RECENT CASES

PERSONAL INJURIES

Survey of recent awards in South Australia

The present survey covers the period from October 1965 to September 1966 and includes summaries of all cases relevant to the topic reported in the Law Society judgment Scheme during that period[1].

The aims of this survey remain those outlined in a previous survey[2]. Moreover it seems pertinent to observe that there appears to have been an increased willingness on the part of judges to articulate the value to be derived from a consideration of previous awards in comparable cases[3]. The present judicial attitude in South Australia towards the comparative method of assessment may, it is submitted, be summarised as follows[4]. That insofar as the law of damages requires that a judge deal in incommensurables and attempt to weigh imponderables, for example, when assessing an amount for pain and suffering or loss of enjoyment of life, it will invariably be impossible to establish an exact relationship between any two injuries[5]. Notwithstanding this axiomatic proposition, it remains equally true that it is in the interests of justice that courts, whether sitting at first instance or on appeal, should strive to produce a substantial measure of consistency in their awards, and that this can only be achieved by a full, unfettered and frequent use of the reasons for awards in comparable cases. Finally, while in no way attacking the theoretical impossibility of a "normative solution" of the problem[6], it is clear that judges are sustained and assisted in the process of computing damages by their ability to see significant relationships between different injuries. In other words, while they reject the possibility of an exclusively normative solution, they very often arrive at a figure by adhering in varying degrees to certain normative standards[7]. It is in the knowledge that both judges and practitioners

1. For previous surveys see 2 *Adelaide Law Review*, 226; 2 *Adelaide Law Review*, 373.
2. See 2 *Adelaide Law Review*, 373.
3. See, *e.g.*, the remarks of Chamberlain J. in *Pistiolas* v. *Tubular Steel Industries Ltd.* (1966) L.S.J. Scheme 492, at 494, 495.
4. For a most informative and interesting discussion of the significance of previous awards in assessing damages for personal injuries, see the judgment of Asprey J. in *Thurston* v. *Todd* (1965) 83 W.N. (Pt. 1) (N.S.W.) 335, at 337-342.
5. See, *e.g.*, the remarks of Windeyer J. in his dissenting judgment in *Thatcher* v. *Charles* (1961) 104 C.L.R. 57, at 71, 72.
6. *Per* Windeyer J. in *Thatcher* v. *Charles*, *supra*, n. 5.
7. *E.g.*, *Attick* v. *Minister of Education* (1966) L.S.J. Scheme 224, at 225, *per* Mitchell J.; *Dwiar* v. *S.A. Railways Commissioner* (1966) L.S.J. Scheme 204, at 205, *per* Bright J.; *McLean* v. *Ansett* (1966) L.S.J. Scheme 175, at 178, *per* Chamberlain J.; *Pistiolas* v. *Tubular Steel Industries Ltd.*, *supra*, n. 3; *Rutkowski* v. *Daminato* (1965) L.S.J. Scheme 685, at 686, *per* Bright J.; *Sutcliffe* v. *Victorian Automobile Chamber of Commerce Insurance Co. Ltd*, (1966) L.S.J. Scheme 330, at 331, *per* Chamberlain J.; *Turale* v. *Kuzub* (1966) L.S.J. Scheme 292, at 293, *per* Bright J.; *Waclawik* v. *Baker* (1965) L.S.J. Scheme 723, at 725, *per* Bright J.; *Young* v. *Lutteman & Martin Ltd.* (1966) L.S.J. Scheme 206, at 221-223, *per* Mitchell J. In all the foregoing cases, the judges avowedly derived assistance from looking at previous awards.

broadly support the view that uniformity and predictability of awards are desirable ends that this survey is offered.

The classification of injuries remains the same as before, as does the mode of indicating whether a particular assessment was or was not subject to some apportionment because of contributory negligence[8].

Head Injuries

$1,600 Infant plaintiff aged eight (now aged fifteen) was the victim of an assault by defendant (then aged fourteen) who threw lime into his face and eyes. As a result he suffered an injury resulting in intense pain, both at the time of and for two weeks after its infliction, and thereafter a great deal of discomfort for a considerable period. The lime caused caustic burns to the skin surrounding the left eye, and to the eye itself, extending to its cornea. An operation under anaesthesia was performed to remove particles of lime embedded in the eyes, and to remove dead tissue from the left eye caused by the burning action of the lime. Following this and subsequent operations, the position in relation to the left eye is that the corneal scarring has thinned, there are no signs of adhesion, and the loss of vision is estimated at between 10% and 15%. With the aid of spectacles he is able to perform his work as a woodplaner at no disadvantage. If he persists in his present employment there is no reason why in time he should not be able successfully to follow the trade of a carpenter or some similar trade[9].

$3,000 Infant plaintiff pedestrian aged thirteen suffered very severe facial injuries involving a fracture of the maxilla (upper jaw), a compound fracture of the nose, and severe concussion. The jaw fracture was extremely severe in that the whole of the upper jaw had been freed from its surroundings, the fracture passing vertically up each cheek into the eye orbit, and across the root of the nose joining the two orbits. These fractures were repaired while she was still unconscious. In addition she suffered an injury to the right side tear duct, which cannot now be freed as a result of bone growth following repair of the nasal fracture; there is a resultant loss of efficient function. Moreover, the tear sac was found to have become fibrosed through injury, and was removed to prevent further infection. The accident has resulted in a substantial loss of her sense of smell, and injury to her two upper central front teeth, one of which was repaired and the other replaced. Fortunately her major injuries have healed satisfactorily; jaw fractures have healed in good condition; there is a small bony protrusion at site of nasal fracture, and a small lump on her lower lip; both conditions could be improved or removed by a comparatively minor operation: which she is unwilling to undergo. She has a noticeable but not unsightly scar on her nose, and suffers periodically from headaches which can be relieved by aspros. Her schooling was substantially affected for the year following the accident, but has not affected her future career to any

8. *Assessment only.
†Contentious.

9. **Tsouvalla* v. *Bini* (1966) L.S.J. Scheme 377 (Walters A.J., June 1966).

extent. She is married and expectant, and it is unlikely that she will continue with her modelling career. Damages assessed are for pain and suffering experienced and residual disabilities described[10].

$6,000 Married woman with three children suffered a probable fracture to the left scaphoid bone, an injury to the right fifth nerve, which supplies the function of sensation to the whole face, and a fracture of the right maxilla. Main injury was to a major branch of the fifth or infra-orbital nerve, and in order to alleviate the pain four operations were performed, none of which was successful; unfortunately damage was caused to the seventh nerve during the last operation inducing facial palsy and resultant asymmetry of the face, a condition which has by no means regenerated. Position is that she has suffered pain in the region of the right cheek and back of the head for six years (the latter will in all probability be the more permanent and disabling of the two pains) and will probably continue to suffer from it for an indefinite period. Taste for food has been affected. Although she has been able to work, her enjoyment of life has been seriously affected, and she has become to some degree emotionally unstable because of the suffering she has undergone. No question arises of loss of earning capacity[11].

$6,000 Plaintiff suffered an injury in the course of his employment to his right eye causing a loss of vision of between 80% and 90%. His other eye is unimpaired, and he is able to peform efficiently a job involving reasonably good eyesight. He has a serious disability in the form of an hysterical "overlay", and is convinced that he is going blind, and is in fact impaired in his vision at times. No organic cause exists to explain this condition, but it is accepted that it is a real condition involving real distress and suffering. Prognosis for this condition, with its concomitant manifestations of sleeplessness, irritability, frequent spells of dizziness and nausea, and depression, is good, and he should recover completely. Nevertheless what he has suffered and may suffer merits a substantial award[12].

$7,000 Infant plaintiff aged sixteen suffered an injury to his left eye, consisting of a rupture of the sonule attaching the lens to the ciliary body; the left pupil became grossly dilated (a condition known as traumatic mydriasis), and he is left with a perceptibly larger pupil than that of the right eye. The eye moves normally in its socket;

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10. †*Paech* v. *Bourne* (1966) L.S.J. Scheme 368 (Hogarth J., June 1966). (No apportionment.)

11. **Seychell* v. *Rogers* (1966) L.S.J. Scheme 361 (Mitchell J., June 1966).

12. †*Pistiolas* v. *Tubular Steel Industries Ltd.* (1966) L.S.J. Scheme 492 (Chamberlain J., September 1966). (Damages reduced by 50%.) At 493-495, his Honour discussed two related matters which from this writer's point of view seem to be of particular interest and significance for practitioners. The first relates to the extent to which English assessments for similar injuries ought to be regarded as useful by Australian courts. In discussing this, Chamberlain J., while noting the warning of the High Court issued in *Halley* v. *Chudleigh* (1963) Argus L.R. 616, at 617, concludes (at 495) that: " . . . help is still to be derived, so long as the High Court's warning is borne in mind, from English authorities". The second matter relates to the advantages of reasonable adherence to standards set in previous assessments for similar injuries. In relation to this, his Honour unequivocally recognizes the desirability of fixing and adhering to standards, so far as may be possible, in the matter of computing damages.

he has no central vision in the eye, but there is some peripheral vision giving him early warning of objects approaching him from the left. Condition is permanent, and constitutes the equivalent of a loss of 95% of total vision. Compensation should be awarded on the basis of almost total loss of an eye, not associated with any great pain, nor involving any great disfigurement. He has been affected in his capacity to perform things he did efficiently before, such as play soccer, and one must take into acount the general contraction of the field of employment open to him. His position is better than that of the two plaintiffs in *Young* v. *Lutteman & Martin Ltd.*[13] and *Attick* v. *Minister of Education*[14] in that he still has his natural eye, albeit with an almost total loss of sight in that eye[15].

$8,000 Carpenter's improver aged twenty sustained an injury in the course of his employment in consequence of which it was later necessary to remove the eye. An orbital implant was fixed in place, and an artificial eye was inserted. Until the eye was removed, he had suffered considerable pain which he had borne with considerable fortitude. He complains of irritation caused by dust particles in the eye socket, which is predictable, having regard to the nature of his work; the eye becomes dry on occasions and he is unable to close it properly; certain amount of recurrent infection; his judgment of distance in performing some functions is impaired, but he should be able to adjust to this problem. The eye itself will have to be replaced perhaps every five to six years. Loss of one eye puts him at a disadvantage when attempting to obtain employment in competition with a carpenter with both his eyes, and of course he has no reserve in the event of injury to his remaining eye[16].

$8,000 Infant plaintiff aged ten suffered an injury to his right eye while at school which subsequently required excision one month later. A corneal implant was performed and an artificial eye was subsequently inserted. Socket is in good condition, as is the implant. He has very good vision in the left eye, but has a degree of limitation of full vision resulting from the loss of the eye which is estimated at about 40% less on the right side than if he had two eyes. There are, of course, severe disadvantages associated with the loss of an eye, but he has faced his difficulties stoically. He has made good progress at school since he returned, and there is no reason why he should not realise his ambition to become a qualified carpenter[17].

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13. See *infra*, n. 16.
14. See *infra*, n. 17.
15. **Turale* v. *Kuzub* (1966) L.S.J. Scheme 292 (Bright J., May 1966).
16. †*Young* v. *Lutteman & Martin Ltd.* (1966) L.S.J. Scheme 206 (Mitchell J., April 1966). (No appointment.) Her Honour's judgment (at 221-223) contains a not inconsiderable review of the authorities involving assessment damages for eye loss or inury. An injury as sharply defined as the loss of an eye is, of course, especially amenable to the comparative process, in that the imponderables to be weighed occur not so much at the physical level as at the level of assessing economic loss. Her Honour's approach to an assessment concerned with the loss of an eye was approved by Bright J. in *Turale* v. *Kuzub* (*supra*, n. 15).
17. **Attick* v. *Minster of Education* (1966) L.S.J. Scheme 224 (Mitchell J., April 1966). It is submitted that her Honour's adherence (at 226) to the High Court's warning as to the limited assistance to be derived from perusing English assessments in *Halley* v. *Chudleigh* (1963) Argus L.R. 616, at 617, should be read in the light of the remarks of Chamberlain J. on this admonition in *Pistiolas* v. *Tubular Steel Industries Ltd.* (*supra*, n. 12).

$12,800 Infant female pedestrian aged thirteen was very severely injured, sustaining fractures of the right humerus and both bones of the lower leg, and "gross damage" to the brain. Tracheotomy was performed and she remained unconscious for more than a month. She has made a remarkable recovery, but further substantial improvement is unlikely. Her principal disability is the brain injury, which has caused her to lose two years of schooling at a time when it is of inestimable value. Although there has been no substantial personality change, nor reason to suppose that she will be unable "to cope with the ordinary things" that a woman has to cope with, her loss is real and substantial. It is not so much in mental capacity as in a diminished power of concentration, and this coupled with the lameness and loss of dexterity in the use of the left hand are the most serious disabilities. In addition there are other aggravations in the form of scars, loss of taste and smell, slight deafness and headaches and head noises[18].

$24,674 Infant plaintiff suffered a severe brain injury which resulted from "a very severe closed head injury", rendering him unconscious and paralysed down his left side for a period of three weeks. He gradually recovered consciousness and the paralysis disappeared. He is left with a permanent and very gross disturbance of motor co-ordination affecting all limbs, and to a lesser extent his speech. His balance is much impaired, and he is unable to walk without the assistance of an elbow-crutch. Although he has made no attempt to find employment, there can be no doubt it would be extremely difficult, and that his employment potential will not materially improve in the future. He has lost approximately 70% of his employment potential. As to economic loss, he has no special qualifications or training; he was a youth of unstable personality, he had a not inconsiderable criminal record for crimes of dishonesty which might have been an obstacle to his obtaining employment in the future, and it was a reasonable assumption that he might very well have experienced a good deal of trouble with the law in his future lifetime had there been no accident. The matter must accordingly be faced on the basis that had there been no accident, he would not have averaged more than about the basic wage, year in year out, in the future. In addition to his economic loss, actuarially calculated at $22,000, there must be an allowance for loss of physical capacity and social amenities of an obvious kind which need not be detailed[19].

Spinal and Neck Damage

$1,500 Plaintiff had previously sustained an injury to his back which required an operation for the removal of an intervertebral disc at the lumbo-sacral level. He has never been fit since that accident. At the date of the accident in respect of which the present claim was brought it was considered necessary to perform a further operation for the stabilization of his lumbar spine and that without further treatment he was likely to be permanently disabled to 50% of total

18. †*Sarapuu* v. *Dempsey* (1966) L.S.J. Scheme 189 (Napier C.J., March 1966). (Damages reduced by 33⅓%.)

19. **O'Leary* v. *Woods* (1965) L.S.J. Scheme 764 (Travers J., December 1965).

working capacity. Main effect of this accident was to exacerbate his pre-existing disability. His back was shaken up, and gave him additional pain, discomfort and disability for some period. No permanent increase in his disablement, although there was considerable aggravation of his injury for two or three months after the accident which continued in an abated degree for a further six months or so, and which ceased thereafter. In respect of loss of wages, he has made no great efforts to find work since the accident, and is making the most of his disability. The events of the accident did no more than increase for a limited period and to a limited extent an existing disability which was not "critical", converting him from an employable into an unemployable person[20].

$2,500 Female plaintiff aged twenty-two suffered a whiplash injury to the spine while a passenger in a car. X-ray of the spine disclosed no fracture, but that there was ligamentous damage in the area of fourth, fifth and sixth cervical vertebrae. As a consequence she suffered pain in the nape of the neck and back of the head necessitating the wearing of a cervical collar for some weeks; on occasions she had a burning pain with pins and needles in the left shoulder and down the left arm. She still has pain in the neck and occasionally the burning sensation and numbness in the left shoulder and arm. It is likely that it will recur from time to time and although it has decreased in severity, it will probably endure in the form of an inconvenience rather than a real disability. There is some possibility that arthritis could develop in the cervical spine. For three years following the accident her injury caused her absence from work for approximately three weeks in each year, but this year she has only lost four days[21].

$3,000 European migrant aged fifty-four suffered a compressed fracture of the twelfth dorsal vertebra and disc lesion between the eleventh and twelfth thoracic vertebrae. He experienced pain in both the neck and lumbar back as a result of the jarring and torsion received. Although the fracture has healed, he has experienced pain in his back ever since the accident, not at the fracture site but in the neck with consequent occipital headaches, and in the lumbar region. The disability associated with the lumbar region is not wholly to be attributed to the accident which in all probability aggravated a degenerative condition already present in the lumbar spine, rendering him more susceptible to incidents quite unconnected with the accident, for example, being jolted in a bus, which would have the result of increasing pain in the lumbar region where the degenerative process was at work. He has, moreover, been led to exaggerate the degree and extent of his disabilities, not by a conscious desire to mislead the court, but because he is suffering from a form of "compensation neurosis". It is predictable that much of his pain will disappear on the conclusion of the case[22].

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20. **Kontopoulos* v. *Nelson* (1965) L.S.J. Scheme 748 (Bright J., December 1965).

21. **Hofmeyer* v. *Mezic* (1966) L.S.J. Scheme 301 (Hogarth J., May 1966).

22. **Plavcak* v. *Duke* (1966) L.S.J. Scheme 387 (Hogarth J., June 1966). (On the plaintiff's admission of contributory negligence, the parties agreed that damages be reduced by 20%.)

$3,600 Plaintiff sustained concussion and a laceration to the back of the head which required suturing. He suffered immediate post-concussional headaches, and some weeks after the accident began to experience pain in the neck, which subsequently extended down between the shoulder-blades and thence into the right arm. This pain was associated with an injury affecting two spinal vertebrae which was probably attributable to nerve root pressure rather than to instability in the disc. He was advised that surgery consisting of fusing the two vertebrae together on either side of the disc damage would provide relief from the pain. Pain in these areas persists, and becomes worse when he exerts himself. His sleep has been disturbed since the accident, and his enjoyment of life to some extent affected, although he has tended to exaggerate his disabilities. In assessing damages it was relevant to have regard to the fact that, were he to undergo surgery, he would in all probability obtain permanent relief from the pain. Damages ought therefore to be assessed on the assumption that he will undergo the surgery advised[23].

$4,500 Married woman aged twenty-seven suffered an injury to the soft tissue in the region of the fifth and sixth cervical joint. She underwent treatment by halter-traction and physiotherapy. Recovery was delayed by pregnancy during which she suffered from nausea and which was made more uncomfortable than would have been the case had there been no accident and resulting injury. Physically she has recovered, except that she will have pain from the neck injury at times of physical stress, which will persist for some years. In addition to the physical disability, she suffered a psychological disturbance, resulting from the accident, in conjunction with her pregnancy, in consequence whereof she has suffered and will continue to suffer from headaches, pains in the left shoulder and back, a pumping pain in the arm and leg and pins and needles in the hands and feet, for all of which no organic cause exists, but which for her are genuinely experienced. These should disappear with treatment[24].

$6,800 Migrant sheet-metal worker suffered an injury which accelerated a pre-existing spondylitic condition of his spine, causing considerable pain in the back of the neck. Pain has persisted during four years following the accident and will in some degree continue. He suffers mainly from headaches, but these have improved and will improve further. He is in a tense, depressed, and anxious state, and has been unable to find any substitute for his former musical activities in the Salvation Army which makes him more aware of his pain than he would be if he were engaged in some diversion. No significant limitation of neck movement, but he complains of some loss of sexual ability. On the other hand it is necessary to take into account the pre-existing spondilitis. He has been working regularly throughout the pre-trial period, except for a short period after the accident. There will nevertheless be some financial loss in the form of medical and physiotherapy expenses, a continuing inability to work overtime, and perhaps an occasional day off. The determination of the litigation may be of some help to him[25].

23. **Meneghetti* v. *Renwick* (1965) L.S.J. Scheme 688 (Mitchell J., November 1965).

24. **Owen* v. *Lockwood* (1966) L.S.J. Scheme 120 (Mitchell J., March 1966).

25. †*Hodge* v. *Dobrijevic* (1965) L.S.J. Scheme 643 (Travers J., October 1965). (Damages reduced by 40%.)

$7,000 Male plaintiff aged thirty-five sustained an injury to his back in the course of his employment. For two-and-a-half years following the accident he was unfit for any kind of work, and during this period he underwent physiotherapy and manipulative treatment and a course of prescribed exercises. He now runs a taxi-truck business on his own account, but has suffered a loss of approximately 30% of earning capacity in the general labour market. His main residual disabilities which are likely to be permanent are a scoliosis to the left and degeneration of the joint between the fourth and fifth lumbar vertebrae and of the lumbo-sacral joint with a considerable loss of mobility and lumbar spasm. He suffers from persistent headaches which are probably the result of emotional disturbance, rather than physical disability. It was relevant that he had suffered a previous injury to his back which to some extent predisposed him to an injury of the sort sustained in the present accident[26].

$30,000 Female wine-tasting officer aged forty-four sustained a whiplash type of injury, causing damage to the ligaments in her neck. X-rays showed a loss of normal cervical curve and degenerative changes in the lower cervical regions, with a narrowing of the spaces anteriorly between the fifth and sixth cervical vertebrae, with lipping of the opposing bony margins of the sixth and seventh cervical vertebrae. No evidence of bone injury. During the next two-and-a-half years she continued to work, but finally was forced to give up because of the deterioration in her condition. Her treatment has included two major cervical neck fusions, a discogram examination, a myelogram examination which involved considerable discomfort, two manipulations under general anaesthetic, and two series of cervical traction treatments in hospital involving a halter round the neck with weights. Nevertheless she continues to suffer from the sensation of weights bearing down on her shoulders, and a burning sensation down her arms, with headaches and periods of vomiting. There is little if any prospect of alleviation of these conditions in the future. She is incapable of any form of consistent work, and will continue permanently to be so incapable although her temperament was previously suited to the full, congenial, busy type of life which her occupation made available to her. In short she has been transformed from an active and attractive woman into a semi-invalid with little or no prospect of being able to earn her living. Moreover she has suffered and will continue to suffer a great deal of pain and discomfort[27].

Injuries to Hand and Arm

$ 7,500 Married woman aged twenty-eight suffered an injury in the course of her employment when her hand was crushed in a press. As a result she required amputation under general anaesthetic of two joints of her index finger, the middle finger and two joints of the ring finger of the right hand; the little finger of that hand was severely lacerated and crushed. She suffered shock, and has suffered and will

26. **Hedges* v. *Anchor Products Ltd.* (1966) L.S.J. Scheme 115 (Travers J., March 1966).

27. **Leak* v. *Gronert* (1966) L.S.J. Scheme 13 (Hogarth J., January 1966).

continue to suffer pain and discomfort. At present she has good range of mobility in the stump of the index finger, and the operative scars are quite stable. The stumps of the middle and ring fingers are stable, but in both cases there is a small implantation nodule in the scar. The little finger has healed in a position of 45% of flexion at the proximal interphalangeal joint, and cannot be extended beyond this position; full extension is limited by a few degrees, and sensation is normal. Fortunately the thumb is not affected, but there is an estimated loss of 50% of function in the hand. She has faced her disability with courage, and can perform most household duties, although such things as ironing, sewing, carving and opening tins are beyond her. In addition there must be an allowance for her diminished employability, although she probably would have worked only for so long as it was necessary to alleviate the financial burden of bringing up children. Her disability has dissuaded her from having any more children, since she feels she would be unable to handle them with confidence[28].

$8,000 Woodcutter aged fifty was injured in a road accident in which he sustained an injury to the chest and broken ribs, but these have left him with little disability except some shortness of breath. His main residual disability results from an injury to a nerve which runs from the neck to the fingertips on the right side. He is left with a right arm of little value, and with no hope of further recovery. The grip is reasonably firm between the ball of the thumb and the ring and little fingers, but the ability to lift anything with this arm is very limited indeed. There is practically a total sensory loss in the arm, and the condition is little better than if he had lost the arm entirely. He is unable to follow his previous occupation, and clearly the categories of jobs open to him have been severely restricted. His income from woodcutting and other activities had not been sufficiently high to be taxable for the several years immediately preceding the accident. The money paid to him by way of invalid pension since the accident represents the high-water mark of his recent income, and it would not be proper to assess his loss of earning capacity on the basis of physical loss alone. A significant factor, necessitating a low assessment, was his attitude towards work and earnings which consisted in the view that it was unprofitable to do more than was required to provide for the day-to-day necessaries of life. Under the head of contingencies it must be said that had he not suffered the accident, it appears unlikely that he would have bettered his economic situation, or would have sought to improve it. Further one must not ignore the fact that he still retains some earning capacity of an indeterminate quality[29].

$8,000 Wood-machinist aged forty-two suffered bruising over the shoulder and right of the chest near the area of the sterno-clavicular joint, and a fracture disclocation of the right shoulder, together with various abrasions and lacerations of the hands and arms. An operation was necessary to reduce the shoulder fracture, which caused a good deal of pain. He was thereafter compelled to wear a frame for one

28. **Typuszak* v. *Tubular Steel Industries Ltd.* (1966) L.S.J. Scheme 313 (Hogarth J., May 1966).

29. **Fischer* v. *Polst* (1965) L.S.J. Scheme 677 (Travers J., November 1965).

month, and in addition received physiotherapy treatment for four months. He is left with a range of arm movement at the shoulder which is grossly and permanently restricted, elevation being possible only to about 90° actively and little better passively. External rotation is restricted to 20°, as compared with 80° in the other arm. Internal rotation is restricted by about 10°. He is permanently unfit for work which requires him to raise his arm above shoulder level. His ability to cope with his employment as a wood-machinist is decreased, and with his disability he will continue to be vulnerable from the point of view of employability, as evidenced by his being put off by a company with which until the accident he had worked for over ten years. He has suffered a permanent loss of earning power of about $5 per week. Moreover he is affected in his ability to play tennis and cricket which formerly were a part of his recreational and social activities[30].

Leg and Pelvis Injuries

$3,500 Snack-bar owner suffered a comminuted fracture of the lower pole of the right patella, necessitating an operation for removal of small pieces of bone and a consequent period of painful convalescence and physiotherapy treatment. There was also a 1¼″ wastage of the quadraceps muscle. The main disability is an estimated 10-20% loss of function in the knee and there are some radiological signs of early osteo-arthritis. In view of the arthritic condition and accompanying pain, it may be necessary for him to undergo surgery for the removal of the patella, although this may in turn cause a reduction in mobility. Damages are assessed on the basis of pain and inconvenience which he has suffered and will probably continue to suffer, and the expense he may incur in having further surgery[31].

$3,500 Apprentice motor-mechanic aged nineteen suffered a fractured pelvis, rupture of the urethra, rupture of the middle ligament of cruciate ligaments of the left knee, and a third degree Potts fracture of the left ankle. He underwent three operations for repair of the urethra, for screwing of the medial malleolus of the ankle, and for repair of the medial ligament of the knee respectively. Urethra and pelvis have completely healed and are symptomless, although in relation to the urethra there is some possibility of future complications. Has full extension of leg, but flexion of leg is permanently limited by about 30°. Although ankle is at present almost painless and has good function, it will in later years develop some degree of post-traumatic osteo-arthritis, with a consequent degree of disability. Taking these things into account, it is estimated that overall function of left leg has been permanently diminished by about 15-20%. Generally speaking has made a good recovery from serious injuries, but is now precluded from engaging in athletic and gymnastic pursuits as he did formerly[32].

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30. **Schenscher* v. *Ferrier* (1966) L.S.J. Scheme 383 (Hogarth J., June 1966). (On the plaintiff's admission of contributory negligence, the parties agreed that damages be reduced by 20%.)

31. † *Papadopoulos* v. *Loader* (1966) L.S.J. Scheme 158 (Mitchell J., March 1966). (Damages reduced by 60%.)

32. †*Richards* v. *Smith* (1966) L.S.J. Scheme 244 (Hogarth J., May 1966). (Damages reduced by 50%.)

$3,600 Pedestrian sustained a fractured right tibia and fibula in the lower third with considerable displacement. Closed reduction proved unsuccessful, and subsequently a Kirschner wire was passed through the calcaneus, traction was applied, the fracture reduced and plaster applied. Union was slow and leg remained in plaster for some seven months. He experienced considerable pain in the ankle on recommencing heavy work, but has now made a good recovery and is left with no significant disability, nor is there reason to suppose that he will develop any in the future as a result of this accident[33].

$4,000 Welder aged forty-four suffered compound comminuted fracture of right tibia and fibula, and minor lacerations to scalp which were cleansed and sutured. Leg fracture was unstable and was fixed with a plate. Tremendous swelling of right leg necessitated a relaxing incision in calf of right leg and a skin graft in that area. Three months later plate was removed and leg again encased in plaster. Wound healed well, but he required manipulative treatment under general anaesthetic to ankle to break down adhesions. He is left with a permanent loss of about 50% of subtaloid movements of the right ankle and walks with a slight limp. Some clawing of the right toes which may require minor operative treatment in the future. Some muscle wasting of the right thigh, and considerable loss of tissue at the fracture site which causes him embarrassment when at the beach. He has faced his injuries with courage and is presently employed as a first-class welder with the Engineering and Water Supply Department. He is able to do this work, but with more difficulty and fatigue than is normal[34].

$4,500 Female pedestrian aged sixty-three suffered severe permanent injuries. She was deeply shocked and unconscious for about ten months. She sustained fractures of considerable severity involving both sides of the pelvis, and a compound fracture of the right shin. Six bottles of blood were required. Haematoma on left side of forehead had to be aspirated. An inter-medullary nail was used to fix the shin, and a split skin-graft placed over fracture area. Very large haematoma formed about the left buttock which was evacuated under anaesthesia; proved unsatifactory as sinus with a foul discharge at its site persisted, necessitating an operation for excision of a great deal of tissue; this has healed satisfactorily, but with considerable loss of bulk and hyper-sensitivity in the area. Fractures have united satisfactorily, but she is left with a right leg shortened by $\frac{1}{2}''$; ankle swells if she is on it all day; she has an unnatural posture causing pressure on her great toe; she takes tranquillizers to relieve pain in the leg. Previously she was active in the house, but is now restricted in her activities. Has suffered and will continue to suffer pain, limitation in her activities and inconvenience of a permanent nature[35].

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33. †*Bartolme* v. *Brown* (1966) L.S.J. Scheme 441 (Bright J., July 1966). (Damages reduced by 25%.)

34. †*Poczopko* v. *Dessimone* (1965) L.S.J. Scheme 703 (Hogarth J., November 1965). (Damages reduced by 50%.)

35. †*Bertram* v. *Gurr* (1965) L.S.J. Scheme 782 (Bright J., December 1965). (Damages reduced by 20%.)

$5,000 Pedestrian suffered concussion, a severely lacerated scalp and a severe compound fracture of right lower leg involving both tibia and fibula. He required two pints of blood on admission to hospital. Scalp laceration was approximately 6″ long and went to the bone; required twenty to twenty-five stitches, and subsequent aspirations to dispurse collections of blood were performed. He is left with a scar and bald line some 6″ long by ½ cm. wide; small cyst and noticeable bald patch in that area; these cause him discomfort when combing his hair because of nerve damage, and are a source of embarrassment to him. Leg fracture was slow to heal, but there is now a satisfactory uniting of the bones with little residual disability in movement. Most serious permanent disability is a scar on front of lower leg, some 2-3 cms. wide and 10 cms. long; scar tissue is very thin and adherent to the bone; if damaged it is abnormally susceptible to infection in the form of ulceration and underlying bone infection. In the nature of his employment, he runs such a risk of damage. The real danger of infection through damage to the scar is a substantial matter in assessing his damages[36].

$7,000 Iron-moulder aged fifty-seven suffered an injury to both knees and an injury to the right shoulder. Only residual disability is in respect of knee injuries. Patella was removed from left knee. After operation, he remained in plaster for about one month, and walked with aid of crutches for approximately two months, and with a stick for a further six weeks. Considerable thickening of capsule and synovial membrane of joint of right knee, efflusion of fluid in the joint with gross grating on movement. With regard to left knee from which patella was removed, passive movements are practically normal, but squatting and rising cause pain. Some obvious wasting of muscles which extend left knee joint. Osteo-arthritic changes have occurred in both knees, although it appears that injuries suffered aggravated and accelerated a condition already present. Condition will worsen and cut short his working-life by two to three years. He has continued in his trade as iron-moulder, but only with assistance of his mates who spare him the heavier work. Notwithstanding this, he becomes very tired, and is unable to perform a number of functions associated with his job without pain, fatigue and instability. He is, moreover, limited as to his participation in social activities which formerly were pleasurable to him. In short, he has lost his zest for things which formerly were part of his life; he has suffered and will continue to suffer continual pain and discomfort; there has been a substantial loss of enjoyment of life[37].

$10,000 Shipwright aged thirty-six suffered a severe injury to his left leg as a result of a fall through a hole in the deck of a ship under construction. Sustained compound comminuted fracture of tibia and fibula involving ankle joint. Fracture passed into the ankle-joint, splitting it open, fracturing surface of tibia which forms part of ankle joint. Following manipulation, a pin was passed up fibula under anaesthetic, and leg immobilised in plaster from toe to upper thigh. Bone graft operation later performed on tibia and after six months pin was

36. †*Carne* v. *Miller* (1966) L.S.J. Scheme 499 (Mitchell J., September 1966). (Damages reduced by 20%.)

37. **Williams* v. *Tickell* (1965) L.S.J. Scheme 755 (Hogarth J., December 1965).

removed. Leg remained in plaster for a further ten months, during which period he was on crutches, and for a period after removal of plaster. Considerable physiotherapy accompanied by pain was required to mobilise leg and joints after so long a period of immobility. Leg is shortened by $\frac{1}{4}''$; there is some backward and outward bowing at site of fracture and severe limitation of movement of ankle joint, estimated as being only 15°-20°. He found considerable difficulty in pursuing his former occupation of shipwright, which required, *inter alia*, walking over irregular surfaces, climbing and bending. He experienced both pain and insecurity in doing these things, and has since been employed by the defendant in a clerical capacity. He is left with a permanently shortened leg with an estimated 50% loss of function in the lower leg, and arthritis in the ankle which is constantly painful and will continue so, with accompanying arthritic changes. In the social sphere, he will never be able to lead a normal life. Although he has suffered no great economic loss because of the accident, and is now in a more advantageous position financially and from the point of view of security of tenure, this will only be so for as long as he remains in the defendant's employ. He would be at a disadvantage on the general labour market, and the field of available employment has been considerably diminshed. There are physical limitations imposed by his disabilities even in the performance of clerical duties[38].

$10,000 Infant plaintiff aged nine at date of level-crossing accident in which both his father[39] and mother[40] were injured, suffered shock, multiple lacerations and abrasions, depressed fracture of right temporal region, his left foot was severed and lower part of leg grossly mangled necessitating amputation $4\frac{1}{2}''$ below the knee. Stump has healed well; there are no ill-effects from the skull fracture, and he is able to walk satisfactorily with an artificial leg. Apart from requirement of two trimming operations as the bone grows, the principal complication is that of skin infection of the stump in hot weather; this can be treated and should diminish in significance as the skin hardens. He has adjusted to his disability with courage and good sense, he has not been affected in his school career; he has a remarkable range of activity in the circumstances, and there is no reason why he should not make a satisfactory career for himself with the inevitable limitations that his disability imposes[41].

$10,000 Crane porter aged thirty-four suffered an injury to both groins with considerable bruising, a compound fracture of the left tibia and a fractured pelvis. An operation was performed to fix both fractures with screws. The pelvic fracture has healed with close apposition, but there remains a permanent pelvic separation of about $\frac{1}{2}''$ which will deteriorate and cause a lessening of muscular power in that region as he ages. Leg fracture has united but with a good deal of bowing, and $1''$ shortening of the limb. There is a large scar on the

38. †*Heron* v. *Broken Hill Pty. Co. Ltd.* (1965) L.S.J. Scheme 646 (Bright J., November 1965). (Damages reduced by 20%.)

39. See *infra*, n. 51.

40. See *infra*, n. 52.

41. **Sutcliffe* v. *Victorian Automobile Chamber of Commerce Insurance Co. Ltd.* (1966) L.S.J. Scheme 330 (Chamberlain J., June 1966).

left shin, and a substantial loss of muscle bulk behind the shin bone. Some limitation in ankle friction. Has lost an estimated 33⅓% of function in the leg. This disability in conjunction with the effects of the pelvic fracture precludes him from ever doing heavy work again, and it is estimated that his working capacity has been reduced by 50%. In addition to these major disabilities he suffered intense pain and discomfort from a variety of other lacerations, some of which required skin grafts and took months to heal. Leg continues to cause him pain and discomfort in hot weather, with pain and swelling of the ankle, and in times of weather change. He will never be able to return to the trade of carpenter for which he was trained; his earning capacity has been reduced, nor will he have the same security of employment that he had prior to the accident; he is at a disadvantage on the general labour market, and faces a possible prospective economic loss as he becomes older[42].

$11,000 Widow aged fifty-seven suffered injuries in an accident in which her husband was killed involving a supra-condylar fracture of the left femur, a fracture of the lower third of the right tibia, fractures of the pelvis, and a fracture of the right clavicle. Caliper was fitted to her left leg, and some nine months after the accident, it was reported that the fractures were all well-healed. She is left with a number of disabilities including severe aching in the left leg in winter and cramp in both legs at night; she limps and experiences a feeling of insecurity. She has bad varicose veins in both legs which existed before the accident but which have considerably worsened since. Stiffness and restriction of neck movement. Finally accident has brought about an anxiety state with a resultant pronounced tremor in both hands. It may be that psycho-therapy will assist the neurotic state, that the cramps can be controlled by tablets, and that surgery will relieve the varicose condition, so that she will eventually get back to somewhere near normal. It remains true, however, that the accident has had a serious effect on her enjoyment of life as well as on her capacity to earn her living, and that she is therefore entitled to substantial compensation[43].

$13,000 Carpenter aged forty-one sustained a fracture in mid-shaft of the left femur and numerous abrasions. Some amnesia and loss of consciousness, but no skull fracture and no permanent organic brain damage. Femoral fracture was treated by the introduction of a Steinmann pin in conjunction with a Thomas splint—physically and emotionally a most uncomfortable and distressing form of treatment. Femur healed, but with some medial angulation and shortening, and was accordingly broken again and re-set. He resumed work some five months later, and performs his tasks adequately, but within a restricted scope. Position is reasonably secure, and physically his sole residual disability is some shortening of the leg and resultant scoliosis. Chief residual disability is a true hysteria, manifesting itself in "terrible" pain which originates in the fingers of each hand and radiates thence through the arms and shoulders to the head, causing headaches. There is no organic cause for this condition

42. †*Crescitelli* v. *March* (1966) L.S.J. Scheme 397 (Walters A.J., June 1966). (Damages reduced by 10%.)

43. **Selkrig* v. *Watson* (1965) L.S.J. Scheme 761 (Chamberlain J., December 1965).

which in addition increases his limp and scoliosis. Possibly this condition will improve but it is unlikely that this will be soon or be very pronounced if and when it does happen; it cannot therefore be found that on the balance of probabilities the hysterical condition will improve. In any event he will be left with pronounced physical residual disabilities which are likely to deteriorate. True he is able to work and earn full wages, but his range of working activities has been permanently restricted, and while the hysteria persists his usefulness in the broad sense is greatly diminished for all purposes[44].

$15,000 Tradesman foreman suffered an injury to his left leg necessitating amputation below the knee. He was in hospital for thirty-two days, and required morphine injections every four hours for the pain. For a considerable period after his discharge he received a good deal of physiotherapy, and occupational therapy five days per week. During this period a second operation was performed on the stump, followed by a week in hospital, with considerable pain. He has so far had three artificial legs, none of which has been satisfactory; a fourth is being made, but it is by no means certain that this will overcome the major problem of pressure on the stump. He suffers from numbness and pain in the region of the right knee caused by lacerations received in the accident, with the result that he suffers unnoticed knocks to the knee, which cause swelling and pain later. He suffers pain and fatigue in the back. He has undergone various operative procedures on the stump, and is able to wear an artificial leg which causes discomfort and fatigue by the end of the day. Leg will need renewal every five years or so. Residual pains in his back and right knee are likely to be permanent, while stump of left leg is likely to be a source of continuing pain. In short he has been severely affected in his general way of life, having led a vigorous and healthy life before the accident. He has done his best to accommodate himself to his disabilities, but has suffered a great deprivation. He has suffered financial loss in that his chances of promotion are negligible. His loss of efficiency in his employment is a very serious deprivation for him since it places him in a position of jeopardy so far as security of employment in the future is concerned[45].

$15,000 Fitter and mechanic aged thirty-five was injured in an accident in the course of his employment so that the lower part of his leg was almost severed. Immediate amputation below the knee was performed, and an artificial leg fitted some five months later. A further amputation was performed in order to obtain a better stump and because of suspected bone disease and infection. His pain has two components, a cerebral cause referable to the part of the brain that registers sensations from the leg giving him a phantom pain, and a local cause in the nature of tender nerve endings in the stump, the latter constituting the major problem. He is now fit only for a sedentary job but should in time be able to engage in various forms of light exercise, and walk without more than minor discomfort for

44. **Rutkowski* v. *Daminato* (1965) L.S.J. Scheme 685 (Bright J., November 1965).

45. †*Waclawik* v. *Baker* (1965) L.S.J. Scheme 723 (Bright J., November 1965). (Damages reduced by 10%.)

up to half a mile. He is a courageous man who has done his best to minimise the inconvenience and deep sense of privation in the loss of a limb, with the consequent inability to continue in the sort of work in which he was trained and in which he was experienced. His present employment is less remunerative and offers less security of tenure than his former employment[46].

$48,000 Seaman was very gravely injured in a winching operation when certain wire ropes were set in violent motion damaging his legs, and resulting in their amputation above the ankle. In the accident each leg was severed through the lower third of the tibia, one foot actually having been amputated by the wire. Each leg is now amputated at a point 6″ below the knee. He was fitted with a type of patella tendon prostheses, and suffered considerable pain and inconvenience during fitting and tuition in their use. He has suffered allergic dermatitis of the left stump, and breakdowns of the scar tissue at the stump ends requiring operative and other treatment occurred frequently during the year following the fitting of the prostheses. These breakdowns are likely to occur in the future. Arthritic changes may take place in the hips and knee joints because of the abnormal stresses imposed by the use of the prostheses. He is confined to a sedentary occupation and is restricted to no more than two to three hours walking per day. From time to time he will require medical treatment, and the fitting of fresh artificial limbs. In short he has suffered a very severe injury, involving great pain and discomfort which has left him permanently disabled and has meant a grave loss of the amenities of life despite the courage with which he has faced his adversities. In addition he has sustained a severe past and prospective economic loss in consequence of his injuries[47].

Nervous Disorders

$5,000 Italian plasterer aged thirty-nine suffered an injury to the right shoulder and some minor lacerations and bruises, and was unconscious for a brief period. Injuries were considered of little significance at the time, and he was discharged from hospital three or four hours later. Shoulder, however, remained stiff after extensive physiotherapy, and some three months later he was sent to an orthopaedic surgeon, who found noticeable wasting and slackening of the right shoulder girdle, and, althought he was right-handed, 1″ wasting of the biceps of the right arm compared with the left side. He complained his arm felt numb, and that he could not lift it; he also complained of his eyes. Accordingly he is left with a condition of the right shoulder which causes him pain and which renders the right shoulder and arm of little use to him. There is no physical or organic cause for this disability which is attributable to a partial paresis of an hysterical nature resulting from the acci-

46. †*Dwiar* v. *South Australian Railways Commissioner* (1966) L.S.J. Scheme 204 (Bright J., April 1966). (Damages reduced by 15%.)

47. **Baynes* v. *Coast Steamships Ltd.* (1966) L.S.J. Scheme 443 (Walters J., July 1966).

dent. This condition should disappear after the emotional disturbance of the litigation ceases. If paresis persists thereafter it must be viewed as a result of his matrimonial problems. Main item of general damages is loss of wages, assessed at $3,000. Moderate allowance under head of pain and suffering must be made in the absence of satisfactory proof justifying a substantial award[48].

Miscellaneous Injuries

$100 Male pedestrian suffered sore ribs on his left side and required stitches for a leg wound caused by a protruding bone from his wife's broken leg. Slightly shocked, but apart from a temporary loss of equilibrium, he has suffered no permanent disability[49].

$150 Male plaintiff suffered shock, abrasions and a stiff and swollen left knee and a dislocated shoulder. He suffered considerable nervous tension, with sleeplessness for some time, no doubt due to his son's condition rather than his own[50]. He is now back to normal with no after-effects[51].

$1,500 Married woman suffered severe shock, a fractured right clavicle and multiple abrasions and lacerations, especially of the lower limbs, requiring a small skin-graft operation on her foot. It was later found that she had also suffered fractures of the left transverse processes of three lumbar vertebrae. These injuries have left her with a number of minor resultant disabilities which do not interfere with any activity except heavy work such as digging the garden. She suffered some nervous disorder for a period after her return from hospital, again no doubt due to her son's condition rather than her own[52].

$2,000 Infant male plaintiff aged fourteen, whose mother and father were also injured when a semi-trailer overturned in front of their car, suffered a broken jaw and lost eleven or twelve of his front teeth. He has thus been condemned to wear dentures from age of fourteen, and has a rather prominent scar on his lower lip. This was caused by a wound which severed a nerve, and has left him with a twisted smile; the condition could be improved by a relatively minor operation. But for the accident he could have expected many years of freedom from dental trouble. However, apart from the expense of denture renewal, say, every four years, the wearing of dentures is a disability to which the victim usually adapts himself without any serious effect on his enjoyment of life[53].

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48. **Viscariello* v. *Sammartino* (1965) L.S.J. Scheme 742 (Bright J., December 1965).

49. †*Bertram* v. *Gurr* (*supra*, n. 35). (Damages reduced by 20%.)

50. See *supra*, n. 41.

51. **Sutcliffe* v. *Victorian Automobile Chamber of Commerce Insurance Co. Ltd.* (1966) L.S.J. Scheme 330 (Chamberlain J., June 1966).

52. **Sutcliffe* v. *Victorian Automobile Chamber of Commerce Insurance Co. Ltd.* (1966) L.S.J. Scheme 330 (Chamberlain J., June 1966). See *supra*, n. 41.

53. **McLean* v. *Ansett* (1966) L.S.J. Scheme 175 (Chamberlain J., March 1966).

$4,000 Charge-hand aged forty-seven suffered multiple abrasions and bruising of right side of the chest, fractures of the right second to tenth ribs, several in two places, with associated large right side pneumothorax fractures and displacement of both hip bones. He has made a remarkable recovery, but is left with four main disabilities: (1) a chronic right sacro-iliac strain which is likely to progress and impairs and causes pain in such normal activities as walking, bending or lifting; it is unlikely to become disabling, and could be relieved by use of a corset; (2) mild instability of the right ankle, which could be corrected; (3) osteo-arthritis of the right acromio-clavicular joint; this involves pain and limitation of the movement of the arm and is likely to deteriorate further, but could be improved by an operation; (4) cervical spondylosis aggravated by the accident causing pain and stiffness of neck movement; this is likely to progress, but is not regarded as a major disability. Although unlikely to interfere with his capacity to earn a living, these disabilities represent a substantial interference with his enjoyment of life[54].

$4,000 Married woman suffered shock, multiple lacerations to the scalp, forehead, nose and tongue. Compound fractures of both bones of left forearm close to the wrist and a disclocation of the left sterno-clavicular joint. Tenderness over right side of chest and evidence of an underlying pneumo-thorax. It was necessary to perform open reduction and plating of the forearm fractures. Her residual disabilities consist of: (1) limitation of movement and pain in the left forearm and wrist; this imposes limitations on the activity of hairdresser which she carries on at home, and has meant the abandonment of plans to open her own shop, and clearly involves some financial loss; (2) she suffers from a low back pain which is a substantial disability, caused by degenerative changes in the disc spaces between the fifth lumbar and first sacral vertebrae; this is likely to progress and a fusion operation may become necessary; (3) she is abnormally sensitive about forehead scarring, but this does not detract from her appearance. There are other minor difficulties of a nervous sort which will improve with the passage of time and the conclusion of litigation[55].

$7,500 Draftsman aged sixty, an employee of the Department of Lands and part-time lecturer at the Institute of Technology in Surveying Laws, suffered mild concussion, a fracture-dislocation of the right shoulder, a fracture of the pelvis and a compound fracture of both bones of both legs below the knee. He was treated for shock, his wounds were attended to, and the fractures set; his arm was placed in a sling-splint, and both legs in plaster of paris. His condition gradually improved after blood-transfusions, and a re-setting of the position of his left leg under general anaesthetic. Some three months after the accident he had an operation performed under general anaesthetic to release pressure on the ulnar nerve in the right arm, and manipulation of the right shoulder to improve the range of movement. After removal of the leg plaster, he was able to walk with the aid of crutches and continued to employ them on his return to work some seven months after the accident, and was able to walk

54. **McLean* v. *Ansett* (*supra*, n. 53).

55. **McLean* v. *Ansett* (*supra*, n. 53).

with the aid of a stick some twelve months after the accident. His left leg in particular continued to cause him pain, and he developed eczema on this leg requiring the attentions of a skin specialist. He is still receiving physiotherapeutic treatment and continues to improve slowly. He has some numbness in the right hand, and persistent swelling of both lower legs, particularly the left, and accompanying pain. He was an active man before the accident, but is now severely limited in his activities. He will continue to be employed with the Department of Lands. There cannot be an allowance for prospective loss of salary from his lecturing duties, since on the evidence it may well be that a request for his position back would be granted. Further allowance for sick-leave entitlement and further necessity of physiotherapy[56].

$11,000 Male plaintiff came into collision with car while riding his motor-scooter. He suffered shock, concussion and severe cerebral irritation, skull and staphoid bone fractures, loss of blood, and considerable facial laceration, laceration and maceration of two terminal phalanges of index finger of right hand, injury to ring finger, a fracture involving the tibia and fibula of the right leg, as well as abrasions of the left leg. These injuries have not prevented him from working, but have resulted in impaired capacity with a resultant loss of $14 per week for the remainder of his working life (nine years). General damages including pain and suffering fixed at $11,000 in all[57].

M. C. HARRIS*

COMPANY LAW

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

In *Smallwood* v. *Black*[1] Walsh J. suggested that *Kelner* v. *Baxter*[2] stood for a strict rule of law making promoters of companies personally liable on contracts they have made on behalf of the proposed companies. Critical note of this suggestion was made in the last issue of this review (2 *Adelaide Law Review* 388-393). Walsh J. was inclined to hold the defendants in *Smallwood* v. *Black* liable on the strength of this principle, but decided that doing so would amount to a refusal to follow *Newborne* v. *Sensolid (Great Britain) Ltd.*[3] He considered that the Court of Appeal, in *Newborne's* case, had

56. †*Connor* v. *D'Agostino* (1965) L.S.J. Scheme 718 (Hogarth J., November 1965). (Damages reduced by 33⅓%.)

57. †*Sadauskas* v. *Reckitt & Coleman Pty. Ltd.* (1965) L.S.J. Scheme 775 (Mayo J., December 1965). (Damages reduced by 33⅓%.)

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1. [1964-1965] N.S.W.R. 1973.
2. (1866) L.R. 2 C.P. 174.
3. [1953] 1 All E.R. 708, C.A.

created an exception to the supposed rule in *Kelner* v. *Baxter* for cases in which the promoters had signed, not "as agents of" the company, but in the form of a company signature. Walsh J. regarded this distinction as unsound, but adopted it in order to preserve uniformity of English and Australian law. Meanwhile, the case has been decided by the High Court[4].

Walsh J.'s reasoning provided the plaintiffs with a convenient basis on which to attack the judgment of the Full Supreme Court of New South Wales. On appeal to the High Court they followed his Honour's line of reasoning, including his critical assessment of *Newborne* v. *Sensolid*; however, they argued that this case should not be followed in Australia. The plaintiffs' counsel probably realized that Walsh J.'s interpretation of *Kelner* v. *Baxter* was not likely to appeal to the judges of the High Court, for they assigned an alternative source to the principle of personal promoter-liability on pre-incorporation contracts. This alternative argument was as unconvincing as it was ingenious; it was so decisively rejected by the High Court that it seems unnecessary to introduce and examine it here[5]. The High Court also showed convincingly that the promoters' liability in *Kelner* v. *Baxter* had resulted, not from the application of a rule of law, but from the application of a rule of construction[6]. In this respect the joint judgment of Barwick C.J., Kitto, Taylor and Owen JJ. as well as the concurring judgment of Windeyer J. accord substantially with the views of Asprey and Hardy JJ. in the Full Supreme Court[7].

Three aspects of the High Court decision in *Black* v. *Smallwood* seem particularly important:

1. Walsh J.'s interpretation of *Kelner* v. *Baxter* has been decisively rejected; there is no rule of law which makes promoters liable as principals on pre-incorporation contracts merely because of the fact that they have purported to make a contract on behalf of the future company. This is clear as a matter of law, even though it may be deplorable as a matter of policy. As Windeyer J. stated: "I agree that this appeal must be dismissed. I have come to that conclusion without hesitation but with regret. The law requires it, but I do not think that it accords well with a belief that bargains should be kept"[8]. It is indeed typical of cases such as *Black* v. *Smallwood* that the promoters induce contractual expectations when they either know or ought to know that the company they purport to be acting for does not yet exist. Would they have any right to complain if the law were to treat them as personally liable on such contracts?

2. In the Full Supreme Court, Asprey J. had stated that the defendants, though not bound to perform the contract itself, could be sued for damages for breach of warranty of authority. This followed, in his Honour's view, from a wide interpretation of the rule in *Collen* v. *Wright*[9]. Since this type of liability was not in issue in *Black* v. *Smallwood* (the action was one for specific performance), the High Court did not have to examine the correctness of this suggestion and the joint judgment of Barwick C.J., Kitto, Taylor and Owen JJ. does not refer to

4. (1965-1966) 39 A.L.J.R. 405, *sub nomine Black* v. *Smallwood*.
5. See *id.*, at 406-408.
6. See *id.*, at 405, 406.
7. *Cf.* 2 *Adelaide Law Review* 390-393.
8. (1965-1966) 39 A.L.J.R. 405, at 408.
9. (1857) 8 E. & B. 647.

it. However, Windeyer J. felt qualms about the defendants going scot-free and he agreed with Asprey J.: " . . . the appellants might it would seem have a cause of action in the nature of an action for breach of warranty of authority—that is on an implied warranty that they were directors of an existing company which had power to make a contract to purchase land"[10]. It is to be hoped that these dicta will be regarded as stating the law correctly.

3. A problematical feature of *Black* v. *Smallwood* lies in the wholehearted endorsement by Barwick C.J., Kitto, Taylor and Owen JJ. of *Newborne* v. *Sensolid*[11]. This might well be taken to mean that a promoter who signs in the form of a company signature is never personally liable on the contract regardless of any other factors such as verbal understandings between the parties. To resolve the problem of personal promoter-liability by applying a rule of construction would admittedly accord with the approach of the Common Pleas judges in *Kelner* v. *Baxter*. The defendants in that case had been held liable on the strength of the *ut res magis valeat quam pereat* principle which was applied to the exclusion of all extrinsic evidence of verbal understandings not reflected in the document[12]. With great respect to the learned judges who decided *Kelner* v. *Baxter*, they have failed to distinguish between the conclusion of a contract and the determination of its contents. The latter must certainly largely proceed in exclusive reliance on the terms of the written document. But when the question is whether a party has bound himself at all to the written terms, extrinsic evidence must be freely admissible, even to contradict the document. This has been the law ever since *Pym* v. *Campbell*[13]. The *ut res magis valeat quam pereat* rule is intended to save contracts from being held invalid against the wishes of the parties. In *Kelner* v. *Baxter* it was employed to turn into a contract an arrangement which the excluded evidence might have shown not to have been intended to possess any contractual status at all prior to the incorporation of the company. It is submitted that this was not a legitimate application of the *ut res magis valeat quam pereat* principle. On the other hand, a promoter who signs a pre-incorporation contract in the form of a company signature (as in *Newborne's* case), may agree verbally to be bound personally if and as long as the company should not be liable. *Newborne's* case should not be taken to suggest that evidence of such an undertaking is inadmissible. Such evidence would serve to identify the promoter as the true principal and would therefore not be barred by the parol evidence rule.

Black v. *Smallwood* has helped to clarify important aspects of pre-incorporation contracts made by company promoters, contracts which have presented the courts with intricate legal problems in the past and will continue to do so until the rule against company liability on such arrangements is removed by legislation.

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10. (1965-1966) 39 A.L.J.R. 405, at 409.
11. See *id.*, at 408.
12. *Cf. id.*, at 406.
13. (1856) 6 El. & Bl. 379 (Q.B.).

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CONTRACT

Effect of rescission of contract on exception clauses

In *Suisse Atlantique Société D'Armement Maritime S.A.* v. *N. V. Rotterdamsche Kolen Centrale*[1], the respondents agreed to charter a vessel from the appellants for a total of two years' consecutive voyages. Fixed periods of laytime were provided within which the respondents were obliged respectively to load and discharge the vessel on each voyage. In the event of these being exceeded demurrage was payable at the rate of 1,000 dollars a day. Apparently the respondents found it more economical to pay demurrage than freight and adopted the policy of making as few trips as possible during the period of the charter. The appellants contended *inter alia* that these delays amounted to a fundamental breach of the charterparty which prevented the respondents from relying on the demurrage clause and allowed the appellants to sue for damages at large.

The substance of the judgments of the members of the House of Lords is no doubt well known—that there is no doctrine of fundamental breach as a substantive rule of law, and that generally whether an exception clause will relieve a party from the consequences of breach or not depends upon the construction of the contract. It is not proposed in this note to comment on this aspect of the decision. However, in the course of their judgments several of their Lordships made observations concerning the effect of discharge by breach on the operation of exception clauses which are important in their implications and seem to warrant separate examination. It may be mentioned at the outset that these observations were not essential to the decision because, in this case, the appellants had never accepted the respondents' breach but had instead elected to affirm the contract.

Lord Reid stated that where an innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. "the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term"[2].

Lord Upjohn said: " . . . It is common ground that had the owners accepted the assumed repudiation and sailed away, thereby terminating the contract, none of its terms survived, and damages for breach of contract would have been at large, including damages for loss of profitable employment of the ship for the term of the charterparty"[3]. Later in his judgment his Lordship again adverted to this point:

> "If I am right in drawing this conclusion then the necessary result, in my opinion, is that the principle upon which one party to a contract cannot rely on the clauses of exception or limitation of liability inserted for his sole protection, is not because they are regarded as subject to any special rule of law applicable to such clauses as being in general opposed to the policy of the law or for some other reason but, just as in the deviation cases, it is the consequence of the application of

1. [1966] 2 W.L.R. 944, H.L.
2. *Ibid.*, at 958.
3. *Id.*, at 976.

> the ordinary rules applicable to all contracts, that if there is a fundamental breach accepted by the innocent party the contract is at an end; the guilty party cannot rely on any special terms in the contract. If not so accepted the clauses of exception or limitation remain in force like all the other clauses of the contract"[4].
>
> Viscount Dilhorne and Lord Hodson also apparently took a similar view[5].

The proposition that an exception clause is necessarily destroyed by rescission for breach was apparently considered by members of the House to be the one exception to the general rule that the effect of such a clause depends upon the construction of the contract. This exception seems to have been thought to derive from the decision of the House of Lords in *Hain Steamship Co. Ltd.* v. *Tate and Lyle Ltd.*[6] which was cited with approval extensively throughout the judgments in the *Suisse Atlantique* case. In *Hain* v. *Tate and Lyle*, the Court was concerned with the effect of a deviation, where accepted as a repudiation, on an exception clause in a charterparty. The Court held that in such a case the wrongdoer is disabled from relying on the exception clause; where on the other hand the contract is affirmed, the exception clause along with the rest of the contract remains effective. Lord Atkin (with whom Lord Thankerton and Lord Macmillan concurred) said that this was the result of "the ordinary law of contract"[7]. Lord Wright on the other hand confined his observations to the particular effect of deviations only.

Coote has shown convincingly that this effect of a deviation on a charterparty has been recognised by courts in a long line of cases dating back to as early as 1830, and appears to have been in its origins a special incident of bailment and peculiar to it[8]. In *Hain* v. *Tate and Lyle*, Lord Atkin by attempting to explain the effect of deviation in terms of "the ordinary law of contract" unfortunately provided a basis for the view subsequently taken by members of the House of Lords in the *Suisse Atlantique* case that in all cases the effect of an exception clause can be got rid of if the innocent party rescinds the contract for breach. The influence which Lord Atkin's view carried is seen perhaps at its clearest in the judgment of Lord Upjohn where, after citing the former's judgment in *Hain* v. *Tate and Lyle*, and after examining certain cases dealing with warehousing contracts and contracts of carriage of goods by land, his Lordship concluded that no special rules apply to any of these classes of case: "[all] are governed by and *only* by the general law relating to contracts"[9].

Coote in a recent article[10] attacks the view of the House of Lords on the effect of rescission for breach on exception clauses on the grounds that a substantial body of authority supports the proposition that rescission for breach terminates a contract not retrospectively to the date of breach but from the moment of rescission only so that until that moment an exception clause will remain effective. He concludes: "For its part, discharge by breach by itself can never be the cause of the non-application of exception clauses otherwise than in respect of loss incurred after termination of the contract"[11].

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4. [1966] 2 W.L.R. 944, at 981.
5. See *id.*, at 956, 968, 971.
6. [1936] 2 All E.R. 597.
7. *Ibid.*, at 601.
8. *Exception Clauses* (1964) 80 *et seq.*
9. [1966] 2 W.L.R. 944, H.L., at 981.
10. "The Rise and Fall of Fundamental Breach", (1967) 40 A.L.J. 336.
11. *Id.*, at 346.

It is proposed in this note to show that the decision of the House of Lords in *Hain* v. *Tate and Lyle* cannot be regarded as expressing any general contractual principle, and that the members of the House in the *Suisse Atlantique* case who would have applied the decision to exception clauses at large were accordingly mistaken. It is also proposed to show however that Coote's view is unsatisfactory and is in any event largely beside the point.

That the effect of deviation on an exception clause in a charterparty is not to be explained on ordinary contractual considerations is made clear by the decision of the House of Lords in *Heyman* v. *Darwins Ltd.*[12] In this case an arbitration clause in a contract between manufacturers and distributors relating to the sale of steel products provided that any dispute arising between the parties in respect of the contract should be referred to arbitration. The appellants claimed that the respondents had repudiated the contract and brought proceedings asking for a declaration to that effect and damages for breach. The respondents applied to have the action stayed in order that it might be dealt with under the arbitration clause.

The House of Lords held that the dispute fell within the terms of the arbitration clause and that the action ought to be stayed. All members of the Court were agreed that even on the basis that the appellants had rescinded the contract for a repudiatory breach by the respondents, the arbitration clause still applied.

In reaching this conclusion, the Court stressed the limited nature of the effect which rescission for breach has upon a contract. Lord Macmillan said:

> "I am accordingly, of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligation which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. *It survives for the purpose of measuring the claims arising out of the breach,* and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract. . . .
>
> It is said to be wrong to allow a party to a contract who has refused to perform his obligations under it at the same time to insist on the observance of a clause of arbitration embodied in the contract. The doctrine of approbate and reprobate is said to forbid this. I appreciate the apparent dilemma, but with the greatest respect I venture to think it is based on a misapprehension. The key is to be found in the distinction which I have endeavoured to draw between the arbitration clause in a contract and the executive obligations undertaken by each party to the other . . . It is not a case of one party refusing to perform the obligations in favour of the other and at the same time insisting that obligations in favour of himself shall continue to be performed. The arbitration clause, as I have said, is not a stipulation in favour of either party"[13].

12. [1942] A.C. 356; cited in argument but not in any of the judgments in the *Suisse Atlantique* case.
13. [1942] A.C. 356, H.L., at 374 (italics added).

Lord Wright expressed a similar view:

> "The commonest application of the word 'repudiation' is to what is often called the anticipatory breach of contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the 'repudiation' is wrongful and the rescission is rightful, the contract is ended by the rescission but only as far as concerns future performance. *It remains alive for the awarding of damages either for previous breaches or for the breach which constitutes the repudiation*"[14].

Later in his judgment, Lord Wright re-emphasizes that this proposition extends to damages for anticipatory breach where rescission follows[15].

Lord Porter also adopted the same view:

> "What then is the effect of such repudiation if it be accepted? In such a case the injured party may sue on the contract forthwith whether the time for performance is due or not . . . he is still acting under the contract. *He requires to refer to its terms at least to ascertain the damage . . .*
>
> To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract, the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages but the contract itself is not rescinded. The injured party may, therefore, rely on the contract and apply to have the action stayed if he desires to do so"[16].

Lord Porter went on to say that equally the wrongdoer has this last right.

The substance of these views can be stated quite shortly. Rescission for breach operates only to discharge obligations for future performance in execution of the contract. It leaves the contract intact in all other respects, and in particular it leaves the contract on foot "for the purpose of measuring the claims arising out of the breach"[17].

The decision in *Heyman* v. *Darwins* has been followed in several subsequent cases relating to arbitration clauses[18] and has never in any way been controverted. Its significance, of course, extends beyond arbitration clauses. In particular in our present context, it seems to follow from this decision that exception clauses are not affected by rescission for breach. If, as is thought to be the case, the only effect of rescission for breach on a contract is to terminate obligations of future performance under the contract, an exception clause not being a term setting out such obligations but instead being

14. [1942] A.C. 356, at 379 (italics added).
15. *Id.*, at 381.
16. *Id.*, at 397, 399 (italics added).
17. See text to n. 13, *supra.*
18. *Kruse* v. *Questier* [1953] 1 Q.B. 669; *Daniels* v. *Carmel* [1953] 2 Q.B. 242; *Government of Gibraltar* v. *Kenny* [1956] 2 Q.B. 410.

concerned only with "measuring the claims arising out of a breach" survives rescission and remains binding on the parties. If this is correct, it follows that Lord Atkin's observation in *Hain* v. *Tate and Lyle* that the effect of deviations, when accepted, on exception clauses is to be explained in terms of the ordinary law of contract cannot stand beside *Heyman* v. *Darwins*. In reviewing the weight to be attached to that observation, it must be borne in mind that *Heyman* v. *Darwins* was decided several years after *Hain* v. *Tate and Lyle* and that furthermore two judges in the case, Lord Macmillan and Lord Wright, were parties to the earlier decision.

Two possible objections to the view propounded above must be considered.

In *Woolf* v. *Collis Removal Service*[19], again concerning the effect of an arbitration clause (this time in a warehousing contract), the Court of Appeal (Cohen and Acquith L.JJ.) stated, in reliance on *Heyman* v. *Darwins Ltd.*, that where there has been rescission for breach there are "radical distinctions" between exception clauses and arbitration clauses[20]. The Court referred to Lord Macmillan's statement in *Heyman* v. *Darwins* that arbitration clauses are not clauses inserted in favour of one party or the other, and stated that he was emphasising "the distinction between exception clauses (stipulations inserted for the protection of or benefit of one party) and arbitration clauses". The Court concluded: "If deviation equals repudiation, then, under the decision in *Heyman* v. *Darwins Ltd.*, which is binding on this court, even if it is accepted, the arbitration clause survives, although exception clauses, if the implied repudiation is accepted, become a dead letter"[21]. Chitty, also referring to *Heyman* v. *Darwins*, distinguishes arbitration clauses and exemption clauses in the same way[22]. It is submitted that this distinction mistakes the point of *Heyman* v. *Darwins* completely. The Court in this case did not decide that an arbitration clause is unaffected by rescission for breach simply because it is not a term in favour only of one party, but because it is not a stipulation requiring performance under the contract: it is not a clause which requires performance by one party in favour of another of an obligation by way of execution of the contract (an "executive obligation" in Lord Macmillan's own terms) and rescission terminates only obligations of future performance but otherwise leaves the contract standing[23]. At least as clearly as an arbitration clause, an exception clause does not embody any executive obligation, for by its very nature it is a term which only becomes relevant on non-performance. There seems no sense at all in a bald distinction between terms in favour of one party and terms in favour of both as regards the effect on them of rescission for breach. The view of *Heyman* v. *Dœrwins* advanced here explains very adequately without recourse to such a distinction as the foregoing why, for example, it has never been suggested that a liquidated damages clause which is stated to operate upon a specified breach ceases to operate because incidentally the innocent party happens as well to rescind for that breach.

A second possible objection to the conclusion that exception clauses are not affected by rescission for breach might be thought to derive from the

19. [1948] 1 K.B. 11, C.A.

20. *Ibid.*, at 16

21. *Id.*, at 17.

22. *Chitty on Contracts: General Principles* (22nd ed., 1961), 322.

23. A recent case in which a similar distinction is made between these two classes of terms in a contract is *Robophone Facilities Ltd.* v. *Blank* [1966] 3 All E.R. 128, C.A.; note *ibid.*, at 141, *per* Diplock L.J.

view developed by Coote in his work on exception clauses[24]. He suggests that the true function of exception clauses is to help define the nature of the obligations undertaken under a contract. Given this view, it might be argued that an exception clause is thus a stipulation helping to set out executive obligations. Two points might be made by way of meeting this objection. First, despite Coote's view of what should be the true function of exception clauses, it nevertheless remains the case that English law has not traditionally approached such clauses in this way. Generally, as Coote himself concedes, "it seems to have been taken for granted that an exception clause provides merely a shield to a claim for damages and that it does not in itself affect the obligations undertaken by the promisor"[25]. In other words, an exception clause relates only to the enforcement of obligations, not to the obligations themselves. Secondly, even if Coote's view were to be adopted, the proposition advanced above based on *Heyman* v. *Darwins* would not be affected. The only way an exception clause can "define" an obligation is, it would seem, to define it out of existence. Any exception clause which simply imposes a limit on liability for breach of a given obligation is not part of the contract defining the obligations. The obligations are conceded. If, on the other hand, an exception clause provides, for example, that there is *no liability* for breach of a given condition, Coote would presumably argue that no obligation in relation to that condition has been undertaken. But if this is the case there could not be any action in damages for breach to be affected by the exception clause simply because there is no obligation to breach. Thus where following rescission for an established breach an action is brought in damages for *that breach,* it must necessarily be the case that any exception clause relating to that breach is not a clause helping to define the obligation undertaken, that is, it is not part of the contract stipulating the executive obligations and will therefore not be affected by the rescission.

While one can agree with Coote that the cases strongly support the proposition that rescission for breach must be regarded as terminating a contract as from the moment of rescission and not as from the breach, this in the present context is beside the point. Whether or not the rescission relates back to the breach, it simply cannot affect an exception clause. This is not to suggest that situations cannot arise in which this question might become important. For example, where as in *Boston Deep Sea Co.* v. *Ansell*[26] a servant who has committed a sufficiently serious breach of his contract of service to justify dismissal subsequently performs services under the contract before dismissal, the question may arise as to whether he is entitled to payment for those services in terms of the contract. The Court in *Boston Deep Sea Co.* v. *Ansell* in these circumstances held that the servant was so entitled and that the contract was only terminated from the moment of dismissal. *Heyman* v. *Darwins* was not of course concerned with this sort of question at all. However, Lord Macmillan did point out in this case that the doctrine of approbate and reprobate may prevent any party who is refusing to perform the executive obligations he has undertaken to the other party from insisting that obligations of the same nature in favour of himself shall continue to be performed. The operation of this doctrine is in no way dependent on any question of rescission. Even if the doctrine had been argued in *Boston Deep Sea Co.* v. *Ansell,* the decision may well have been the same because although the servant had

24. *Exception Clauses* (1964).

25. *Op. cit.*, 1.

26. (1888) 39 Ch. D. 339; applied in *Healy* v. *S.A. Franchise Rubastic* [1917] 1 K.B. 946.

committeed a material breach justifying rescission of the contract, he was not refusing further performance of his obligations under the contract and in this sense probably had not "reprobated" it.

With regard to Coote's conclusion that "discharge by breach by itself can never be the cause of the non-application of exception clauses *otherwise than in respect of loss incurred after termination of the contract*"[27], this would produce odd results, even on his own premise. Damage flowing from the one breach (committed of course while the contract applies in full to the breach) is governed by the exception clause up until the moment that the breach is accepted but thereafter ceases to be so governed. To say that damages for anticipatory breach, that is, breach of future obligations, are not affected by an exception clause is little better because notwithstanding that the obligations are future the anticipatory breach is committed as soon as the repudiation occurs (again when the contract applies in full to the breach): "anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable"[28] and an immediate right of action for damages for breach arises[29]. Moreover, Lord Wright in *Heyman* v. *Darwins* expressly stated that damages for anticipatory breach where rescission follows are, like damages for any other breach, governed by the contract[30].

It is accordingly submitted that the view expressed by the House of Lords in the *Suisse Atlantique* case as to the effect of rescission for breach upon an exception clause is mistaken. It is suggested that the effect to be given an exception clause in this circumstance ought to be no different from that given it in any other: *in every case* its operation will depend entirely upon the true construction of the contract.

M. J TREBILCOCK*

REGULATORY OFFENCES

Sheep straying — Interpretation of the Impounding Act 1920-1962, s. 46 (1)

Norcock v. Bowey[1] is a recent decision of the Court of Criminal Appeal of South Australia on the interpretation of a regulatory offence[2]. It is significant for two reasons[3]. First, it indicates that the doctrine of strict liability (to the extent that it exists in Australia[4]) is less draconic in operation than its English

27. (1967) 40 A.L.J. 336, at 346 (italics added). This view finds some support in the passage from the judgment of Lord Reid in the *Suisse Atlantique* case cited at p. 105, *supra*.
28. *Universal Cargo Carriers Corporation* v. *Citati* [1957] 2 Q.B. 401, at 438, *per* Devlin J.
29. *Hochster* v. *De La Tour* (1853) 2 E. & B. 678; *Frost* v. *Knight* (1872) L.R. 7 Ex. 111.
30. Cited at p. 108, *supra*.

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1. [1966] S.A.S.R. 250.
2. 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.
3. The second may seem to contradict the first. However, see the discussion of the court's reasoning, *infra*.
4. See generally, Howard, *Strict Responsibility* (1963).

counterpart. Secondly, the decision is notable for the preference shown by the court for English, as opposed to Australian, authority on the interpretation of regulatory offences.

In this case the appellant was charged with being the owner of a sheep found straying in a public place, an offence prescribed by the Impounding Act 1920-1962, s. 46 (1). This sheep had been one of a flock belonging to the appellant which had been moved by an employee from one paddock to another. It had been found on the road separating these two paddocks. The magistrate found that neither the appellant nor his employee had been negligent in failing to keep the sheep off the road and acquitted the appellant. Reliance was placed upon the decision of Napier C.J. in *Snell* v. *Ryan*[5], a case involving the same statutory provision. In that case D had depastured a cow in a paddock which was securely fenced and enclosed. The cow escaped onto a road when released by a stranger without D's authority or knowledge. D had in no way been negligent. He was convicted and appealed to the Supreme Court. In allowing the appeal Napier C.J. stated his reasons as follows:

> "I have too much respect for the legislature to suppose that it would have intended to penalize the owner of cattle, which are found straying, through no fault or neglect upon the part of anyone for whom the owner is responsible, but as the result of the wrongful and possibly criminal act of a stranger. . . . The onus was, of course, upon the appellant to show how his cow came to be upon the road, but when it appears that he had done everything that any reasonable man could be expected to do, in the way of securing his cattle, and ensuring that they would be kept off the road, it is plain that he ought not to be convicted under this section"[6].

The acquittal of the appellant in the instant case was then appealed against by the prosecution. Chamberlain J. of the Supreme Court of South Australia allowed this appeal, holding that the offence prescribed by the Impounding Act 1920-1962, s. 46 (1), was one of strict liability. In his Honour's opinion the English and Australian authorities indicated that either a regulatory offence imposes strict liability or requires proof of *mens rea*. There was no "half-way house"[7] between these two extremes and, since *Snell* v. *Ryan* suggested the contrary, that case had been incorrectly decided.

The appellant then appealed against the conviction ordered by Chamberlain J., relying, *inter alia*, upon the decision in *Snell* v. *Ryan*. The Court of Criminal Appeal of South Australia (Napier C.J., Hogarth and Walters JJ.) disallowed the appeal. Napier C.J. (in whose judgment Walters J. concurred) construed Section 46 (1) as imposing strict liability. However, in his Honour's opinion, the appellant would have been exculpated had he been able to establish, on the balance of probabilities, that the presence of the sheep on the road was attributable to circumstances beyond his control, as for example, an Act of God or some wrongful act on the part of a stranger whom the appellant had no means of controlling or influencing[8]. This the appellant was unable to do; merely establishing that he had taken reasonable care was insufficient.

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5. [1951] S.A.S.R. 59.
6. *Ibid.*, at 60.
7. See Glanville Williams: *Criminal Law—The General Part* (2nd ed., 1962), 262.
8. [1966] S.A.S.R. 250, at 266.

His Honour cited several English authorities, including the decision of the Privy Council in *Lim Chin Aik* v. *Queen*[9], and one Australian authority, *Snell* v. *Ryan*, in support of the above interpretation of Section 46 (1). In his Honour's opinion these authorities indicated that where a regulatory offence does not require proof of *mens rea*, "absolute" liability is not imposed. Instead, the defence of Act of God or wrongful act of a stranger is available to an accused and therefore liability is merely "strict"[10]. *Snell* v. *Ryan* was not regarded as supporting the wider proposition that it was a defence for an accused to establish an absence of negligence. His Honour made no reference to the considerable body of Australian case-law supporting this wider proposition[11].

Napier C.J. conceded that usually there is no indication in the wording of a regulatory offence that a distinction should be drawn between "absolute" and merely "strict" liability. However this distinction had to be inferred "as a matter of reason or common sense"[12]. In support of this contention his Honour relied mainly upon the Acts Interpretation Act 1913-1936, s. 22, which provides that every statute "shall be deemed remedial, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of [the statute] according to [its] true intent, meaning, and spirit". This provision is probably declaratory of accepted principles of statutory interpretation[13].

The judgment of Napier C.J. contains only one express argument against construing the Impounding Act 1920-1962, s. 46 (1), allowing an accused to exculpate himself by establishing an absence of negligence. This was to the effect that unless strict liability were imposed the object of the provision (to prevent animals straying onto public roads) would not be best ensured within the meaning of the Acts Interpretation Act 1913-1936, s. 22[14].

Hogarth J. was in substantial agreement with Napier C.J. but, unlike Napier C.J., did refer to *Proudman* v. *Dayman*[15], a decision of the High Court and perhaps the leading Australian authority on the interpretation of regulatory offences[16]. In that case Dixon J. (as he then was) stated that in the construction of regulatory offences there was a presumption that although the prosecution need not prove *mens rea*, an accused could exculpate himself by establishing that he made a reasonable mistake of fact[17]. This presumption applies "unless from the words, context, subject matter, or general nature of the enactment some reason to the contrary appears"[18]. Hogarth J. did not expressly refer to the defence of reasonable mistake of fact but stated that

9. [1963] A.C. 160.
10. [1966] S.A.S.R. 250, at 265.
11. See the cases collected and analysed in Howard: *Strict Responsibility* (1963), and note the authorities cited n. 38, *infra*. Also *cf.* Cardozo: *The Growth of the Law* (1924), 17, 18.
12. [1966] S.A.S.R. 250, at 265.
13. See *McCulloch* v. *Anderson* [1962] N.Z.L.R. 130; *United Insurance Co. Ltd.* v. *The King* [1938] N.Z.L.R. 885. See also Maxwell: *Interpretation of Statutes* (11th ed., 1962) 275; Cardozo: *The Nature of the Judicial Process* (1921), 113-116.
14. [1966] S.A.S.R. 250, at 266.
15. (1941) 67 C.L.R. 536.
16. Howard: *Strict Responsibility* (1963), 86.
17. (1941) 67 C.L.R. 536, at 540, 541.
18. *Id.*, at 540.

the Impounding Act 1920-1962 s.46 (1), was a provision where, in the words of Dixon J. in the above decision[19], "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"[20]. In reaching this conclusion his Honour placed considerable reliance upon the fact that, according to the decision of the House of Lords in *Searle* v. *Wallbank*[21], a person who suffers injuries in a collision with a straying animal has no right of action against the owner of the animal[22]. If his Honour did in fact consider the possible application of the presumption that the defence of reasonable mistake of fact is available to an accused charged with a regulatory offence this may have been the reason[23] for excluding the defence from the operation of section 46 (1).

The conclusion reached by the Court of Criminal Appeal in the instant case is inconsistent with present English authority. In England no distinction is drawn between "strict" and "absolute" liability[24]. Reference need be made only to *Lim Chin Aik* v. *Queen*[25], one authority relied upon by Napier C.J. The extract from the judgment of the Privy Council citied by his Honour was as follows:

> "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 dealing with a grave social evil, strict liability is not likely to be intended"[26].

It is quite clear from the rest of the judgment that where, on the above test, strict liability is not to be imposed, the regulatory offence is to be construed as requiring proof of *mens rea*[27]. In other words the offence is not construed as imposing strict liability subject to the availability of such defences as the defence of Act of God[28].

This criticism of the reasoning in the instant case is, however, minor. *Lim Chin Aik* v. *Queen* and the other decisions of English courts referred to by Napier C.J. are, it is submitted, not binding upon any court in an Aus-

19. (1941) 67 C.L.R. 536, at 540.
20. [1966] S.A.S.R. 250, at 267.
21. [1947] A.C. 341.
22. [1966] S.A.S.R. 250, at 267.
23. See text and n. 18, *supra.*
24. *Cf. Burns* v. *Bidder* [1966] 3 All E.R. 29. But see *Parker* v. *Alder* [1899] 1 Q.B. 20; *R.* v. *Larsonneur* (1933) 24 Cr. App. R. 74; and *Strong* v. *Dawtry* [1961] 1 W.L.R. 841. These decisions are not referred to in *Burns* v. *Bidder* or in Smith & Hogan: *Criminal Law* (1965), 58, 59 (where the view is also taken that in England liability is strict rather than absolute).
25. See n. 9, *supra.*
26. [1963] A.C. 160, at 174, 175. This principle is unworkable. See comment in 2 *Adelaide Law Review,* 397, at 403.
27. The same is true of *Reynolds* v. *C. H. Austin & Sons Ltd.* [1951] 2 K.B. 135 (except *per* Humphreys J.), another English authority upon which Napier C.J. placed considerable reliance.
28. This conclusion is also supported by the extra-judicial comments of Lord Devlin: *Samples of Law Making* (1962), 67 *et seq.*; and "Statutory Offences", (1958) *Journal of the Society of Public Teachers of Law,* 206 *et seq.*

tralian jurisdiction[29]. The conclusion reached by the Court of Criminal Appeal is substantially consistent with a line of Australian authority which indicates that the defences of impossibility, inevitable accident, and necessity are available even where the relevant regulatory offence is one imposing strict liability[30]. The only significant departure from this line of authority is the placing of a persuasive burden of proof upon the accused. This departure may be desirable[31].

However, one serious criticism is to be levelled at the decision in *Norcock* v. *Bowey*. No member of the Court of Criminal Appeal attempted to discuss whether the defence of reasonable mistake of fact was available on a charge under the Impounding Act 1920-1962, s. 46 (1). This is very surprising. On the facts of the case it would seem that this issue was central[32]. So much is evident from the judgment of Chamberlain J. who discussed the point in considerable detail. Furthermore in *Tanner* v. *Smart*[33], another recent decision on section 46 (1) Bright J. of the Supreme Court of South Australia held that the defence of reasonable mistake of fact was available to an accused charged under this provision. Numerous Australian authorities, both at the High Court and State Court of Criminal Appeal level, indicate that the defence is generally applicable to regulatory offences[34]. These authorities were clearly more relevant in the present case than the English authorities cited, especially since, as has been discussed above, the latter do not support the court's reasoning. Perhaps their Honours' silence on this issue could be construed as agreement with the views expressed by Chamberlain J. For this reason it is necessary to consider whether these views are sound.

Chamberlain J., after reviewing several authorities, including *Proudman* v. *Dayman*[35], concluded that a regulatory offence is to be interpreted as requiring proof of *mens rea* or as imposing strict liability. In his Honour's opinion, the defence of reasonable mistake of fact was merely a defence which could be relied upon to cast doubt on the case of the prosecution that the accused possessed *mens rea*. Furthermore a persuasive burden of proof did not lie upon an accused who pleaded the defence.

This approach is consistent with English authority, including *Lim Chin Aik* v. *Queen*. It is also consistent with the bulk of South Australian case-law[36],

29. It is submitted that *Lim Chin Aik* v. *Queen* [1963] A.C. 160, being a decision of the Privy Council on appeal from Singapore, is not binding on Australian courts. See *Uren* v. *John Fairfax & Sons Pty. Ltd* [1965] N.S.W.R. 202, at 236, 237, *per* Wallace J.; *Walsh* v. *Walsh* [1948] 1 D.L.R. 630, 647; *cf. Bakhshuwen* v. *Bakhshuwen* [1952] A.C. 1. (The latter two references are taken from D. L. Mathieson, "Australian Precedents in N.Z. Courts", 1 N.Z.U.L.R., 102.) This view is reinforced by the complete absence of reference to decisions of the High Court by the Privy Council in *Lim Chin Aik* v. *Queen*. See *Rejfek* v. *McElroy* (1965) 39 A.L.J.R. 177, at 178. It is significant that the decision has yet to be followed in Australia. (It has however been misapplied—see, *e.g.*, *August* v. *Fingleton* [1964] S.A.S.R. 22; *Hancock* v. *Cooley* [1964] V.R. 639; *Norcock* v. *Bowey*.)

30. See Howard: *Strict Responsibility* (1963), 204-207, and also *Blyth* v. *Hudson* (1929) 41 C.L.R. 465, at 471.

31. See Howard: *Strict Responsibility* (1963) 39-44.

32. However, see discussion *infra*.

33. [1965] S.A.S.R. 44 (an authority not cited in the present case).

34. See n. 4, *supra*, and n. 38, *infra*.

35. (1941) 67 C.L.R. 536. See text to n. 15, *supra*.

36. *E.g.*, *O'Sullivan* v. *Harford* [1956] S.A.S.R. 109; *August* v. *Fingleton* [1964] S.A.S.R. 22. *Cf.*, however, *Belling* v. *O'Sullivan* [1950] S.A.S.R. 43; *Lenzi* v. *Miller* [1965] S.A.S.R. 8; *Hann* v. *Butcher* [1963] S.A.S.R. 197 (Chamberlain J.).

except that usually the view has been taken that a persuasive burden of proof lies upon an accused to establish the defence[37]. However his Honour's views and the bulk of the South Australian case-law (except in respect of the issue of burden of proof) are inconsistent with the interpretation of High Court authority on the defence of reasonable mistake of fact adopted in other Australian jurisdictions. The Australian case-law indicates that the defence does not apply in the case of offences requiring proof of *mens rea* but only to those which do not[38]. The defence is pleaded to establish the absence of negligence, not the absence of *mens rea*. This is because an accused will not be exculpated unless the court considers that the mistake of fact relied upon was reasonable *as a matter of law*[39]. It is also clearly established that a persuasive burden of proof lies upon an accused who pleads the defence[40].

Chamberlain J. did not review the Australian authorities referred to above and for this reason it is submitted, with respect, that his Honour's views on the defence of reasonable mistake of fact are unsound[41]. Although his Honour's approach is consistent with several decisions of the Privy Council, including *Lim Chin Aik* v. *Queen*, this would seem immaterial. None of these appeals were from an Australian jurisdiction and therefore, it is submitted, are not binding upon Australian courts[42]. Furthermore since the Privy Council has yet to examine the Australian case-law[43] any of its past pronouncements would appear to be of scant persuasive value[44].

It is arguable that the bulk of the South Australian case-law on the defence of reasonable mistake of fact (except in respect of the issue of burden of proof) is also unsound. Significantly, a review of the recent relevant Australian case-law has yet to be undertaken by a South Australian court.

The failure of the Court of Criminal Appeal in *Norcock* v. *Bowey* to discuss whether or not the defence of reasonable mistake of fact was available to the appellant may be explicable on one other ground. Their Honours may have thought some reason existed for excluding the defence, a possibility contemplated by Dixon J. in *Proudman* v. *Dayman*[45]. Some evidence of this is to be found in the judgment of Hogarth J. who placed reliance on the fact that, according to the House of Lords decision in *Searle* v. *Wallbank*, an owner of straying animals which injure road-users escapes civil liability[46]. However it is submitted that the above decision would not be a sufficient reason for

37. See *O'Sullivan* v. *Harford* [1956] S.A.S.R. 109; *August* v. *Fingleton* [1964] S.A.S.R. 22; *Tanner* v. *Smart* [1965] S.A.S.R. 44; *Lenzi* v. *Miller* [1965] S.A.S.R. 8, at 16 *per* Bright J.

38. See *R.* v. *Coventry* (1938) 59 C.L.R. 633; *R.* v. *Martin* [1963] Tas. S.R. 103; *Coysh* v. *Elliott* [1963] V.R. 114; *Madsen* v. *Western Interstate Pty. Ltd.* [1963] Q.R. 434, at 465 *per* Wanstall J.; *Crichton* v. *Victorian Dairies Ltd.* [1965] V.R. 49. See also Howard: *Strict Responsibility* (1963), 99-105, and *cf.* Hannan, "Mens Rea in Statutory Offences", 16 A.L.J. 91, an article of interest in 1943, but which is not relevant today.

39. See n. 36, *supra.*

40. See *Maher* v. *Musson* (1934) 52 C.L.R. 100; *Dowling* v. *Bowie* (1952) 86 C.L.R. 136; *Bergin* v. *Stack* (1953) 88 C.L.R. 248; *Vines* v. *Djordjevitch* (1955), 91 C.L.R. 512; *R.* v. *Martin* [1963] Tas S.R. 103. None of these authorities was reviewed by Chamberlain J.

41. And *cf. Hann* v. *Butcher* [1963] S.A.S.R. 197 (Chamberlain J.).

42. See n. 29, *supra.*

43. *Cf.* the cursory reference to Australian authority in *Patel* v. *Comptroller of Customs* [1965] 3 W.L.R. 1221, P.C.

44. See *Rejfek* v. *McElroy* (1965) 39 A.L.J.R. 177, at 178.

45. See text to n. 18, *supra.*

46. See text to n. 22, *supra.*

excluding the defence of reasonable mistake of fact from the operation of section 46 (1) of the Impounding Act[47], especially since the exclusion results in the imposition of a higher duty of care than would exist under the tort of negligence.

Further evidence that this was the reasoning implicit in the present case could be found in the judgment of Napier C.J. His Honour was of the opinion that the Impounding Act 1920-1962, s. 46 (1), could not be best implemented, within the meaning of the Acts Interpretation Act 1913-1936, s. 22, if it were a defence to prove merely that reasonable care had been taken[48]. However, it is submitted that this also would be an insufficient reason for excluding the defence of reasonable mistake of fact. As one commentator has pointed out, it has not been proven that regulatory offences are less adequately enforced where such a defence is made available[49]. Furthermore, consider the following illustration. D forbids his employee Z to leave any gates open on D's station property. Z, while acting in the scope of his employment[50], deliberately or negligently leaves a gate open contrary to D's express instructions. As a result several of D's sheep stray onto a road. D hears of Z's actions and dismisses him immediately. Assuming that D has not been negligent in any way, according to the interpretation of section 46 (1) by the Court of Criminal Appeal in the present case, D would still be convicted since the presence of the sheep on the road would not be attributable to an Act of God or the wrongful act of a stranger. It is difficult to appreciate how, as a matter of "fair and common sense" (the test approved and applied by Napier C.J.)[51], the imposition of liability in such circumstances assists the implementation of the statute. If anything it encourages disrespect for the law.

In conclusion it is submitted that since there seems no adequate reason for excluding the defence of reasonable mistake of fact from the operation of section 46 (1) of the Impounding Act, it should have been available to the appellant in the instant case. Had the defence been available he would have been acquitted if he had consciously believed that none of his sheep were straying on a road[52] since, according to the finding of the magistrate, he had taken reasonable care to ensure that his sheep would not stray onto a public road. However, if the appellant had merely made an unconscious assumption that none of his sheep were straying on a road[53], it is less clear that he would have been acquitted. Although such an assumption would have been reasonable (in view of the magistrate's finding) there is authority to the effect that the defence of reasonable mistake of fact requires an accused to establish that he made a conscious mistake of fact[54]. It has been argued, however, that it is still an open question whether a reasonable unconscious assumption is excluded from the scope of the defence[55].

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47. And see *Fleming* v. *Atkinson* (1959) 18 D.L.R. (2d.) 81.
48. See text to n. 14, *supra*.
49. Howard: *Strict Responsibility* (1963), 24-26.
50. See Edwards: *Mens Rea in Statutory Offences* (1955), 220-224. Possibly, although this is not at all clear from the present case, if Z were acting outside the scope of his employment his actions might be equated with those of a stranger whom D had no means of controlling or influencing.
51. See text to n. 12, *supra*.
52. This is not clear from the facts stated in the judgment.
53. This again is not clear from the facts stated in the judgment.
54. *E.g.*, *Proudman* v. *Dayman* (1941) 67 C.L.R. 536.
55. Howard: *Australian Criminal Law* (1965), 324-327.

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NEGLIGENCE

Standard of care in child negligence

The recent case of *McHale* v. *Watson and Others*[1] raised a question upon which there was, as Owen J. said[2], no direct English or Australian authority. The basic point at issue on appeal, and the one with which it is intended to deal in this note, was whether a child's age could be taken into consideration in determining whether or not he was negligent. This problem may be expected to assume much greater importance as society presses the privileges and responsibilities of adulthood upon children at an increasingly young age. In addition, of course, it raises the fundamental issue of the extent to which tortious liability should depend upon subjective criteria.

Since *McHale* v. *Watson* at first instance[3] also was concerned with whether trespass to the person must be either negligent or intentional, and upon whom the burden of proof lies in such an action, it may well be termed a most important case. With the matters just mentioned it is not intended to deal—Windeyer J., who heard the case at first instance, agreed with Diplock J. in *Fowler* v. *Lanning*[4] that a trespass must be either intentional or negligent, and this point was not contested on appeal. But his Honour disagreed with Diplock J. as to the burden of proof, which he felt was on the defendant[5]. This opinion was referred to only briefly on appeal, and was not examined[6].

The case arose from an incident in Portland, Victoria, in January 1957[7] and was brought on before Windeyer J. sitting in the original jurisdiction of the High Court[8]. Barry Watson and Susan McHale, aged twelve years and nine years respectively, were playing a game of "chasings, a children's game also known as tag"[9], with some other children. When the game ended Susan and Barry were on opposite sides of a tree guard, which formed a square enclosure the sides of which were about two feet long, with a four feet high post at each corner. Between the posts were low pickets, approximately two feet high. On the view of the facts taken by the learned judge at first instance and accepted by the majority of the High Court on appeal[10], Barry then threw a sharpened six-inch length of metal welding rod at one of the corner posts, about one foot away. It struck the post and was deflected towards Susan who was at most four to five feet away, and to Barry's left.

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1. (1966) 39 A.L.J.R. 459.
2. *Ibid.*, at 470.
3. (1964) 111 C.L.R. 384.
4. [1959] 1 Q.B. 426.
5. For a case note on the original hearing, see (1966) 5 Melbourne University Law Review, 243.
6. (1966) 39 A.L.J.R. 459, at 459, *per* McTiernan A.C.J.
7. No problem as to limitation of actions arose because the action was by an infant: (1964) 111 C.L.R. 384, at 386.
8. *I.e.*, under the Commonwealth Constitution, s. 75 (iv), since the parties came from different states—the plaintiff from New South Wales and the defendant from South Australia, and the events took place in Victoria.
9. (1966) 39 A.L.J.R. 459, at 459, *per* McTiernan A.C.J.
10. Menzies J. expressed doubts; (1966) 39 A.L.J.R. 459, at 469.

Susan McHale, by her next friend, sued Barry Watson for damages for assault and trespass. Barry's parents were sued for negligence, but the claim was dismissed by Windeyer J. and was not contested on appeal.

In his judgment Windeyer J. held that the defendant was not liable, since he was not negligent and it was admitted by the plaintiff that the defendant's act was not intentional, and therefore no action in assault or trespass could lie. He held that in determining whether the defendant had been negligent he must take into consideration his age—"I do not think that I am required to disregard altogether the fact that the defendant Barry Watson was at the time only twelve years old. In remembering that I am not considering 'the idiosyncrasies of the particular person'[11]. Childhood is not an idiosyncrasy"[12]. His conclusion on the facts of the case was that the injury to the plaintiff was not caused by "a lack of foresight and appreciation of the risk that might reasonably have been expected, or of a want of reasonable care in aiming the dart"[13], and that therefore Barry Watson was not negligent. It would appear from this cautiously worded judgment that the learned judge probably feels that the test of negligence for a twelve-year old child is whether he showed the care that might reasonably be expected of a child of that age in the circumstances. He did not say that the test is a "reasonable twelve-year old" test, but laid emphasis on the particular circumstances, and on what a normal child's experience and intelligence would tell him in such a situation. Thus, his test was a rather vague "childhood" test, not a "twelve-year old" test, and in determining what can reasonably be expected of a child he impliedly took into account the child's "age group", and the limited experience and knowledge of a child of that age group. His Honour said: "It may be that an adult, knowing of the resistant qualities of hardwood and of the uncertainty that a spike, not properly balanced as a dart, will stick into wood when thrown, would foresee that it might fail to do so and perhaps go off at a tangent"[14].

It is suggested that this formulation by Windeyer J. of the test for a child's negligence is, with respect, too vague and imprecise to be of much value as a criterion for future fact-situations. It does emerge from his judgment that the defendant's age is a relevant consideration insofar as the standard of care demanded of him will depend on the experience and knowledge of a child, if the defendant is a child.

The appeal was argued on two main grounds—firstly that Windeyer J. erred in holding that the standard of care demanded of the defendant was any different from that of an adult in the same circumstances, and secondly that his Honour should have made a finding of negligence whether he applied this different standard or that of the ordinary reasonable adult.

The appeal was dismissed by the majority of the High Court (McTiernan A.C.J., Kitto and Owen JJ.), with Menzies J. dissenting. However, while the majority all expressed themselves as in agreement with the judgment of their learned brother at first instance, their formulations of the correct test are not identical with it nor with each other's. Since the problem as to the scope of subjectivity is so important and the boundaries so indeterminate the formulations of their Honours are worthy of close examination.

11. This is a reference to the well-known speech by Lord MacMillan in *Glasgow Corporation* v. *Muir* [1943] A.C. 448, H.L., at 457, where he said liability in negligence was "independent of the idiosyncrasies of the particular person whose conduct is in question".
12. (1964) 111 C.L.R. 384, at 397.
13. *Ibid.*
14. (1964) 111 C.L.R. 384, at 397.

There was general agreement that there was no direct authority on the case either in England or Australia, and so the Court looked to Canadian and American cases and to textbook comment. However, as Menzies J. pointed out[15], some of the North American cases[16] were cases where the parents' liability for the child's negligence was at issue, either solely or in conjunction with the child's liability, and therefore the considerations were somewhat different. In determining whether a parent has been negligent with respect to his child, clearly the latter's own particular characteristics are important, since upon his subjective qualities and thus his propensity for negligent or intentional wrongdoing depends the parent's liability for negligence in allowing him to get up to mischief, as it were. Thus, in such cases there is of necessity a much stronger emphasis on subjectivity, and they cannot be regarded as strong authority on the test for negligence by a child.

Menzies J. also objected to the reliance in these cases on decisions as to contributory negligence by a child[17]. He asserts that there is no inconsistency between using a subjective test for contributory negligence and an objective test for negligence: " . . . the objective test . . . follows inevitably from the statement of the duty of care which the law imposes upon one man in his relationship with others; no such duty is necessarily in question when the question is merely whether the plaintiff has been guilty of contributory negligence"[18]. Despite the support given to his Honour's opinion by the dictum of Viscount Simon in *Nance* v. *British Columbia Electric Railway Co. Ltd.*[19] the rebuttal by Owen J. of this theory seems more convincing and logical. He points out the anomaly that would arise in an action between infants if the tests for negligence and contributory negligence were different—one infant would be expected to be an adult, the other would not (since it is clearly established that in contributory negligence cases the child plaintiff's age is to be taken into account in determining the standard of care he owes[20]). "A jury thus directed would, I should think, form the opinion, with some justification, that the law was an ass"[21].

Kitto J. agrees that negligence and contributory negligence are "cognate" subjects and that the standard of care should be the same[22]. In support he quotes Lord Atkin[23]: "The competition as to efficiency of causation is between 'a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances . . . ' "[24].

Neither Kitto J. nor Owen J. regard the contributory negligence test applied in past cases as being subjective—it is objective with a subjective element. It

15. (1966) 39 A.L.J.R. 459, at 467.
16. For example, *Kuhns* v. *Brugger* (1957) 68 Am. L.R. (2d.) 761.
17. (1966) 39 A.L.J.R. 459, at 468.
18. *Ibid.*
19. [1951] A.C. 601, P.C., at 611, quoted by Menzies J., (1966) 39 A.L.J.R. 459, at 468.
20. See, *e.g.*, *Joseph* v. *Swallow & Ariell Pty. Ltd.* (1933) 49 C.L.R. 578; *McEllistrum* v. *Etches* (1957) 6 D.L.R. (2d.) 1.
21. (1966) 39 A.L.J.R. 459, at 470, *per* Owen J.
22. *Id.*, at 464.
23. *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152, H.L., at 164, 165.
24. (1966) 39 A.L.J.R. 459, at 464.

is only Menzies J. who calls it a subjective test—here, as at several other times in his judgment, he is overstating the opposing argument so as to make it easier to refute.

However, while both Kitto J. and Owen J. held that the test for negligence should be the same as for contributory negligence, they differed as to what was the test (that is, the standard of care) laid down in the contributory negligence cases. Each having derived a test from these cases, he applied it directly to the instant case, and so this difference is of great importance in determining for what proposition this case is authority.

Kitto J. felt that the test emerging from the cases was whether the child "failed to exercise the care reasonably to be expected of an ordinary child of the same age"[25]. He said "the standard of care is objective; it is the standard to be expected of a child, meaning any ordinary child, of comparable age"[26].

Throughout his judgment he makes it clear that a child cannot excuse himself if he is "abnormally slow-witted, quick-tempered, absent-minded or inexperienced"[27] any more than an adult can, but that "abnormally" means abnormal with respect to people of his age—for it to mean anything else would be a "misuse of language"[28].

With respect, his Honour would appear to be entirely correct when he says that the only subjective part of the test is age—everything else is judged objectively, but objectively with regard to a normal reasonable person of that age. It is quite normal, reasonable and ordinary to have limited foresight and prudence at the age of twelve. It was in this sense that Windeyer J. said that childhood is not an idiosyncrasy, and it was because he felt that a normal child would not realise the risk involved in an act such as Barry Watson's that he found no negligence. As Kitto J. said, this is not a personal idiosyncrasy but a "characteristic of humanity at his stage of development, and in that sense normal"[29].

Owen J. does not appear to see a distinction between this theory and taking into account the child's "age, intelligence and experience". The latter phrase comes from Canadian cases[30] and is repeated by Fleming[31], and Owen J. uses it without regarding it as being any real extension to the principle of Kitto J. This is clear when he says "where an infant defendant is charged with negligence, *his age* is a circumstance to be taken into account and the standard by which his conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of *the same age, intelligence and experience*"[32].

It is submitted that this distinction is of the utmost importance—it is the difference between an objective test and a subjective test. To take into account a child's particular intelligence and experience not only presents an evidential problem, but is also a leap into subjectivity such as has never been taken in the

25. (1966) 39 A.L.J.R. 459, at 464.
26. *Ibid.*
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *McEllistrum* v. *Etches* (1957) 6 D.L.R. (2d.) 1.; *Walmsley* v. *Humenick* (1954) 2 D.L.R. 232.
31. Fleming: *The Law of Torts* (3rd ed., 1965), 117.
32. (1966) 39 A.L.J.R. 459, at 472.

law of torts. It would seriously undermine the whole basis of liability at law by excusing people because of their own peculiar idiosyncrasies. More will be said of this later.

The rationale of the objective theory of liability in negligence is that where a man is injured by the act of another then unless that act was a normal and reasonable one, *in that it is one to be expected in the circumstances*, then the actor is liable, no matter how innocent he may be morally nor how congenital his conduct is—his behaviour is no less injurious to his neighbours because of these "mitigating circumstances". Thus, defective intelligence and abnormal inexperience can be no defence to an act which is not reasonable (that is, would not have been done by a normal person).

But where a person makes it quite clear to everyone that he is abnormal—and this abnormality is not so gross as to make notice of it ineffectual because nothing can reasonably be done to avoid the consequences of it—then his conduct, if normal and reasonable for a person of the type which he declares himself to be, becomes reasonable conduct with respect to those given "notice", because it can reasonably be expected by those who know of the abnormality. Hence a child, who obviously gives notice of his "abnormality" (that is, his youthfulness) to everyone who sees him, is not liable in negligence so long as he behaves in a way normal for such a child as he gives notice, as it were, that he is.

Thus, it is suggested that Kitto J. is right in allowing age to be taken into account—because except in cases of very exceptional physical and perhaps mental development, notice of the "abnormality" of childhood is given where the defendant is a child. When a child acts with limited foresight and prudence he is acting normally for such a person as he gives notice that he is—this is what his Honour means when he says such limited capacity is a "characteristic of humanity at his stage of development and in that sense normal"[33]. It would seem to follow from this that a child who deliberately sets himself up as having adult capabilities must show an adult's care—for example, a minor who gets a driving licence probably must show the care of an adult driver[34].

For these reasons the suggestion that intelligence and experience are subjective, too, with respect to a child's standard of care is hard to support. If there were express notice of abnormal intelligence or experience, and a reasonable opportunity to avoid risking the consequences of being proximate to such abnormality, then this should afford a defence—but in the ordinary situation where these are not the circumstances, the child must behave reasonably for one of his age. He must behave as if he had the intelligence and experience of a normal person of his age.

It follows from this theory that, as Windeyer J. perhaps suggested, the exact age is not so important, but it is the age group—a child may seem to be about eight years old, for example, and so he will have to show the intelligence and so on of a person of about that age. In some circumstances the "group" of ages for which the same knowledge is expected may extend from two years to twenty-one years, whilst in others it may be limited to, say, children of eight years.

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33. (1966) 39 A.L.J.R. 459, at 464.
34. Fleming: *The Law of Torts* (3rd ed., 1965), 118.

Thus, allowance should not be made for child A's age, child A's intelligence and child A's experience; allowance should be made for child A's age, and from this a normal and reasonable standard, for a child of A's age, of intelligence and experience and all the other factors which go to make up foresight and appreciation of risk should be determined by the Court. If A does not keep to this standard then he is liable in negligence.

This "notice" principle is not a new one—it has been applied to professional negligence, for example, on many occasions. It was applied in *Walker* v. *Turton-Sainsbury*[35], where the standard of care demanded of the respondent was that of a person without any real experience in driving and quite unfamiliar with the racing car, because this was what she gave notice that she was. In *Insurance Commissioner* v. *Joyce*[36], the whole problem was whether the plaintiff had been given sufficient notice of the defendant's drunken state in order to reduce the standard of care demanded of the defendant to that of a "reasonable" drunken driver. Again, in *Phillips* v. *William Whitely Ltd.*[37], a jeweller who pierced the plaintiff's ears only had to show the standard of care which a normal jeweller in such circumstances would show, because the plaintiff had clear notice that he was merely a jeweller, not a medical man.

The "notice" principle is in accord with the brilliant analysis of the "social compact" and its legal implications, especially with respect to the way in which the law of negligence seeks to enforce this compact and its notion of individual duties to the rest of society, which Holmes expounded and from which Owen J. quoted: "When a man has a distinct defect of such a nature that all can recognise it as making certain precautions impossible, he will not be held answerable for not taking them"[38].

From a reading of the whole of the judgment of Owen J. it appears that he probably agrees with Kitto J. that only age should be taken into account, but his evident failure to see the distinction between "age" and "age, intelligence and experience" means his judgment lacks a clear test or *ratio*.

Fleming, who is quoted by his Honour[39], seems merely to repeat the loose terminology of the North American cases. He says: " . . . a child is only expected to conform to the standard which ordinary children of his age, intelligence and experience would exercise under similar circumstances"[40]. He says, " . . . if the child lacks the capacity to understand and appreciate the nature of his actions, negligence is not attributed to him at all"[41].

The use of the word "capacity" in this respect can also be found in *Walmesley* v. *Humenick*[42] and in *Cotton* v. *Commissioner for Road Transport*[43]. It is an unfortunate term because it implies a subjective test as to foresight and prudence. If it is in fact meant to mean this, Kitto J. rejects it[44], and if the reasoning given above is correct then his Honour is right. If it only means an

35. [1952] S.A.S.R. 159.
36. (1948) 77 C.L.R. 39.
37. [1938] 1 All E.R. 566.
38. Holmes: *The Common Law* (1881), 109.
39. (1966) 39 A.L.J.R. 459, at 472.
40. Fleming: *The Law of Torts* (3rd ed., 1965), 123.
41. *Ibid.*
42. (1954) 2 D.L.R. 232, at 238, *per* Clyne J.
43. (1942) 43 S.R. (N.S.W.) 66, at 69, 70, *per* Jordan C.J.
44. (1966) 39 A.L.J.R. 459, at 464.

objective test with a subjective element, that is, whether the child is of such an age that a normal child of that age lacks this capacity, then it is correct, but unfortunately expressed.

None of the cases on contributory negligence, including the two just cited, unambiguously asserts a subjective test with respect to foresight; some use the "age, intelligence and experience" formula and some the "capacity" formula, but none clearly demarcates what is subjective and what is objective. McTiernan A.C.J. and Owen J. both drew on these cases and adopted the formulae, but again did not advert to the distinction seen by Kitto J. Thus, the majority opinion is vague and inconclusive as to a vital part of this branch of the law of negligence. It is respectfully suggested that the judgment of Kitto J. should be the law on the matter and that if and when the matter is clarified by the courts his opinion will be adopted. As it stands, this case cannot really be said to be authority for any definite and clear test for negligence by a child.

Menzies J. did not seem to see the distinction either. He regarded, rightly it is argued, the "age, intelligence and experience" and "capacity" tests as subjective if given their proper literal meaning, and therefore he rejected them. Throughout his judgment he speaks of the undesirability of allowing individual idiosyncracies to exempt from liability[45], and the majority judges would very likely agree with him that this was contrary to the very roots of the law of negligence. But he never at any stage considers the test of Kitto J., which allows age to be subjective, but nothing else. As has been said, he appears to see only the two extremes, "age, intelligence and experience" or nothing[46].

He rejects the contributory negligence cases as inapplicable because they set a subjective test, yet Kitto J. regards their test as being objective. Kitto J. rejects the capacity test, so does his brother Menzies. Likewise both say the negligence test should be objective; likewise both reject the "age, intelligence and experience" test. It seems possible that had Menzies J. seen the distinction which his brother Kitto saw he might have agreed with him. It is submitted that read as a whole his judgment, though in dissent, does not refute what Kitto J. said.

It may not be unimportant, of course, that Menzies J. did not agree with Windeyer J. in his view of the facts of the case[47].

McTiernan A.C.J. agreed with Snow J. in *Charbonneau* v. *McRury*[48] that there is no reason for having a standard of care test for contributory negligence which differed from that for negligence. He relied heavily on American cases and as a consequence he, too, fails to see the distinction of Kitto J. He cites two passages from *Hoyt* v. *Rosenberg*[49] which by their conflict show quite clearly the ambiguity of the "age, intelligence and experience" test as formulated in North America and as espoused by Owen and McTiernan JJ. Barnard P.J. said that a minor is "only required to exercise that degree or amount of care that is ordinarily exercised by one of *like age,*

45. (1966) 39 A.L.J.R. 459, especially at 466, 467.
46. *Id.*, at 467.
47. (1966) 39 A.L.J.R. 459, at 469.
48. 73 Am. L.R. 1266.
49. 173 Am. L.R. 883.
50. *Ibid.*, at 886.

experience and development"[50]. Prima facie this is a subjective test. Two pages later the learned justice says that the test is whether the defendant has done "what *an ordinary child* in that situation would have done"[51]. This, prima facie, is an objective test. That McTiernan A.C.J. saw no conflict between these statements means, with respect, that his judgment is of little help in determining what the true test for child negligence is. Again, however, as with Owen J., his judgment when read as a whole suggests he might well agree with Kitto J. that only the age is subjective. He says: "It seems to me that the present case comes down to a fine point, namely whether it was right for the trial judge to take into account Barry's *age* in considering whether he did foresee or ought to have foreseen"[52] the risk of injury.

Like Windeyer J., his Honour the Acting Chief Justice says that his finding of lack of negligence depends upon the particular facts of the case and does not mean a twelve-year old boy can never be negligent[53]. A strong indication that McTiernan and Owen JJ. did not really intend intelligence and experience to be subjective is that at no stage do they examine Barry Watson's particular intelligence and experience; the talk in terms of what is *natural* and *normal* for a boy of his age. It was, of course, because no unusual or subnormal intelligence or experience was pleaded in Barry's defence that the importance of the distinction seen by Kitto J. was not forced upon the remainder of the Court.

McHale v. *Watson,* it is submitted, does not provide a clear test for negligence by a child, because each judge gives a different version. It does recognise, however, the logical and practical absurdity of contending that a child's age is irrelevant and makes it clear that while liability in negligence must remain basically objective in order to protect society, subjective elements must be introduced in order to prevent such unjust results as would harm society even more. Where this line is drawn is in essence a policy decision, and in the distant future as the whole framework of society changes the test may well become predominantly subjective. At present, however, it would appear that Kitto J. is right when he allows for the child's age, but not the child's own particular intelligence and experience—to allow for the latter would be greatly to extend the subjective element beyond its former bounds, and it is clear from the judgments that no such bold step was intended.

The test of Kitto J., as has been said, is in accord with many decisions in the field of professional negligence, and may also be seen in the recent case of *Haley* v. *London Electricity Board*[54] where blindness was taken to be a relevant factor in assessing whether a person had been contributorily negligent. It is highly likely that obvious physical defects may be taken into account, for example, blindness, childhood, disabled limbs and so on. This is in accord with the "notice" principle[55]. In *Haley's* case notice had in effect been given, because the barricaded hole was in a public thoroughfare and blind men were clearly going to use the thoroughfare. Most mental abnormalities do not seem likely to be taken into account in the near future, since they are in general

51. *Id.*, at 889.
52. (1966) 39 A.L.J.R. 459, at 462.
53. *Id.*, at 463.
54. [1965] A.C. 778, H.L.
55. See Seavey: "Principles of Torts" (1942), 56 *Harvard Law Review* 72, especially at 87-93, for a similar approach.

not sufficiently obvious to amount to giving constructive notice. "The law takes no account of the infinite varieties of temperament, intellect and education . . . when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare"[56].

Conclusion

When a child is sued in negligence the standard of care required of him should be the same as in cases of contributory negligence, and the child should be expected to take the care which a child of his age group, with the normal intelligence, "experience, understanding of causes and effects, balance of judgment and thoughtfulness"[57] of a normal child of that age, would have taken[58].

In some situations a young child will be expected to show the same care as an adult, because the risk is so obvious that a normal young child could have appreciated it. But in many other situations this will not be the case. In all these circumstances, however, the *standard* of care of the child remains the same, it is merely the *degree* of care which changes.

This appreciation by the High Court of the need for the subjective element of age to be introduced into the objective "reasonable man" test is significant. It may be extended to other physical "abnormalities" such as blindness, deafness, partial disablement and so on, as well as to allowing for the decay and frailties of old age.

J. H. P. DISNEY*

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56. Holmes: *The Common Law* (1881), 109.
57. (1966) 39 A.L.J.R. 459, at 464, *per* Kitto J.
58. A virtually identical test is suggested by Salmond: *Law of Torts* (13th ed., 1961), 77, 78, and Clerk and Lindsell: *Law of Torts* (12th ed., 1961), 157.

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