

PERSONAL INJURIES

Survey of recent awards in South Australia

The present survey covers the period from July 1964 to October 1965, and includes summaries of all cases relevant to the topic reported in the Law Society Judgment Scheme during that period.¹

This collection of cases has been undertaken in the hope that it will provide a convenient and useful source of reference to the profession in South Australia. A further reason is the belief that the citation of previous awards in comparable cases provides a useful guide to judges who are entrusted with the performance of this most difficult task, and has the desirable consequence of promoting both uniformity and predictability in awards for similar injuries.²

The cases dealt with have again been classified under certain heads according to the injury or if there are multiple injuries, according to the major injury received. It has also been thought desirable to indicate whether the case came on for assessment only or whether it was contentious, and if so, whether the plaintiff's damages were reduced because of his contributory negligence.³

Head Injuries

£1,500 Spanish migrant carpenter aged thirty suffered a fractured skull. He suffers from a severe nerve deafness which is permanent, and renders his left ear practically useless. There

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1. For the period prior to July 1964 see 2 *Adelaide Law Review*, 226.
 2. The Privy Council has recently affirmed this proposition in *Singh (an infant) v. Toong Fong Omnibus Co. Ltd.* [1964] 3 All E.R. 925, especially 927. A most instructive case, although primarily concerned with the problems of jury assessments, is *Ward v. James* [1965] 2 W.L.R. 455, especially 470, 473. See also a comment on this case 'Juries and Personal Injury' (1965) 38 A.L.J. 393. A good illustration of the utility of comparing previous awards in comparable cases is afforded by the approach of Napier C.J. in *Burfitt v. Minister of Education* (1965) L.S.J. Scheme 496, especially 498, 499. The remarks of Bright J. in *Cooper v. Spender* (1965) L.S.J. Scheme 342, 343, are not, it is submitted, to be read as a denial of the utility and desirability of the comparative method of assessment. They merely serve to remind us that there are limitations in the making of any comparison. It is not within the scope of the present survey to deal with the criticism, frequently asserted and with some force, that the uniformity rule is an undesirable accretion to the law of damages, and one to be applied only with the highest degree of circumspection. For a most interesting introduction to this controversy see: Lowe: 'Some Recent Cases on Damages' (1964) 61 *Law Society's Gazette* 485, continued in (1964) 61 *Law Society's Gazette* 536; Grayson: 'Damages for Personal Injuries - A further Comment on Recent Cases', and correspondence referred to therein, (1964) 61 *Law Society's Gazette* 666.
 - 3.* Assessment only.
† Contentious.

is tinnitus in the ear and attacks of nausea occur. The main residual disability is a serious giddiness resulting from damage to the balancing mechanism, which may be permanent. He has a fear of falling when working above ground. Attacks are momentary varying in frequency from three to eight times a day. There is a greater awareness of condition when relaxing.⁴

£1,800 Boy of twelve (now aged sixteen) was struck in eye by golf-ball. Severe intra-ocular haemorrhage. Subsequently a traumatic cataract developed over a period of months. Three 'needling' operations were performed and a fourth to deal with a complication known as 'secondary glaucoma'. Contact lens worn for a period, but later discarded. Sight of injured eye very seriously impaired, and cannot be made to see normally by use of the appropriate lens in conjunction with his good eye. It serves for side vision, but central vision is blurred and less than 10%. Loss of ability to use both eyes together is equivalent to the loss of 75% of sight of one eye, and for this damages are assessed at £1,500. Further £300 allowed for pain and suffering, necessity for periodic examinations, and the possibility of further trouble. Eye injury has not substantially interfered with his schoolwork or prospects in life.⁵

£2,000 Infant aged seventeen (thirteen at time of accident) suffered broken left leg and severe head injuries involving fractures to the skull. Major residual disability is a permanent paralysis of the muscle which turns the right eye outward, resulting in a substantial degree of double vision which will be permanent. Further treatment is impossible, and there is a deprivation of advantages of binocular vision, which is assessed at the equivalent of a 70% loss of vision of one eye. Good adaptation to injury. He appears able to read with reasonable facility and to perform other normal activities. Disability will deny a number of careers to him, and may limit his opportunities of employment in the future.⁶

£2,000 Female infant sustained fracture of the right occipital bone, and fracture of right clavicle, but the latter has left no permanent disability. As a result of the head injury, she has suffered and will continue to suffer considerably from head-

4. *Caravaca v. Mullighan* (1965) L.S.J. Scheme 201 (Hogarth J., April 1965).

5. *Burfitt v. Minister of Education* (1965) L.S.J. Scheme 496 (Napier C.J., September 1965).

6. *Ball v. Gamblings Pty. Ltd.* (1964) L.S.J. Scheme 597 (Chamberlain J., September 1964).

aches. There is a serious and permanent interference with the sense of smell and, because of an impairment to the olfactory nerve, an apparent and, from her point of view, a real impairment of the sense of taste. She further complains of a continuous unpleasant smell, sufficient to induce nausea and even vomiting on occasions. She is shy in company, believing that others can smell this odour, and associate it with her. She is otherwise able to lead a normal life, but her enjoyment of life is substantially affected through her sensory loss.⁷

£4,500 Farmer aged forty-one suffered a head injury which has left him with an inco-ordinated right arm, accompanied by a very pronounced tremor. There is a substantial effect on activities involving use of both arms, with left hand virtually useless for fine actions. Minor inco-ordination of left leg. His memory of recent events is affected, but he is otherwise able to give a coherent and sensible account of himself. He tires easily, and tends to become moody and irritable. Damage may be more diffuse than originally suspected with the possibility of an epileptic condition developing which may respond to drugs. He is still able to work, but a number of activities are beyond his capacity, with a consequent dependence on paid labour.⁸

£9,000 Female aged seventeen suffered concussion and contusion and laceration of the brain. This damage is severe and will never permit anything like a full recovery. Before accident she was of slightly above average intelligence, but this is now sub-normal, approximating to that of a child between eight and ten years. There has been a substantial inhibition and frustration of personality, and she is emotionally labile, the slightest of stimuli producing happiness or distress. She is able to perform simple and menial tasks in the family bakehouse at about half the normal pace. She expects to marry, but her limited intelligence and chronic irritability militate against a successful marriage. She suffers from a terror of sex and isolation, and may be prevented from overcoming either because of her diminished powers of comprehension. Damages must be substantial because she has suffered brain damage converting her from a state of independence to one of semi-dependency.⁹

7. **Anderson v. Trenerry* (1964) L.S.J. Scheme 752 (Hogarth J., October 1964).

8. †*Sivour v. Paech* [1965] S.A.S.R. 65; (1965) L.S.J. Scheme 158 (Chamberlain J., March 1965). (Damages reduced by 50%.)

9. **Friends v. Aistrope* (1964) L.S.J. Scheme 599 (Bright J., September 1964).

- £17,500 Twenty-year-old man sustained severe brain damage, which could not be availed by surgical treatment. For two months no expectation of recovery such as has followed was expected. As it is he is left with residual signs of a severe brain injury. These include a gross defect in articulation, a considerable disturbance in mentality, and gross impairment of intelligence. His performance in identifying patterns (Revin test) is distressingly bad. His motor functions show co-ordination of the hands, but disturbance in the reflexes suggests damage to the spinal tracks. His memory is substantially impaired. Employment is more likely to be of psychological than remunerative benefit to him. The damages must be substantial to compensate for his drastically altered future life.¹⁰
- £17,500 Infant female, aged two at time of accident, suffered fractured skull with injury to her brain and her right side middle ear with concussion and abrasions. She was unconscious for two weeks, and has the following permanent disabilities: deformity of the feet, with consequent impairment of balance and co-ordination; slowness of movement; impairment of her intellectual processes which will adversely affect her opportunities for education and training for employment. Her disability will continue during her adult life, and she will require someone to be with to attend to her when necessary. She will be unable to support herself, and it seems improbable she will ever marry. There is no reason to expect her life to be shortened.¹¹
- £24,000 Final year pharmacy student at University of Adelaide suffered a fractured skull and compound fracture of left mandible with severe brain damage. Unconscious for four months and in hospital for over two years, undergoing three operations. He is left with a spastic and virtually useless left arm and hand, spastic left leg and an asymmetrical jaw. Considerable and varying difficulty in articulation. There are severe effects on temperament and personality, and he is permanently unfit for any useful employment. He is incapable of most of the pleasures of life. He retains some powers of mental and physical activity, and is able to read and write and perform some personal tasks and so does not require nursing so much as supervision. Destruction of his prospects of a full and happy life. He faces instead the prospect of futility and lone-

10. **Clarke v. O'Dea* (1965) L.S.J. Scheme 109 (Mayo J., March 1965).

11. **Asher v. Tyler* (1965) L.S.J. Scheme 500 (Mayo J., September 1965).

liness, alleviated by his limited ability to look after and entertain himself, and by the illusions which enable him to live in an unreal world. His liability to accident must constitute a threat to a normal expectation of life.¹²

£25,000 Male infant aged four suffered severe head injuries, including brain damage which has affected his intellect and to a lesser but appreciable extent, his motor ability. The intellectual retardation is grave, and it is unlikely that from an intellectual and emotional point of view he will progress beyond the standard of a child of ten. There is, moreover, a permanent bitemporal loss of field of vision, and within this field of vision, a considerable loss of acuity of vision. It is estimated that he only has 50% of normal acuity of vision in the right eye, and 20% of normal acuity in the left eye. In the area in which both eyes are operable, vision is between 20% and 50% of normal. As to his loss of motor ability there is permanent impairment of agility and co-ordination in his left leg which is attributable either to the head injury or to his period of immobilisation. His disabilities in combination render him practically unemployable on the general labour market, although he can perform the ordinary daily tasks of clothing and feeding himself. He will be unable to manage his financial affairs. He exhibits a strong desire to do his work well and to get on well with his fellows. These qualities may enable him to find employment of a limited kind in a sheltered environment. He is aware of his enfeebled intellect, and this leads to emotional outbursts and will continue to cause frustrations for the rest of his life. It is unlikely in the extreme that he will ever be able to make a home and family. He seems ultimately destined for the care of an institution. His disabilities mean a grave loss of the amenities of life.¹³

12. **Black v. Mount* (1965) L.S.J. Scheme 170 (Chamberlain J., April 1965). Chamberlain J. in dealing with the head of damages 'loss of amenities of life' at p. 187 said: 'To award him a large sum in addition [to damages for pain and suffering] would be a mere gesture of sympathy which would do nothing to compensate him for his loss. It seems to me to be futile to attempt to do what no sum of money, however large, could even begin to do. . . . It may be that this case will provide an opportunity for an authoritative statement on this much debated topic.' This opportunity has been passed over; it is submitted that there is in this sort of case, much force in the views of Chamberlain J. His approach to the problem of assessing damages to compensate for an injury as grave as that suffered by the plaintiff in this case is similar to that of Harman L.J. in *Warren v. King* [1963] 3 All E.R. 521, 528 letter I, a case in which the plaintiff, a girl of nearly seventeen, was, as a result of a road accident, rendered a permanent quadriplegic. For a recent discussion of this head of damages, see McGregor: 'Compensation versus Punishment in Damages Awards', (1965) 28 M.L.R. 629, 649-653.

13. **Miles v. Silvestri* (1965) L.S.J. Scheme 246 (Hogarth J., June 1964).

Spinal and Neck Damage

- £1,500 Plaintiff plant operator suffered injury to his back involving the crushing of his fourth cervical vertebra, and damage to some of the joints of the neck. There is a consequent limitation of the movement of the neck, both in rotation to the right and in hyperextension, and pain in the lower back. Manipulation of the neck under anaesthetic was performed to disperse adhesions, which provided temporary relief in this area. The condition of the back will gradually improve and eventually disappear, as there is full range of movement in that area. The neck injury constitutes a permanent disability, and varying degrees of pain will continue to be suffered with concomitant headaches which will diminish in severity. He is permanently unfitted for heavy work, and his leisure activities will continue to be interfered with, although less drastically as time goes on.¹⁴
- £1,800 Opal miner suffered an injury to his neck involving the nerve roots in the cervical spine, and an injury to his lower back. These injuries continue to impair his capacity for hard manual work, and caused or contributed to a neurotic condition. Injuries were aggravated by an ill-advised attempt to continue mining.¹⁵
- £2,000 Salesman aged forty-eight suffered an injury to the fourth lumbar disc producing compression on the left fifth lumbar nerve root. He has suffered, as a result of these injuries, fairly continuous pain of varying intensity, including periods of extreme pain when he became immobilised. This condition will gradually improve, with some residual discomfort and pain. Possible that surgery in the form of laminectomy or even fusion of the three vertebrae may become necessary if the pain increases. Little time has been lost from work, and the injuries do not constitute any significant disability in the performance of his work, although they place him at a disadvantage should he have to compete on the general labour market.¹⁶
- £3,500 Woman police constable aged thirty-one suffered fracture of second cervical with some forward displacement. She underwent treatment designed to put traction on her neck and for this purpose, holes were made in her skull, calipers inserted and weights hung. Treatment was continued for six weeks,

14. **Dickson v. Jones* (1965) L.S.J. Scheme 608 (Hogarth J., October 1965).

15. **Mazik v. Lloyd* (1964) L.S.J. Scheme 745 (Chamberlain J., October 1964).

16. **Ryan v. Cook* (1965) L.S.J. Scheme 618 (Hogarth J., October 1965).

after which the weights were removed, and replaced by a heavy fracture collar, which was worn for some three months. Thereafter she wore another collar for six weeks. Throughout this period she experienced considerable pain, and had to relearn to use her neck. Her residual disabilities are a restriction of neck rotation (about half) and stiffness in that area which will be permanent to a degree. Pain in right side of head which will continue. Diminution of powers of physical endurance. Possible degeneration at the site of injured joints, and the possibility of arthritis in the future. Remote possibility of irritation of spinal cord. Some irregularity in her menstrual periods, but childbearing capacity not impaired. Diminution of her enjoyment of sporting activities. Pain and discomfort experienced in her work necessitating wearing of a collar two to three times per week.¹⁷

£15,000 Married woman aged fifty-one (forty-eight at time of accident) sustained injuries to her cervical spine which have resulted in a very serious incapacity. Injury diagnosed as an injury to the spinal cord, consisting of bruising to the cord and tearing of some of the nerve roots in the lower part of the neck. This condition is irreparable, and some further deterioration is expected. Bone graft to cervical spine has been performed to prevent further deterioration in that area, but she continues to experience severe pains in the arms. She is permanently deprived of a great deal of the use of her hands and legs. Great impairment of sensation and function of hands. Contracture in some fingers of the right hand make any degree of dexterity impossible. Weakness of legs and manifest spasticity, which makes walking slow and ineffectual. Normal activities as a housewife are impossible of performance. In short she is reduced to a condition of almost complete helplessness from which no improvement but rather deterioration may be expected.¹⁸

£21,100 Boy aged sixteen was the victim of a shooting accident, the bullet travelling through his spine and lodging close to the heart. He is completely paralyzed from a point high up in his spinal column, and will have to spend his life in a wheel chair. His intellectual powers and use of his arms and hands are unimpaired, and he is able to bath and dress himself, to drive a specially equipped car, and to undertake limited types

17. **Pocock v. Pope* (1964) L.S.J. Scheme 552 (Mayo J., August 1964).

18. **Heusler v. South Australian Railways Commissioner* (1964) L.S.J. Scheme 757 (Hogarth J., October 1964).

of employment. His intelligence is quite good and he should be able to make something worthwhile of his life, despite his disabilities.¹⁹

Cosmetic Injuries

- £75 Married woman suffered some ragged cuts on her left cheek and above her left eye, and on left leg and thigh—stitches later inserted, and, after removal, scars on face were very noticeable. Scars are now inconspicuous, and there is no resultant disability. In view of this damages could not exceed the sum awarded.²⁰
- £1,750 Infant female suffered concussion, facial and other lacerations and a fractured lumbar vertebra. The latter has caused and will continue to cause intermittent backache, with the possibility of arthritic changes developing in contiguous joints. Difficulty in childbirth a possibility. No present impairment of social and sporting activities. The facial disfigurement is not great, but is noticeable on her forehead. Fact that the defendant intends to marry her is irrelevant to this head of damage.²¹

Injuries to Hand and Arm

- £1,500 Motor-car repairer sustained broken nose, facial lacerations and bruising, and concussion, but apart from headaches there is no residual disability. His major disability results from bony damage to the left shoulder. He now suffers pain and there is a limitation of movement which may improve but which will be offset by supervening osteo-arthritic changes which may already have begun. There is loss of power and crepitus in the joint. In relation to employment, the arm is a constant discomfort and imposes limitations on his exertions, but is not a major disability.²²
- £2,500 Male plaintiff suffered severe injuries to right arm with considerable pain and discomfort. He also sustained compound fracture in the right elbow, fracture near the wrist, and lacerations to the fourth and fifth fingers. He is left with disabilities

19. *Harris v. Ryan* (1965) L.S.J. Scheme 121 (Chamberlain J., March 1965). (Note that the sum of £21,100 includes the amount of special damages proved, claimed at £1,016 7s. 2d. in the Statement of Claim.)

20. *Passmore v. Nott* (1965) L.S.J. Scheme 579 (Chamberlain J., September 1965).

21. *Morgan v. Aunger* (1964) L.S.J. Scheme 808 (Mayo J., November 1964).

22. *Quire v. Coates* (1964) L.S.J. Scheme 488 (Bright J., August 1964). (No apportionment.)

and limitations of movement which will be permanent and are likely to deteriorate. Present loss of function is estimated at 40%, and this is likely to increase.²³

Leg and Pelvis Injuries

- £1,500 Carpenter aged thirty-two sustained fracture of left tibia and fibula. Fracture of tibia was compound, and did not unite. Thereafter it was necessary to perform a bone-grafting operation to promote union which was successful. He is left with about $\frac{1}{2}$ " shortening of the leg, putting some extra strain on the spine. Reduction of 5° knee flexion, and some limitation of ankle movement, both in dorsi-flexion and plantar flexion, also by about 5°. It is unlikely that full range of movement will be regained, with a consequent predisposition to osteoarthritic changes. Slight foot and ankle pain will continue, and a feeling of instability will be present when walking on some surfaces. Swelling of limb in hot weather may persist.²⁴
- £2,000 Bricklayer suffered fracture of left tibia and fibula with mild concussion and laceration of scalp and strained neck ligaments. Fracture was reduced and a sliding bone graft operation performed. As a result of injury he is more accident-prone than before. Muscle wasting of the thigh and calf has occurred. His leg is a little shortened and liable to swell at the end of the day. Ankle and knee movements are somewhat restricted. No reason why he cannot carry on his occupation as bricklayer, though with some discomfort.²⁵
- £2,500 Pastoralist aged fifty-eight sustained compound fracture of the right knee-cap, concussion, bruising and various lacerations. Severe pain and discomfort associated with the knee fracture. Operations for the removal of broken pieces of the knee were performed, and subsequently treatment at the hospital and physiotherapy were necessary. Some degree of mobility recovered. There is a reduction of flexibility in the knee—only 90°. $\frac{1}{2}$ " muscle wastage in the right thigh, and a limp which restricts his movements. He is unable to kneel on right knee, to mount and ride a horse, or to hold a sheep for shearing. These and other similar defects have impaired performance of his normal work.²⁶

23. **O'Donohoe v. Miller (Nominal Defendant)* (1965) L.S.J. Scheme 273 (Travers J., June 1965).
 24. †*Wurtle v. Holmes* (1964) L.S.J. Scheme 827 (Hogarth J., December 1964). (Damages reduced by 33%).
 25. †*Kuschinas v. Wait* (1965) L.S.J. Scheme 167 (Chamberlain J., April 1965). (Damages reduced by 25%).
 26. **Pick v. Wynes* (1964) L.S.J. Scheme 540 (Mayo J., August 1964).

- £2,600 Apprentice sustained fracture of left leg below the knee involving compound fracture of the tibia. The wound required suturing, and a sliding bone graft operation was performed which has resulted in satisfactory bone union. Leg is of normal shape and length but is $\frac{1}{2}$ " less in circumference at both thigh and shin. Some loss of knee flexion. Ankle extension is of almost normal range, but there is a considerable loss of flexion and limitation of movement at the ankle of about 35° . Leg is permanently scarred and indented and is unlikely to improve. Increased likelihood of osteo-arthritis, although not of early onset. Injury is a serious though not a major interference with his efficiency as a tradesman in that the limb tires more quickly and prevents his working in cramped conditions or steep places. These limitations will restrict his earning capacity in the future.²⁷
- £2,750 Forty-year-old man suffered injury necessitating removal of both knee-caps. Good deal of pain at the time. Present disability consists of a weakness in both knee-joints—slight limitation of flexion in each and a feeling of unsteadiness. His perseverance has enabled him to combat his disability. Continued equal vigilance in the matter of exercise will have to be shown for the rest of his life or his legs will stiffen and become weak. He cannot go about his daily life without having to think constantly of his legs. Crepitus is present in one joint, and there is a likelihood of arthritic changes in his knees at an earlier age than is normal. Earning capacity not seriously affected because of his accommodation to his injuries.²⁸
- £3,200 Metal polisher sustained fracture of upper end of left thigh bone. Operation performed to fix the splintered fracture with a metal plate and screws. He walked with aid of crutches for three months and stick or sticks for six months, undergoing physiotherapy at the same time. He is permanently unfit for work requiring agility of foot or the handling of heavy weights. Fracture has healed with some deformity. Left leg shortened by $\frac{3}{4}$ ". There are periodic attacks of pain, especially in cold weather, which may necessitate removal of the plate. Earning capacity reduced by £2 to £3 per week because of inability to do overtime.²⁹

27. **Kemp v. Thomas* (1965) L.S.J. Scheme 458 (Bright J., August 1965).

28. **Cooper v. Spender* (1965) L.S.J. Scheme 342 (Bright J., July 1965).

29. †*Massolino v. Noppel* (1965) L.S.J. Scheme 142 (Napier C.J., March 1965). (Damages reduced by 30%.)

£3,500 Man aged thirty-five suffered compound comminuted fracture of left tibia with considerable tissue and skin damage, loss of blood and shock. Skin graft was required, and the leg was immobilised in plaster for eight months. He is left with a shortened and damaged left leg with 25% loss of function. He is permanently unable to lift heavy weights or to play sport. He has pain in the leg and back, with swelling and discolouration of the leg after walking or standing. There is a loss of muscle bulk with thin numbed skin which is abnormally susceptible to damage. There is a limitation of foot movement, some curvature of the spine and rotation of the pelvis. Arthritic changes have begun to occur in the leg.³⁰

£4,000 Female aged twenty sustained concussion, fractured left pelvic bone, a centrally dislocated hip and multiple lacerations and abrasions. She was in hospital for thirteen weeks, for nine of which she had a steel pin through the shin while traction was applied in the form of a 20 lb. weight to reduce the pelvic fracture. Left leg is permanently shortened by 1½", in some measure due to her putting weight on the leg contrary to instructions. Lessening of the pelvic orifice will prevent natural childbirth, and her childbearing capacity is probably limited to three. Her future seems to be as a wife and mother, and she will be able to cope with those duties, although with some pain and inconvenience and osteo-arthritis.³¹

£4,000 Male plaintiff suffered very severe compound comminuted fracture of lower right leg. This necessitated five operations, including a bone graft and an extensive skin graft. He is left with a misshapen and, at times, painful leg, restricted ankle movement and a tendency to a minor degree of arthritis. His inability to do overtime has resulted in a permanent diminution of his earning capacity.³²

£5,800 Orchardist aged fifty-one at time of accident suffered a severe and permanent injury to his left leg. This involved fractures of the left femur, and the left tibia and fibula, with

30. †*Sharrock v. General Motors-Holden's Pty. Ltd.* (1964) L.S.J. Scheme 680 (Chamberlain J., October 1964). (Damages reduced by 40%.)

31. †*Harvey v. Woods* (1964) L.S.J. Scheme 707 (Bright J., October 1964). (No apportionment.)

32. †*Zuk v. Hodges* (1965) L.S.J. Scheme 427 (Chamberlain J., July 1965). (Damages reduced by 50%. An appeal to the Full Court on the question of apportionment was dismissed in a judgment delivered on 4 October 1965.)

injury to ankle and knee joints. A sliding bone graft operation had to be performed. Ankle movement is now restricted to half of normal range. The damaged leg has wasted and is $\frac{1}{2}$ " less in circumference than the other, and the leg is left $1\frac{1}{2}$ " shorter because of the fractures. There is some limitation of movement in the ankle, knee and big-toe, and arthritic changes are taking place. He is able to walk smoothly with the aid of built-up shoes. He is in a condition in which, as an orchardist, he would experience difficulties in walking over rough or hilly terrains, and in climbing ladders or trees. There must be some allowance for the loss of the pleasure of maintaining an orchard, and for the loss of profits from the time of the accident to the time when it must have appeared obvious that the orchard could no longer practicably be maintained.³³

£5,900 Man aged twenty-three suffered a crushed leg necessitating amputation 2" to 3" below the knee joint. Considerable pain during period in hospital and while convalescing. Several skin grafts were necessary to promote the healing of the stump, leading to ulceration in the places of contact. Difficulties encountered in the fitting of an artificial leg because of the proximity of the amputation to knee joint. Chafing and irritation of stump causing skin abrasion followed its fitting. Probability of recurring trouble with the stump and the need for further surgery to remove a part of the fibula to prevent its cutting into or adversely affecting skin on stump. His future earning capacity is open to grave doubt. He will suffer recurring pain for the rest of his life and his artificial leg will require constant repair and replacement.³⁴

Nervous Disorder

£10,000 Semi-trailer driver aged thirty-five sustained severe tearing of the soft tissues of the neck accompanied by bruising and swelling from base of skull to shoulder region. Limitation

33. **McCarron v. Harrison* (1965) L.S.J. Scheme 627 (Travers J., October 1965).

34. **Walch v. Minister of Mines* (1964) L.S.J. Scheme 563 (Mayo J., August 1964). This case went on appeal to the High Court of Australia, and was heard in Adelaide on 30 September and 1 October 1965 before McTiernan A.C.J., Kitto, Menzies, Windeyer and Owen JJ. No argument was put on the question of damages and the High Court was not therefore called upon to consider the trial judge's method of assessment. On 1 October 1965 an order was made by consent allowing the appeal with costs and varying the order of Mayo J. to alter the figure £6,489 7s. 3d. to £8,800. This represents an increase of over £2,000 on the figure originally allowed for general damages, and appears to be much closer to the proper figure for such a severe disability.

of movement in all directions of about 50% of normal. He can do a fairly arduous day's work, but it not free from pain and discomfort. His major disability is that he now suffers from 'an anxiety depression of moderate severity', which constitutes a permanent disability. He is and will continue to be unable to drive a semi-trailer because of this disorder. He has suffered a severe financial loss through his inability to resume in the trucking business.³⁵

Miscellaneous Injuries

- £300 Russian aged sixty-two suffered 'mild' concussion and an extensive laceration of the scalp. Wound sutured under general anaesthetic, and despite some early infection the wound healed satisfactorily. He returned to work after 2½ months treatment and convalescence. No residual disability apart from slight post-concussional and/or neurotic headaches. (N.B. Award as follows: £50 for pain and suffering following accident; £50 for period of convalescence; £150 for headaches.)³⁶
- £1,250 Married woman aged twenty-four suffered shock, concussion, lacerations to scalp and face, damaged teeth and fractured femur. Lacerations sutured and fracture reduced. Femur pinned and wired and plaintiff immobilised for two months. Kidney stone operation subsequently performed owing to an infection contracted during period of immobilisation. She now suffers periodic pain and discomfort in the affected leg and headaches and nervousness. She has large operation scars on her thigh and abdomen which cause embarrassment when wearing shorts or bathers. Scars are no real disability, and the headaches and nervousness should disappear.³⁷
- £1,500 Man aged twenty-three (nineteen at time of accident) suffered concussion, shock, compound fracture of right elbow, and compound fracture to bone of right little finger. Laceration right ring finger. Compound fracture left side of pelvis in region of buttocks with large wound extending

35. **Buchanan v. Reading & Bates (Australia) Pty. Ltd.* (1964) L.S.J. Scheme 815 (Travers J., November 1964).

36. **Pietrowicz v. Miller* (1965) L.S.J. Scheme 594 (Napier C.J., September 1965). The case is interesting for the mention of specific sums in respect of the various heads of damage. This 'breaking-down' of the overall amount is, obviously, of much interest and assistance to those who are faced with the computation of damages.

37. **Richards v. Lake* (1965) L.S.J. Scheme 515 (Chamberlain J., September 1965).

to near the anus across the back of the thigh, causing bruising to front of body, including private parts. Blood transfusion necessary. Little finger amputated. Four operations on buttock wound to remove dead pieces of bone. Satisfactory healing with scar tissue and loss of bulk. Injury to minor nerves has meant a loss of skin sensation, but no appreciable discomfort in sitting. Main disabilities are the loss of little finger, and some loss of use of ring finger, especially a loss of power. No significant interference with his employment or sporting and social activities.³⁸

£1,750 Malaysian woman aged twenty-nine suffered injuries in a road accident in which her husband was killed. These included concussion, fractures of the mandible, left wrist, a rib, fracture of the second cervical pedicle and displacement of the second and third vertebrae. She was later readmitted with toxæmia of pregnancy and a ruptured spleen. Pre-eclampsia not related to the accident, but it could be inferred that spleen injury was so related. She is left with neck pains, some difficulty with her jaw, weakness in her left wrist, leg pains and she complains of sleeplessness. These should disappear 'in six months or so'.³⁹

£2,000 Plaintiff suffered a fractured rib. This aggravated a pre-existing condition of osteo-arthritis, senile type, which aggravation is permanent. Good deal of pain from the neck, causing headaches which are a constant discomfort. Stiffening of back and neck is an acceleration of degeneration which would have inevitably occurred, although not so soon, nor with so much pain. Only substantial subject of compensation is pain and suffering in the form of headaches. An allowance of £2,000 is as much as the evidence warrants.⁴⁰

£2,500 Roumanian aged forty-one suffered concussion, compound fracture of lower end of right ulna and of right tibia and fibula. Fractures were reduced and immobilised in plaster. He was in hospital for four months and in plaster for a further seven months. He is left with a painful and angulated right leg; he walks with a limp, which may induce a tendency to arthritis in the ankle. His right wrist is weak-

38. **Marsh v. Nurton* (1964) L.S.J. Scheme 778 (Hogarth J., November 1964).

39. **Li Lian Tan v. Durham* (1965) L.S.J. Scheme 401, especially 404, 405 (Chamberlain J., July 1965).

40. **Wittber v. Linnett* (1965) L.S.J. Scheme 636, a judgment of the Full Court reducing an award of general damages of £2,750 made by Bright J. ((1965) L.S.J. Scheme 345).

ened and becomes painful under stress. He is suffering from a degree of deafness, estimated overall at about 35% which could be slightly improved by using a hearing aid. He is not as strong or as active as formerly and some regard must be had to his reduced earning capacity.⁴¹

£3,000 Plaintiff aged fifty-three suffered very severe injuries from which he might well have died. These were a fracture of the sternum, a collapse of the left lung, bleeding into the pericardium, and a fracture of the upper end of the tibia and fibula of the right leg just below the knee. There was severe shock, and transfusions were necessary. There was impairment of kidney function, and severe lung infection necessitating a tracheotomy. The fracture of the sternum developed a disease in the bone ends, and further treatment was necessary. Large abscess developed on front of chest which continued to discharge for about a year. There was considerable pain associated with the operations on his chest and difficulty in breathing, which are now considerably improved. He is left with a large and noticeable depression of the breast bone. The leg fracture has united strongly, but with some deformity, giving the leg a bowed look. There is no loss of rotational movement of the leg, although there is evidence of early arthritis on the inner side of the knee joint, which will slowly become more painful. Plaintiff is now unable to perform work involving heavy lifting, but is employed as a first gardener by the City Council, with a reduction of £2 10s. per week from his pre-accident earnings. There will be some allowance for diminished earning capacity in assessing general damages.⁴²

£3,700 Girl aged nineteen (sixteen at time of accident) suffered severe injuries in a car accident. These included collection of blood in both eyes, an enormous laceration of the scalp, fractured cheek-bone with damage to antrum, jaw fractures on both sides, and a displaced fracture of the nasal bone, with other minor injuries. Treatment was prolonged and distressing and she is still not fully recovered in her health. Scalp wound has responded to plastic surgery, but she is still acutely conscious of what was but is no longer a serious disfigurement. The scars are not very noticeable and may

41. †*Aleman v. Buxton* (1965) L.S.J. Scheme 113 (Chamberlain J., March 1965). (Damages reduced by 50%.)

42. †*Demasi v. Fraser* (1965) L.S.J. Scheme 613 (Hogarth J., October 1965). (Damages reduced by 60%.)

be concealed by her hair. Some tenderness of the scars will be present for some time, and other minor disabilities associated with the jaw and cheek fractures will persist. Her principal injury calling for compensation is the anxiety-state from which she still suffers, but from which she should with courage be able to recover.⁴³

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COMPANY LAW

Contracts made by promoters on behalf of companies yet to be incorporated

It is a well-settled principle of English and Australian law that a company cannot validly ratify contracts made in its name by promoters or agents prior to its incorporation. Some American courts have held corporations liable in such situations on a principle of 'adoption';¹ others have taken the more cautious view that a contract made with a non-existent company is merely a 'continuing offer' and the 'ratification' by the company after its creation an acceptance.² Although this latter approach seems consistent with established principles of Australian contract law, it has not as yet been expressly adopted here. Even if it were to receive recognition, it would create only an insecure expectation of future liability of the prospective company, since it would make the transaction subject to the rules on the termination of continuing offers. Thus, the position of pre-incorporation contractors *vis-à-vis* companies is likely to remain unsatisfactory. Such persons will continue to look to the promoters for the fulfilment of their contractual expectations. For this reason, the legal nature of such claims against promoters is a matter of considerable practical importance. A recent decision of the Full Court of the Supreme Court of New South Wales was concerned with this problem.

In *Smallwood v. Black*³ the plaintiffs purported to enter into an agreement for the sale of forty-four acres of land at Ingleburn, N.S.W., to the 'Western Suburbs Holdings Pty. Ltd.'. Under 'signature

43. **Enwright v. Knight* (1965) L.S.J. Scheme 382 (Napier C.J., July 1965). (An appeal to the Full Court against this assessment was dismissed in a judgment delivered on 12 November 1965, which has not, at the date of going to press, been reported.)

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1. 18 *American Jurisprudence* (2nd ed.) 'Corporations', sec. 120, nn. 6-9.

2. *Id.*, at nn. 10, 11.

3. [1964-1965] N.S.W.R. 1973; see also the decision of Jacobs J. in [1964] N.S.W.R. 1121, *sub nomine Black v. Smallwood and Cooper*.

of purchaser' in the printed form contract prepared by the Real Estate Institute of New South Wales appeared the name of the company, and underneath were appended the signatures of the defendants, Smallwood and Cooper, followed by the word 'directors'. The document bears the date of 22 December 1959, but in fact the company was not incorporated until 5 February 1960. After its incorporation the company repudiated the transaction and eventually the plaintiffs sued the signatories for specific performance. Jacobs J. granted specific performance on the ground that the defendants, having represented that the company was in existence, were now estopped from denying their personal liability on the contract. The learned judge did not shrink from admitting that the contract was binding only on the defendants and not on the plaintiffs; indeed, this admission was essential to his judgment since it enabled him to distinguish the case before him from *Newborne v. Sensolid (Great Britain) Ltd.*,⁴ which had decided that the promoter has no cause of action against the third party in a very similar situation. Jacobs J.'s judgment meant that the plaintiffs had, in effect, an election whether to treat the contract as a complete nullity (in which case the directors had no cause of action at all against them) or as a contract binding the directors personally rather than the company (in which case the directors had to pay the purchase price but could, of course, insist on having title to the land transferred to them). This result seems fairly well adapted to the natural merits of the situation. But to say that a result is equitable does not necessarily mean that it is legally justifiable. There may be such things as contracts by estoppel, but it seems clear (and the Full Court so held) that the contract in *Smallwood v. Black* was not one. Even if held to their representation that the company existed on the date of the contract, the promoters would still not be liable on the contract itself. Although Walsh J., in the Full Court, came close to upholding Jacobs J.'s decree, he had no doubt that this could not be done on grounds of estoppel:

In my opinion, if they are liable at all this could not be upon the basis of any estoppel against a denial by them that the company was incorporated. Nobody wants to assert that it was. An assertion by the plaintiffs that, as between themselves and the defendants, it must be taken to have been incorporated by reason of an estoppel, would be meaningless in the present suit and certainly would not advance the case of the plaintiffs. As I have said, the relevant principle of liability is not, in my view, based upon any estoppel.⁵

The reason why Walsh J. was partial towards Jacobs J.'s decree was that he believed there to be a general principle of law making pro-

4. [1953] 1 All E.R. 708.

5. [1964-1965] N.S.W.R. 1973, 1983 ff.

motors who contract on behalf of non-existent companies liable personally on contracts so made. The learned judge considered that this principle had been established by *Kelner v. Baxter*.⁶ The ratio of that case applied, so Walsh J. suggested, regardless of whether the third party (or indeed both promoters and third party) knew or did not know that the company had not yet been incorporated. This seemingly indiscriminate view of the operation of the rule in *Kelner v. Baxter* resulted, so Walsh J. suggested, from the fact that the question of knowledge had not been treated as relevant in any of the more recent English or Australian cases.⁷ Walsh J. recognized only two exceptions to the liability of promoters: (1) there will be no liability if it is excluded expressly by clear language in the document (nothing short of such clear language will suffice); (2) there will be no liability if the ratio in *Newborne v. Sensolid*⁸ applies. According to Walsh J. the latter exception depends on the way in which the promoters have signed. The mere presence of a personal signature in conjunction with the company seal and followed by the word 'director' is no indication that the promoter has signed as agent for the company, it merely constitutes what Walsh J. called a 'company signature'.⁹ If, however, so the learned judge continued, there is something more, accompanying the mere signature, which indicates that the promoter was acting as the agent of the company (regardless of how it is worded) then the rule in *Kelner v. Baxter* applies and the promoter will be personally liable on the contract. This distinction seems to make the decision depend on a purely fortuitous circumstance which has little to do with the actual nature of the promoter's action for and on behalf of the company. In fairness to Walsh J. it must be pointed out that the distinction did not appeal to him as sound; he adopted it only because there was no contrary Australian authority and for the sake of preserving uniformity of English and Australian law.

Asprey J. came to the same conclusion but his approach was fundamentally different. The learned judge did not consider that *Kelner v. Baxter* stood for so wide a principle of liability:

Kelner v. Baxter . . . is not, in my opinion, an authority for the proposition that the person signing the document as an agent is, as a matter of law, personally liable on the document if, when he executes it, he *bona fide*, but mistakenly, believes that

6. (1866) L.R. 2 C.P. 174.

7. The learned judge pointed out that the question of knowledge or belief of either or both parties was not treated as relevant in either *Newborne's* case or in *Summergreene v. Parker* (1950) 80 C.L.R. 304 or in *Vickery v. Woods* (1952) 85 C.L.R. 336.

8. [1953] 1 All E.R. 708.

9. [1964-1965] N.S.W.R. 1973, 1983.

his principal is then in existence and has authorized him to sign it.¹⁰

To Asprey J. the liability in *Kelner v. Baxter* resulted not from the application of a rule of law but from the application of a rule of construction. Despite isolated *dicta*¹¹ which he proposed should be read *sub modo*, Asprey J. claimed that the whole of the judgment clearly displayed 'not the language of the application of an absolute rule of law which makes the "agent" liable on the contract because his principal is non-existent; it is the language apt to be used in ascertaining the intention of the signatories from the language employed by them'.¹² His Honour emphasized that both parties knew of the non-existence of the company, and that this fact appeared on the face of the contract;¹³ both these features he regarded as crucial. Since the company did not exist the court concluded that the parties must have intended the defendants personally to have been the contracting parties. On this reading of *Kelner v. Baxter*, which, with respect, seems preferable to that of Walsh J., the case stands for nothing more rigid and absolute than the following proposition, ably formulated by Williston and quoted with approval by Asprey J.:

... it must generally be presumed that the parties intended to make a binding contract, and if they knew that none was possible with the supposed principal because, for instance, it was a corporation not yet formed ... it is often a fair inference that a contract with the purported agent was contemplated.¹⁴

Asprey J. considered *Kelner v. Baxter* distinguishable, since the non-existence of the company was not disclosed on the face of the contract in the present case. As a matter of construing the contract before him, His Honour decided that the defendants were not liable on the contract itself at all; this, so His Honour held, followed simply from the fact that the signed contract showed unambiguously the intention on the part of both parties that the contract should be concluded between the plaintiffs and Western Suburbs Holdings Pty. Ltd. to the exclusion of any other party or parties.

This finding was sufficient to dispose of the appeal. By way of *obiter dictum*, however, His Honour also examined the question

10. [1964-1965] N.S.W.R. 1973, 1998.

11. Notably the statement by Erle C.J.: 'The cases which have been cited fully bear out the proposition that, if there be no existent principal, such a contract binds the persons professing to contract as agents.' (*Kelner v. Baxter* (1866) 36 L.J.C.P. 94, 97).

12. [1964-1965] N.S.W.R. 1973, 1999.

13. The contract in *Kelner v. Baxter* stated expressly that the defendants in that case were acting 'on behalf of the proposed Gravesend Royal Alexandra Hotel Company Limited' - (1866) L.R. 2 C.P. 174, 177.

14. [1964-1965] N.S.W.R. 1973, 1997.

whether the defendants were liable to the plaintiffs on some other basis.

His Honour discounted the possibility of liability being based on deceit, since the defendants had been acting in good faith. It is, however, well established that good faith is no defence to an action based on breach of warranty of authority and Asprey J. suggested that the defendants might well be held liable if they were sued for damages on this basis. To be sure, *Smallwood v. Black* involved a case somewhat different from the classical cases of breach of warranty of authority. In those cases (notably *Collen v. Wright*,¹⁵ cited by Asprey J.¹⁶) the person represented by the purported agent to have been the principal did in fact exist, but had not given the agent the authority which he represented he possessed. The rule in such cases is that there will be liability for breach of warranty of authority even where the agent acted in good faith and without negligence.¹⁷ In *Smallwood v. Black* there was not and could not have been any authority in the defendants to act for the 'Western Suburbs Holdings Pty. Ltd.', because that company did not exist when the contract was made. The problem simply was whether this distinction made any difference in principle:

The question in the present case is whether the principles to which I have adverted apply in a case where the 'agent' believed that his principal existed and that he was authorized by that principal to execute a contract in the name of his principal but the principal was not in existence.¹⁸

Asprey J. felt that no binding authority existed preventing him from adopting the view that in both types of cases the essential element was present, namely, the representation by the alleged agent of an authority which did not, in truth, exist, and that therefore both cases should be treated alike. The reason for the 'defect of the authority' was, in His Honour's view, not a material factor.

*Newborne v. Sensolid (Great Britain) Ltd.*¹⁹ presented none of the difficulties to Asprey J. which Walsh J. had had to contend with. The reason why Leopold Newborne had not been able to sue personally on the contract was simply that on the true construction of the document he was not a contracting party. For the same reason the Sensolid Company could not have sued Newborne *on the contract*. They could, however, so Asprey J. submitted, 'have successfully sued

15. (1857) 8 E. & B. 647.

16. [1964-1965] N.S.W.R. 1973, 1994.

17. Cf. Powell: *The Law of Agency* (2nd ed. 1961), 253.

18. [1964-1965] N.S.W.R. 1973, 1997.

19. [1953] 1 All E.R. 708.

Leopold Newborne for breach of warranty of authority and, depending upon the facts as to his knowledge of the existence of Leopold Newborne (London) Ltd., in an action of deceit'.²⁰ With respect, this is a satisfactory explanation and it means that the case does not make any new law at all. Walsh J. also adverted briefly to the question whether the defendants were liable for breach of warranty of authority. His Honour conceded²¹ that holding the defendants liable on this basis might well appear to be 'a logical extension' of the rule in *Collen v. Wright*. The learned judge refused to adopt the notion of what he called 'an implied warranty that the principal was in existence'²² because there was no authority for it and because it seemed to him to conflict with his view of *Kelner v. Baxter*, namely that promoters acting for non-existent companies must either be liable on the contract itself or not at all. With respect, *Kelner v. Baxter* does not stand for such a broad proposition and if the law is not to stagnate, lack of authority should be no reason against the beneficial extension of the *ratio* of a case.

Hardie J. in a short but incisive judgment substantially agreed with the main part of Asprey J.'s judgment;²³ he also insisted that *Kelner v. Baxter* was no more than the application of a rule of construction and had not established a rule of law. The learned judge stressed the fact that this very question had been before Williams J. in *Hollman v. Pullin*²⁴ and that Williams J. had emphatically rejected the wide interpretation of *Kelner v. Baxter* to which Walsh J. subscribed. Hardie J. declined to deal with the problem whether the defendants could be held liable for breach of warranty of authority, a question which, as he rightly pointed out, was not before the court.

Smallwood v. Black is an important case since it sheds much light on the vexed problems raised by contracts made by promoters on behalf of companies prior to their incorporation. It is submitted with respect that Asprey J.'s approach to these problems provides elegant and just solutions which are in no way incompatible with established principles or binding authority.

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20. [1964-1965] N.S.W.R. 1973, 2002.

21. *Id.*, at 1985.

22. *Id.*, at 1985.

23. *Id.*, at 1986 ff.

24. (1884) Cab. & El. 254.

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REGULATORY OFFENCES

Negligence as a basis of liability

While the courts in England have construed regulatory offences¹ either as requiring proof of *mens rea* or as imposing strict responsibility,² Australian courts have frequently recognised the concept of negligence, 'the half-way house between *mens rea* and strict responsibility',³ as being a more suitable basis of liability.⁴ One illustration of this approach is *Brew v. Cox*,⁵ a recent decision of Hogarth J. of the Supreme Court of South Australia.

In this case, the appellant, whose car was parked on the opposite side of a busy city street, was prevented by a stream of passing traffic from crossing the street in time to remove the vehicle before the parking meter expired. He appealed to the Supreme Court against his conviction by the justices on a charge of causing allowing permitting or suffering a vehicle to remain standing in a metered space while the expired indicator on the meter was visible, an offence prescribed under a city by-law.⁶

In dismissing the appeal Hogarth J. held that although the words 'cause', 'allow', 'permit' and 'suffer' usually imply a consent to the event caused, allowed, permitted or suffered, under the by-law it was unnecessary for the prosecution to establish an actual consent on the part of a motorist to his vehicle remaining in a metered space. Instead it was sufficient to establish a failure to take reasonable steps to remove the vehicle. His Honour held that the appellant had failed to take such reasonable steps since being delayed by passing traffic in a busy city street is not an 'extraordinary occurrence' but rather 'one of the ordinary consequences of everyday life' that should be foreseen as a reasonable possibility.⁷ An illustration of an extraordinary occurrence is afforded by the 'extreme example' of a person being injured when crossing the road and thus being prevented from removing his vehicle in time.

1. The term 'regulatory offence' embraces those classes of summary offences where proof of *mens rea* is usually not required. See Howard: *Strict Responsibility* (1963), 1, n.3.
2. E.g., *Lim Chin Aik v. The Queen* [1963] A.C. 160 (P.C.).
3. Glanville Williams: *Criminal Law* (2nd ed. 1961), 262.
4. See generally Howard: *Strict Responsibility* (1963), where the Australian case-law is analysed in depth.
5. [1964] S.A.S.R. 90.
6. S. 4(b) of by-law LXVIII of the Council of the Corporation of the City of Adelaide. This provision also prescribes the offence of leaving a vehicle standing in a metered space while the expired indicator on the meter is visible.
7. [1964] S.A.S.R. 90, 93.

Although no authorities were cited the approach adopted is similar to that of the High Court in *Ferrier v. Wilson*⁸ where it was held that the offence of allowing rubbish to fall into Sydney Harbour required proof of negligence. Proof of *mens rea* was not required but liability would not be imposed if the prohibited event was due to some occurrence which could not reasonably have been foreseen or prevented.⁹ In *O'Sullivan v. Truth and Sportsman Ltd.*¹⁰ the High Court held that proof of *mens rea* was required on a charge of causing to be offered for sale newspapers which contravened a statutory restriction on newspaper reports of immorality. However this decision is probably applicable only where 'cause' is not coloured by other words such as 'allow', 'permit' or 'suffer' which are likely to be interpreted as evidencing a legislative intention to punish negligence.¹¹

Had the approach advocated by the Privy Council in *Lim Chin Aik v. The Queen*¹² been adopted the offence would have been construed either as requiring proof of *mens rea* or as imposing strict liability. Either construction would have been unsatisfactory. Requiring proof of *mens rea* would have made the offence unworkable, for it is a reasonable assumption that it was designed to prevent negligence and that most motorists who fail to remove their vehicles in time do not possess an intentional or reckless state of mind, but, like the appellant in the instant case, are merely negligent. Imposing strict responsibility would have resulted in the conviction not only of those who are negligent, for example, the appellant, but also of those whose conduct is quite reasonable, for example, the Good Samaritan who is delayed as a result of telephoning an ambulance for an injured pedestrian.¹³

8. (1906) 4 C.L.R. 785.

9. For a discussion of this case see Howard: *Strict Responsibility* (1963) 55-58. It is clear that the defence of honest and reasonable mistake of fact (see *Proudman v. Dayman* (1941) 67 C.L.R. 536, and analysis thereof in Howard, *op. cit.*, 58-62 and Chaps. 5, 6) was not available to the appellant since he had made no mistake as to the status either of the parking space or the indicator. For a discussion of the difference between the rule in *Ferrier v. Wilson* and the rule in *Proudman v. Dayman*, see Howard: *Strict Responsibility* (1963), 138-140.

10. (1957) 96 C.L.R. 220.

11. In this respect 'permit' and 'allow' are synonymous - *Ferrier v. Wilson* (1906) 4 C.L.R. 785. For 'suffer' see Howard: *Strict Responsibility* (1963), 55, n.33. The same approach could have been adopted even if the appellant had been convicted of the alternative offence prescribed under the by-law of leaving a vehicle standing in a metered space while the expired indicator on the meter is visible.

It is quite clear, however, that an English court would construe such an offence as imposing strict responsibility: see, e.g., *Strong v. Dawtry* [1961] 1 W.L.R. 841.

12. [1963] A.C. 260.

13. Cf. Edwards: *Mens Rea in Statutory Offences* (1955), Chaps. 4-7, where the English authorities on the interpretation of 'cause', 'allow', 'permit' and 'suffer' are discussed.

However, even if the offence were construed as one of strict responsibility in situations such as the 'extreme example' referred to above, it could be argued that since the vehicle remaining in the metered space was not attributable to any voluntary act or omission on the part of the accused the *actus reus* of the offence had not been committed.¹⁴ Nevertheless in jurisdictions where the doctrine of strict liability is in vogue there is no guarantee that such an approach will be adopted, especially in situations which are less extreme.¹⁵

Finally, it may be noted that in the instant case, as in *Ferrier v. Wilson*, the prosecution carried the persuasive burden of establishing facts from which it could be inferred that the appellant had been negligent. However, as Dr. Howard points out, requiring this of the prosecution may prevent the effective administration of criminal justice in this sphere.¹⁶ For this reason the same commentator argues that once the prosecution has established beyond reasonable doubt the facts constituting the *actus reus* of the offence a persuasive burden should be cast on the accused to exculpate himself by establishing, on the balance of probabilities, facts from which the court can infer that he had not been negligent.¹⁷

As this is now the position where an accused relies on the defence of honest and reasonable mistake of fact¹⁸ perhaps the same rule should also operate where the approach in *Ferrier v. Wilson* is adopted. This would seem desirable not only in the interest of expediency and justice but also because it is quite conceivable that a court might adopt the *Ferrier v. Wilson* approach where the reasonable mistake of fact doctrine would also have been applicable.¹⁹

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14. *E.g. Kilbride v. Lake* [1962] N.Z.L.R. 590; see Howard: *Strict Responsibility* (1963), 204-207. This approach would be inapplicable in the Good Samaritan example since the decision not to remove the vehicle but to assist the injured pedestrian would be regarded as voluntary.
 15. *E.g., Parker v. Alder* [1899] 1 Q.B. 20. Cf. *Larsonneur* (1933) 24 Cr.App.R. 74.
 16. Howard: *Strict Responsibility* (1963), 40, 41.
 17. *Id.*, at 41-43.
 18. *Lenzi v. Miller* [1965] S.A.S.R., 1, 16 per Bright J.; *Tanner v. Smart* [1965] S.A.S.R., 44; and cf. *Norcock v. Bowey* (15 February 1966), a decision of Chamberlain J. of the South Australian Supreme Court (as yet unreported). The judgment of Dixon J. (as he then was) in *Proudman v. Dayman* (1941) 67 C.L.R. 536, is not clear on this point.
 19. The principle in *Ferrier v. Wilson* could be applied in any case where the reasonable mistake of fact doctrine is applicable. The converse, however, is not true. See Howard: *Strict Responsibility* (1963), 138-140, and *supra* n.9.

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REGULATORY OFFENCES

Driving under the influence — Interpretation of the Road Traffic Act 1961-1964, s. 47(1)

The recent decision of the Full Court of the Supreme Court of South Australia in *August v. Fingleton*,¹ is important not only because of the conclusions reached as to the scope and operation of the offence of driving under the influence of alcohol or a drug, but also because of the view taken of the High Court decision in *Proudman v. Dayman*,² the most influential Australian decision on the application of the doctrine of strict responsibility to regulatory offences.³

While driving his car, the appellant, a diabetic, suffered an unexpected and apparently sudden attack of hypoglycaemia.⁴ As a result he lapsed into a semi-comatose state rendering him incapable of exercising effective control of the vehicle within the meaning of the Road Traffic Act 1961-1964, s. 47(1).⁵ The attack had been caused by the over-action of the dose of insulin the appellant had given himself earlier that day. However, the attack was also attributable to some other factor such as emotional stress or physical exertion, for the dose of insulin had been normal and the appellant had not changed his diet. He was convicted by a magistrate of driving whilst so much under the influence of alcohol or a drug as to be incapable of exercising effective control and he appealed to

1. [1964] S.A.S.R. 22.

2. (1941) 67 C.L.R. 536.

3. For a detailed examination of this decision and its implications see generally Howard: *Strict Responsibility* (1963). The term 'regulatory offence' embraces those classes of summary offences where proof of *mens rea* is usually not required. See Howard, *op. cit.*, 1, n.3.

4. Hypoglycaemia is a condition produced by a deficiency of sugar in the bloodstream due to the presence of excess insulin in the body. A normal dose of insulin may produce this condition in a diabetic when he changes his diet, exerts himself physically, is under emotional stress, or is suffering from minor infections, such as a cold. Some diabetics are so unstable that it is impossible to find a normal dose which will prevent attacks of hypoglycaemia occurring. Attacks of hypoglycaemia can occur with little or no warning.

Hyperglycaemia, as opposed to hypoglycaemia, is the condition where sugar accumulates in the bloodstream as a result of insufficient insulin. The symptoms are apparently similar to those of hypoglycaemia.

The above facts are taken from the judgment.

5. The relevant part of this section provides as follows:

(1) A person shall not —

(a) drive a vehicle; or

(b) attempt to put a vehicle in motion, while he is so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the vehicle.

For an outline of the corresponding provisions in other Australian States see Wiseman and Vickery: *Motor and Traffic Law* (2nd ed. 1960), 310-312.

the Supreme Court against this conviction on the following grounds. Firstly, that *mens rea* was an element of the offence or that at least it was a defence to show a non-negligent unawareness of the fact that he was so much under the influence of alcohol or a drug as to be incapable of exercising effective control.⁶ Secondly, that the prosecution had not established beyond a reasonable doubt that the incapacity to exercise effective control was due to the influence of a drug.

The Full Court rejected the contention that *mens rea* was an element of the offence. Although the Privy Council in *Lim Chin Aik v. The Queen*⁷ seemed inclined to favour *mens rea* as the basis of liability in regulatory offences, the Court held that the approach adopted in that case was similar to the approach of the High Court in *Proudman v. Dayman*.⁸ The following extract from *O'Sullivan v. Harford*,⁹ an earlier decision of the Full Court, was cited to illustrate what this latter approach was:

Speaking generally an act is not a crime unless the actor knows that he is doing the act which is prohibited, but, in the case of a statutory offence, it is for Parliament to frame the terms of the prohibition and 'where there is an absolute prohibition of the doing of the act, *scienter* forms no part of the offence, and the absence of it affords no defence' (*Reynolds v. G. & H. Austin & Sons Ltd.*,¹⁰ *R. v. Prince*¹¹). In any case in which the statute requires motive, knowledge or the like to be proved the prosecution must fail if it is not proved (*Bank of New South Wales v. Piper*¹²). But there is the intermediate case in which affirmative evidence of the *mens rea* is not required, but its absence is a defence, *i.e.*, if the accused can show an honest and reasonable belief in facts which, if proved, would make the act charged innocent (*ibid*; *Maher v. Musson*,¹³ *Proudman v. Dayman*¹⁴).

In the present case it is not suggested that the prohibition . . . is absolute . . . but the difficulty that arises is that which must arise when the offence consists of doing an act 'wilfully' or 'knowingly', and the prohibition is in two limbs

6. Since the appellant's actions were not rendered completely automatic, sane automatism could not have been pleaded. For a discussion of this defence in relation to offences of strict responsibility see Howard: *Strict Responsibility* (1963), 199-201. Cf., *e.g.*, *H.M. Advocate v. Cunningham* [1964] Crim. L.R. 475.

7. [1963] A.C. 160.

8. (1941) 67 C.L.R. 536.

9. [1956] S.A.S.R. 109, 114.

10. [1951] 2 K.B. 135, 145.

11. (1875) L.R. 2 C.C.R. 154, 171.

12. [1897] A.C. 383 (P.C.), 389.

13. (1934) 52 C.L.R. 100, 104.

14. (1941) 67 C.L.R. 536, 538, 540.

leaving it uncertain whether the word, which imports *scienter*, applies to both. We have considered all the cases, that we can find, in which that question has been or might have been raised . . . but we think that all that they show is that there is no clear principle which can be invoked for the solution of the problem. The answer must depend upon the form of the enactment, and the purpose it is intended to serve.¹⁵

Applying this approach the Court held that the purpose of section 47(1) indicated that *mens rea* was not an element of the offence:

The act of driving a motor vehicle on a public highway is one that involves a grave risk to life and limb as well as to the property of other people, unless it is done with the appropriate degree of care and skill. The purpose of the rules laid down by the Road Traffic Act is to keep this risk down to the, more or less, irreducible minimum. It follows that in prohibiting such things as driving without due care (see *R. v. Coventry*¹⁶), or to the danger of the public (see *Hill v. Baxter*¹⁷) or by persons incapable of exercising effective control of the vehicle, the legislature is not concerned with the moral quality of the act, but with the risk of injury to others.¹⁸

Furthermore if *mens rea* were an element of the offence the provision 'would be reduced to absurdity' for it would not apply to cases where a driver is, for example, too drunk to realize he is incapable of exercising effective control.

Influenced by this view of the purpose of section 47(1) the Court did not discover in the form of the provision any legislative intention to punish only *mens rea*. Instead, following *Armstrong v. Clark per Lynskey J.*,¹⁹ the Court held that all the prosecution need establish to obtain a conviction is (1) that the accused was either driving or attempting to drive a motor vehicle, and (2) that he was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of that vehicle.

The Court therefore concluded that not only is *mens rea* not an element of the offence of driving under the influence, but also that the offence is one of strict responsibility. The contention in the second limb of the appellant's first ground of appeal that negligence ('the half-way house between *mens rea* and strict responsibility'²⁰)

15. [1956] S.A.S.R. 109, 114.

16. (1938) 59 C.L.R. 633, 637.

17. (1957) 42 Cr.App.R. 51.

18. [1964] S.A.S.R. 22, 25.

19. [1957] 2 Q.B. 391, 395. The Court also relied on *Ainsworth v. O'Sullivan* [1955] S.A.S.R. 323. With respect, it would seem that the issue involved in that case was the interpretation of a provision corresponding to section 47(2) and not whether the doctrine of strict responsibility was applicable.

20. Glanville Williams: *Criminal Law* (2nd ed. 1961), 262.

is the basis of liability under section 47(1) was not expressly considered in the judgment.

The appellant's second ground of appeal was also rejected. The Court was satisfied that although there may have been some other factor rendering him more susceptible to an attack of hypoglycaemia than he might otherwise have been, he was so much under the influence of a drug, insulin, as to be incapable of exercising effective control.

The Court was able to distinguish *Watmore v. Jenkins*,²¹ a decision of the Divisional Court in England, relied on by the appellant. In that case, a diabetic suffering from infective hepatitis was prescribed an increased dose of insulin to counteract that condition. While he was driving the condition of his liver improved and he suffered an attack of hypoglycaemia as a result of the excess insulin in his body. It was held, dismissing a prosecutor's appeal against an acquittal on a charge of driving whilst unfit to do so through drink or drugs, that in view of the special facts of the case the justices were entitled 'to entertain a reasonable doubt whether the injected insulin was more than a predisposing or historical cause comprised in a situation or state of equilibrium upon which the reduction of cortezone [through the improvement of the liver condition] operated as the effective cause of the hypoglycaemic episode'.²²

The two main grounds for distinguishing this decision are to be found in the following passage:

In the first place, it seems to us that although the words of the enactment—'whilst so much under the influence as to be incapable'—do, admittedly, import causation, they do not import the 'effective cause', in the sense which that expression was used in actions for negligence prior to the Wrongs Act Amendment Act 1951 . . . the words of the enactment are satisfied, if it is proved that alcohol or a drug, as the case may be, was a 'continuing and contributing cause' of the incapacity. In the present case, all the doctors are agreed that the hypoglycaemic episode would not have occurred, if the appellant had not taken the insulin, and there is no evidence of any *novus actus interveniens*.²³

The first ground appears to be that the wording 'so much under the influence of alcohol or a drug' in section 47(1) imports a

21. [1962] 2 Q.B. 572. The Court also doubted whether it would have reached the same conclusion as the Divisional Court had it decided *Watmore v. Jenkins*.

22. [1962] 2 Q.B. 572, 585.

23. [1964] S.A.S.R. 22, 27.

different test of causation from the wording 'unfit to drive through drugs' in the English provision construed in *Watmore v. Jenkins*. The second ground appears to be that the improvement of the respondent's liver in *Watmore v. Jenkins* was a 'novus actus interveniens' whereas the unknown factor which contributed to the attack of hypoglycaemia in the instant case was not. This point of distinction is consistent with the axiomatic statement made in both cases that the question of causation is always one of fact.

The conviction of the appellant on the charge of driving under the influence was therefore upheld.²⁴ As the Court did not regard the offence as 'trifling' within the meaning of section 47(4) it did not alter the statutory period of disqualification of three months imposed by the magistrate. However the order for the payment of costs made by the magistrate was discharged.

Strict Responsibility and the Defence of Reasonable Mistake of Fact

Perhaps the most important point decided in the instant case is that the approach towards the doctrine of strict responsibility adopted by the Privy Council in *Lim Chin Aik v. The Queen*²⁵ is similar to that adopted by the High Court in *Proudman v. Dayman*²⁶ a decision often regarded as the turning-point in a trend, apparent in numerous Australian decisions, towards the recognition of negligence as the basis of liability in regulatory offences.²⁷

With respect, the similarity is not clear. In *Proudman v. Dayman* it was held by Dixon J. (as he then was) that in the construction of modern statutory offences there is a presumption that an honest and reasonable mistake of fact will be a ground of exculpation.²⁸ It is clear from subsequent cases²⁹ that where this presumption

24. An appeal against a conviction on a charge of driving without due care and attention under the Road Traffic Act 1961-1964, s. 45, however, was allowed.

25. [1963] A.C. 160.

26. (1941) 67 C.L.R. 536.

27. For a full discussion see Howard: *Strict Responsibility* (1963). Cf. *Norcock v. Bowey* (15 February 1966), a decision of Chamberlain J. of the South Australian Supreme Court (as yet unreported). With respect, however, there no reference was made to several relevant authorities, e.g., *Lenzi v. Miller* [1965] S.A.S.R. 1; *Dowling v. Bowie* (1952) 86 C.L.R. 136.

28. (1941) 67 C.L.R. 536, 538. The objection may be raised that the other two members of the High Court in *Proudman v. Dayman*, Rich A.C.J. and McTiernan J., did not share these views. McTiernan J. favoured imposing strict responsibility, and it is not clear from the judgment of Rich A.C.J. whether he agreed with Dixon J. or not. However, in view of the eminence of Dixon J. perhaps this objection has little force. See Howard: *Strict Responsibility* (1963), 85-87.

29. *Dowling v. Bowie* (1952) 86 C.L.R. 136, per Dixon C.J.; *Belling v. O'Sullivan* [1950] S.A.S.R. 43; *Lenzi v. Miller* [1965] S.A.S.R. 1; *Tanner v. Smart* [1965] S.A.S.R. 44.

applies an accused will only be exculpated if the Court considers that the mistake of fact was, as a matter of law, reasonable. For this reason it is arguable that the purpose of raising the defence is to establish facts from which the Court can infer that the accused was not negligent. If it were merely to negative an implied *mens rea*, as was stated in *O'Sullivan v. Harford*,³⁰ the requirement of reasonableness would be of evidentiary significance only.³¹

In *Lim Chin Aik v. The Queen*, however, the only reference to the concept of negligence by the Privy Council appears in the following qualification the Board made to the rule of interpretation that the purpose of an enactment may indicate a legislative intention to impose strict responsibility:

But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim. This principle has been expressed and applied in *Reynolds v. G. H. Austin & Sons Ltd.*³² and *James & Sons Ltd. v. Smee; Green v. Burnett*.³³ Their Lordships prefer it to the alternative view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty. This latter view can perhaps be supported to some extent by the *dicta* of Kennedy L.J. in *Hobbs v. Winchester Corporation*³⁴ and of Donovan J. in *R. v. St. Margaret's Trust Ltd.*³⁵ But though a nominal penalty may be appropriate in an individual case where exceptional lenience is called for, their Lordships cannot, with respect, suppose that it is envisaged by the legislature as a way of dealing with offenders generally. Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is

30. [1956] S.A.S.R. 109, 114.

31. See, e.g., *Thomas v. The King* (1937) 59 C.L.R. 279, 299, per Dixon J. See also Howard: *Strict Responsibility* (1963), 99-105.

32. [1951] 2 K.B. 135.

33. [1955] 1 Q.B. 78.

34. [1910] 2 K.B. 471.

35. [1958] 2 All E.R. 289.

dealing with a grave social evil, strict liability is not likely to be intended.³⁶

The essence of this qualification appears to be as follows. If the imposition of strict responsibility would result in the conviction of a class of persons whose conduct is not negligent, then although the legislature may have contemplated the punishment of those who are negligent but who do not possess *mens rea*, the offence should be construed as one requiring proof of *mens rea*. With respect, it is doubtful whether this application of the concept of negligence adds anything but additional confusion to the existing body of English law.³⁷ Whatever the effect of the decision is, however, it is quite clear that the Privy Council did not regard negligence as an appropriate basis of liability in regulatory offences:

It would seem therefore that the approach of Dixon J. in *Proudman v. Dayman* may be essentially different from that of the Privy Council in *Lim Chin Aik's* case. However, it could be argued that in one respect that two approaches are similar. In *Proudman v. Dayman* Dixon J. apparently contemplated that the presumption would not apply to certain offences:

But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one.³⁸

It is difficult, however, to assess the weight to be attached to this statement for the offence construed in *Proudman v. Dayman* undoubtedly related to 'matters of police . . . or safety'. In any event, later in his judgment Dixon J. said: '. . . unless from the words, context, subject-matter, or general nature of the enactment some reason to the contrary appears, you are to treat honest and reasonable mistake as a ground of exculpation, even from a summary offence'.³⁹ As it is arguable that no reason usually exists for rejecting negligence as a basis of liability in favour of strict responsibility⁴⁰

36. [1963] A.C. 160, 175.

37. Whenever strict liability is imposed consistency necessitates the conviction of a 'class' of persons whose conduct is not negligent. See, e.g., *Norcock v. Bowey* (*supra* n. 27), and note *Patel v. Comptroller of Customs* [1965] 3 W.L.R. 1221 (P.C.), 1226, 1227.

38. (1941) 67 C.L.R. 536, 540.

39. *Id.* at 540.

40. See Howard: *Strict Responsibility* (1963), chap. 1; also Howard: 'Not Proven', 1 *Adelaide Law Review*, 269. Cf. *Norcock v. Bowey* (*supra* n. 27).

it would seem that the similarity between the approach of Dixon J. and that of the Privy Council in *Lim Chin Aik's* case may be minimal.

It is submitted that in view of the cogent arguments which may be advanced against the doctrine of strict responsibility⁴¹ the approach of Dixon J. in *Proudman v. Dayman* is preferable to that of the Privy Council in *Lim Chin Aik v. The Queen* and the Full Court in *O'Sullivan v. Harford* and the instant case. For this reason it is submitted, with respect, that in subsequent cases, no shackle of precedent⁴² should prevent the escape of an accused who can establish that he made a mistake of fact which was reasonable.

Strict Responsibility and Driving under the Influence.

In the instant case the Court, as a result of equating the approach of the High Court in *Proudman v. Dayman* with that of the Privy Council in *Lim Chin Aik v. The Queen*, concluded that section 47(1) imposed strict responsibility. With respect, the wisdom of this conclusion may be questioned on several grounds. Firstly, it has not been proved that strict liability is a more effective means of keeping, for example, the road toll to the irreducible minimum than liability based on negligence.⁴³ In view of this it seems undesirable to convict those whose conduct is not negligent especially since the penalties prescribed by section 47(1) are severe.⁴⁴ Secondly, since no reference is usually made in criminal statutes to the requisite mental element, it is arguable that the neutral wording of section 47(1) does not indicate a legislative intention to impose strict liability.⁴⁵

This latter view is supported by the harshness of the results strict liability produces under section 47(1). For example, a diabetic who suffers a sudden unexpected attack of hypoglycaemia, or a person who consumes a small quantity of alcohol which has a sudden unexpected deleterious reaction on, for example, a stomach complaint, will be convicted, disqualified from driving, fined, and, in the

41. See *supra* n. 40.

42. *Lim Chin Aik v. The Queen*, being a decision of the Privy Council on appeal from Singapore, is presumably binding on courts in this jurisdiction. See *Corbett v. Social Security Commission* [1962] N.Z.L.R. 878, where the New Zealand Court of Appeal seems to have regarded itself as bound by *Robinson v. South Australia* [1931] A.C. 704, a decision of the Privy Council on appeal from South Australia. The authority of *Lim Chin Aik's* case, however, is considerably weakened by the apparent failure of the Privy Council to consider the contribution made by the High Court of Australia in this field.

43. See Howard: *Strict Responsibility* (1963), 24-26.

44. Cf. section 47(4), and see n. 46 *infra*.

45. See Howard: *Strict Responsibility* (1963), 9-12.

case of a second offence, imprisoned.⁴⁶ The effect of the instant decision, therefore, may be to dissuade from driving many diabetics and many persons who consume even a small quantity of alcohol or drugs quite insufficient in itself to produce an incapacity to exercise effective control.⁴⁷ It is questionable, despite the increasing road toll and the problem of motor-vehicle insurance, whether section 47(1) was intended to operate in this way.

However, if the defence of reasonable mistake of fact were available the above objections would have no force. Nor would section 47(1) be 'reduced to absurdity' for the driver who is too drunk to realise he is incapable of exercising effective control could not establish the defence either because he did not make any conscious mistake of fact⁴⁸ or because his mistake would be considered unreasonable. Furthermore, no unreasonable demand would be made of the prosecution, for to establish the defence both the persuasive and evidentiary burdens of proof lie on the accused.⁴⁹

It is submitted that in view of the almost universal reliance on alcohol as a palliative and the increasing use of drugs, whether in a socially approved form such as sedatives, tranquillisers or insulin, or in a less socially approved form such as pep-pills, poppy seeds or lysergic acid, it is important that the apparent uncertainty as to the basis of liability under section 47(1) be settled, one way or the other. It may be desirable, in view of the conflicting authorities, for the legislature to enact the appropriate amendment to this provision.

Finally, it may be noted that in the instant case the result may possibly have been the same if the defence of reasonable mistake of fact had been available to the appellant. Even if he had in fact

46. Only rarely would the provisions of the Justices Act 1921-1960, s. 75 (2), (4), (7) (S.A.), apply.

47. One further possible effect of the decision may be to encourage diabetic drivers to reduce their normal dose of insulin so as to lessen the chance of suffering an attack of hypoglycaemia, for the diabetic who suffers an attack of hyperglycaemia while driving can be convicted only of a less serious offence than driving under the influence. See *infra*, 406, 407.

48. One requirement of the defence of reasonable mistake of fact is that the accused must make a conscious mistake of fact; see, e.g., *Proudman v. Dayman*. It may be noted, therefore, that this defence differs from the defence the appellant in the second limb of his first ground of appeal contended was available under section 47 (1). This contention may have been based on *dicta* of Napier C.J. in *Thomas v. O'Sullivan* [1951] S.A.S.R. 149, 151. However, for the view that a conscious mistake of fact may not be an inflexible requirement of the defence of reasonable mistake of fact see Howard: *Strict Responsibility* (1963), 88-96.

49. This is not clear from the judgment of Dixon J. in *Proudman v. Dayman*. However, see now *Lenzi v. Miller* [1965] S.A.S.R. 1, 16, *per* Bright J.; *Tanner v. Smart* [1965] S.A.S.R. 44; but cf. *Norcock v. Bowey* (*supra* n. 27).

made a conscious mistake in believing either that he was not under the influence of alcohol or a drug or that he was capable of exercising effective control, it would have been open to the Court to hold that he had been negligent in making such a mistake.

Interpretation of 'Influence'

In distinguishing *Watmore v. Jenkins*,⁵⁰ the Court held that the wording 'so much under the influence' in section 47(1) imported a different test of causation from the wording 'unfit to drive through drugs' in the corresponding English provision. However, the nature of this different test is not clear. The 'continuing and contributing cause' test is, with respect, unhelpful for it is arguable that it would be satisfied even if the cause were merely a factual as opposed to a 'legal' cause. The later reference to the notion of '*novus actus interveniens*' makes it clear, however, that something more than proof of factual causation is required. As the Court did not require the alcohol or drug to be the 'effective cause' of the incapacity to exercise effective control perhaps it had in mind the distinction between 'a substantial cause' and 'the substantial cause', a distinction drawn in some decisions on the offence of causing death by dangerous driving.⁵¹

Whatever the test is, however, it is clear that a person in the position of the appellant in the instant case, or a person who consumes, for example, 20 ozs. of beer which reacts on a defective liver condition to produce an incapacity to exercise effective control will come within section 47(1).⁵² Although this type of case may not have been contemplated by the legislature,⁵³ perhaps the main reason why the operation of the provision may be too wide is not the above interpretation of the word 'influence' but the exclusion of the defence of reasonable mistake of fact.

Interpretation of 'Drug'

In the present case the question whether insulin is a 'drug' within the meaning of section 47(1) apparently was not raised. Although there is clear authority that it is,⁵⁴ it would seem that the case of the diabetic driver was not considered by the legislature when

50. [1962] 2 Q.B. 572. See *supra* 400, 401.

51. *E.g.*, *Gould* [1963] 2 All E.R. 847; *Curphey* (1957) 41 Cr.App.R. 78.

52. See *Wickens* (1958) 42 Cr.App.R. 236, an authority relied on in the instant case.

53. See *Ainsworth v. O'Sullivan* [1955] S.A.S.R. 323, 325.

54. *Armstrong v. Clark* [1957] 2 Q.B. 391; *Thomas v. O'Sullivan* [1951] S.A.S.R. 149.

enacting section 47(1) for this provision applies only to a diabetic who suffers an attack of hypoglycaemia. The diabetic who suffers an attack of hyperglycaemia,⁵⁵ a condition which apparently may be equally dangerous to other road-users, can be convicted only of the lesser offences of driving without due care and attention or driving recklessly or in a manner dangerous to the public, prescribed by the Road Traffic Act 1961-1964, ss. 45, 46, respectively.

It is submitted therefore that a separate offence relating to diabetic drivers be enacted. As in the case of the offence of driving under the influence, in the interest of certainty it may be desirable that the legislature should indicate whether or not this offence is one of strict responsibility.

W. B. FISSE.*

TRUSTS

Tracing the profits of trust money in a mixed fund

In *Scott v. Scott*¹ the High Court was presented with an opportunity to discuss an area of the law which, although the subject of academic speculation, has never been directly considered in an authoritative case. The issue raised was the availability of a proprietary remedy to a beneficiary when a trustee has, by investment of trust funds mingled with his own, acquired property which has increased in value. The existence of a proprietary remedy enabling the beneficiary to participate in that increased value has long been settled in America, but only recognised with respect to severable property in English and Australian law. Certain fundamental principles of equity would, however, appear to be relevant, and on reference to these the extent of the High Court's decision seems to be justifiable neither by the reasoning advanced nor the exigencies of the facts.

The original action in the Supreme Court of Victoria² was brought against the executrix of the estate of a deceased trustee, W. H. Scott.

55. See *supra* n. 4.

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1. *Scott v. Scott* (1964) 109 C.L.R. 649; [1964] A.L.R. 946. A single judgment was delivered by a Court composed of McTiernan, Taylor and Owen JJ.

2. *Scott v. Scott* [1964] V.R. 300.

In 1940 he was by the will of his wife appointed co-trustee with his brother-in-law, A. Scott, of property and personalty to be held for W. Scott for life and then on trust for conversion and distribution between the children of the marriage. The most substantial asset of the estate was a house valued at £1,400, which for reasons of convenience W. H. Scott wished to sell and replace with another. After the sale of the house in 1942 for £1,125 he made a deposit on another property as trustee, and the contract was originally drawn up as between the vendors and the co-trustees of the estate. On being informed by their solicitors that such a purchase of real estate would constitute a breach of trust, and following their advice, the trustees recast the transaction so that the purchase was effected in the name of W. H. Scott only. The trust estate, however, advanced the sum of £1,014 towards the purchase price of £1,700; A. Scott contributed £500 and the remainder of the price came from the personal funds of W. H. Scott. The advances were secured by a registered mortgage to A. Scott, in respect of which he executed a declaration of trust to the effect that he stood possessed of the mortgage for the benefit of the trust estate to the sum of £1,014; W. H. Scott executed a similar declaration in respect of the house. At a later date W. H. Scott borrowed £2,000 on mortgage and the amount of the advances was repaid to the trust estate of A. Scott. Before his death in 1959 W. H. Scott retired from the trust and his place was taken by the plaintiff in the case, who claimed that the executrix of the former trustee's estate held the house, at the time of commencement of the action valued at £5,450, for the benefit of the trust estate, subject to the mortgage for £2,000.

The defendant conceded that a breach of trust had taken place when the trust funds were advanced, but contended that all liability for that breach had been extinguished by the repayment of the £1,014. She denied that there was any liability to account for profits derived from the employment of trust money in cases other than those concerning investments in trading concerns, and particularly those where the profits were represented by unrealised capital accretions to inseverable property.

Hudson J., after an extensive examination of authorities, concluded that the liability of a trustee to account for profits is not confined to cases where the trust money is employed in a trading concern³ but includes every profit derived from the employment of a mixed

3. He relied particularly on *Docker v. Somes* (1834) 2 My. & K. 655, a case concerned with trading profits, where Lord Brougham expressed the proposition in very broad terms.

fund for the trustee's own advantage.⁴ The order which Hudson J. made on this basis raises analytical difficulties which are not considered in his judgment or by the High Court in approving it. The actual remedy was a charge placed over the house to secure the same proportion of the increase in value as the amount of the trust money invested in the estate bore to the full purchase price, that is, 1014/1700 of the increase; from this it would seem that where the principal sum has not been repaid to the trust fund, the beneficiaries would be entitled to a charge over property purchased with a mixed fund to the extent of the proportion of trust money employed in its purchase.

Before the High Court counsel for the appellant argued, very properly in the light of the absence of authority or reasoning to support such an order, that the charge over the property could only extend to the amount of trust moneys used in its purchase, citing *In Re Hallett's Estate*⁵ and *Brady v. Stapleton*,⁶ also that a charge for that amount was the only remedy in the case of inseparable property. On this reasoning any liability of W. H. Scott to the trust estate was satisfied on the repayment of £1,014 representing the trust moneys misused. The High Court, however, approved the order of Hudson J. without adding to his reasoning.

The adoption of this novel technique of restitution would seem to have required some discussion. No justification by authority is possible, since no authority exists;⁷ but the need for some stage of reasoning intermediate between establishing the existence of a duty to account for profits and the imposition of a charge emerges on reference to the nature of the charge device in the context of the equitable rules on tracing. The occasion for considering this question arose through the contention of counsel for the defendant before Hudson J. and the High Court that the charge existed only to secure a personal liability, so that relief was available under the Trustee Act 1958, s. 67 (Vic.).⁸ This was briefly dismissed, but a more

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4. The High Court considered this to be a particular instance coming within the general principle stated by Lord Porter in *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 All E.R. 378 (H.L.) 395: 'The legal proposition . . . may be broadly stated by saying that one occupying a position of trust may not make a profit which he can acquire only because of his fiduciary position, or, if he does, he must account for the profit so made.'
 5. *In Re Hallett's Estate* (1880) 13 Ch. D. 696 (C.A.).
 6. *Brady v. Stapleton* (1952) 88 C.L.R. 322.
 7. *Mant v. Leith* (1852) 15 Beav. 524 sufficiently illustrates the previous limits within which charges were imposed.
 8. Cf. Trustee Act 1936-1953, s. 56 (S.A.); Trustee Act 1925-1942, s. 85 (N.S.W.); Trustees and Executors Act 1897-1961, s. 51 (Qld.); Trustees Act 1962, s. 75 (W.A.); Trustee Act 1898 (as amended), s. 50 (Tas.); Trustee Act 1925, s. 61 (Eng.). The effect of the section would have been to relieve the trustee of any personal liability.

extensive consideration is illuminating. The equitable charge is, like the other remedies available to trace trust money, only available against property in which the plaintiff has an equitable proprietary interest. This proposition is implicit in the reasoning of Jessel M.R. in *In re Hallett's Estate*,⁹ but is strongly emphasised in *Sinclair v. Brougham*:¹⁰ 'Their [the depositors'] claim cannot be *in personam* and must be *in rem*, a claim to follow and recover property with which, in equity at all events, they had never parted.'¹¹

The Court of Appeal in *Re Diplock*¹² accepted this as the correct statement of the principle. The charge is not, in this branch of the law, used in an arbitrary manner; it attaches only to definite property which is identifiable as representing, in whole or in part, the plaintiff's misappropriated money.¹³ It would, therefore, seem incorrect to speak of a personal liability secured by a charge. Hudson J. recognises that the charge in this case is an independent proprietary remedy, but does not pursue the implication that some reasoning is required which leads to the conclusion that, in this case, the plaintiff was beneficially interested in the property to the extent not only of the trust money invested, but to a similar proportion of the unrealised accretion in value. The effect of the proposition enunciated above is, however, that the plaintiff must have a beneficial interest co-extensive with the charge imposed; the chief difficulty of the case is that the High Court considered this point unnecessary for decision when it was raised by the respondent's argument.¹⁴

It is notable that counsel for the respondent in the High Court, rather than relying on Hudson J.'s order (or, perhaps, having realised the hiatus in the reasoning discussed above, considering that this was the only justification for such an order), persisted in his original argument that the respondent was entitled in equity to a share of the estate proportionate to the amount of trust money invested in purchasing that estate, supporting his contention by reference to the American law and general principles of tracing. Academic discussion on the question of tracing profits has previously resolved itself into this question.¹⁵ The High Court inclined to view this remedy favour-

9. (1880) 13 Ch. D. 696 (C.A.).

10. *Sinclair v. Brougham* [1914] A.C. 398 (H.L.).

11. *Id.* at 418, *per* Viscount Haldane L.C. See also Lord Parker at 441, 442.

12. *Re Diplock* [1948] Ch. 465 (C.A.) *passim*, especially at 530-543.

13. On the importance of identifiability see *Re Diplock*, *supra* n. 12, at 521; *Frith v. Cartland* (1865) 2 H. & M. 417; 71 E.R. 525.

14. In a puzzling passage ((1964) 109 C.L.R. 649, 662), the High Court suggests that the question of beneficial interests is irrelevant when discussing profits. In the light of *Sinclair v. Brougham* these remarks must be confined to the question of personal liability to account for profits.

15. See, *e.g.*, Maudsley: 'Proprietary Remedies for the Recovery of Money' (1959) 75 L.Q.R. 234.

ably, but considered any final decision unnecessary; since, however, the present submission is that the inclusive charge can only be supported by such an equitable proprietary interest, the matter would seem to require further examination.

The American law, referred to as that in *Scott on Trusts*¹⁶ and the *Restatement*,¹⁷ has adopted the constructive quasi-trust¹⁸ as a remedial device in cases of restitution where flexibility is desirable. The plaintiff is not confined to a charge over a fund or property for the amount of his money used, but may elect to take a proportional share; the exercise of this election is naturally influenced by the value of the property at the time when the election arises. When its value has fallen, it is more advantageous to rely on a simple charge; when the value of the fund or property has increased, a share is more desirable. The American doctrine of beneficial ownership is broader than the English in that any profit derived from an abuse of a fiduciary position may be recovered in this way; the American law developed without reference to the principle in the case of *Lister v. Stubbs*,¹⁹ which stands for the proposition that a fiduciary principal is not necessarily the beneficial owner of profits derived from the abuse of a fiduciary relationship. It is submitted, however, that the principle of the case is not relevant where a share of property is sought; the plaintiff is claiming in equity the share of the property bought with *his* money, which on realisation may include profits, rather than seeking to establish that he is the beneficial owner of particular profits, as would be the case where profits existed independently of the main fund or were separately invested.²⁰

The general principles discernible in the law on tracing would also seem to support the validity of the constructive quasi-trust. In the simplest case, where property has been purchased wholly with trust money, the plaintiff may elect to have a charge on that property or to take it so long as the property is identifiable.²¹ Where the

16. *Scott on Trusts* (2nd ed. 1956) iv, 3289, s. 516.

17. *Restatement of the Law, Trusts* (2nd ed. 1959), s. 202.

18. This term, adopted by Maudsley, *op. cit.*, *supra* n. 15, is useful in distinguishing the right to a share in the equitable ownership of property from both the personal liability to account for profits and the right to a charge against property.

19. *Lister v. Stubbs* (1890) 45 Ch. D. 1 (C.A.).

20. There seems in principle no reason why the plaintiff should not have an equitable proprietary interest in separate profits so as to support a proprietary remedy; in the light of *Lister v. Stubbs*, *supra* n. 19, it may, however, be argued that only an account of profits is available.

21. *In Re Hallett's Estate* (1880) 13 Ch. D. 696 (C.A.). For a reconciliation of this case with the constructive quasi-trust see *Primeau v. Granfield* (1911) 184 Fed. R. 480.

plaintiff's money is part of a mixed fund, or a mixed fund has been used to buy severable property, the plaintiff may have a charge on the fund or take a proportional share of the severable property, and this election will usually be influenced by considerations of value. This was established in *Brady v. Stapleton*,²² amplifying remarks of Jessel M.R. in *In Re Hallett's Estate*.²³ Various dicta of Dixon C.J. and Fullagar J. are directed at distinguishing the kinds of remedy appropriate to severable property on the one hand, and inseverable property on the other:

The real distinction which equity draws is between the case where it is, and the case where it is not, practicable to give effect to the rights of the *cestui que trust* by appropriating to him a specific severable part of the available property.²⁴

Using shares and a horse as illustrations of the respective problems raised by the different kinds of property, their Honours seem to suggest that the apportionment of inseverable property is beyond the confines of practicability. It may well be difficult to attribute specific portions of a horse to trust money; the plaintiff cannot merely take his property, as may be done with shares or money, but an undivided share in, for instance, a successful racehorse might be preferable to a charge for the amount invested in its purchase from the point of view of an increase in its value. Whether such an undivided share would also be preferable to an inclusive charge will be discussed at a later stage.

Further support for the validity of the constructive quasi-trust can be obtained from the principles and decision in *Lord Provost etc. of Edinburgh v. Lord Advocate*,²⁵ a case concerning the apportionment of profits on mingled trust funds where the guiding principle in such cases was expressed to be:

. . . The rule which is common in cases of this kind, namely, that a *cestui que trust* whose funds have been dealt with without his consent has a right to take the result of that dealing in the manner most favourable to himself.²⁶

Such considerations, it is submitted, should determine the issue of whether the constructive quasi-trust exists as an independent remedy which may be the object of an election by the plaintiff. It is not difficult to construct situations in which a share of property might be

22. (1952) 88 C.L.R. 322.

23. (1880) 13 Ch. D. 696 (C.A.).

24. *Brady v. Stapleton* (1952) 88 C.L.R. 322, at 338 per Dixon C.J., and at 339 per Fullagar J.

25. *Lord Provost etc. of Edinburgh v. Lord Advocate* (1879) 4 App. Cas. 823 (H.L.).

26. *Id.*, at 841.

more advantageous than an inclusive charge for a fixed sum. The imposition of such a charge crystallises the plaintiff's rights; it would seem that in principle he could have no further claims against the property for increases in value or subsequent profits. A share in the equitable ownership of the property would, however, encompass further increases in value before realisation and provide an equitable interest which might be the basis for a claim to profits accruing after the election. The issue of the nature of the remedies for claiming actual profits rather than capital accretions is still outstanding, but a part-owner in equity could at least have an action for an account of such profits. The case for the creation of the inclusive charge as an independent remedy is less obvious; it seems little more than a dilution of the American doctrine with the worst features of the English charge, in particular its rigidity. The possibility of an election between an inclusive charge and a constructive quasi-trust might be significant in one situation—where the property was of a speculative nature the plaintiff could enforce an inclusive charge imposed at a time when its value was high although the value later diminished; the equitable part-owner would be subject to the risk of such a diminution after his election had been made.

The inclusive charge seems to be established as a remedy by *Scott v. Scott*,²⁷ rendering obsolete the simple charge in the context of claiming property which has increased in value. Its merit as a sole remedy could be open to doubt, for the reasons explained above, but an election between the inclusive charge and a constructive quasi-trust would be a potent method of giving effect to the rights of the beneficiary in accordance with the principles of *Lord Provost etc. of Edinburgh v. Lord Advocate*.²⁸

One interesting feature of the case is that there seems no necessary reason why such complex issues should have been raised. The right to an account of profits comprehends more situations than the proprietary remedies subsumed under the head of tracing and there should have been little difficulty in establishing the liability of the appellant to account for profits in the light of the English cases;²⁹ once such a liability was established the reasons for the claim to a proprietary remedy are obscure. The only limitations of an action for an account stem from its personal nature;³⁰ in the event of a supervening bankruptcy the plaintiff's claim has no priority over those of other creditors. In the case of property purchased wholly

27. (1964) 109 C.L.R. 649.

28. (1879) 4 App. Cas. 823 (H.L.).

29. See *Regal (Hastings) Ltd. v. Gulliver*, *supra* n. 4.

30. *Lister v. Stubbs* (1890) 45 Ch. D. 1 (C.A.), *per* Lindley L.J.

with trust money, or severable property, the plaintiff who has established some equitable proprietary interest may take that property out of the bankruptcy; a charge secures the plaintiff's claim against those of the general creditors. There seems to have been no urgent reason for requiring such protection, since it was not suggested that the estate was insolvent; at all events the distinction between the various remedies and their nature was never clearly related to the issues.

J. M. HAYNES.*

ADMINISTRATIVE LAW

Jurisdiction of the courts over domestic tribunals— natural justice

The English courts have long displayed an unwillingness to interfere in the affairs of 'voluntary associations'. The jurisdiction they have exercised over their affairs has been a limited one. This attitude was exemplified by Brett L.J. in *Dawkins v. Antrobus*:

. . . In my opinion there is some danger that the Courts will undertake to act as Courts of Appeal against the decisions of members of clubs, whereas the Court has no right or authority whatever to sit in appeal upon them at all.¹

Such an attitude was, no doubt, designed to discourage club members from transferring their private feuds to the courts, and it may well be that such matters are better left to the clubs themselves. It is more questionable, however, whether all the organisations classed as 'voluntary associations' should be allowed the same degree of autonomy in their internal affairs.

In *Beale v. S.A. Trotting League (Incorporated)*² the association was the S.A. Trotting League, an incorporated body constituted in accordance with the provisions of the Lottery and Gaming Act 1936-1956, s. 22(a) (S.A.). The objects of the League are 'to govern control supervise and regulate trotting and trotting racing in the State of South Australia'. The League consisted of one delegate from each club affiliated with the League. The plaintiff Beale was a

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1. (1881) 17 Ch.D. 615 (C.A.), 630.

2. [1963] S.A.S.R. 209.

member of the S.A. Trotting Club (Inc.), a club affiliated with the League. He was also the owner of a horse registered by the League.

The Constitution of the League empowered it to set down rules and regulations in relation to trotting. Under rule 391 the stewards could 'fine, disqualify or suspend the trainer and fine or disqualify any other person (including the owner)' who was party to a horse not being raced on its merits. Under rule 541 an Appeal Committee was constituted 'to hear and determine appeals against the decisions of the Stewards'. The plaintiff had been suspended for twelve months under rule 391. His appeal to the Appeals Committee was dismissed. The plaintiff then commenced an action in the Supreme Court, claiming, *inter alia*, a declaration that the disqualification was void. The declaration was granted by Travers J., but on appeal his decision was reversed by Napier C.J., Chamberlain and Hogarth JJ.

The essence of the case for the League was firstly, that there was no right of access to the court, and that Beale was limited to such remedies as he could get from the domestic tribunals of the League, and secondly, that even if there was a right of access, there were no grounds justifying interference with the decision of the stewards or that of the Appeal Committee.

In the opinion of Travers J.,³ a claim to have access to the courts might be based on alternative grounds, these being the showing of a proprietary interest in the assets of the organisation, or the existence of enforceable contractual rights. To decide the latter question, the nature of the particular association was all important. On the conditions for court intervention all members of the Full Court agreed with Travers J. Thus, Napier C.J. said that while intervention was not limited to protecting 'rights of property', nevertheless 'the jurisdiction [had] not so far been exercised, otherwise than for the protection of the party against some tort . . . or against a breach of contract'.⁴ The law was stated in similar terms by Chamberlain J.⁵ and Hogarth J.⁶

It was on the application of the law to the case in hand that the Full Court differed from Travers J. The plaintiff had contended that he was a member of the defendant League, and enforceable rights existed between members and the League, and that he also had a proprietary interest in the League and its assets. This conten-

3. *Beale v. S.A. Trotting League (Inc.)* [1963] S.A.S.R. 209, at 213.

4. *Id.*, at 230.

5. *Id.*, at 239.

6. *Id.*, at 249.

tion was rejected.⁷ Travers J. held that the clubs affiliated to the League were not members of the League, but merely had 'the status of being registered clubs on the register of the League'. Hence the plaintiff, who was a member of a club, could not thereby be a member of the League. Nor, on the construction of the Act constituting the League, could the plaintiff have a proprietary interest in it. However, Travers J. accepted the second contention for the plaintiff, that, though not a member of the League, he was a contracting party with it, the rules of trotting constituting an enforceable contract.⁸ The effective control of trotting would require 'something more binding than the legally unenforceable rules of a mere social club'. Travers J. also accepted the third contention of the plaintiff, that submission to the League's tribunals created a contract in terms of the rules.⁹ Thus, there was an enforceable contract between the plaintiff and the League, quite apart from any question of a proprietary interest. The plaintiff did have a right of access to the court.¹⁰

The Full Court found, on the other hand, that the plaintiff had no right of access to the court. Napier C.J. agreed with Travers J. in rejecting the plaintiff's first contention.¹¹ He also rejected the second contention. In his opinion the rules were 'not promulgated as the terms of a contract, but as a code for the regulation and control of the sport or business of trotting'.¹² The sanction behind the rules lay in the imposition of fines. These were not recoverable by legal process, but an 'Unpaid Forfeit List' was equally effective in its own way. On the third contention Napier C.J. expressed no final opinion, finding this unnecessary for reasons which appear below.¹³ Chamberlain J. did not discuss any of these contentions, since the claim failed on its merits anyhow.¹⁴ Hogarth J. agreed with Napier C.J. and Travers J. on the first point.¹⁵ On the second point he recognised the possibility of a contract in terms of the rules. Since, however, the plaintiff was not a member of the League, it was necessary to show knowledge of the existence of the rules and agreements, express or implied, to be bound by them.¹⁶ His Honour found that there was not sufficient knowledge of the contents of the

7. *Beale v. S.A. Trotting League (Inc.)* [1963] S.A.S.R. 209, at 214, 215.

8. *Id.*, at 215-217.

9. *Id.*, at 217.

10. *Id.*, at 218.

11. *Id.*, at 230.

12. *Id.*, at 231.

13. *Id.*, at 232.

14. *Id.*, at 248.

15. *Id.*, at 249.

16. *Id.*, at 250.

rules to enable him to infer *consensus ad idem*.¹⁷ Nor could a contract be implied from the submission to jurisdiction.¹⁸

Thus, on the preliminary issue of access to the court the Full Court adopted the traditional approach and showed no inclination to mitigate its rigours. Both Napier C.J. and Hogarth J. required clear proof of the existence of a contract, and were unwilling to imply a contract from the circumstances of the case.

Quite apart from showing a right of access to the court, it was also necessary for the plaintiff to convince the court that the decision of the stewards should be reversed.

Travers J. held¹⁹ that the plaintiff had a right to complain of any failure to observe 'the rules of natural justice'. As His Honour said: 'There is a singular lack of unanimity in the judicial descriptions of the court's function.'²⁰ The test to be applied by the court was an objective test—was there evidence reasonably capable of supporting the decision? Although some of the authorities supported the test of honesty, that subjective test was relevant only in the sense that the court would intervene more readily if *mala fides* were suspected. Thus, the court must restrict itself to an objective test, and would not in applying this test substitute its view of the correct finding on the available material. Applying this test, Travers J. found that there was no evidence on which the stewards could reasonably have found that the horse was not driven on its merits.²¹ As well as satisfying this test, the rules of natural justice must be observed. Perhaps because the decision was already found to be unreasonable, His Honour did not find it necessary to state these requirements in detail. The hearing was defective, however, at least in the failure to make the issues clear to the party accused, to enable him to present an adequate defence.²² The result was that there was not a 'fair and proper inquiry', the rules of natural justice were not observed, and there was no evidence reasonably capable of supporting the decision. The League was in breach of its contract, and the suspension was void.²³

As was said above, the Full Court on appeal found that there was no right of access to the court. It also found that even if there were, the rules of natural justice had been complied with, and that there was evidence reasonably capable of supporting the decision.

17. *Beale v. S.A. Trotting League (Inc.)* [1963] S.A.S.R. 209, at 251.

18. *Id.*, at 252.

19. *Id.*, at 218.

20. *Id.*, at 219.

21. *Id.*, at 223.

22. *Id.*, at 224.

23. *Id.*, at 228.

Napier C.J. was of the opinion that Travers J. was 'far too legalistic' in his approach. His Honour referred to the Court of Appeal decision in *Ridge v. Baldwin* as supporting the view that the requirements of natural justice depended on the nature of the case.²⁴ Where a tribunal was acting within its authority:

. . . all that natural justice requires is (1) that it should act in good faith, and that the party charged should (2) know the substance of what is charged, and (3) have an opportunity of answering it.²⁵

He was satisfied that these requirements were observed. But even had he decided to the contrary, the decision may still have been valid, since he inclined to the opinion that the action of the stewards was of an executive rather than a judicial nature.²⁶ The Court of Appeal decision in *Ridge v. Baldwin* was relied on here, but this point has since been overruled by the House of Lords.²⁷

Chamberlain J. stated the requirements of natural justice in similar terms. He rejected the test of reasonableness. Relying on *A.W.U. v. Bowen*²⁸ he held that the tribunal was merely required to act honestly.²⁹ This they had done. Similarly, the rules of natural justice were satisfied. Although the plaintiff was not 'told in so many words' of the charge, he must have been aware of the object of the inquiry. The essential element was the opportunity to present a defence, and this the plaintiff had.

Hogarth J. agreed substantially with Napier C.J. and Chamberlain J. on these issues. He made the same error as Napier C.J. in holding the decision of the stewards to be 'of administrative or executive nature rather than judicial', and decided that no inquiry was in fact necessary. However, the inquiry which was held had satisfied the requirements of natural justice.³⁰

The result was then, that the appeal to the Full Court was allowed, and the suspension stood.

The case is noteworthy for the agreement over the relevant legal rules and the widely divergent application of them to the facts of the case. The latter quite possibly reflects a difference in attitude

24. [1962] 1 All E.R. 834 (C.A.), 844. The point was unaffected by the overruling of this decision by the House of Lords ([1963] 2 All E.R. 66).

25. [1963] S.A.S.R. 209, 233.

26. *Ibid.*

27. See *Ridge v. Baldwin* [1963] 2 All E.R. 66 (H.L.).

28. (1948) 77 C.L.R. 601, 629 *per* Dixon J.

29. [1963] S.A.S.R. 209, 242.

30. *Id.*, at 253, 254.

to the role of the courts in relation to the affairs of voluntary associations. As was mentioned above, cases such as *Dawkins v. Antrobus*³¹ were emphatic in their disclaimer of any general right to intervene in the affairs of voluntary associations. Dissatisfaction has been felt with the contractual and proprietary tests. This has manifested itself in suggestions that the tests be abolished altogether, or in a liberal application of the tests.

An American writer, Chafee,³² rejects the finding of a property interest as largely a fiction, and as being unsatisfactory anyhow since it is (or should be) an immaterial factor in deciding whether intervention is allowable. The contract theory is also unsatisfactory when applied to an unincorporated body. Chafee concludes that the interest which is protected is in fact the member's relation to the association. As he himself admits, this theory receives no support judicially. He is supported by Lloyd,³³ who argues that because of the economic importance of many voluntary associations, for example, trade unions, that intervention be based simply on public policy. The court is of course confronted with conflicting policies in this field. Many such bodies require a considerable degree of autonomy for their efficient working. At the same time, their economic importance to their members requires some degree of external supervision—this seems undeniable. To base this supervision on contract or proprietary interests seems unduly restrictive. Even where these conditions are interpreted liberally, difficulties are encountered in classifying a member's interest under one of these divisions. In *Beale v. S.A. Trotting League (Incorporated)* the court was precluded from going beyond the common law rules. At the same time, only Travers J. seemed willing to use them liberally. Neither Napier C.J. nor Hogarth J. appeared inclined to do anything other than look for a contract consciously entered into with full knowledge of all terms.³⁴ The notion of a contract implied from submission to the tribunals seemed most likely to lead to a relaxation of the common law rules, but this also failed to find favour.

Accepting then that the plaintiff must work within this limiting framework, the grounds on which the court will interfere are also important. Again, there was substantial agreement on the requirements of natural justice, and the court's formulation of these is supported by the House of Lords in *Ridge v. Baldwin*.³⁵ The very

31. (1881) 17 Ch.D. 615 (C.A.).

32. 'The Internal Affairs of Associations Not for Profit' (1930) 43 Harv. L.R. 993.

33. 'Disqualifications imposed by Trade Associations—Jurisdiction of Court and Natural Justice' (1958) 21 M.L.R. 661, 664.

34. See [1963] S.A.S.R. 209, especially at 250-252.

35. [1963] 2 All E.R. 66.

generality of these rules, and the importance of the facts of the particular case, make it difficult to criticise their concrete application. The mere fact, however, that a tribunal is not bound by strict rules of procedure should not lead to any relaxation of the rules—quite to the contrary where proceedings are more subject to the will of the tribunal. Since the authorities reject the requirement of reasonableness the plaintiff can rely only on *mala fides*. Once again, it is doubtful whether such a high degree of autonomy is acceptable in the case of such bodies.

One can only conclude that the present law allows a plaintiff only rudimentary protection. While the protection is capable of being extended by judicial action, the chances of success remain relatively slight. One can only agree with Lloyd³⁶ that this is a field of law in need of development, but the scope for judicial development appears limited.

J. J. DOYLE.*

36. (1958) 21 M.L.R. 661, 667, 668.

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