CASE NOTES

LETANG v. COOPER

Trespass to the person — Limitation of actions

> The truth is that the distinction between trespass and case is obsolete. We have a different subdivision altogether. Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally.[1]

These words of Denning L.J. mark the most recent[2] attempt to rationalise the modern status of trespass to the person in relation to the broad ground of liability formulated by Lord Atkin in *Donoghue* v. *Stevenson.* This sort of concern by contemporary judges of the Supreme Court of Judicature to deploy rational as opposed to 'formalistic' methods is most welcome where the relevant law is in doubt either because authority is confused or absent. Outside such areas, a degree of anxiety would accompany the enthusiasm of those who think that something of value is lost to the system as a whole when a 'sensible' decision is given in the face of authority. In such areas judicial responsibility would dictate a literal application of the authoritative rule, leaving the question of good sense to another forum.[3] At least where great moral issues are not at stake. For the conservative, the negligible practical consequences of a restatement of common law doctrine in *Letang* v. *Cooper* might suggest that supposed gains in theoretical consistency have been sought at a high price.

The plaintiff's cause of action arose after a car driven by the defendant ran over her legs. After more than three years she issued a writ for damages for negligence and/or damages for trespass to the person. Elwes J.[4] found the defendant negligent and ruled that,

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[1] *Letang* v. *Cooper* [1964] 3 W.L.R. 573.

[2] Previous advances are virtually limited to the decision in *Stanley* v. *Powell* [1891] 1 Q.B. 86 equating a jury finding of no negligence with the traditional defence of 'inevitable accident', and the more recent opinion of Diplock J. in *Fowler* v. *Lanning* [1959] 1 Q.B. 426 that the onus of proving the negligence issue in trespass lay with the plaintiff, whether the trespass occurred on or off the highway.

[3] A principle recognised even by the 'American Realists', *e.g.*, Cardozo, *The Nature of the Judicial Process,* 14, 19, 20, 149. Cardozo may have approved the exception in the present case, however; *infra* pp. 150, 151.

[4] [1964] 2 Q.B. 53.

although negligence was statute-barred, trespass was available and was within the limitation period. The Court of Appeal disagreed, ruling that an action in trespass would not lie; all three members taking the view that the three-year period for 'negligence, nuisance or breach of duty' included trespass. Denning L.J. and Danckwerts L.J. ruled that trespass was a 'breach of duty', and Diplock L.J. held that a non-intentional trespass action was an action 'for negligence'. For Denning L.J., the interpretation of 'breach of duty' to include trespass was an alternative ground, the main ground being the non-existence, at this time, of any action for a non-intentional trespass to the person. Danckwerts L.J. expressly agreed with him.

The exact status of a majority reason where a unanimous reason is given in the same case, is not entirely clear,[5] but on principle it should rank as a ratio.[6] On this view the Court of Appeal must be taken to have ruled first, that the directness rule no longer applied, secondly, that the action for trespass to the person was confined to intentional injuries.

It is true that the survival of the technical distinction between direct and consequential injuries has been largely theoretical in trespass to the person. Its practical effect was limited to the exclusion of indirectly inflicted negligent harm from the scope of trespass, and the odd cases where a plaintiff might benefit from suing in trespass for a negligent harm would be rare enough without this additional factor. Again, the demise of negligent trespass is in line with much current opinion on the social function of these torts.[7] Since negligent injury is satisfactorily compensated through an action in Negligence, an action in which a plaintiff suffers no procedural disadvantage (apart from the present one) in comparison to trespass,[8] and since liability without damage serves no ascertainable policy where the conduct is not intentional, the idea of a non-intentional trespass is an anachronism. Hence tort law would gain coherence by restricting trespass to the person to intentional injuries and giving *Donoghue* v. *Stevenson* the exclusive function of compensating victims of careless conduct.

No great judicial energy was directed to this reform of theory in *Letang* v. *Cooper*. Neither Denning L.J. nor Danckwerts L.J. made any real attempt to base their decision on authority, which is fairly clearly against them. The relevant cases were discussed in detail by Goodhart and Winfield in 1933, who demonstrated that both the directness rule and non-intentional trespass to the person survived.[9]

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5 The point is not discussed by Cross, *Precedent in English Law,* nor by text-books on jurisprudence available to this reviewer.

6 This is a negligible extension of the principle expounded in *Jacobs* v. *L.C.C.* [1950] A.C. 361 at 369.

7 Fleming, *Law of Torts* 3rd ed. 22, 23; James, *Torts* 2nd ed., 64; *Winfield on Tort* 7th ed., 147, 148; *Walmsley* v. *Humenick* (1954) 2 D.L.R. 232; *Beals* v. *Hayward* [1960] N.Z.L.R. 131.

8 *Fowler* v. *Lanning, supra* n. 2. But see *McHale v. Watson* (1965) 38 A.L.J.R. 788 at 790. Diplock J.'s view constituted a ratio whereas that of Windeyer J. was expressly stated not to be essential to his decision (791).

9 49 *L.Q.R.* 359.

Such authorities have ceased to influence those conscious of the need for a better division of functions between the two torts however, and occasional expressions of judicial doubt have lent support to a more conjectural view.[10]

Whatever the propriety and impact of *Letang* v. *Cooper* in England, the Australian law appears to have been settled by the High Court eight years ago. *Williams* v. *Milotin*[11] was an appeal from the Supreme Court of South Australia in which the defendant to a running down claim had pleaded the statute of limitations. Section 35 of the South Australian Act provided that actions formerly brought as actions on the case were, 'save as otherwise provided in this Act', to be subject to a six-year period. Section 36 stipulated a three-year period for trespass to the person. The defendant argued that, since non-intentional trespass was available on the facts and Section 36 covered this, that therefore the proviso in Section 35 operated to exclude the plaintiff's reliance on the six-year period. The Full High Court ruled that the proviso was not directed to the possibility that two causes of action might be available, hence did not exclude an action in negligence merely because one was available in trespass. What is important here is that the Court decided this point only after expressly accepting the defendant's contention that trespass was available on the facts. If that contention had not been accepted the interpretation of Section 35 would not have been in issue.

In the course of ruling that non-intentional trespass was still an available action the High Court also indicated that the directness rule continued to apply.[12] In view of the attitude expressed in *Parker's Case* and the recency of *Williams* v. *Milotin,* it is most unlikely that Australian courts will follow *Letang* v. *Cooper* on this question.

The practical importance of the issue is very small; there may be odd cases where liability will depend on who has the onus of proving the issue of negligence. At least one High Court judge has very recently questioned the ruling in *Fowler* v. *Lanning*[13] that non-intentional trespass and negligence are identical on this matter.[14] The question is no longer important to those jurisdictions which retain a different limitations period for the two torts. Victoria[15] and Queensland[16] having adopted the English wording are covered by the *unanimous* decision in *Letang* v. *Cooper.*[17] South Australia[18] now

10 *E.g. Milotin* v. *Williams* [1957] S.A.S.R. 228 *per* Ligertwood J. at 238.
11 (1957) 97 C.L.R. 465.
12 *Ibid.,* 470, 474.
13 *Ibid.,* n. 2.
14 *McHale* v. *Watson* [1965] 38 A.L.J.R. 267, *per* Windeyer J. at 268.
15 *Limitations of Actions Act* 1958, s. 5.
16 *Law Reform (Limitation of Actions) Act* 1956, s. 5.
17 In this respect *Letang* v. *Cooper* was anticipated by Adam J. in *Kruber* v. *Grzesiak* [1963] 2 V.L.R. 62.
18 *Limitation of Actions Act* 1956, ss. 3, 4.
19 *Mercantile Law Act* 1935, s. 3.

applies one period to all actions for personal injuries. Tasmania,[19] New South Wales[20] and Western Australia[21] apply a six-year period for negligence and a four-year period for trespass to the person, so that no plaintiff would ever wish to sue in trespass and the point could not arise. (*Williams* v. *Milotin* effectively prevents a defendant arguing a characterisation against the wishes of the plaintiff).

BROADHURST v. QUEEN

Criminal Law — Intoxication — Onus of Proof

Until last year the common law regarding intoxication was largely based on the dictum of Lord Birkenhead in *Beard* v. *D.P.P.*[1]. Particularly was this so in regard to the onus of proof:

> Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts.[2]

Later cases (*Woolmington* v. *D.P.P.*[3] for example) tempered the somewhat harsh doctrine laid down by the Lord Chancellor which implied that it was for the accused if he wished to negative the specific intent constituting an element of the crime to adduce evidence to support his defence and to carry the risk of non-persuasion in regard thereto. This principle, which was followed in the formulation of section 17 of the Tasmanian Criminal Code, has now been disapproved and in effect practically destroyed by the present case.[4]

The case was an appeal from a judgment of the Criminal Court of Malta. The appellant had been found guilty of causing wilful grievous bodily harm to his wife as a result of which her death ensued. The death was caused by a fracture of the skull when she fell or was pushed down the stone stairway which led to the Broadhursts' flat. On the night of Mrs Broadhurst's death, the couple had been to a dance, the deceased returning home an hour earlier than the appellant. The latter had consumed a large amount of liquor and remembered nothing concerning his wife's injury until he saw her lying on the stairway in a pool of blood. The fact that the neighbours had heard scuffling and shouting, combining as it did with the couple's known propensity for 'skylarking', tended to preclude the possibility of accidental death.

In the opinion of the Privy Council, delivered by Lord Devlin— allowing the appeal, two points of significance arose: first with regard

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20 *Limitations*, 21 *Jac.* 1 C. 16 (1601).
21 *Limitation Act* 1935, s. 38 (b) and (c) (vii).
1 [1920] A.C. 479.
2 *Ibid.*, 501.
3 [1935] A.C. 462.
4 [1964] A.C. 441.

to the degree of intoxication required to negative intent and secondly concerning the burden of proof of such intoxication.

With respect to the first point, Lord Devlin said:

> This is not a case in which there is direct evidence about the accused's state of mind and the effect of drink upon it. There is evidence about what the accused did in fact, but what he intended to do is a matter for inference. In a case in which the intent of an accused is to be ascertained solely by inference, nothing short of incapacity need be considered.[5]

This statement, of course, is no departure from precedent. The common law has always held so. Ample evidence for this may be seen in earlier cases. (See *inter alia* Lord Denning's restatement of the law in *Attorney-General for Northern Ireland* v. *Gallagher*[6]).

The second principle, regarding onus of proof, suggests a clear departure if not a complete reversal of the principle enunciated in *Beard's Case,* depending on one's interpretation of Lord Birkenhead's words. Again quoting from Lord Devlin's judgment, the principle was laid down as follows:

> Before the Board the Crown conceded that it is not for the accused to prove incapacity affecting the intent and that if there is material suggesting intoxication the jury should be directed to take it into account to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent. Their Lordships approve this concession. The dictum of Lord Birkenhead L.C. cannot be treated as laying down the law upon burden of proof and it is therefore unwise to use the dictum in a direction to the jury.[7]

The effect of these two propositions may at first seem contradictory, but this is not so. Whereas it is true that only incapacity to form the necessary specific intent should be taken into account to determine whether the crime was committed, by the same token the jury should be directed to consider *any* relevant material suggesting intoxication to determine whether such incapacity existed or not, and it is not necessary for the accused himself to prove the absence of such incapacity.

The relevance of this case to the Tasmanian Criminal Code must not be under-estimated. By virtue of section 8 of the Criminal Code Act 1924 all defences of the Common Law are preserved except where they are inconsistent with the Code. But in reference to intoxication, both Burbury C.J. and Cox J. in *Snow* v. *Queen*[8] held that

> Section 17 must be taken to be intended to cover the field as to drunkenness in relation to *mens rea* and no justification or excuse by reason of voluntary drunkenness is to be found in any principle of the common law not defined in section 17 so as to form any basis for invoking section 8 of the Criminal Code Act.

Broadhurst's Case having altered (or perhaps more clearly expressed the common law), this statement cannot now be completely accurate. It was unnecessary, however, for their Honours to deal with the burden

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5 *Ibid.*, 462.
6 [1961] 3 All E.R. 299, 313.
7 [1964] A.C. at 463.
8 [1962] Tas. S.R. 271, 283.

of proof, and it is respectfully submitted that section 17, which as it stands by strong inference lays the burden of proof on the accused, remains sufficiently ambiguous or uncertain to justify a resort to the common law (see dicta of Lord Herschell in *Bank of England* v. *Vagliano Bros.*[9]). If this be true, *Broadhurst's Case,* representing the current position at common law, will necessarily assume significance in the criminal law of Tasmania. Ultimately, of course, this depends on the extent to which resort to the common law is justified in the interpretation of the Code; that is, whether the Code is to be regarded as rigid and comprehensive in itself, or whether it has the flexible and dynamic character suggested by Burbury C.J. in *Murray* v. *The Queen.*[10] Moreover, with regard to the further question of non-indictable offences not covered by the Code (see Crisp J. in *Woodruff* v. *Nolan*[11]) *Broadhurst's Case* may be of even greater significance.

ROOKES v. BARNARD

Tort of Intimidation — Exemplary Damages

There are two important features of this House of Lords' decision.[1] The first is the clear statement of the modern status and scope of the tort of intimidation given in each of the judgments. The second is the formula for the awarding of exemplary damages proposed in the judgment of Lord Devlin.

The facts of the case are as follows:

The appellant was employed for many years by B.O.A.C. as a skilled draughtsman in their London Airport office. Like all the employees in that particular draughting office he was a member of the Association of Engineering and Shipbuilding Draughtsmen (AESD), a trade union. In November 1955 the appellant became dissatisfied with the conduct of the union and resigned. Vigorous efforts were made through the three respondents—two of whom were union members and B.O.A.C. employees, with the third being a union official—to get him to rejoin, and thus to preserve 100% membership in the draughting office. On January 10th, 1956, when it was clear that he would not do so, a meeting of union members was called, whereat it was resolved that if within three days the appellant was not removed from the design office, a withdrawal of all labour of AESD membership would take place. This resolution was delivered to B.O.A.C., and as a result they were induced first to suspend him, and then after due notice to terminate his employment.

These facts must be read in the light of an agreement made some years previously, in 1949, between the employers' and employees' sides

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9 [1891] A.C. 107.
10 [1962] Tas. S.R. 170, 172.
11 [1934] Tas. S.R. 127, 130.
1 [1964] 2 W.L.R. 269.

of the Draughtsmen's Planners' & Tracers' Panel of the National Joint Council for Civil Air Transport, which provided that no lockout or strike should take place, and that any dispute should be dealt with as provided for in the Constitution of the Joint Council. As this agreement had been made a term of all contracts of employment of the men who took part in the meeting of January 10th, it follows that if they had ceased work as threatened, they would have done so in breach of their contracts with B.O.A.C.

It is clear that the appellant had no remedy against B.O.A.C., for he was dismissed by them in accordance with the terms of his contract of employment. What he sought was a remedy against the three respondents on the ground that they wrongfully induced B.O.A.C. to act in such a manner.

Lord Reid framed the question of law raised by the facts thus: '[Was it lawful for the employees] to use a threat to break their contracts with their employer as a weapon to make him do something which he was legally entitled to do but which they knew would cause loss to the plaintiff.'[2]

The first point which came up for consideration was whether there was known to the English law a tort of intimidation. The respondents claimed there was not. However, their Lordships unanimously agreed, in the absence of a direct decision, that the bulk of persuasive authority was more consistent with the existence of such a tort. Thus Lord Hodson is constrained to say 'I agree with your Lordships that the existence of this tort is established by authority.'[3]

Lord Devlin acknowledged that the scope of the tort was as suggested by *Salmond on the Law of Torts*[3a]:

(a) It is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him, and

(b) When the intimidation consists in a threat to do or procure an illegal act, or when the intimidation is the act of two or more persons acting together in pursuance of a common intention, it is an actionable wrong to intimidate other persons with the intent and effect of compelling them to act in a manner or to do acts which they themselves have a legal right to do which cause loss to the plaintiff.[4]

There are two points here which are worthy of comment. First, it is a prerequisite of the tort that the threat must be to do an illegal act. Lord Devlin points out that, though the essence of the offence is coercion, not all coercion is wrong, and where such coercion cannot be legally resisted, the consequences thereof must be borne.[5]

Secondly, it is important to note the extensive zone of potential plaintiffs indicated by (b). Lord Evershed, too, stresses this: 'the

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2 *Ibid.* 278.

3 *Ibid.* 305.

3a (1961), 13th ed., p. 697.

4 [1964] 2 W.L.R. 310.

5 *Ibid.* 312.

person entitled to recover may be either the party intimidated or may be a third party where the intention and effect of the threat is to injure such third party.'[6]

The next contention of the respondents was that if this tort did exist, it was one of a restricted character, and countenanced only threats of criminal or tortious acts—in particular, threats of violence, wherein the tort had its roots. Once again, this argument was unanimously rejected by their Lordships, who held as a matter of principle, in the absence of direct authority, that the tort included threats of breaches of contract. The rejections were made in very strong terms. Thus Lord Reid said: 'I can see no difference in principle between a threat to break a contract and a threat to commit a tort. Intimidation of any kind appears to me to be highly objectionable. The law was not slow to prevent it when violence and threats of violence were the most effective means. Now that subtler means are at least equally effective I see no reason why the law should have to turn a blind eye to them.'[7]

His Lordship also pointed out that, particularly in the case of a large company, a threatened breach of contract could be much more coercive than a threatened tort.[8]

Lord Evershed said: 'I cannot be persuaded that there is in the constitution of the tort of intimidation an essential difference between tortious or criminal acts, on the one hand, and unlawful acts consisting of breaches of contract, on the other, or threats of such breaches which make it necessary for us now to say that the tort of intimidation can never extend to cover threats of breaches of contract.'[9]

Lord Hodson said: 'I do not think your Lordships are laying down any new principle in including a threat to break a contract under the head of intimidation. It is no more than an application of the existing principle to a case which has not been before considered.'[10]

Finally, the respondents argued that if a plaintiff were allowed to sue on a threat of an illegal act made to an intermediate party, and if the tort of intimidation included a threatened breach of contract, then surely in a case such as the present this would allow him to sue on another person's contract. Lord Devlin disposed of this objection by pointing out that the cause of action arose, not because the contract was broken, but because it was *not* broken. It arose because of the action taken by B.O.A.C. to avoid the breach.[11]

To sum up therefore on the question of intimidation, it was decided that such a tort was known to English law in the form outlined above, and that on the facts of the present case this tort had been committed. An order was accordingly made to restore the judgment of the trial judge on the question of intimidation.

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6 *Ibid.* 291.
7 *Ibid.* 279, 280.
8 *Ibid.* 280.
9 *Ibid.* 296.
10 *Ibid.* 307.
11 *Ibid.* 313.

This did not dispose of the appeal however, as counsel for the respondents requested a new trial on the question of damages. The basis of this request was that the trial judge misdirected the jury in virtually saying that, 'the tort of intimidation having been proved, the jury was bound to give exemplary damages unless they thought that the appellant by his provocative conduct had brought it all on himself.'[12]

Consideration of this point was left to Lord Devlin. His Lordship first pointed out that it was impossible without a complete disregard of precedent, and indeed of statute, to arrive at a determination which completely refused to recognise the exemplary principle. See, e.g., the ancient authorities of *Wilkes* v. *Wood,*[13] *Huckle* v. *Money,*[14] and *Benson* v. *Frederick.*[15]

In cases of oppressive, arbitrary or unconstitutional action by the servants of the government, and in cases where the defendant's conduct has been calculated by him to make a profit for himself which is likely to exceed the compensation payable to the plaintiff, he said, 'an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal.'[16] The first category was included by his Lordship because 'servants of the Government are also the servants of the people and the use of their power must always be subordinate to their duty of service.'[17] Lord Devlin stressed, however, with particular regard to the facts of the present case, that he would not extend this category to oppressive action by private corporations or individuals, 'If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful.'[18] The second category was included because: 'Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.'[19]

His Lordship then laid down three considerations to be borne in mind in considering an award of exemplary damages.

First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour; 'The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.'[20]

Secondly, the power to award exemplary damages must be used in defence of liberty, not against it 'Some of the awards that juries have made in the past seem to me to amount to a greater punishment than

12 *Ibid.* 333.
13 (1763) Lofft. 1.
14 (1763) 2 Wils. K.B. 205.
15 (1766) 3 Burr. 1845.
16 *Ibid.* 328.
17 *Ibid.* 328, 329.
18 *Ibid.* 328.
19 *Ibid.* 329.
20 *Ibid.* 329.

would be likely to be incurred if the conduct were criminal, and, moreover, a punishment imposed without the safeguard which the criminal law gives to an offender.'[21]

Thirdly, the means of the parties are material in the assessment of exemplary damages, although irrelevant in the assessment of compensation.

In laying down this formula, Lord Devlin expressly denied an award of exemplary damages in the class of case where the injury to the plaintiff has been aggravated by the manner of doing the injury, i.e. the insolence or arrogance by which it is accompanied. 'Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages.'[22] The case of *Loudon* v. *Ryder*[23] was expressly overruled. This was a case where the defendant broke into a young girl's flat and tried to turn her out. The defendant's behaviour was admittedly outrageous, but the plaintiff's injuries were trivial. Nevetheless, a jury awarded her £1,500 damages for trespass, £1,000 for assault, and £3,000 as exemplary damages. Lord Devlin commented: 'The sums awarded as compensation for the assault and trespass seem to me to be as high as, if not higher than, any jury could properly have awarded even in the outrageous circumstances of the case, and I can see no justification for the addition of an even larger sum as exemplary damages. The case was not one in which exemplary damages ought to have been given as such.'[24]

His Lordship consequently considered that the direction of the trial judge on the question of exemplary damages was too wide, and ordered a new trial on this point.

QUEEN v. SCHELL

Rape of Mental Defective — Consent

The propriety of an indictment for rape, of a man who has had permissive intercourse with a woman of defective intellect, is not merely a difficult legal issue, complicated in Tasmania by Code specifications as to consent, but ought to be a matter for concern by those who give thought to the administration of criminal justice. The seduction of such a woman with her assent or, as the evidence in the present case suggests, at her invitation is, however reprehensible, something which ought to be distinguished from the forceful or fraudulent rape of a woman against her will.

No doubt there is a range of cases in which the woman is so obviously defective in her ability to consciously control her own body that her sexual exploitation by another is thought no less heinous than the *violenter et felonice rapuit* of the old Latin indictment. But an

21 *Ibid.* 329.
22 *Ibid.* 331.
23 [1953] 2 Q. B. 202.
24 *Ibid.* 331.

increasing awareness of the variety and complexity of mental abnormality suggests the likelihood of at least as broad a range of cases where grave doubt must be felt as to when this protection from exploitation becomes rather like a restriction on the moral freedom of intellectually inferior people.

The same difficulty is reflected in the policy which seeks to protect teenage girls from the consequences of their sexual desires, itself a policy no less morally necessary. But the rape of such a girl is still distinguished, in its seriousness as a crime, from her voluntary seduction. The distinction seems no less valid in relation to mentally deficient persons and ought, for that reason, to be reflected in any morally based criminal law. But a difficulty more serious than maintaining a proper balance between the gravity and the punishment of such crimes lies in ensuring that the protection required for specially vulnerable persons is achieved without avoidable injustice to others. In this respect the protection of girls is importantly different from that of weak-minded persons; breach of the law regarding the former depends upon a simple question of fact, the age of the victim, and it is arguable that a prospective seducer ought to be put at his peril with regard to that fact, for the policy to work at all. Even so, few would dispute that the stipulated 'age of consent' is a rough compromise, that many older girls are by intellectual or emotional immaturity equally vulnerable. But at least the policy is largely achieved. On the other hand, the intellectual inferiority of a person is a matter of degree,[1] on which opinion is apt to vary, so that there arises a real difficulty in a defendant's ability to distinguish an unintelligent though sexually promiscuous female from one who is so unintelligent that it is almost certain she would be protected by the law as a 'mental defective.' But if the protection of those who are clearly and seriously feeble minded necessitates such a strict responsibility, it seems reasonable that this ought to be achieved by a defilement statute rather than by the crime of rape.

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[1] Mental Deficiency Act 1920, s. 5 states:

'The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act:

(a) Idiots; that is to say, persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers;

(b) Imbeciles; that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or in the case of children, of being taught to do so;

(c) Feeble-minded persons; that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision, and control for their own protection or for the protection of others, or, in the case of children, that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools;

(d) Moral defectives; that is to say, persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect.'

The stigma and penalty of the latter seem quite out of proportion to the comparative ease with which it might be committed by a person unaware that he is guilty of more than an illicit relationship with a weak minded woman.

For such reasons, in cases where the evidence establishes a clear assent to the physical aspect of carnal knowledge, it would be unfortunate that the law of rape should require a court to put the issue of consent to the jury, so giving it a fiat to pronounce the man a rapist if it happens to think the woman's intellect was sufficiently below normal.[2]

The legal validity of such a procedure has recently been considered by Crisp J. in *R.* v. *Schell.*[3] The accused met a woman in the street and asked her the way to a certain hotel. She answered that it was near where she lived and that she would accompany him. She followed him into a house and, in the course of conversation, remarked that she had never had anything to do with men. Subsequently, she 'practically asked him' for sexual intercourse. She had in fact previously had a baby and, although less capable of self-control, was a woman of normal sexual development and capable of strong desires. Whilst he went to get a rug, she undressed herself in anticipation. When he subsequently took her home she said 'Drop me off here because my mother will go crook.' She then asked for a further assignation, which was granted, as the accused said, 'to get her out of the car.' Subsequent tests of manipulative ability by a psychologist showed the girl to be within the 'imbecile' range of intelligence, although her verbal adaptability put her in the slightly higher range of the 'feeble-minded.'

His honour considered the nature of the consent required to negative rape (section 185: 'Any person who has carnal knowledge of a female not his wife without her consent is guilty of a crime, which is called rape') and ruled that the question was governed by *Papadimitropoulos* v. *The Queen,*[4] viz. the consent need only be a consent 'to the physical act, that is the act of inserting the male organ into the female organ.'[5] The High Court in that case had narrowed the range of fraudulent rape by restrictively interpreting the 'fraud negatives consent' principle to apply only where the fraud is to the physical act, thus distinguishing the 'true' rape cases, the 'bedchamber burglaries' and 'doctors' treatment cases' from the marriage deception cases. That consent in incapacity cases need be only to the physical fact of penetration was not new law,[6] but what perhaps was new was the seeming opportunity given by *Papadimitropoulos* v. *The Queen* to apply an analogous interpretation of 'consent' which would render irrelevant any evidence of non-perception of 'social, moral or biological' aspects of the act.

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2 And that the accused appreciated at least a 'possibility' of such want of capacity. *R.* v. *Lambert* [1919] V.L.R. 205, 212.

3 No. 88 of 1964, Law Society Reports, Tas.

4 (1957-1958) 98 C.L.R. 249.

5 *Ibid.*

6 *R.* v. *Lambert* [1919] V.L.R. 205.

All that was necessary for the consent to be effective was, in the words of the High Court, a 'perception as to what is about to take place, as to the identity of the man and the character of what he is doing.'[7] His honour interpreted the High Court's statement of principle, not as a three-part specification, but regarded the part subsequent to the comma as being expository, not cumulative, on the first part of the sentence. Thus, 'all she has to know is what is being done to her and who is doing it . . . She would understand the character of the act, know what it meant—that is to say, she would appreciate that what was going to happen would be the insertion of the male organ into herself.'[8] This avoided the necessity of distinguishing a perception of 'what is about to take place' from perception of 'the character of what he is doing', consequently rendering irrelevant any evidence that the girl did not appreciate the nature of the act in terms of procreation and satisfaction of lust; *ex fortiori* its moral or social implications. This interpretation is crucial and, although the statement of principle is ambiguous in this respect, there is no authority against the present reading, which is consistent with the strict interpretation applied to penal laws.

The Code definition of 'consent' seemed to present a *prima facie* difficulty here for it stipulated that 'consent means a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which she consents.'[9] However, his honour ruled that the 'rationality' was specific to the act of consent in question, that this was not a high standard, and was satisfied if the girl knew that the accused was going to have carnal connection with her. She need appreciate nothing more in relation to the act than the identity of the accused and his physical penetration of her. A physical acquiescence not amounting to rational consent would be one 'dictated by instinctive desires to satisfy sexual appetites'.[10] The evidence of the woman's 'remembering, anticipating, preparing for and asking for a repetition of the sexual relations',[11] and particularly of her ability to translate her sexual desires into 'language of sentences of recognisable words',[12] sufficed to place her behaviour beyond the merely instinctive level.

This task of separating rational from instinctive behaviour is an onerous responsibility even for a judge and, in view of the difficulties already discussed, the intellectually less demanding notion of 'rational' is preferable to that favoured by the psychologist who gave evidence. The latter thought that rational behaviour was characterised by an approach which weighed the pros and cons of an act and understood why it was rewarded or punished.

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7 (1957-1958) 98 C.L.R. 249.
8 No. 88 of 1964, p. 6.
9 Criminal Code 1924, s. 1.
10 P. 3.
11 P. 7.
12 P. 3.

His honour, anticipating possible difficulties, considered the same submission for the defence in relation to the alternative charge of defilement of a defective,[13] which was not expressed in the indictment but which could have arisen under powers of conviction on alternative charges given by the Code. On the evidence, such a case might *prima facie* go to the jury he concluded, pointing out that the Crown would have the onus of proving that the accused knew the woman was a mental defective within the terms of the Mental Deficiency Act, 1920.[14] This seems to be a more onerous responsibility on the Crown than the corresponding requirement for rape in this context, and might have been one reason for the indictment on the latter charge.[15] A special difficulty in a defilement prosecution would also arise from the way in which the offence has been drafted; the Code refers to the Mental Deficiency Act which defines 'defective' as being applicable only to persons who have been mentally deficient since birth or from an early age. Since the accused must appreciate that the woman had the characteristics of a defective person as statutorily defined,[16] the Crown face the formidable task of proving that the accused knew the weakness was congenital or extending from childhood. Whether or not this influenced the decision not to proceed with the defilement charge in the present case, it does suggest that the effectiveness of the Code in this respect might be reconsidered.

KAY'S LEASING CORPORATION PTY. LTD. v. FLETCHER

Hire-Purchase Agreement—Statutory offence—Law applicable—Proper Law—Hire-Purchase Agreements Act 1941-1957 (N.S.W.) ss. 26c, 31

In the absence of a choice of law clause, the unlimited generality of the language which may be found in a State statute must be reconciled with the limitations of that State's legislative powers. The recent High Court decision in *Kay's Leasing Corporation Pty. Ltd.* v. *Fletcher*[1] illustrates the way in which such a problem can be resolved by construing the statute (with a reference to the subject-matter and context) rather than by using the rules of the conflict of laws or by an application of what has been described by one writer[2] as a 'crude territorial limitation.'

In *Kay's Case* the plaintiff, which was a company incorporated in Victoria with its principal place of business in Melbourne, entered into leasing agreements with the defendants in respect of specific goods, with an associated agreement which gave the defendants an option to purchase goods of the same description. These agreements were

13 S. 126.
14 *Ibid.*, footnote 1.
15 *Ibid.*, footnote 2.
16 P. 8.
1 [1965] A.L.R. 673.
2 Sykes: *Cases on Private International Law*, at p. 885.

executed by the defendants at the plaintiff's office in Sydney and they were then forwarded to its principal place of business in Melbourne where they were sealed by and on behalf of the plaintiff. These agreements provided, *inter alia,* that they should take effect and be construed in accordance with the law of the State of Victoria.

In this action the plaintiff sued to recover the unpaid balance of charges under the agreements. The defendants, in a cross-action to recover the monies already paid by them, argued that the agreements, being hire-purchase agreements within the meaning of either the Hire-Purchase Act 1959 (Vict.) or the Hire-Purchase Agreements Act 1941-1957 (N.S.W.), were void and the amount paid by them was recoverable under the New South Wales Act because the plaintiff was in breach of the minimum deposit provision (s. 31 (3) required a minimum deposit in respect of hire-purchase agreements) and the maximum hiring charge provision (s. 26c(4) prescribing maximum hiring charges). The Victorian statute was in similar terms except that it did not provide for the repayment of monies already paid by the defendants. It was held by the majority of the High Court that the agreements were hire-purchase agreements within the meaning of the Victorian statute and, by virtue of that Act, were void so that the action failed. Further it was held by the whole court that, as the agreements had been entered into in Victoria, the New South Wales Act had no application to them. The cross-action thus failed.

It is interesting to compare the reasoning of the New South Wales Full Court[3] and that of the High Court in coming to the conclusion, which they both arrived at, that the New South Wales statute did not apply to the agreements. Walsh J., who handed down the leading judgment of the New South Wales Court, applied the rule as formulated by Dixon J. in the *Wanganui Case*:[4] 'The rule is that an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or recognised in our Courts, it is within the province of our law to affect or control. The rule is one of construction only and it may have little or no place where some other restriction is supplied by context or subject matter. But, in the absence of any countervailing consideration, the principle is, I think, that general words should not be understood as extending to cases which, according to the rules of private international law administered in our Courts, are governed by foreign law.' Walsh J. reached the conclusion that:[5] 'There is in the Act no express statement of the criterion upon which is to be determined to what hire-purchase agreements out of all such agreements throughout the

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[3] (1964) 81 W.N. (Pt. 2) N.S.W. 155.

[4] (1934) 50 C.L.R. 581 at p. 601.

[5] See n. 3, *supra,* at p. 161.

world the Act should be regarded as intended to apply. In that situation I am of the opinion that in so far as the Act regulates and changes the rights and obligations of the parties to a contract, it should be treated as applying to all contracts of which the proper law, that is the law by which the parties intended or are presumed to have intended that their rights and obligations should be governed, is the law of New South Wales.'

Walsh J.'s ultimate conclusion was that the New South Wales statute could be left out of account in view of the fact that the parties had selected the law of Victoria as the proper law of their contract. The learned judge took the view that this express selection did not in any way offend the principle as formulated in the *Vita Food Case* and, in addition, there was ample connection with Victoria to justify the selection.

This reasoning of Walsh J.'s was an attempt to answer the first question asked of the Full Court in the case stated. This question was: 'Is the law applicable to the interpretation of the agreements . . . between the plaintiff and the defendants the law of the State of Victoria or the law of the State of New South Wales?' The view which the High Court took was that this question was irrelevant and, along with others which were asked, 'reflected some confusion of thought' and, further, that the question was stated in such a way as to obscure the problem in the case. 'The question, therefore, was not one concerned with the ascertainment of "the law applicable to the interpretation" of the agreements in question but as to the ambit of the operation of these particular provisions.'[6] The limitation which the majority judgment placed upon the operation of the minimum deposit provision of the New South Wales act was that it applied only to agreements entered into in New South Wales: 'This is, we think, not a problem to be decided by ascertaining the proper law of the contract, for an offence must be taken to have been committed if, in New South Wales, a vendor enters into a hire-purchase agreement without having first obtained from the purchaser or proposed purchaser a deposit of the specified amount. But it can have no application to the case of the hire-purchase agreement entered into outside the State.'[7] Similarly with regard to the maximum hiring charge provisions: 'In our view, whether or not there has been such a contravention does not in any way depend upon the proper law of the contract; it falls to be determined by considering whether, within New South Wales, a person has, in relation to a hire-purchase agreement, made defined "hiring charges" in excess of those prescribed . . .'[8]

Kitto J. pointed out that it was made clear in the *Wanganui Case* (particularly from the judgment of Dixon J.) that the court there

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6 [1965] A.L.R. 675, per Barwick C.J., McTiernan and Taylor JJ. at p. 676.
7 *Ibid.* at p. 677.
8 *Ibid.* at p. 677.
9 [1965] A.L.R. 675 at p. 682.

was applying a rule of construction only and 'that the context or subject-matter of legislation might supply a different restriction upon the generality of the language.'[9] The learned judge further suggested that it was at the point of entering into the contract that the legislature was concerned to see that no objectionable practice took place and thus it was to be inferred, from the context and the subject-matter that the minimum deposit and the maximum hiring charge provisions applied only to hire-purchase agreements entered into in New South Wales.

However Kitto J. rejected, in much stronger terms than the majority judgment, the relevance or appropriateness of the proper law of the contract in solving the problem. His Honour said:[10] 'In the *Vita Food Case* the proposition was laid down that the parties to a contract may conclusively determine for themselves what the proper law of the contract shall be, provided that their expressed intention is "bona fide or legal", and provided that there is no reason for avoiding their choice on the ground of public policy. That seems to me the strongest possible reason for rejecting the proper law of the contract as a test for determining to what agreements enactments . . . of the New South Wales Hire-Purchase Agreements Act should be understood as intended to apply'.

It is submitted, with respect, that the approach of the High Court is the correct one and that, faced with the provisions of a hire-purchase statute the object of which seems clearly designed to implement a social policy, it would be quite wrong to attempt to resolve difficulties of interpretation by the use of the proper law of the contract. 'It would mean that provisions enacted as salutary reforms might be set at nought by the simple expedient adopted in the present case of inserting in an agreement a stipulation that validity should be a matter for the law of some other country.'[11]

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10 *Ibid.* at p. 683. See also at p. 682.
11 *Ibid.* at p. 682.