COMMENTS

ATTORNEY-GENERAL FOR NEW SOUTH WALES V. STOCKS & HOLDINGS

CONSTITUTIONAL LAW — COMMONWEALTH PLACES — RE-APPLICATION OF STATE LAWS AFTER VACATION BY COMMONWEALTH

The Commonwealth Constitution, by s.52(1), grants to the Commonwealth exclusive power to legislate with respect to ". . . all places acquired by the Commonwealth for public purposes". This clause received its first authoritative interpretation in *Worthing* v. *Rowell*[1] and was further expounded in *R.* v. *Phillips*[2]. The case presently under discussion, *Stocks & Holdings*[3], completes the trilogy of cases on the interpretation of this section and the status of state legislation pertaining to places acquired by the Commonwealth.

Worthing v. *Rowell* decided that the Commonwealth had complete general exclusive legislative power in Commonwealth places; conversely, the States were excluded from legislating (at least after the acquisition of the place by the Commonwealth) in any way that could apply to such a Commonwealth place. *Phillips* took this interpretation a little further. There the law was a criminal law of general application, passed before the Comonwealth had evinced any intention of acquiring the place. But it was held that the State law was excluded from operating in the Commonwealth place, since, in the words of *Barwick* C.J.[4], speaking for the majority, "by virtue of the exclusive ness of the power given to the Commonwealth, the States . . lose all legislative power, not merely the power to make a new law, but the legislative power which would support the continued operation of an existing law in the place acquired".

The resulting situation was that State laws passed either before or after Commonwealth acquisition of a place could not operate in that place. *Stocks & Holdings* establishes the further point of considerable significance that if the State law had been made during the period of Commonwealth possession it would require a new Act of the State Parliament for it to apply to the land after transfer.

After these decisions, except for Commonwealth general statutes, a complete legislative vacuum existed in Commonwealth places, for the Commonwealth had never attempted to use the hitherto undefined power of s.52(1). Accordingly it legislated so that State law would become operable in these places. State legislatures likewise made laws authorising State authorities to apply this "federalized" (now Commonwealth) law in the Commonwealth places. However, *Stocks & Holdings* raises questions as to the validity of these Acts, so it remains important to consider the issue.

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1. (1970) 44 A.L.J.R. 230.
2. (1970) 44 A.L.J.R. 497.
3. (1971) 45 A.L.J.R. 9.
4. (1970) 44 A.L.J.R. at 499.

In 1929 the Commonwealth acquired an area of land in the County of Cumberland, N.S.W., for a rifle range. In 1951 the County of Cumberland Planning Scheme Ordinance was enacted as a schedule to the Local Government (Amendment) Act (N.S.W.). The Scheme included a map of the Commonwealth rifle range and on its face purported to regulate the development of that land. In 1965 the Commonwealth transferred the land to the Randwick Council, who in turn transferred it to Stocks & Holdings. In 1968 Stocks & Holdings applied to the Cumberland Council for permission to erect an hotel on the land, and an interim development order was issued by the N.S.W. Minister for Local Government pursuant to the Local Government Act granting consent. A suit was brought against Stocks & Holdings by the Attorney-General of New South Wales at the instance of the relators seeking a declaration that the consent given was invalid and ineffective against certain provisions of the scheme, and an injunction to restrain Stocks & Holdings from their proposed developments. But Stocks & Holdings raised a contention that neither the Act nor the Scheme, nor, for that matter, the interim development order made thereunder, bound them, by reason of the Commonwealth interest in the land from 1929 to 1965.

This contention raised three questions:

1. whether upon its enactment in 1951 the scheme was applicable to the Commonwealth or the land;
2. whether upon transfer the ordinance became binding on the land;
3. whether the interim development order bound the subsequent owners of the land.

All were answered in the negative; (1) unanimously, (2) by all except *Menzies* J., and (3) by all except *Windeyer* J., and *Menzies* J. provisionally. The submission made by the informant was that the Scheme ordinance be read as having no application to the land while it was a Commonwealth place, but that it was to come into force there on transfer from the Commonwealth. This was necessary since the Ordinance, to be valid, required to be read down in two respects: (a) so that it was not binding on the Commonwealth, thus not infringing the *Bogle/Cigmatic*[5] proposition that the States may not bind the Commonwealth; and (b) so that it was not binding on the land, thus not infringing s52(1). Thus there are two distinctly separate constitutional impediments. The majority, in rejecting this submission, conceded that the ordinance could be read as not binding on the Commonwealth, but they could not read it down in the second sense, since such a provision would itself infringe s.52(1) being a law relating to a Commonwealth place. The scheme was not invalidated, but was read down to avoid any reference to the Commonwealth or the Commonwealth land. *Walsh* J. stated[6], "those provisions [i.e. the scheme as it had applied elsewhere] would remain . . . valid and operative to the extent that they did not exceed the legislative powers of the State . . . the ordinance may properly be read down to the extent required to avoid any excess of constitutional power. But if it be so read, the

5. *Commonwealth* v. *Bogle* 89 C.L.R. 239. *Commonwealth* v. *Cigamatic* 108 C.L.R. 372.
6. (1971) 45 A.L.J.R. at 19.

result is that the subject land is not within the scheme at all". All members of the court rejected the submission made by Stocks & Holdings that the State had no power over the land simply because it had once been a Commonwealth place. The general exclusive power of the Comonwealth under s.52(1) ceased when the Commonwealth abandoned ownership or possession of the place, and state general legislative power revived.

Barwick C.J. outlined most of the issues and stated his conclusions, but left the bulk of his reasoning to *Walsh* J. He rejected the submission regarding the construction of the Ordinance, because (a) "it would not be . . . an exercise of construction to import such a provision into the scheme. It would . . . amount to an attempt to legislate"[7], and (b) such a provision as submitted would itself offend s.52(1) as a law with respect to the Commonwealth place.

McTiernan J. did little more than state his conclusions. He decided that the ordinance was a law with respect to a Comonwealth place, and so would not have applied to the land at the time of its enactment. He did not discuss the reading-down submission other than to say that "even if the ordinance were read down so as to avoid any excess of power, the result would be the same, for the scheme on its enactment would have had no application to the land in question"[8]. The scheme could not have applied to the land after transfer, because it did not apply before transfer and "there was nothing entailed in the change of ownership which could have had the effect of applying the ordinance to the rifle range"[9]. The third question he also answered in the negative, voicing the reasoning of the majority (and of *Menzies* J.) by reading the Act as indicating that such an interim development order could only effect land to which a prescribed scheme had applied. No such scheme had applied to this land, so neither could the interim development order apply.

Walsh J. came to the same conclusions,, although with considerably more extensive and interesting reasoning. He considered the reading-down questions in great detail, placing much emphasis on the distinction between a law binding the Commonwealth and a law binding the land. He pointed out that it was essential for the informant to make the submission in the manner stated, in order to bring the land within the scheme so that its restrictive provisions could bind the new owner after transfer from the Commonwealth. Although the ordinance could be read down so that it was not binding on the Commonwealth, it could not be read down in the second sense submitted because "if the enactment is read as making the scheme apply to the land, and as issuing directions as to its use, whether in the present or in the future . . . it is to that extent beyond legislative power"[10]. There would still be a conflict with s.52(1).

Windeyer J. was the only member of the court who decided that, even though the scheme had never applied to the land, the interim development

7. *Id.*, 10.
8. *Id.*, 11.
9. *Ibid.*
10. *Id.*, 18.

order made by the minister subsequent to the transfer from the Commonwealth could apply to it without any re-enactment of the ordinance. However, this point was decided on *Windeyer J's* interpretation of s.342y of the N.S.W. Local Government Act, and is not relevant to the questions under consideration in this note.

Menzies J. dissented on the outcome of the second question. He accepted the submission that the State could make a law not purporting to operate in relation to a place so long as it remained a Commonwealth place, but to operate there as soon as it was vacated by the Commonwealth. His Honour agreed that the Scheme could not have applied to either the land or the Commonwealth at the time of its enactment. He did not accept that such a provision as that submitted would infringe s.52(1) as being a law with respect to a Commonwealth place. *Menzies* J. made his construction of the Ordinance on the general principles of construction that words should be read with such limitations as are necessary to keep the enactment within legislative power. But the reasoning by which he accepted the informant's submission is clearly specious. He argued that s.52(1) would not prevent a state from enacting such a proviso to a law since "a Commonwealth law expressed to operate with respect to a place acquired by the Commonwealth, not only while it is the property of the Commonwealth, but after it has ceased to be so, is not a valid law. What the Commonwealth Parliament cannot do, the State Parliament can do"[11]. This idea is obviously based on the aphorism used in *Worthing* and *Phillips* that "the measure of the grant of power is the measure of the denial". But the Commonwealth cannot pass the law in His Honour's illustration, because it cannot legislate extending beyond its ownership. The corollary to this is that the state cannot legislate for the place until it has acquired ownership; likewise the State cannot then legislate extending beyond its ownership. But *Menzies* J. apparently ignores the exclusiveness of the power; he allows the state to legislate for the place while it is still a Commonwealth place. As pointed out by *Windeyer* J., this relegates the power in s.52(1) to a concurrent power, while it is clearly expressed as exclusive. "The measure of the grant is the measure of the denial" in that the gain or loss of legislative power is reciprocal: one polity has power when, and because, the other polity has not. *Windeyer* J. rebuts *Menzies* J's argument in the comment that "the doctrine applicable to concurrent powers, enunciated in *Butler* v. *Attorney-General for Victoria*[12], has no application here"[13].

The overall situation is highly unsatisfactory for it puts both the States and the Commonwealth in extremely inconvenient positions. However, as will be seen, the problems go back, not just to *Phillips*, but to *Worthing* v. *Rowell*, to the basis of the construction placed on s.52(1) by the High Court in that case.

As a statement of general theory, I would submit that the reasoning of the dissentients, *Walsh* and *Gibbs* JJ., in *Phillips*, is preferable to that of the majority, who merely stated, without supporting reasoning, the proposition

11. *Id.,* 14.
12. (1961) 106 C.L.R. 268.
13. (1971) 45 A.L.J.R. at 16.

that laws do not outlive power. *Walsh*[14] and *Gibbs*[15] JJ. point out that there is no principle of law or fundamental rule that a law cannot outlive the power which creates it. They further analysed the wording of s.52(1), drawing a distinction between legislative power, on one hand, and the operation and effect of laws on the other, pointing out that s.52(1) is expressed in terms of the former, not the latter, so that the exclusiveness is one of power, not of the operation of laws.

But an impossible dilema had arisen. On the majority view, the States are put in the absurd position of having to legislate every time the Commonwealth vacates land, in order that some legislation might come into force in that place (since the Commonwealth legislation does not outlive the Commonwealth power). But if the court had held that legislation outlives power, so that State legislation continues in force until the Commonwealth exercises its power under s52(1), the position would have been even worse: for on the same theory Commonwealth laws made under s.52(1) would also have to continue in force after the Commonwealth transferred the land. The State would then have legislative power, but could not exercise it to replace the Commonwealth laws because of s.109. This would mean that, subsequent to transfer, laws made by the Commonwealth under s.52(1) would never be able to be repealed or amended. So the Commonwealth, before or at the instant of transfer, would have to repeal all laws made under s.52(1) concerning the place, and the State, to avoid the creation of a legislative vacuum, would immediately have to legislate so that its own laws might apply in the newly vacated place.

The dilemma has its origin in *Worthing* v. *Rowell*. It is apparent that the majority in that case gave insufficient consideration to the consequences which flow from their interpretation of s.52(1). The better interpretation would have been, I submit, as follows. S52(1) related only to particular State laws, not general laws, so States would be precluded only from making laws relating particularly to Commonwealth places. And only a very small group of laws would end on acquisition by operation of the *Cigmatic* principle: for example, the planning regulations in *Stocks & Holdings*. Such laws would require re-enactment, but the inconvenience caused would be minimal. The problem of Commonwealth law on transfer is also minimized. Since Commonwealth power is limited to creation of laws relating particularly to that place, these would probably be laws relevant only to the Commonwealth establishment; so at transfer such laws would naturally and conveniently end and there would be no requirement of their replacement.

Both the Commonwealth and the States[16] have legislated in an attempt to fill the legislative vacuum created in Comonwealth places by the interpretation given to s.52(1). The Commonwealth Parliament, pursuant to s.52(1), enacted the Commonwealth Places (Application of Laws) Act 1970. S.4 is the

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14. (1970) 44 A.L.J.R. at 508.
15. *Id.*, 512.
16. Tasmania has not enacted complementary lebislation: see Lane, 45 A.L.J. 138, at 144-5, n.34. O'Brien, 8 M.U.L.R. 320 at 327, n.67, notes that the Victorian Act has a unique provision which keeps the Act in force only until 31st December, 1971.

key section. It both prospectively and retrospectively applies State laws in Commonwealth places, thus creating a class of "federalized" State laws. Such referential legislation was suggested by both *Barwick* C.J.[17] and *Windeyer* J.[18] in *Worthing* v. *Rowell.* This legislation has not been otherwise judicially considered, and having regard to the language of s.52(1) (apparently relating only to places already acquired, not covering such anticipatory legislation) it may perhaps be doubted. In any event State complementary legislation was necessary in order to impose on State authorities the application of the Commonwealth Act. Lane[19] has noted that "the Commonwealth cannot impose duties on the state authorities to carry out these laws . . . therefore to impose duties on the state authorities under these (now Commonwealth) laws in s.52(1) places the various state legislatures brought down their own legislation"[20].

The South Australian Act, Commonwealth Places (Administration of Laws) Act 1970, provides for the administration of the Commonwealth Act in Commonwealth places by defined state authorities, and for the State law merely to go into abeyance for the duration of the Commonwealth possession of the land.

S.14(2) is the key provision, providing that when a place ceases to be a Commonwealth place, all State laws, whether passed before or after acquisition, are to be read as applying there. This exactly reproduces the legislative situation in *Stocks & Holdings,* which was invalidated. The validity of the other provisions is also dubious, in that they purport to relate to Commonwealth places, determining how laws are to be applied there[21]. Should these provisions be invalidated (and it is hard to see following *Stocks & Holdings* how they could fail to be) the position would be absolutely insupportable. For there would be no general prospective re-application of State law, and in order to avoid a vacuum each time the Commonwealth vacates a place the State Parliaments would have to meet to pass special legislation.

The only possible saving limitation inherent in *Stock & Holdings* is suggested by *Walsh* J., and backed up to a certain extent by *Windeyer* J., both majority judges. *Walsh* J. suggests that there might be some different State laws which, though enacted after acquisition by the Commonwealth, might be "capable of having a valid operation with respect to that place after it ceases to belong to the Commonwealth"[22] without requiring a re-enactment. But His Honour did not further consider the question. He seems to have thought, though, that perhaps the only laws which might come within the *Stocks & Holdings* decision are laws concerning the land, as opposed to laws concerning the relationship between people on the land (such as criminal laws); and that perhaps these laws, though excluded from operation by s.52(1) need not be re-enacted to apply. This idea is reminiscent of the minority argument in

17. (1970) 44 A.L.J.R. at 235.
18. *Id.,* 247.
19. P. H. Lane, *The Law in Commonwealth Places—a Sequel:* (1971) 45 A.L.J. 138.
20. *Id.,* 144.
21. See F. C. O'Brien, 8 M.U.L.R. 320.
22. (1971) 45 A.L.J.R. at 19.

Worthing v. Rowell that s.52(1) only concerned laws for a Commonwealth place "as a place". That argument was necessarily rejected in *Phillips. Windeyer* J. deliberately confined himself to the narrow point raisd for decision, "whether or not a particular state law, the ordinance, which had previously no force with respect to the subject land . . . somehow came into force there when the Commonwealth relinquished its ownership"[23], rather than the broad point, hitherto left open, "of the application of general laws of a State in places that have ceased to be Commonwealth places"[24]. However, this is open to the same criticism as *Walsh* J's reservation.

Although such a proposed limitation seems to be untenable, the High Court may find it necessary to seize upon it in order to overcome what seems likely to be an impossibly inconvenient situation for both the Commonwealth and the States. Or it wil lhave to take the drastic step of overruling *Worthing* v. *Rowell* where the whole trouble started.

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ATTORNEY-GENERAL (S.A.) EX. REL. DANIELS, STEWARD & WELLS V. HUBER, SANDY & WICHMAN INVESTMENTS PTY. LTD.

EQUITY — INJUNCTION — APPREHENDED COMMISSION OF ILLEGAL ACT.

The action in this the "Oh, Calcutta" case[1] created widespread public controversy and the case itself posed difficult questions of law.

The case came before the Full Court (Bray C.J., Walters and Wells JJ.) on appeal from interlocutory orders made by Hogarth J. The action was brought by the respondent, the Attorney-General, on the relation of several private citizens, seeking an injunction to restrain the appellants Huber and Sandy, as the intended producers of the review at premises called Chequers Place, and the appellant Wichmann Investments Pty. Ltd., as the owner of the premises, from staging the whole or any part of the production at Chequer's Place or elsewhere in South Australia, and a declaration that its production staging and presentation would involve the appellants in the commission of breaches of the law and in particular of the provisions of secs. 7(1) and 23 of the Police Offences Act 1953-1967[2].

23. *Id.*, 16.
24. *Ibid.*

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1. [1971] S.A.S.R. 142.
2. Bray C.J. noted that if the actors would have been guilty of the offences against the act then the appellants would have been liable under the provisions of s.53 of the Justices Act 1921-1969 to be dealt with as principal offenders ([1971] S.A.S.R. at 154). The case was argued, however, on the basis that the only relevant offences were those against the Police Offices Act.

The appellants took out an interlocutory summons asking that the writ be set aside on the ground that the Supreme Court had no jurisdiction to grant the relief claimed, or alternatively, that the writ disclosed no cause of action.

Hogarth J. had dismissed the appellants' summons and granted the interlocutory injunction sought by the respondent.

S.23(1) of the Police Offences Act states:

"Any person who behaves in an indecent manner—

(a) in a public place, or while visible from a public place, or in a police station, or

(b) in any place other than a public place or police station, so as to offend or insult any person,
shall be guilty of an offence.

Penalty: Fifty pounds or imprisonment for three months."

It was not contended that the staging of the play would necessarily involve a breach of s.23(1)(b): the argument was that it would involve indecent behaviour in a public place.

The Full Court held it unnecessary to consider the offence of offensive behaviour contained in s.7(1). Any offensive element in the performance was to be found in its indecent nature, and if it was not indecent—cadit quaestio.

The appellants could most effectively deny the jurisdiction of the court by showing either (a) that Chequer's Place would not be a public place within the meaning of those words in the Act, or (b) that the performance of the play would not involve acts of indecent behaviour. Success on either issue necessarily meant that the staging of the play would not involve the appellants in the commission of breaches of the provisions of the Police Offences Act, and hence the foundation of the Court's jurisdiction would be destroyed.

The "public place" question centred on the interpretation of s.4(1) of the Police Offences Act which provides, inter alia, that:

"In this Act, unless the context otherwise requires or some other meaning is clearly intended . . .

'public place' includes—

(b) every place to which the public are admitted on the payment of money, the test of admittance being the payment of money only; . . ."[3]

Wells J. held that the imposition of a test of admittance other than the payment of money only meant simply that the issue was left to depend on the ordinary and natural meaning of the phrase "public place" and Walters J. agreed with him that the conditions upon which tickets were intended to be sold would not have precluded Chequer's Place from being a public place,

3. So far as Bray C.J. could ascertain, "legislation in this form providing that, in order for a place to which the public are admitted on payment of money to be a public place, the test of admittance must be the payment of money only, is unique to South Australia and to this Act in South Australia". [1971] S.A.S.R. at 155.

which, in its ordinary and natural meaning is a place where the public *qua* public go, regardless of how the right to go there arises and even though the test of admittance might be the payment of money or the fulfillment of any other condition. Bray C.J., in dissent, did not think such reasoning met what he regarded as the "imperative obligation of subsection (b)", the obligation to declare that a place to which the test of admittance was something in addition to the payment of money, was not a public place.

On the questions of indecent behaviour Walters and Wells J.J. had no hesitation in holding that the performance of the play would involve acts of such a nature, whereas Bray C.J. thought this "likely" or even "extremely likely"[5], but not necessarily so, and accordingly would have allowed the appellants to stand on their claim that the play was innocent and their acceptance of the consequences if it was not.

These two questions having been decided against the appellants, it became necessary to consider their remaining argument which was of a more fundamental nature; they disputed the very existence of the Court's jurisdiction in the case and whether the Attorney-General's application could even be entertained, and they contended that even if jurisdiction was established, it should not, in the circumstances of the case, be exercised and the relief claimed should not be granted.

Under s.29 of the Supreme Court Act (S.A.) 1935-70, the Supreme Court may grant an injunction by interlocutory order "in all cases in which it appears to the Court to be just or convenient so to do"; but deriving support from dicta of Lord Eldon L.C.[6], the appellants asserted the broad principle that a Court of Equity has no jursidiction to prevent the commission of crimes and submitted that it was beyond the jurisdiction of Hogarth J. to entertain the application for an interlocutory injunction merely on the ground that the intended performance of "Oh, Calcutta" would involve breaches of the Police Offences Act. Two qualifications to the principle were conceded, the first being where the offence alleged or apprehendd involved some interference with a private or public property right and the second where there is a public interest in securing the observance of the law in the face of repeated violations of its criminal sanctions.

Whilst this reasoning may have been sound in its conception, the authorities revealed to Walters and Wells J.J. an extension, in the last 50 years, of the principles by which Equitty had held itself able to interfere in the realm of public law. This extension had been recognised by the High Court in *Cooney's* case[7], in which Menzies J. (with whom Kitto, Taylor and Windeyer JJ. agreed) observed that the jurisdiction of Equity had been enlarged to confer "benefits or advantages that could not be regarded as having any resemblance

4. *Id.*, 172.

5. *Id.*, 167.

6. Viz.: "The publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crimes." *Gee* v. *Pritchard* (1818) 2 Swan 402, 413: 36 E.R. 670, 674, and similarly in *Macauley* v. *Shackels* (1827) 1 Bligh (NS) 96, 127: 4 E.R. 809, 820.

7. *Cooney* v. *Ku-ring-gai Municipal Council* (1963) 114 C.L.R. 582.

at all to proprietary rights"[8]. But although that much may have been clear, its applicability to and effect on the instant case were not free from doubt, as Bray C.J. pointed out. The High Court in *Cooney's case* was primarily concerned with breaches of laws that have a limited operation within the community generally. The offences, the commission of which had been restrained, were breaches of administrative regulations or by-laws, whereas the Police Offences Act is a public general Act. Wells J. however, inferred from the generality of the judgment of Menzies J., support for the wider application of the principle expressed therein, and Walters J., by necessary implication of his final decision, did not regard this distinction as material.

A further distinction drawn by Bray C.J. between the authorities and the instant case was likewise rejected. In the decided cases some sort of material interest in health, comfort, convenience or pocket was protected, whereas the instant case involved only the apprehended commission of offences against public morality or decency and no civil right or material interest of any particular individual, and indeed no material interest of the public itself, was alleged to be affected. Harvey J. (as he then was) in *Attorney General (N.S.W.)* v. *Mercantile Investment Ltd.*[9] had doubted "whether the court would ever interfere where the only injury alleged is to the moral well-being of the public, even though that injury is prohibited by Act of Parliament under penalty." The Court, he said, "should be very slow to interfere on behalf of the public injury in any case except where the members of the public require protection from some wrongful act from which they cannot protect themselves"[10]. The case before the court was not, in the opinion of Bray C.J., such a case, for the members of the public could protect themselves simply by staying away from the theatre.

The majority view expressed by Wells J. was that since the time of *Attorney-General* v. *Mercantile Investments Ltd.* there had been "almost dramatic" changes in this branch of the law and there was no longer any fundamental distinction to be drawn between laws based on supposed moral standards and other kinds of laws; and further, Harvey J. did not actually exclude the possibility of equity's intervention in areas of law concerned with moral standards, but rather, he was expressing a considered opinion that in those areas a strong case would have to be made out before Equity would be justified in using its reserve power to enjoin.

At this point it can be said that pursuant to the view of the authorities held by Walters and Wells J.J. it would be within the jurisdiction of a Court of Equity to enjoin the infringement of a law of general or limited operation, be it based on moral standards or otherwise, which protects no civil right or material interest in the health, comfort, convenience or pocket of any individual or member of the public, in order to confer a benefit or advantage which need not necessarily bear any resemblance to a proprietary right. What then was the benefit, advantage, right or interest which in this case, although it bore no resemblance to a proprietary right, could nevertheless justify the interven-

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8. *Id.* 603.
9. 21 S.R. (N.S.W.) 183.
10. *Id.* 187.

tion of Equity? It was the public interest. To Walters and Wells J.J., the essence of the case was an action brought by the Attorney-General to assert a public right or interest in the enforcement of the law. It was the obligation imposed on the Attorney-General to promote the interests of all sections of the community and to prevent the wrong-doing of one resulting in injury to the general welfare which gave him standing in the Court, and by his intervention the dispute was no longer between individuals but between the law breaker and the public.

The concept of the public interest which lies at the core of the judgments of Walters and Wells J.J. and upon which their decisions were ultimately based, merits close analysis. It was not clarified however, other than by statements to the effect that if the law is flouted or brought into contempt a detriment to the public will result. Arguably, the public interest is something intangible and any detriment caused to it by the breach of a law is of a purely formal nature and cannot be quantitatively assessed, or at least not precisely. This would seem to be the rationalé of the view expressed by Wells J. that "if the apprehended offences in the opinion of the court *tend* to the detriment of the public . . . it is not necessary in order to establish the existence of the jurisdiction to prove that any detriment *will*, in the particular circumstances, *in fact be caused*"[11]. Walters J. made an interesting reference (p.186) to the prospect of "substantial injury to the public interest". The word "substantial" in particular suggests that some sort of quantitative assessment of the injury might, in fact, be possible. The next question of course relates to the factors of criteria upon which the court will rely in making such an assessment. The answer would seem to lie in the fact of His Honour's several references to open, repeated, continuous, persistent and intentional violations of a statute.

If it is a correct assumption that the detriment is purely formal, i.e., it is constituted by the breach of the law, it is difficult to see how distinctions can be made between offences. Wells J. spoke against the enjoining of felonies and misdemeanours[12], and Walters J. drew a distinction between the enjoining of crimes which are "definitely criminal and mala in se", which His Honour said would be inappropriate, and cases such as the instant case, which concerned "anti-social acts made quasi-criminal by statute", in which a completely different situation obtained[13]. Thus, it seems that some sort of qualitative assessment can be made of the detriment caused to the public interest by breach of different laws. Now while this proposition may be easily maintained if extreme examples are taken, no clear indication was given as to the basis on which distinctions between offences were to be drawn, nor as to the means by which the difficult cases, such as the instant case, were to be resolved. The Court thereby runs the risk of being accused of making a decision to enjoin on the basis of some unexpressed prejudgment or value judgment, and such accusations, it may be added, be they conceived in ignorance or nay, tend to bring the law and its institutions into disrespect. Similarly it may be asked why was the offence involved, quasi-criminal rather than mala in se. When all is said and done the public interest emerges as an unfortunately nebulous concept.

11. *Supra* n.1 at 199.
12. *Id.*, 210.
13. *Id.*, 181.

The statement of Walters J. that "where there is evidence that a statute will in future be openly, repeatedly, continuously, persistently and intentionally, violated a detriment to the public will result"[14], apart from its relevance to the analysis of the public interest above, also prompts an examination of the evidence before the Court in the instant case. The appellants had neither violated, let alone persistently flouted, any law, nor had they been prosecuted. Accordingly it was argued that it had not been proved that prosecution and the imposition of the penalty imposed by the Statute had and would be an ineffective means of enforcing the law. These facts were a distinguishing feature of the decided cases, and the appellants further claimed that what they proposed to do did not constitute any offence at all and they should be allowed to stand on this claim and bear the consequences if it was proved wrong. This argument was accepted only by Bray C.J. who refused to deny the appellants the right to a trial by jury, or in a court of summary jurisdiction, and thereby provide a means of short circuiting the processes of a criminal trial, with its safeguards for the rights of accused persons such as the burden on the prosecution of proving their case beyond reasonable doubt. "The dominant tradition of the English Law", observed the Chief Justice, "has always been to deal with offenders or potential offenders retrospectively for what they have done, not prospectively for what they might be going to do"[15].

The force of these considerations was recognised by Walters and Wells J.J. and both made it clear that they would not deny the right to trial by jury[16]. It was concluded that while proof of past breaches might be of great weight in determining whether future breaches are imminent, it was not essential to the existence of the jurisdiction. But in the words of Wells J., it was "largely the certainty of the primary facts that (took) this case out of the ordinary run"[17], and it is to be assumed that their Honours felt that the facts were certain beyond a reasonable doubt. Yet it must be asked that even though a trial in a court of summary jurisdiction would merely have vindicated this view (albeit with extra expense and delay) is this sufficient reason to preclude the operation of a process which is a corner-stone of the British system of justice? Walters and Wells J.J. thought that this argument did not outweigh the regard and effect which must be given to the public interest, which it would no doubt be added is what the law is ultimately designed to serve, but again what is the public interest but the sum of individual interests?—and so the debate continues.

The requirement of the condition precedent, as it were, of the certainty of the essential primary facts which Wells J. thought would effectively fetter persons who sought to invoke the principles of Equity in order to build and establish a modern regimen morum, makes it tempting to conclude that the particular case was unique and entirely sui generis, yet the fear expressed by Bray C.J. nevertheless remains, that if the injunction stood, the civil courts would be invaded by "bands of self-appointed moral vigilantes using the name of the Attorney-General, as by constitutional practice they would be able to

14. *Id.*, 186.
15. *Id.*, 166.
16. *Id.*, 181 and 210.
17. *Id.*, 210.

do if they showed him a prima facie case, seeking to restrain the publication of books and periodicals, the showing of films, the opening of art exhibitions, the performance of plays and, for all I know, the holding of public meetings and the delivery of speeches". His Honour added that it would be "a cause of some surprise that the authorities had not previously hit on this easy way of closing down brothels, sly grog shops and gambling dens"[18].

It is submitted that there may now be a right of action for conservationers and persons concerned with the protection of the environment.

A further limiting characteristic in what, at first glance, appears to be a decision of far-ranging implications is the requirement expressed by Wells J. that the apprehended offence must be seriously intended. This requirement as to intention should not be confused (as it has a tendency to be) with the requirement as to the certainty of essential primary facts in issue. It is one thing to say that a person seriously intends to do or perform something and another to say that that act or performance would undoubtedly involve the commission of a breach of the law.

As to the argument that it is the general rule that where an Act creates an offence and provides a remedy, then the only remedy is that provided by the statute, Wells J. was of the opinion that this general rule was displaced by the intervention of the Attorney-General, subject to the qualification which was not applicable in the instant case, that a set of laws, Parliamentary or subordinate, may be so comprehensive as to demand reading as an exhaustive code, and accordingly exclude the Attorney-General's remedy altogether[19]. In the instant case the intervention of the Attorney-General meant that dispute had become one "between the public at large and a small section of the public who are refusing to obey the law of the land"[20]. Walters J. had rejected a total acceptance of the general rule, at least impliedly, when he said:

> "the foundation of equitable jurisdiction lies in the inadequacy of the relief as it is administered through ordinary legal procedures; the acts which occasion the right to a remedy may be brought within the cognizance of common law or statutory law, yet the remedies provided are so insufficient that complete justice can only be done by means of the equity jurisdiction . . . In a case where the ordinary remedy to be obtained is not as efficient as the relief which equity will confer in the same circumstances, something in the nature of a concurrent equity jurisdiction subsists in order to redress the alleged illegal act"[21].

Now while prima facie, it seems implicit in such statements that there be a person who has already broken the law, or that there be an act which is alleged to be illegal and which must be redressed by (the most effective) retrospective action, their Honours, as has been seen, did not regard proof of prior breaches of the law as essential.

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18. *Id.,* 165.
19. Note the explicit wording of the provisions of the Places of Public Entertainment Act Amendment Act 1971-1972 which are set out in the addendum. The Act was passed after judgment was given in the case.
20. *Supra* n.1 at 198.
21. *Id.,* 176.

On what basis then did Walters J. when considering the exercise of the jurisdiction decide that the remedy provided by the legislature was inadequate? The only guide given is in the statement: "if what is in prospect is likely to occasion substantial injury to the public interest which cannot be repaired—if the proceedings are allowed to run their normal course—then, as it seems to me, the party who has established his jurisdictional right is entitled virtually to go to complete relief, and the interlocutory injunction should go"[22]. But if it is correct to assume that the injury to the public interest lies in the fact that a breach of the law has been committed it will never be able to be repaired, for what is done cannot be undone: To construe the sentence as placing the emphasis on the requirement of "substantial injury" to the public interest ultimately leads us back to the question of how can their injury be quantitavely assessed and accordingly makes the answer to their question doubly important. It may well be that the size of the maximum penalty provided by the Act is a relevant factor (in the instant case in which the injunction went the maximum penalty under s.23(1) was comparatively small in the context of the case, viz. $100 or imprisonment for three months); but this was not expressly stated. Would the relevance be that the smaller a penalty, the less seriously parliament regards an offence and accordingly that the less is the need in the eyes of the lawmakers to restrain, in advance, the apprehended commission of the offence; or would it be that, as seems more consistent with the judgment, the smaller the penalty the more the apprehended breach of a law (or more consistently, any law which makes anti-social acts quasi-criminal) should be prevented in advance in order to protect the public interest?

Walters and Wells J.J. in contrast to Bray C.J. rejected the appellants argument against the exercise of the jurisdiction based on the relative damage, harm and inconvenience likely to be suffered by the appellants and the members of the public, because of the overiding consideration of the protection of the public interest. A matter upon which Bray C.J. concentrated however, was the effect of certain correspondence between the Attorney-General and the appellants, and the fact that the Attorney-General had not exercised the powers he possessed under s.25 of the Places of Public Entertainment Act (S.A.) 1913-67. It was the view of Bray C.J. that the relators were using the name of the Attorney-General to ask the Court to do something which he had power to do himself in his official capacity without reference to the Court and which he had disclaimed his intention of doing unless and until a performance demonstrated that he ought to do it. Wells J. on the other hand felt that the producers, in proceeding with their plans. had accepted "the very real risk that they would be frustrated by some process of law, be it administrative or in the courts . . . They had shown themselves unmindful of warnings" and were "apparently determined to put on the show unless enjoined"[23]. It was His Honour's view that "the Attorney-General had not seen fit to use his power under the Places of Public Entertainment Act and had suffered the relator action to proceed according to law[24]. His Honour was supported by Walters J. in his view that the jurisdiction which they had held to exist should be exercised and accordingly the appeal was dismissed.

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22. *Id.*, 186.

"The play's the thing wherein I'll
catch the conscience of the king." Hamlet II, ii.

Addendum

On 23rd March, 1972, the Places of Public Entertainment Act Amendment Act 1971-72 was assented to, and the following was inserted:

> "(1) Where a Minister is of the opinion that a public entertainment has been, or is about to be conducted in a place of public entertainment in contravention of the provisions of this Act, or any other Act or law, he may apply to a local court of full jurisdiction for an order under this section.
>
> (2) The Minister, the proprietor of the place of public entertainment and any person by whom the public entertainment was, or is to be conducted may appear personally or by counsel upon the hearing of an application under this section.
>
> (3) Where the court is satisfied upon the hearing of an application under this section that a public entertainment has been, or is about to be concluded in a place of public entertainment in contravention of the provisions of this Act or any other Act or law, and that an order should in the interests of the public be made under this section, it may order:
>
> (a) that the place of public entertainment be closed and kept closed, for a period specified in the order, or until further order of the Court.
>
> (b) that the place of public entertainment be not used for the conduct of the entertainment, or an entertainment of the kind specified in the order.
>
> (4) Where an order has been made under this section, the Commissioner of Police shall ensure that the order is complied with and any members of the Police Force acting under his authority may enter any place or premises, and exercise such force as may be reasonably necessary to give effect to the order."

Now while the Act seems clearly, in both intent and effect, to remove the equitable jurisdiction of the Court in relation to public entertainment which has been, or is about to be, conducted in breach of the law, it should be noted that the equitable principles upon which the majority relied were not expressly limited, or necessarily related to public entertainment.

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23. *Id.*, 214.
24. *Id.*, 215.

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ATHENS - McDONALD v. KAZIS

CONTRACT — DAMAGES — MENTAL INJURY

The recent case of *Athens-Macdonald* v. *Kazis*[1] decided by Zelling J. in the South Australian Supreme Court may be a significant development in the law relating to the award of damages for mental injury, such as anxiety, suffering and torment caused by a breach of contract. Before examining this case, the existing law will be briefly reviewed.

In *Robinson* v. *Harman*[2] Baron Parke said:

> "The rule of the Common Law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

Unfortunately such a statement is deceptively broad. Although apparently governing every situation, on examination of the cases it is found that such a "principle" can only be applied after other conditions required by precedent, have been satisfied. So it is that the damage sustained is usually required to be of a pecuniary nature. Thus in *Hamlin* v. *Great Northern Railway Company*[3] Pollock C.B. said:

> "In actions for breaches of contract the damages must be such as are capable of being appreciated or estimated . . . The plaintiff is entitled to nominal damages, at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of contract . . . it may be laid down as a rule that generally in actions upon contracts no damages can be given which can not be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract."

Ease of assessment of damages, uniformity in the law, and certainty in commercial affairs are sometimes advanced as reasons for such a rule. For example in *Addis* v. *Gramophone Company*[4] Lord Atkinson took the view that exceptions should be "checked rather than stimulated; inasmuch as to apply in their entirety the principles on which damages are measured in tort to cases of damages for breaches of contract would lead to confusion and uncertainty in commercial affairs, while to apply them only in part and in particular cases would create anomalies, lead occasionally to injustice, and make the law a still more 'lawless science' than it is said to be".

Thus in *Foaminol Ltd.* v. *British Plastics*[5] although pecuniary loss had undoubtedly been suffered, through a loss of good will, Hallet J. refused to estimate the amount involved:

1. [1970] S.A.S.R. 264.
2. [1848] 1 Ex. 850, at 855. For a similar general statement, see *Hadley* v. *Baxendale* [1854] 9 Ex. 341 at p.354 per Baron Alderson.
3. 156 E.R. 1261 at 1262.
4. [1909] A.C. 488.
5. [1941] 2 All E.R. 393, at 401.

"All that (viz loss of good will) is perfectly true, but all that seems to me to be very general, and, although quite real, very vague . . . I can best perhaps put my position by saying that, whatever figure I take . . . I am wholly unable to say with any confidence that it is not too much. I feel I am completely in the dark and I have no basis for fixing a figure at all . . . There may be cases in which the quantifying of pecuniary loss is extremely difficult, and yet the Judge has to do the best he can. Here, however, I think that I have no material which enables me to put any figure at all upon that pecuniary loss which the plaintiffs have suffered . . ."

However, although, as in *Foaminol*[5], the difficulties are sometimes insuperable it is well settled that the courts will strive to quantify an established pecuniary loss. It has been held that financial loss need not be stated specifically by a plaintiff but may be claimed as "general damages", the plaintiff proving that a pecuniary loss has occurred and the Court assessing that loss[6]. Furthermore, in cases such as *Chaplin* v. *Hicks*[7], *Simpson v. London and North Western Railway Co.*[8] and *Howe* v. *Teefy*[9] it has been laid down that although a loss of chance to make a profit is involved and hence the amount of the pecuniary loss is extremely speculative, this will be no bar to the recovery of damages which must be assessed by the Court.

But perhaps the best evidence that difficulty of computation does not bar recovery of damages is the fact that the courts will compute damages for such intangible injuries as pain and suffering, loss of amenity and loss of expectation of life. For a valuble discussion of the principles of assessment of damages for this type of loss see the House of Lords decision, *West & Son Ltd.* v. *Shephard*[10]. Although some niceties of assessment may be slightly uncertain the important point is that damages *will* be assessed and given for non-pecuniary loss of this nature[11].

A further important line of cases has emerged establishing that damages can be recovered for physical discomfort caused by a breach of contract even though no pecuniary loss is involved. Such damages were allowed in the early cases of *Burton* v. *Pinkerton*[12] and *Hobbs and Wife* v. *London South Western Railway Co.*[13], but it was contended in *Bailey* v. *Bullock*[14] that pecuniary loss must be involved. Barry J. rejected this contention, ruling that damages could be recovered. His decision was followed in *Feldman* v. *Allways Travel*

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6. e.g. *Aerial Advertising Co.* v. *Batchelors Peas Ltd.* [1938] 2 All E.R. 788 at 795; *Last Harris* v. *Thompson Bros. Ltd.* [1956] N.Z.L.R. 995 per Archer J. at 999.
7. [1911] 2 K.B. 786.
8. [1876] 1 Q.B.D. 274.
9. (1927) 27 S.R. (N.S.W.) 301.
10. [1964] A.C. 326.
11. See also *Phillips* v. *London and South Western Railway Co.* [1879] 5 Q.B.D. 78 at p.80 per Field J., whose direction was approved by the Court of Appeal; *Godley* v. *Perry* [1960] 1 W.L.R. 9.
12. [1867] L.R. 2 Ex. 340.
13. [1875] L.R. 10 Q.B. 111.
14. [1950] 2 All E.R. 1167.

Service[15], and by the English Court of Appeal in *Stedman* v. *Swan's Tours*[16]. In that case Singleton L.J. made the point that:

> "Damages could be recovered for appreciable inconvenience and discomfort caused by breach of contract. It might be difficult to assess the amount to be awarded, but it was no more difficult than to assess the amount to be given for pain and suffering in a case of personal injuries."

It seems likely that this line of cases will be followed in Australia, though there is little authority on the point. Of course, as will be seen later, Zelling J. accepted these cases as good law, and in the High Court decision of *Fink* v. *Fink*[17] the tenor of the judgements suggest that recovery will not be rigorously limited to pecuniary loss. Thus Dixon J. (as he then was) and McTiernan J. said:

> "Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provided for breach of contract, an award of damages"[18].

However, statements of principle as to just what type of loss will be made the subject of an award of damages are extremely hard to find, and the position seems to be that there is in fact no one rule. Undoubtedly the ideal situation is a specified sum of money being lost due to the breach of contract, but upon this ideal have been grafted a number of categories such as physical discomfort, loss of expectation of life, etc. If a plaintiff can bring himself within such a category he will be awarded damages.

There are also "negative" categories, certain fact situations the courts have specified in which damages will not be recoverable. Thus in *Addis* v. *Gramaphone Company*[19] an employee was dismissed in a harsh and humiliating fashion and claimed damages for, *inter alia*, injury to feelings and reputation. Lord Gorrel stated:

> "If it (the contract) had been performed, he would have had certain salary and commission. He loses that and must be compensated for it. But I am unable to find either authority or principle for the contention that he is entitled to have damages for the manner in which his discharge took place"[20].

In *Cook* v. *Swinfen*[21] Lord Denning M.R. (with whom Dankwerts L.J. and Winn L.J. concurred) said:

> "It can be foreseen that there will be injured feelings; mental distress; anger; and annoyance; but for none of these can damages be

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15. [1957] C.L.Y. 934.
16. (1951) 95 Sol. Jo. 727.
17. (1946) 74 C.L.R. 127.
18. *Id.*, 143.
19. [1909] A.C. 488.
20. *Id.*, 501.
21. [1967] 1 W.L.R. 457 at 461.

recovered. It was so held in *Groom* v. *Crocker*[22] on the same lines as *Addis* v. *Gramophone Co.*"[23].

In such a state of the law there are bound to be inconsistencies and illogicalities, caused in the main by a desire to do justice in a case which can not be conveniently categorised, or falls within a category which seems unjust or out of step with the development of the law. *Athens-Macdonald* v. *Kazis* seems just such a case.

The plaintiff, Mr. Kazis, contracted with the defendant, a travel agency, to provide travel facilities for himself and his family for a three month holiday in Cyprus. Before leaving, Mr. Kazis learnt that the bookings which had been made would mean that the tour would be cut short by three weeks and, being greatly concerned, made equiries and was eventually told that everything was being remedied in Athens. Zelling J. found that in fact nothing was done, Mr. Kazis and his family being forced to return home three weeks early, having been deliberately deceived by the defendant.

As a consequence of the defendant's breach of contract, Mr. Kazis was forced to spend part of his holidays making enquiries as to the departure date, the actual time spent in such activities over the period being equivalent to four and one half days. The Magistrate in the Local Court awarded damages under several heads, but this note is concerned solely with the sum of $650 awarded for "discomfort and inconvenience", one of the awards challenged before Zelling J.

Mr. Kazis's complaint was summed up by Zelling J.:

> "The whole of the seventy day trip was overshadowed by the fact that he was not having the sort of holiday that he had set out to get and he was not able to have it without distraction caused by the matters to which I have already adverted (the time spent making enquiries, etc.). In addition:
>
> (a) he was unable to go to Beirut or to Famagusta as he had planned,
>
> (b) he was unable to attend a special Saint's festival day in Cyprus,
>
> (c) he lost the opportunity to live with relations board free,
>
> (d) he was not able to go to holiday places where other tourists go, which he wanted to see"[24].

The defendant, however, submitted that damages were only payable for the four and one half days spent in making enquiries, etc., the amount to be computed by expressing this as a fraction of the whole period. The question therefore arose, how should damages for inconvenience be computed?

After noting that damages can be recovered for *physical* discomfort, Zelling J. was forced to accede to cases such as *Addis* v. *Gramophone Co.*[25],

22. [1939] 1 K.B. 194.
23. [1909] A.C. 488.
24. [1970] S.A.S.R. 264 at 269.
25. [1909] A.C. 488.

Cook v. *Swinfen*[26], *West & Son Ltd.* v. *Shephard*[27] and *Groom* v.*Crocker*[28] which stand for the proposition that even though it is foreseeable that a breach will lead to mental discomfort, disappointment suffering or loss of reputation (other than trade reputation) only nominal damages are recoverable:

> "I agree immediately that as to mere disappointment, regret or other feelings of the mind *simpliciter* the law has not progressed so far yet that I can say, sitting as a single Judge of this Court, that damages can be awarded under this head, although I think that the law on this topic is in fact lagging badly behind other fields in the law of damages in this respect"[29].

The problem is largely circumvented, however, when it is realised that physical discomfort can not be gauged objectively but nearly always has a large subjective mental element. For example, if Donald, a duck hunter, contracts with Gastro the guide to guide him to a hunting location, and the ducks fail to appear after they have waited there for a period of time, Donald cannot sue Gastro for the physical discomfort involved in waiting in a cold and wet duck-blind, the discomforts of duck-blinds being well known and accepted by hunters.

However, if Donald books a first class seat on Gastro's bus tour and in breach of contract Gastro takes a different route, becomes lost, and forces the passengers to wait for hours in discomfort, then Donald could claim damages for the discomfort. What is discomfort in one situation or to one person is not necessarily discomfort to another person in another situation, the difference being due to different circumstances and different mental elements.

Before this concept can be applied it would seem necessary to have some sort of physical discomfort which could be aggravated or mitigated by the surrounding circumstances. Thus the logical applications of the concept to this case would seem to be to inflate the damages awarded for the period of four and one half days spent in letter writing and making tiresome enquiries—the discomfort of these activities would be aggravated by their setting, an intended blissful holiday from the long hours of Mr. Kazis's fish and chip shop. This would not be a significant deviation from the decided cases, and the Judge would be free to award virtually any sum he liked for the four and one half days physical inconvenience, rejecting the defendant's fractional method and instead looking to aggravation due to Mr. Kazis's mental element, though still scrupulously awarding damages for physical discomfort alone.

However, Zelling J. adopted a more direct approach, which may be divided into two parts. First he said:

> "What is inconvenience and discomfort to one person is not to another, and what is inconvenience and discomfort in one contractual situation

26. [1967] 1 W.L.R. 457.
27. [1964] A.C. 326.
28. [1939] 1 K.B. 194.
29. *Supra* n.1, 274.

is not in another. This was a contract by a travel agency to provide a tour of a certain kind and the type of inconvenience and discomfort which is proper to be considered in relation to such a contract is in my opinion the inconvenience and discomfort of the type which I have detailed above, [i.e. letter writing, enquiries] and which must of necessity have a mental element in it"[30].

Thus Zelling J. establishes that the four and one half days of enquiries, letter writing, etc., may in these circumstances be classed as physical discomfort, for which damages are recoverable. Furthermore the discomfort and hence the damages, are aggravated by the mental element present. In the second part of his reasoning, however, Zelling J. looks to Mr. Kazis's complaints about his inability to undertake certain activities on his holiday as outlined above, and it is here that we seem to find a conflict with precedent:

> "In addition, it is in my opinion a fallacy to say that "physical inconvenience" includes only what one is compelled to do and not what one is compelled not to do, because a number of things complained of . . . were of the second kind, but in a contract of this type the second is just as much a physical inconvenience if one has to subsume it under the old labels as the first, and the respondent is equally entitled to be compensated for it. It is just as much discomfort and inconvenience on a tour to spend a day doing nothing, staying in a hotel or seeing something for the second time when one has planned something new and different for that day—when one has only a limited number of days at one's disposal—as to be forced to do something actively to try and retrive a situation brought about by the contract being broken"[31].

It is submitted that such a view of what is meant by physical inconvenience and discomfort goes beyond the situations such as walking home in the rain[32] or being provided with inferior lodgings[33] which have been dealt with in the decided cases. In fact, to say that inactivity or visiting the same place twice is transformed into physical discomfort by the mental element present, is really equivalent to awarding damages for this mental element *simpliciter*.

Nevertheless the result of the case was that Mr. Kazis recovered substantial damages for his inconvenience, though the sum of $650 was considered by Zelling J. to be excessive and was reduced to $400.

It is interesting to note that a similar result would in all probability have been reached in the United States. As the Court in *Kaufman* v. *Western Union Telegraph Co.*[34] observed:

> "No doubt the law as to liability for mental anguish alone is in a stage of development . . . There is a definite trend today in the United States to give an increasing amount of protection to the interest in freedom from emotional distress."

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30. *Ibid.*
31. *Ibid.*
32. *Hobbs and Wife* v. *South Western Railway Co.* [1875] L.R. 10 Q.B. 111.
33. *Setdman* v. *Swan's Tours* (1951) 95 Sol. Jo. 727.
34. 224 F2d. 723 (C.A.S.), cert. den. 350 U.S. 947; 100 L. ed. 825.

For numerous U.S. cases where damages were awarded for mental suffering see Williston on Contracts (third edition) s.1341.

But although the award of such damages is eminently just, their quantification may be very difficult. In a case of physical discomfort such as walking home in the rain[35] the cost of mitigating the discomfort (viz. the hire of a coach) may be taken as a guide. If a coach *is available* and the plaintiff was carrying the necessary money to hire it but instead preferred to undergo the physical discomfort of walking, it would seem that the hire of the coach would be the *maximum* amount recoverable unless, perhaps, the plaintiff had a good reason for not wishing to expend this money. However, if a coach is *unavailable* is would seem that the usual cost of hiring a coach could be taken as a *minimum* level of recovery, additional damages being given according to the circumstances.

Awards for damage such as pain and suffering or that dealt with in *Athens* v. *Macdonald* are not susceptible to such a simple guideline. It is true that like amounts can be awarded in like cases, but this does not overcome the original problem of estimation in a new situation. And of course the number of new situations requiring a new quantification is infinite. The solution usually adopted seems to be to award a round sum, which is consonant with community values and the judge's view of justice in the particular case, at the same time taking care that his award will not be misinterpreted. Thus in *Aerial Advertising Co.* v. *Batchelors Peas*[36] the amount of damages was deliberately set too low so that the actual award itself could not be complained of:

> "Taking it all in all, I think that, if I give £300 damages altogether, I am certainly not giving them too much. I am confident of that. However, I want to err very much on the low side, for fear it should be thought that I am doing what Sir Wilfred Greene, M.R. said that I must not do—namely, give damages for loss of reputation"[37].

But as submitted above, difficulties of computation should not be allowed to stand in the way of substantive justice and it may well be that Australian and English law will tend to follow the U.S. example in this area[38]. Whatever the eventual solution, *Athens-Macdonald* v. *Kazis* represents a significant development and, some may think, a departure from the decided cases.

*D. H. Peek**

35. *Hobbs and Wife* v. *South Western Railway Co.* [1875] L.R. 10 Q.B. 111.
36. [1938] 2 All E.R. 788.
37. *Id.*, 796.
38. See also Mayne, *Treatise on Damages* (12th ed. by McGregor).

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EDWARDS V. NOBLE

FUNCTION OF APPELLATE COURT — INFERENCES OF FACT AND EVALUATION OF CONDUCT

Edwards v. *Noble*[1] presented to the High Court an opportunity to express its views with some finality on the role of an appellate Court when hearing appeals on questions of fact. The decision is the third in a trilogy of cases in the High Court which represent, at most, a significant departure from settled principle, and, at least, a warning to Supreme Courts that in all but the most exceptional cases, the judgement of the trial judge in "running down" cases should be regarded as final.

The action was commenced in the S.A. Supreme Court before Chamberlain J., who found the following primary facts: The plaintiff, Noble, was driving his motor-bike with a pillion passenger, Mannix, along the Main North Road between Warnertown and Port Pirie. It was 6.30 p.m. on an evening in August, 1969, and dark. The travellers decided to have a cigarette. The plaintiff stopped his bike on the edge of the bitumen surface, although there was a trafficable verge of over nine feet onto which he could have driven. Both plaintiff and passenger alighted and the bike was put onto its stand, but with the engine still running. If the lights were on, it is likely that Mannix was standing behind the motor cycle, so obscuring its rear light to following traffic. As Noble reached for his cigarettes, a car, driven by the defendant, crashed into the back of his motor cycle, killing Mannix and seriously injuring the plaintiff.

The defendant, Edwards, had been driving home to Port Pirie in his Morris Minor with a passenger, one Bickley. He was travelling three feet in from the bitumen at about 45-50 m.p.h., with his head lights on low beam, due, it would seem, to the frequency of oncoming traffic. Bickley had suddenly become aware of a man (presumably Mannix) about forty feet directly ahead on the bitumen, and yelled a warning to Edwards. Edwards had not seen the man until alerted by his passenger and he did not see the motor cycle until nine to ten feet away from it. Although he swerved immediately it was too late.

With those findings of fact, Chamberlain J. was unable to say that any negligence had been proved against Edwards and he dismissed the action. The plaintiff appealed. In the S.A. Full Court, it was held unanimously that on the facts the defendant had been negligent (for varying reasons), although the plaintiff had been largely to blame. The trial Judge's decision was reversed and by a majority (Bray C.J., Mitchell J.) the plaintiff was awarded 1/3 of his damages. Wells J. would have awarded 1/5.

The position, therefore, before the appeal was brought by Edwards to the High Court may be summarized thus:

1. The trial Judge had found certain primary facts.
2. Bickley, the defendant's passenger, was regarded as a reliable witness by Chamberlain J., and his evidence accepted.

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1. (1971) 45 A.L.J.R. 682.

3. Chamberlain J. evaluated all the facts and concluded that no negligence had been proved against the defendant.
4. The S.A. Full Court, accepting the primary facts, together with the trial Judge's assessment of the witnesses, also evaluated the facts, and came to the unanimous conclusion that negligence had been proved against the defendant; they differed only as to the extent to which the plaintiff's own negligence contributed to the result.

When the case came on for argument before the High Court, sitting in Adelaide, in September, 1971, it soon became clear that the issue which their Honours regarded as central was not whether negligence had been proved or not, but whether the Full Court ought to have interfered with the judgement of the trial Judge. By a majority (Barwick C.J., McTiernan, Windeyer, Walsh JJ.; Menzies J. dissenting), they held that the Full Court was not justified in reversing Chamberlain J's decision. McTiernan J. said:

> "The Full Court seemed to me to accept the learned trial Judge's findings as to the circumstances of the accident but to reject his inference that the defendant was not negligent in his driving. In my opinion the evidence does not afford any convincing reason for rejecting that inference"[2].

It is necessary, before turning to the reasons for judgement of the members of the High Court, to establish briefly the position as it was understood before "the trilogy", which consists of *Whitley Muir and Zwanenberg Ltd.* v. *Kerr and Another*[3], *DaCosta* v. *Cockburn Salvage and Trading Pty. Ltd.*[4] and finally *Edwards* v. *Noble*.

The leading Australian case on the question of an appellate Court's approach to primary facts is *Patterson and Another* v. *Paterson*[5]. It was a husband's suit for dissolution of marriage on the ground of the wife's adultery. The judge who heard the suit inferred adultery from circumstances he found upon oral evidence, notwithstanding evidence in denial by the respondent and co-respondent whom he disbelieved. The High Court (Dixon C.J., Webb, Kitto JJ.) dismissed the appeal holding that while the appellate power of the Court extended to the re-examination of the facts, the judge's estimate of the respondent and co-respondent was of first importance, and his estimate not only of the general credibility of the witnesses for the petitioner but of the reliability of their detailed observation was decisive; and these were matters on which his opinion could not be reversed by a Court of Appeal. Dixon C.J. and Kitto J., in a joint judgement undertook a review of the authorities dealing with an appellate Court's approach to findings of fact. The following principles seem to emerge from that review.

1. Since the Judicature Acts, the parties have always been entitled to demand the decision of the Court of Appeal on questions of fact as well as law[6].

2. *Id.* at 687.
3. (1965) 39 A.L.J.R. 505.
4. (1970) 44 A.L.J.R. 455.
5. (1953-4) 89 CLR 212.
6. See Supreme Court Rules, O. 58 r. 6(1).

2. There is a well-known difference, in the scope of a Court of Appeal's review, between the drawing of inferences from fixed facts, and the making of findings based on testimony. With regard to the latter, the Court of Appeal's scope is restricted in accordance with paragraphs three and four below.
3. Great weight is due to the decision of a judge of first instance whenever in a conflict of testimony the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements.
4. The Court of Appeal may differ on matters of credibility when other circumstances show whether the evidence is credible or not (e.g. where the trial judge has failed to take something into account, or has given credence to evidence afterwards shown to be "self-inconsistent" or contrary to indisputable facts). But, before a Court of Appeal upsets a finding into which credibility enters *it should be convinced that the primary judge is wrong.* (emphasis added).
5. Where there is no reason to suppose that the judge proceeded at all upon the manner or demeanour of the witnesses, the Court of Appeal is bound to reach its own conclusions.

The leading English decision is *Benmax* v. *Austin Motor Co.*[7]. It concerned the evaluation of a set of facts to see whether it could be inferred that an invention contained an "inventive step" and so legitimately could be made the subject of letters patent. The House of Lords in dismissing the appeal, held that the Court of Appeal was quite free to draw its own inferences from the facts found:

> "A judge sitting without a jury would fall short of his duty if he did not first find facts and then draw from them the inference of fact whether or not the defendant had [for example] been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, . . . what is perception, what evaluation . . . In a case like that under appeal where, so far as I can see, there can be no dispute arising out of the credibility of witnesses, but the sole question is whether the proper inference from those facts is that the patent in suit disclosed an inventive step, I do not hesitate to say that an appellate Court should form an independent opinion, though it will naturally attach importance to the judgement of the trial judge"[8].

In the S.A. Full Court, Mitchell J. had stated:

> "But we have a duty to consider whether the inferences from these facts drawn by the trial judge were justified."

On the face of it, at least, that approach appears to follow from the principles of *Patterson and Another* v. *Patterson*, and *Benmax* v. *Austin Motor Co.* However, Barwick C.J. regarded it as an incorrect approach. It was not, his

7. [1955] A.C. 370.
8. per Viscount Simonds, at 373-374.

Honour observed, a question of whether the inferences were right but whether the appellate Court was convinced that they were wrong. That was a view he had first expressed in *Whitley Muir and Zwanenberg Ltd.* v. *Kerr and Anor*[9]. There he formed with McTiernan J. a majority in favour of the conclusions reached by the trial judge and from that position he expressed himself on the function of an appellate Court:

> " . . . The trial judge, having found the primary facts, may decide that a particular inference should be drawn from them. Here no doubt the appellate Court has more room for setting aside that conclusion. But, even in that case, the fact of the trial judge's decision must be displaced. It is not enough that the appellate Court would, itself, if trying the matter initially, have drawn a different inference. *It must be shown that the trial judge was wrong.* This may be achieved by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the trial judge is so preponderant in the appellate Court's opinion that the trial judge's decision is wrong"[10]. (emphasis added)

In *Edwards* v. *Noble*, the Chief Justice added these remarks:

> "The question is not whether the appellate Court can substitute its view of the facts which, of course, it is empowered to do; but whether it should do so . . . If [the view of the trial judge] is a view reasonably open on the evidence, it is not enough in my opinion to warrant its reversal that the appellate Court would not have been prepared on that evidence to make the same finding. Merely differing views do not establish that either view is wrong"[11].

His Honour did not regard *Benmax's* case as inconsistent with those observations:

> "I do not understand anything said in the reported cases and in particular . . . *Benmax* v. *Austin Motor Co.* to deny the proposition that an appellant to succeed in an appeal against a finding of fact made by a judge sitting alone must convince the appellate Court that the primary judge was wrong in his conclusion . . . *Benmax's* case does decide that an appellate Court is not so bound by the inferences of fact drawn by a primary judge without dependence on the credibility or bearing of witnesses that it may not examine the matter for itself . . . But in my opinion none of these cases warrants the conclusion that an appellate Court may properly set aside such a finding of fact where it is not satisfied it is wrong, in the sense I endeavoured to explain in *Whitley Muir and Zwanenberg Ltd.* v. *Kerr and Another*"[12].

So, in the Chief Justice's opinion, *Benmax's* case decides or affirms, that an appellate Court *can* reject the inferences drawn by a trial judge, but it

9. *Supra* n.3.
10. *Id.* at 506.
11. *Supra* n.1 at 685.
12. *Id.* at 686.

does not decide whether, or when it *should*. To that extent *Edwards* v. *Noble* further develops the principle by asserting that "as a matter of judicial restraint" an appellate court should not so act unless convinced that the trial judge was wrong in drawing those inferences.

For a court to assert that something can be done, but it should not, is to give with one hand and take with the other; you have power in this case, but you shouldn't exercise it. When the trial judge's assessment of testimony in the finding of primary facts is in issue, his findings *cannot* be upset *unless* he has made an error which convinces the appellate court that his assessment of the evidence is wrong. It seems, however, from what the Chief Justice says, that where the trial judge's assessment of primary facts in the drawing of inferences is in issue, the inference he draws *can* be rejected, but they *shouldn't* be, unless the appellate court is convinced that his assessment of the primary facts and their collective effect (i.e. the inference drawn) was wrong.

Is there a logical difference? Can one construct an exhortation as to the manner of exercise of judicial power into a rule of law?

Windeyer J. distinguished *Benmax's* case. That was a course he had taken initially in *Da Costa* v. *Cockburn Salvage & Trading Pty. Ltd.*[13] There, the High Court (Barwick C.J., Windeyer and Gibbs JJ., Menzies and Walsh JJ., dissenting), held that an appeal from the Full Court of the Supreme Court of W.A. allowing an appeal from the trial judge in a negligence action should be allowed and the judgement of the trial judge restored. With the exception of Windeyer J., all the judges based their decisions, at least in part, on their own views of the correctness of the trial judge's conclusions. Thus, it is not clear that the *ratio decidendi* could legitimately be framed in terms of a proposition concerning the function of an appellate Court in appeals on question of fact. However, Windeyer J. did base his decision on that ground. His judgement in *DaCosta's* case is important therefore because of his reliance on it in *Edwards* v. *Noble*. In *DaCosta's* case Windeyer J. had distinguished *Benmax* v. *Austin Motor Co.* in this way:

> "I am sceptical of applying to a finding of negligence the principle *that an appeal Court is as competent to determine the proper inference from proved facts as is the trial judge*. There is, of course, no difficulty in this proposition when the inference of fact is itself of a physical fact or happening, something which could itself have been observed or otherwise perceived, to use Professor Goodhart's word, by the sense of a person actually present at the relevant time . . . But inferences of fact from proved specific facts seem to be logically in a different position from the evaluation or appraisal of the quality of a man's conduct. Was he negligent? . . . the evaluation of conduct in terms of reasonableness is a value judgement upon facts rather than an inference of fact"[14]. (emphasis added)

13. *Supra* n.4.
14. *Id.* at 464.

His Honour went on to observe that cases involving findings of adultery or "inventiveness"[15] fell naturally on the side of inference of fact, as distinct from evaluation of conduct. In *Edwards* v. *Noble* His Honour affirmed this distinction and added that where the issue concerned "the qualitative evaluation of conduct as tortiously negligent" it was not enough to say that the primary judge was "in no better position to decide" than a judge on appeal. The question was always, should his decision be upset?[16]

Strictly speaking, the passage cited earlier from Viscount Simond's speech in *Benmax's* case, can be regarded only as *obiter dictum*, for his Lordship was using negligence as an example; the actual case concerned inferences of fact from primary facts, not evaluative inferences of conduct from primary facts. But it is very strong *dicta*, and tends to show that the House of Lords did not support the distinction drawn between different types of inferences.

But Windeyer J. makes the distinction. It is not open, in his opinion, for a Court of Appeal to treat both inferences similarly. The "settled rules governing the manner in which a Court of Appeal should deal with appeals on questions of fact" (as Dixon C.J., and Kitto J. referred to the matter in *Patterson's* case) apply only to the drawing of inferences of fact. The evaluation of conduct from facts, on the other hand, should be treated as a jury finding since in such a case the Court of Appeal is not in the same position as the trial judge.

No reason is given as to why, in drawing inferences of fact, the appellate court is in as good a position as the trial judge, and yet, in the evaluation of conduct, its position is different.

Barwick C.J. does not find the distinction easy, because "there is an element of judgement in the decision to draw or not to draw an inference or to prefer one where more than one inference is reasonably open"[17].

It would seem to follow from the position taken by Windeyer J., that "the settled rules" should be confined to inferences of pure fact. The Chief Justice, however, does not seem prepared to acknowledge a clear distinction between different forms of inference. The "settled rules", so it seems, apply to all types of inferences, or none. And his Honour may, by the stand he took in *Edwards* v. *Noble*, feel unable to regard the "settled rules" as relevant in any situation.

The different positions taken up by the two learned judges is nowhere better illustrated than in their approach to *Benmax's* case: both firmly reject the decision as having any bearing on the case before them; Barwick C.J. does so because it is not, in his opinion, inconsistent with his conclusions, which merely operate to restrict what is permitted, by developing on a broad principle[18]; Windeyer J., does so because it is authority only for cases of

15. "Inventiveness": Whether the primary facts pointed to the inference that a novel step was involved in the alleged invention: A step which had not been incorportaed before in that context, and which was more than a mere modification. That was an inference of fact.

16. *Supra* n.1 at 689.

17. *Id.* at 685.

inference of fact, not evaluation of conduct—a much narrower proposition of law than Barwick C.J's.

Walsh J., who dissented in *Da Costa's* case was one of the majority in *Edwards* v. *Noble*. In *DaCosta's* case, his Honour had agreed with Menzies J. that the appeal from the W.A. Full Court should be dismissed. He thought that in the circumstances of the case, the Full Court was entitled to give effect to its own conclusions. No conflict of evidence or assessments of witnesses were involved and his Honour considered that the Full Court had acted within the principles laid down as to the role of an appellate Court in such cases[19]. However, in allowing the appeal from the S.A. Full Court the learned judge said that his statement that in the case the judges who formed the majority of the Full Court of W.A. were not precluded from giving effect to their own conclusions was based upon his "view of the circumstances of that case"[20]. His Honour, however, added that:

> "It should *not* be held that a judgement which requires an evaluation of conduct of a party against the standard or measure of the conduct of a reasonable man placed in the same position is a judgement with which an appellate Court can interfere only in very special circumstances"[21]. (emphasis added)

With respect, this passage is not clear, but it seems that Walsh J. also rejects Windeyer J's distinction; whether he thereby aligns himself with the reasons of the Chief Justice is not apparent.

Menzies J. dissented. He set out the "settled rules" as they emerged from *Patterson and Another* v. *Patterson*, and proceeded to examine the facts as found by Chamberlain J., and the inferences drawn. His Honour concluded that the trial judge had not given sufficient weight to the failure of the defendant to keep a proper lookout, and he would have affirmed the decision of the Full Court on that ground, and dismissed the appeal.

I would venture to suggest that the High Court, in deciding to allow the appeal, expressed a proposition of law which may be put in this way:

Where a trial judge in applying law to a set of primary facts (which he has found by a correct approach), is required to evaluate the culpability of conduct against a legal standard, an appellate Court ought not, as a matter of judicial restraint, to substitute its own evaluation based on the facts found, unless it is convinced that the trial judge was wrong in his evaluation. In other words, for the purposes of an appeal, a court ought to treat an evaluation of conduct by a trial judge as a *finding* of fact, and should therefore only reverse it when it would normally be open to a Court of Appeal to reverse a *finding* of fact; that is, where the inference is not open on the evidence, or where the trial judge has given credence to evidence afterwards shown to be "self-inconsistent"; c.f. *Patterson's* case[22].

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18. The difficulties which that view presents have already been mentioned.
19. *Supra* n.4 at 466.
20. *Supra* n.1 at 694.
21. *Ibid.*
22. *Supra* n.5.

The law as it now stands has one of three courses open to it in its development. It may be forced by the logic of the reasons for judgement of Barwick C.J., to extend the suggested principle of *Edwards* v. *Noble* to *all* inferences from primary facts, whether evaluations of conduct or of a set of facts pointing collectively to further facts, so that all *inferences* would be treated as *findings of primary facts;* and "the settled rules" would no longer be good law. Or, all evaluation, whether of fact or of conduct may come in time to be regarded judicially as inferences of fact, and the distinction drawn by Windeyer J. between inferences of fact and inferences of conduct may become the means of re-establishing "the settled rules". Or, the trilogy may be regarded as mere decisions of local policy—thus providing no departure from "settled" principle: those who read carefully the cases cited by the majority of the High Court, will find it difficult to see how their Honours could regard them as in any way supporting, either directly or by contrast, the proposition emerging from their judgments. Yet we are, nevertheless, faced with an authoritative decision of the High Court.

Perhaps *Edwards* v. *Noble* is best regarded as a "local administrative directive" to Supreme Courts; an order to reduce at all costs the number of appeals from judges of first instance, where the only issue is what inferences to draw from facts found and undisputed. Certainly that view finds support in the concluding paragraphs of Windeyer J's judgment:

> "The law reports in recent times have been filled with accounts of road accident cases. These illustrate that often the same facts are viewed differently by different judges concerned to determine culpability. It may seem remarkable that reasonable men should differ so often, and so markedly, as to what would in given circumstances be expected of a reasonable man. But this merely demonstrates that reasonable prudence is an indefinite criterion of conduct. From this appeals multiply; lawyers flourish; cases which turn on their own facts are reported, bringing by debatable analogies uncertainties in the practical working of the law of negligence. Compulsory insurance by the owners of motor vehicles against their liabilities to third parties often produces protracted litigation . . . Yet the interest of the community is best served by bringing litigation speedily to finality. That can be confidently asserted without invoking the conventional Latin tag. It provides a justification for the firm maintenance of what I take to be the rule of law, namely that a decision of a trial judge on a question of fact and his opinion as to whether conduct was blameworthy are not to be set aside unless they are convincingly shown to be wrong. And one man's opinion about blame is not shown to be wrong simply because it is not shared by other men"[23].

Jonathon Wells*

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23. *Supra* n.1 at 690.

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