer-employee dispute in *Herd v Weardale Steel, Coal & Coke Co Ltd* [1915] AC 67.

52 Beginning with a description of the Full Court decision of the Supreme Court of New South Wales as 'but a majority vote': 'The Balmain Ferry Case', *Balmain Observer* (Balmain), 12 May 1906, 6.

53 *Balmain Observer* (Balmain) 13 October, 1906, 5.

> *Robertson v* [*Balmain*] *New Ferry* [*Co Ltd*] case. No, but the full staff of the Ferry Co. and a lot of shareholders let out a high pressure expression of pleasure followed by a smile that would almost be considered contempt of court by Mr. Robertson.[54]

In the end, these forces were irresistible: Robertson lost in both the High Court and the Privy Council, the opinion of the Judicial Committee of the Privy Council being little more than acquiescence in the judgment of the High Court.[55] It is short, spends no time at all on any constitutional or pleading question and, for good measure, condemns Robertson's actions as unreasonable.[56] The desire to dismiss the case as without merit is evident from the statement by the Privy Council that the trial judge should have granted the nonsuit asked for by the ferry company at trial.[57] However, as the nonsuit related to whether the attendants had acted in the course of their employment, it clearly would have been wrong to have done so. To have expected Darley CJ to nonsuit on matters not raised in argument was unrealistic. Perhaps the best example of Robertson's fall from grace is the headnote in the *Law Journal Reports*. Whereas Darley CJ had instructed the jury that 'it was not a case of cheating',[58] the headnote reads 'Toll — Evasion'.[59]

The result was that Robertson eventually lost, but he had the last, no doubt bitter, laugh: when the House of Lords applied his case to a miner stuck down a mine as a result of his own breach of contract,[60] even *The Solicitors' Journal* thought the *Robertson* principle was somewhat dangerous.[61] Writing in the *Law Quarterly Review* in 1928, Amos explained compellingly why the general ground for the Privy Council decision was untenable.[62]

6. *Outside the Courtroom: Press Reaction to the High Court Decision*

Robertson's case, particularly in the High Court, was a case that had a history outside the courtroom, and a number of points may be made about the press reaction to the High Court decision that reveal a subtler historical context. First, there was no general press reaction. *The Sydney Morning Herald* ended its interest in the affair after reporting the result of the appeal. Conversely, *The Daily*

54 'Observations', *Balmain Observer* (Balmain), 22 December 1906, 1. The High Court judgment is reported later in the edition: 'The Victory of the Turnstile — Balmain Ferry Company's Rules Indorsed — By the High Court — How Robertson Took His Gruel', *Balmain Observer* (Balmain), 22 December 1906, 3.

55 *Robinson v Balmain New Ferry Co Ltd* [1910] AC 295.

56 Ibid 300 (Lord Loreburn LC).

57 Ibid.

58 'The State Courts', above n 17.

59 *Robertson v Balmain New Ferry Co Ltd* (1910) 79 LJR NS PC 84.

60 *Herd v Weardale Steel, Coal & Coke Co Ltd* [1915] AC 67.

61 'False Imprisonment' (1914) 58 *The Solicitors' Journal and Weekly Reporter* 702.

62 M S Amos, 'A Note on Contractual Restraint of Liberty' (1928) 44 *Law Quarterly Review* 464. See also Glanville Williams, 'Two Cases on False Imprisonment' in R H Code Holland and J F M Schwarzenberger (eds), *Law, Justice and Equity: Essays in Tribute to GW Keeton* (1967).

Telegraph (and its sister paper, *The Evening News*) took a considerable interest in the result both in editorials and in letters to the editor and commentary pieces that were published. Broadly, the letters to the editor fell into two categories. The first category was blatantly hostile to the result reached by the High Court. A sample of letters will suffice to illustrate the point. Writing on 3 January 1907 in *The Evening News*, 'JFM' stated:

> The more the judgment of the High Court in this case is considered, the more unsatisfactory it is found to be. Surely the detested trusts of America never exercised a more tyrannical power than is claimed by the ferry company, and allowed by the High Court, namely, the power to collect its debts by force and imprisonment.[63]

Other correspondents challenged the ferry company's right to detain. 'Layman' wrote:

> What right had the ferry company to stop him [from leaving] and demand yet another penny for a return trip that he neither contracted for, did not want, and never had. Suppose I pay the Railway Commissioners my fare to Melbourne, and change my mind on the platform. What right would they have to stop me on leaving, and demand a return fare from Melbourne?[64]

A common theme was the sense of shock that the High Court decision had engendered. One contributor thought, if the decision was right, 'then one of the long cherished ideas of all British-born subjects is gone, and Magna Charta will have to be revised and re-affirmed'.[65] Although it is something of an overstatement, there is much to support the statement of one correspondent that '[t]he correspondence in your columns shows unusual agreement in public opinion as to the absurdity of the High Court judgment'.[66] Interestingly, the same correspondent also noted that this opinion was not confined to laymen 'for every lawyer I have spoken to … has expressed amazement at the decision'.[67]

In fact, *The Daily Telegraph* published a number of lawyers' views on the effect of the case, and the views expressed were more equivocal than the correspondent suggested. In a succinct commentary on 27 December 1906, 'XYZ' summarised the effect of the decision in four points, the most important of which suggested that, although Robertson had been free to revoke any consent he had given to a deprivation of liberty through this contract, this did not require the company to take active steps to release him.[68] Clearly troubled by the fact that Robertson had actually escaped by pushing past a turnstile, which apparently did the turnstile no harm and which did not engage the company in taking active steps

63 'Voice of the People: The Balmain Ferry', *The Evening News* (Sydney), 3 January 1907, 6.
64 Layman, 'To the Editor: The Ferry Case', *The Daily Telegraph* (Sydney), 28 December 1906, 5.
65 HVY, 'To the Editor: The Ferry Case', *The Daily Telegraph* (Sydney), 1 January 1907, 3.
66 FJB, 'To the Editor: The Ferry Case', *The Daily Telegraph* (Sydney), 5 January 1907, 12.
67 Ibid.
68 XYZ, 'The Ferry Case', *The Daily Telegraph* (Sydney), 27 December 1906, 5

to release him, XYZ thought the fact that, in escaping, Robertson might have damaged the turnstile or its counting mechanism provided sufficient grounds for the company to use force to prevent the imminent damage or interference but not to enforce any alleged right to imprison. In an unusual occurrence, Robertson himself wrote to *The Daily Telegraph* in response to the letter, pointing out a number of alleged flaws in XYZ's argument.[69] XYZ responded further, noting that his article was addressed to what the High Court had actually decided and not what XYZ thought the law should be: 'While reserving to myself the right to approve of a High Court decision if I choose, I did not intend that approval should appear from the article written by me on the Balmain Ferry case'.[70]

The public reaction to the case prompted a more global comment on lay criticism of the law. Curlewis, in a 'Mirror of Justice' comment, clearly thought that some of the lay criticism of the Balmain Ferry case had little substance. At the end of his piece, he suggested that when criticising a decision, '[b]e absolutely sure that you are criticising the decision which was given, and not a decision which you merely imagine was given'.[71] But the more general thrust of the piece was that there were spheres where lay criticism missed the point. It could be said that a decision produces great inconvenience, but could any lay criticism along those lines deal with the lawyer's response that the decision followed logically from (say) the rule in *Shelley's Case* and had to be decided as it was in spite of its consequences? 'Would it not follow', Curlewis surmises, 'that you cannot safely deny that a decision follows from *Shelley's* [*C*]*ase* if you have no idea what *Shelley's* [*C*]*ase* actually was'?[72] Even on Curlewis's terms, however, the decision did not escape criticism; one correspondent wanted to know whether it would be too much to ask Curlewis to quote any case — British or American — from which the decision of the High Court in the ferry case followed logically.[73]

Whilst XYZ and Curlewis presented plausible — from a lawyer's perspective — explanations of the case, other attempts to justify the case in legal terms were less successful. After noting the words of Artemus Ward in the book *Artemus Ward: His Book — Being the Confessions and Experiences of a Showman*, who had said while you could not go into his show without paying you could pay without going in, 'Bumble' argued that Robertson's situation was analogous. The payment was for entering upon the wharf not for the ferry trip. It was suggested that if Mr Robertson had read Artemus Ward more and Coke and Lyttleton less, 'trouble would have been saved, and money too'.[74] This light-hearted legal justification was quickly dismissed; the editor of *The Evening News* added a comment to the

69 A Nugent Robertson, above n 31.

70 XYZ, 'To the Editor: The Ferry Case', *The Daily Telegraph* (Sydney), 29 December 1906, 9.

71 H R Curlewis, 'The Mirror of Justice: Lay Criticism of Law', *The Daily Telegraph* (Sydney), 8 January 1907, 8.

72 Ibid.

73 EM, 'To the Editor: The Ferry Case', *The Daily Telegraph* (Sydney), 11 January 1907, 10. See also Sampson Brass, 'Voice of the People: The Balmain Ferry Case', *The Evening News* (Sydney), 29 December 1906, 6, where it is argued that the precedents were 'directly at variance' with their Honours' judgments.

74 'Voice of the People: The Ferry Turnstiles', *The Evening News* (Sydney), 26 December 1906, 3.

letter that the correspondent had rather missed the point,[75] and a later writer thought it not in good taste to 'look upon High Court proceedings as a sort of Gilbert & Sullivan harlequinade of the people's liberties and proper matter for light and frivolous banter'.[76]

7. Robertson, the High Court and Federation

It is clear, then, that there was some degree of public criticism of the case. But it was not just the result that caused disquiet. It was the fact that it was the High Court that had given this decision. The suggestion that the case had federal connotations beyond its own facts should not be overstated nor should this context be dismissed. Archibald Nugent Robertson had been an opponent of Federation in the late 1890s; his opposition culminated in a pamphlet he wrote in 1897.[77] It is an interesting piece, written from the point of view of a fictitious professor and set in 1915. It details the economic decline of, and ultimate revolt by, the State of New South Wales after Federation. The revolt is unsuccessful, crushed by Commonwealth forces that are dominated by Victoria. In fact, Robertson stood as an anti-Federation candidate for New South Wales in the 1897 Convention elections, running, if *The Bulletin* is to be believed, last out of 49 candidates.[78] This seems to have dampened his enthusiasm: there is no record of him playing an active role in the later anti-Federation movement, and he stated in his evidence at the trial that he was chosen as one of five people to pick the best ode to Federation.[79] However, his past deeds remained with him. When the verdict in his favour was given in the New South Wales courts, *The Bulletin* commented that he did better in court than he did when standing on the anti-Federation ticket.[80]

When his case reached the High Court, for reasons unexplained, Robertson had to argue the case himself (he had counsel before the Supreme Court) before a panel of justices that comprised Griffith CJ, Barton and O'Connor JJ, three leading proponents of Federation, the latter two of whom he had stood against in the 1897

75 Ibid.

76 Brass, above n 73.

77 Archibald Nugent Robinson, *Federation and Afterwards: A Fragment of History AD 1898–1912, Which Briefly Sets Forth Some of the Causes of the Late Abortive Revolt of the State of New South Wales against the Commonwealth of Australia* (1897).

78 'Again, HEYDON, of the Prudent Federation crowd, obtained 16000 votes, while his colleague NUGENT ROBERTSON, who upheld the same banner, and who should have got the same votes if they were given to Heydon for his opinions only, comes ignominiously at the end with 2000': 'The Result', *The Bulletin* (Sydney), 13 March 1897, 6 (capitals in original).

79 SRNSW: NRS 5818, [2/2854], Page 42. Robertson indicated that he had been engaged in literary work, and although I have not conducted a detailed search, there is evidence of him contributing a number of stories to the *Centennial Magazine* in the late 1890s. He later wrote a book, *Her Last Appearance*, published by Mills and Boon in London in 1914. Certainly parts of his address to the High Court contain rhetorical flourishes redolent of the age. Thus, he was fighting 'a public battle' as the 'public liberty' was involved and was standing upon the wharf 'clothed with all the liberties of a British subject': 'Law Report: Judgment Reserved: A Lawyer at Law', *The Sydney Morning Herald* (Sydney), 12 October 1906, 7. These words do not appear in the *Commonwealth Law Reports* version of oral argument.

80 *The Bulletin* (Sydney), 7 December 1905, 18.

Convention elections.[81] In this context, an exchange between Robertson and Griffith CJ following the delivery of the judgments in the High Court, which, in other circumstances, might have simply been explained as the complaints of a disappointed party, takes on a different meaning. Robertson queried the order that had just been given by the Court:

Mr Robertson:	I am speaking on the question of jurisdiction. I submit that the Court has gone beyond the order of leave. The order of leave is only on the question of a new trial, and that is all I came to meet. The notice of appeal as served upon us was that a new trial should have been granted on certain grounds. I did not come to meet the question that has been decided. I did not come to meet the question of whether the verdict should be entered or not. If your Honors [sic] think you should enlarge the order of leave, then I submit the case should be reargued.
The Chief Justice:	Leave can be extended now if necessary.
Mr Robertson:	I submit that I should be allowed to argue upon the question of the pleadings.
The Chief Justice:	The question has already been fully argued, Mr Robertson.
Mr Robertson:	The question of the verdict has not been argued at all.
The Chief Justice:	This was all argued, Mr Robertson.
Mr Robertson:	Your Honor [sic] has for the first time raised the question of leave and license [sic] — a question never raised in any Court before. The Supreme Court rule was not put before you at all. I trust your Honor is not going to overrule the laws of this State. The law of pleading is of as much importance as the law of manslaughter.
The Chief Justice:	Mr Robertson, the Court is treating you with great indulgence in hearing you so long.
Mr Robertson:	I don't think so, your Honor [sic]. I have as much right in this court as your Honor.

81 Barton and O'Connor JJ were both elected. In his pamphlet of 1897, Robertson referred to effigies of the ten delegates from NSW to the Convention being erected but then being totally destroyed in the later revolt described in the pamphlet. He certainly would have known Barton and O'Connor JJ socially, as they were all members of the Athenaeum Club, and there is correspondence to suggest he had some dealings with Barton J: State Library of NSW: MLMSS 38, Scott Family (Rose Scott) — Papers, 1777–1925; CY 1222 (MLMSS 38/21) Correspondence of Rose Scott, 8 June 1888 – 24 March 1925, Pages 45–7; letter to Rose Scott from Archibald Nugent Robertson, 17 February (year unknown).

> The Chief Justice: If you don't behave yourself, Mr Robertson, you will find that you have not as much right here as we have.
>
> Mr Robertson: Your Honor [sic] will take such steps as you please. I am not to be silenced when I am putting forward a legitimate objection. Am I to understand that your Honors [sic] extend the order of leave after argument and judgment, and after all is over?
>
> Mr Ferguson [junior counsel for the ferry company] then rose and asked the Court upon the subject of costs, and the incident ended.[82]

The notion that the High Court was paying insufficient respect to State courts was taken up in an editorial in *The Evening News* shortly after the judgment. The editorial noted that the lay mind (which found the decision puzzling) had been supported by decisions of State judges and that, although the High Court existed to correct errors, this did not prevent the possibility of the High Court being wrong. The High Court sometimes gave decisions 'with a rather curt intimation' of what lower courts should have done or suggested that the 'rudiments or other principles of the law were not within the mental grasp of a Lower Court … [and this] was pointed out in something like the style of the headmaster of a school correcting a false quantity of Latin'.[83] Whilst refraining from individual criticism of the judges (indeed, the editorial was very respectful), the prospect of an appeal was considered desirable. In January 1907, after the Privy Council overturned the High Court's decision in the constitutional law case of *Webb v Outtrim*,[84] another editorial raised the same issue:

> Seeing that the judgments of the High Court have since its existence, and more particularly as they concerned the decisions of the Supreme Court of New South Wales, been tending to show that the law of the latter was bad, this cannot fail to raise a very considerable doubt as to whether, after all, the High Court has not been wrong in other judgments than that in the case *Webb v Outtrim*, and this must have a prejudicial effect on the popular confidence in the ultimate judgment under the law. … But the ignorant public … will also be apt to think that if, in the opinion of the Privy Council, the High Court can make important mistakes in

82 'Law Report: An Appeal Sustained', above n 43. A similar version is reported in *The Australian Star* ('Trouble over a Penny Fare', above n 43), but it adds that, when Robertson said he had been given no opportunity to argue the point, Griffith CJ told him that his memory deceived him. Robertson is also reported as saying that the law of pleading was as important as the law of manslaughter and murder and that '[y]our Honor [sic] cannot overrule the laws of this State'. Moreover, the tone of the exchange is noted: Robertson is said to have stated excitedly in a loud voice that he had as much right in the court as Griffith CJ. 'The Tally of the Turnstile', above n 43, refers to 'an excited litigant' and its report of the exchange says that Robertson's last words were said 'defiantly' before sitting down and nervously fingering some documents. The Chief Justice ignored him and asked if there were any motions at the Bar.

83 Editorial, 'The Public and the Law', *The Evening News* (Sydney), 20 December 1906, 4.

84 [1907] AC 81.

> regard to constitutional law, its capability to make important mistakes in regard to the ordinary law of the land is demonstrable.[85]

A number of other correspondents also hoped that the decision would be put right by the Privy Council in terms that clearly suggested a slap in the face for the High Court. In a letter to the editor of *The Evening News*, JFM penned the following verse:

> Do I sleep? Do I dream?
> Do I wander and doubt?
> Are things what they seem?
> Or is visions about?
> Is our High Court a failure?
> Or is British Justice played out?[86]

For JFM, the Privy Council was the people's hope and the key was to get Robertson's case before it, a view shared by another correspondent who offered one sovereign towards the support of any appeal.[87]

The anti-federal nature of the clamour for an appeal was demonstrated when a public meeting was held on 16 January 1907 in response to an advertisement in the press (and to a circular distributed in the area) to consider what steps should be taken in the public interest to promote an appeal in the case.[88] In fact, the meeting was adjourned as only 25 people turned up, but the rhetoric of the few speeches given encapsulated the sentiment that was present. The proposed chairman, federal Senator J C Nield, said that, as a member of the Senate that had passed the *Judiciary Act 1903* (Cth), he had had no idea — nor had any other member of either chamber had any idea — that they were, in passing the section in question (s 74), conferring such extraordinary jurisdiction upon the High Court. It had come as a shock to him that verdicts could apparently be set aside and decisions overruled without pleadings or without argument.[89] Another speaker, Dr McDonald Kelly, observed that there was a certain glamour about the High Court, but any apologist for the High Court must attack most of the decisions of the New

85 Editorial, 'When Judges Differ', *The Evening News* (Sydney) 10 January 1907, 4. See also Editorial, 'What Is Law?', *The Sydney Morning Herald* (Sydney), 10 December 1906, 2, where it is noted that, of 125 appeals to the High Court from State courts, 73 had been reversed and 12 varied. To a quote from a cynical commentator — 'the last court is always right' — the editorial responded, '[p]erhaps'.

86 'Voice of the People: The Balmain Ferry', above n 63.

87 FJB, above n 66.

88 'The Balmain Ferry Case — Criticism on the High Court', *The Sydney Morning Herald* (Sydney), 17 January 1907, 5; 'High Court's Powers — The Balmain Ferry Case', *The Daily Telegraph* (Sydney), 17 January 1907, 6. A less enthusiastic view of the meeting is provided by a correspondent to the ferry-sympathetic *Balmain Observer*, who noted that there was 'less than a score present' and who suggested that the whole dispute was organised by Robertson for publicity purposes: The Scout, above n 10.

89 'High Court's Powers', above n 88.

South Wales courts and other State courts and perhaps even the Privy Council. According to *The Sydney Morning Herald* report, Kelly said:

> The public, he contended, had not the slightest confidence in the High Court because they could not make themselves believe that all the other Judges were wrong and Sir Samuel Griffith right.[90]

I have found no record of a further meeting being held, but Robertson did petition for leave to appeal to the Privy Council in May 1907. Whilst being something of a rant, it expressly raised the issue of the High Court's competence under the *Judiciary Act 1903* (Cth) to deal with questions of jury verdicts and pleadings of State courts.[91] The federal context of the case should not be pushed too far, but it is easy to forget from a distance the precarious authority of the High Court within the Australian federation, a federal institution that was only three years old when it gave its decision in *Robertson*. Federation was not universally popular: in New South Wales, remnants of anti-federal sentiment can be found in editorials of newspapers in early 1907.[92] More generally, Dr J W Hackett, a member of the Western Australian Legislative Council, in a speech to the Royal Colonial Institute in London in April 1907 commented that Federation had not secured the preponderance of sympathy and popular approval that was once expected and that many sanguine believers 'now considered that Federation was a mistake, that the experiment was premature, and that the results, whether financial, political or federal, were more than doubtful'.[93] Despite this, however, he thought that Federation was here to stay, a view that ultimately shows the relative naivety of those who clamoured for an appeal in the hope that the Judicial Committee of the Privy Council was the body to administer a backhanded slap to Federation by dressing down the High Court. Even as special leave was being granted in May 1907, the Privy Council was itself under attack as Australia's ultimate appellate court: the Colonial Conference of the previous month contained a thinly veiled criticism of the Privy Council from Alfred Deakin, albeit in the context of constitutional cases.[94] By the time the *Robertson* appeal was heard two years later, it would not have been a propitious time for the Privy Council to vindicate

90 'The Balmain Ferry Case', above n 88.

91 Judicial Committee of the Privy Council, above n 11.

92 An editorial in *The Evening News* (Editorial, 'Under the Federal Yoke', *The Evening News* (Sydney), 25 March 1907, 4), described the New South Wales's experience as a member of the Commonwealth as 'characterised as to the last degree disappointing and unsatisfactory'.

93 *The Daily Telegraph* (Sydney), 11 April 1907, 11. The quote is not entirely faithful to the original text of the speech: 'To numbers who were once its sanguine believers, the words Australian Federation now imply a mistake — an experiment made too soon and whose results, financial, political, and above all, federal, are more than doubtful' (J W Hackett, 'Some Federal Tendencies in Australia' (1907) 38 *Journal of the Royal Colonial Institute* 333, 334).

94 See the comments in (1907) 42 *Law Journal* 289, 301, 323, 340. Unsurprisingly, an editorial in *The Daily Telegraph* took a different view, noting that '[s]o far from the Privy Council operating unsatisfactorily, it is easy to recall an important occasion on which its judgment was regarded by the great majority of the Australian people as a most acceptable vindication of the palpable justice of a case': Editorial, 'A New Appeal Court', *The Daily Telegraph* (Sydney), 30 April 1907, 4.

Robertson's view that the High Court had gone beyond its constitutional limits, especially for a litigant who had some history of opposing the federal idea as a whole.

8. Conclusion

This article has attempted to place the decision in *Robinson v Balmain New Ferry Co Ltd* in its historical context. That context is a complex amalgam with both an internal and an external dimension — a dimension that was understood and controlled by the lawyers and a dimension that went beyond the intricacies of pleading and doctrine. Whatever the merits of the competing legal arguments — and in many ways Robertson's were stronger — the ferry company was not prepared to limit its case by reference to relatively narrow points of law. By the time the case reached the High Court, the commercial ramifications of a decision in Robertson's favour were explicitly pointed out by the ferry company. The High Court and the Privy Council were not prepared to jeopardise the established system of fare collection; as the *Balmain Observer* put it, the ferry company's rules had been endorsed by its victory.[95] That the decision has proved to be of limited practical importance merely demonstrates its expediency: the commercial imperative of the ferry company could not generate a rule of general application. Viewing the case in its historical context may not change our views as to the result, but it does allow us to explore the interplay between the internal and external dimensions of legal reasoning. It demonstrates that these contexts were not mutually exclusive. As David Ibbetson has shown, the way a case is put by lawyers to the court is fundamental to how the case is decided,[96] and this is evidenced by the varying ways the case was put to the courts by the ferry company's lawyers. The ferry company was allowed to detain Robertson not just because he had entered into a contract but because the High Court was aware of the commercial consequences of a decision in his favour. This is not to deny the force of reasoning processes internal to law but merely suggests that in some cases, at least in the past, judges and courts did consider the consequences of their decisions, and in doing so, may have considered matters beyond legal doctrine.[97]

At a broader level, *Robertson* also shows the value of historical analysis of private law in Australia. The history of tort law in Australia after Federation remains to be written, and *Robertson* is a good example of the merits of such a project. It reveals an Australian court dealing with a case of first impression that forced it to make new law, a law which was in fact endorsed by the Privy Council. As Bruce Kercher notes, the observation that Australian courts merely copied the

95 'The Victory of the Turnstile', above n 54.

96 David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999).

97 This may not be a novel insight, but it remains a point worth making in light of attempts to suggest that the law of tort, or at least of negligence, should exclude such external influences: see, eg, Allan Beever, *Rediscovering the Law of Negligence* (2007). For criticism of Beever's proposed role for legal history, see Mark Lunney, 'Counterfactuals and Corrective Justice: Legal History and Allan Beever's *Rediscovering the Law of Negligence*' (2009) 17 *Torts Law Journal* (forthcoming).

English common law 'should be a commencing point of historical analysis, a hypothesis to explore, rather than a conclusion'.[98] He notes that '[w]hen this history is written, we might well find that the High Court was less deferential to English law than we presently assume'.[99] We may also find, as in *Robertson*, that there were peculiarly Australian contexts in which court decisions and legislation were made. It would be going far too far to think that the High Court justices in *Robertson* were out to get him, but *Robertson* does illustrate that decisions are not made in an historical vacuum and, at least to some degree, reflect contemporary historical and political currents. Viewed in this light, the reaction to *Robertson* represents a remnant of the defeated, but not extinguished, anti-Federation sentiment, a sentiment that at the time was not doomed to failure.

Whatever else this article has achieved, it is hoped that law students of the future may have cause to challenge Harold Luntz's assessment of Robertson as 'the arrogant barrister plaintiff'.[100] Pompous he no doubt was, but as this article has demonstrated, he had good reason to think the law was on his side. Nor can one can doubt the sincerity of his belief in the virtue of his cause. We may not have liked him, but we should, perhaps, respect the actions of a man who, in a different era, might have been championed as a defender of civil liberties.

This article would not be complete without an observation on another well-known aspect of the case — why the authorised report of the Privy Council decision refers to him as Robinson rather than Robertson. There is certainly no error in the Privy Council record, so the mistake must have been made at the printers. An educated guess is that the problem arose from the name 'Nugent', an uncommon name which Archibald Nugent Robertson shared with a reasonably well-known contemporary American writer, Nugent Robinson.[101] The printer may well have inadvertently made the connection with Nugent Robinson, and this is what appears in the printed report. The result was, as Professor Tony Blackshield's ditty on the case records, not only that Robertson lost, but, to add insult to injury, '[t]hey couldn't even spell your name'.[102]

98 Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995) 171.

99 Ibid 169.

100 Harold Luntz, 'Tort Law' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 677.

101 Author and compiler of *Collier's Cyclopedia of Social and Commercial Information and Treasury of Useful and Entertaining Knowledge* (1882); *Better than Gold* (1885); *A History of the World with All Its Great Sensations, Together with Its Might and Decisive Battles and the Rise and Fall of Its Nations from the Earliest Times to the Present Day* (vol 1, 1887; vol 2, 1892); *The Busy Man's Handbook* (1893).

102 ABC Radio National, above n 4.