Judicial Decisions

Australia

Homicide — acting in concert — one pleads defence of insanity — whether nature of sanity amounts to concert?

The High Court of Australia has had occasion to consider whether, on a charge of murder, a person can be found guilty of acting in concert with another person who was insane at the time of the commission of the offence.

The High Court held —

(i) where two accused were charged with acting in concert and one pleaded the defence of insanity, the jury, if it found insanity proved, should be told by the trial judge to consider whether the nature of the insanity was such as to make it impossible for there to be any concert between the two accused; and

(ii) if one of the accused did not understand the nature and quality of his act, there would be no concert, but if he only did not know that what he had done was wrong, the jury could find that the two accused had acted in concert if they were satisfied that there was actual agreement.

In so holding, the High Court applied the House of Lord's decision in *Murdoch* v. *Taylor* [1965] 1 All E.R. 406, and considered the decisions in *R.* v. *Lowery and King* (No. 2) [1972] V.R. 560, *R.* v. *Tyler and Price* (1838) 8 C. & P. 616, *R.* v. *Bourne* (1952) 36 Cr. App. R. 125 and *R.* v. *Cogan* [1975] 3 W.L.R. 316. The Court also examined the rules relating to the admissibility of evidence relating to prior convictions and the nature of the trial judge's discretion to admit or reject such evidence, and, in so doing, examined the decisions relating to the operation of the English Criminal Evidence Act 1898, including *Maxwell* v. *D.P.P.* [1973] A.C. 309, *R.* v. *Stannard* [1965] 2 Q.B. 1 and *Murdoch* v. *Taylor* (above).

Matusevich v. *R.* (1977) 15 A.L.R. 117.

Australia— A.C.T.

Sentencing—mentally retarded offender

The accused pleaded guilty in the Supreme Court of the Australian Capital Territory to the indecent assault of a child. The accused, who was mentally retarded, had had a very poor family and home background, and had spent a number of years in psychiatric hospitals. In addition, he had a number of previous convictions, including convictions for sexual offences.

In sentencing the accused, the Supreme Court had occasion to review the rules of sentencing and, in so doing, held that—

(i) in sentencing the accused and in applying the ordinary principles of punishment of criminals, the retributive element ought to receive less weight than it might with other crimes and in other circumstances; and

(ii) an order should be made, by which the accused would be released upon his giving security that he would be of good behaviour for eight years including that he would during that period abstain from alcohol and would not go to hotels and other places where it is available: would enter a psychiatric hospital as a voluntary patient: would for the period reside at that hospital and accept the direction and guidance of its Medical Superintendent: in the event that the Medical Superintendent should from time to time arrange accommodation in a half-way house outside the hospital, during the period would, if directed, reside in that house as directed and observe such rules and directions as the Medical Superintendent or the person in charge laid down, and if or when so directed during the period, return to reside in the hospital: would during the period, at such times or places as specified by the Medical Superintendent, submit to examination and psychiatric treatment by or on direction of or recommendation of the Medical Superintendent or his nominee: would, during the period, engage only in such employment as might be arranged or approved by the Medical Superintendent: and would not, during the period, enter the grounds of any school or loiter in the neighbourhood of any school.

R. v. *Riley* (1979) 22 A.C.T.R. 1.

Illegal possession and use of dangerous drugs—whether joint occupier of premises in "possession"

The appellant appealed to the Supreme Court of the Australian Capital Territory against his conviction on a charge of illegal possession and use of a dangerous drug, contrary to the provisions of s. 35 of the Poisons and Dangerous Drug Ordinance 1933 (A.C.T.) and ss. 4(1) and 5 of the Public Health (Prohibited Drugs) Ordinance 1957 (A.C.T.).

At the hearing before the Stipendiary magistrate the question arose whether the appellant, who was a joint occupier with another person of the premises in which the drugs were found, was, in fact, in "possession" of the drugs. The appellant was not the owner of the premises, but had a right to occupy them from a relation.

The Supreme Court, in dismissing the appellant's appeal and confirming his convictions, held, inter alia, that—

(i) the concept of "possession" in s. 35 of the Poisons and Dangerous Drugs Ordinance 1933 (A.C.T.) and s. 4(1) of the Public Health (Prohibited Drugs) Ordinance 1957 (A.C.T.) was more than satisfied by a finding that, at the relevant time, the appellant had the exclusive right to possession and de facto control of the premises in which the drug was found;

(ii) it was therefore unnecessary for the Court to attempt to categorise any right of possession of the premises in terms of a tenancy or licence because either right would carry with it the character of exclusivity; and

(iii) even if another person did share equally in joint legal posession of the premises with the appellant, this fact would not have reduced relevantly the appellant's possession of the drug or the liabilities it might have attracted.

In so holding, the Supreme Court considered a number of Australian and English decisions on the illegal possession of drugs and, in so doing, distinguished *Warner* v. *Metropolitan Police Commissioner* [1969] 2 A.C. 256 and *Williams* v. *R.* (1978) 22 A.L.R. 19 but either followed or applied *Radaich* v. *Smith* (1959) 101 C.L.R. 209, *Shell-Max and B.P. Ltd.* v. *Manchester Garages Ltd.* [1971] 1 All E.R. 841, *R.* v. *Bush* (1975) 1 N.S.W.L.R. 298 and *R.* v. *Rawcliffe* (1977) 1 N.S.W.L.R. 219.

See v. *Milner* (1979) 25 A.C.T.R. 21.

Australia—New South Wales

Nervous shock—neurosis from feelings of guilt

The New South Wales Court of Appeal has held that—

(i) in deciding whether a particular injury was of a kind which was foreseeable it was necessary to draw a line between the broadest of categories, on the one hand, which would introduce liability for direct consequences and the narrowest, on the other, which would promote uncertainty and provide distinctions of a disreputable nicety, and, in doing that, it was necessary to remember that the purpose was to set a limit to the consequences for which a negligent defendant ought to pay; and

(ii) in a case where the plaintiff had sustained a depressive neurosis caused by a feeling of guilt arising from the fact that if she had not allowed the respondent to drive a motor vehicle the accident which had befallen him would not have occurred such a condition was not one which was foreseeable and therefore the defendant was not liable to the plaintiff in damages for it.

In so holding, the Court stated that the course of authorities which defines the limits of liability for damages due to nervous shock demonstrates that compensation for some classes of psychiatric

damage have been excluded, even where a link with the defendant's negligence exists, and that the long history of judicial reasoning concerning psychiatric damage due to nervous shock, and the limitation upon the classes of shock regarded as foreseeable, and the (only partial) enlargement of the field of compensable damage by judicial evolution, acknowledge that psychiatric damage arising from circumstances external to the trauma caused by the negligent act can, and ought by parallel judicial approach to, be classified according to the kind of chain that links the damage with the negligent act, to the extent that the kind of chain must be examined to see if damage occuring in this kind of way was foreseeable.

The Court's judgment involved a detailed examination of foreseeability and causation in the law of negligence, including a consideration of the respective judgments of the Judicial Committee of the Privy Council, the House of Lords and the High Court of Australia in *Overseas Tankership (UK) Ltd* v. *Morts Dock and Engineering Co Ltd. (The Wagon Mound No. 1)* [1961] A.C. 388, *Hughes* v. *Lord Advocate* [1963] A.C. 837, the *Overseas Tankership (UK) Ltd* v. *Miller Steamship Co Ltd (The Wagon Mound No. 2)* [1967] A.C. 617, and *Mount Isa Mines Ltd* v. *Pusey* [1970] 125 C.L.R. 383.

Rowe v. *McCartney* [1974] 2 N.S.W.L.R. 72.

Narcotic drugs — Innocent possession — Drugs imported by post — Ratification of international convention

In a case involving a charge of possession of prohibited imports, and sending narcotic drugs through the Post Office, the New South Wales Court of Criminal appeal has held that —

(i) the ratification by the Federal Parliament of the Single Convention on Narcotic Drugs 1961, together with the enactment of it of the provisions of the Customs Act 1967 and the Narcotic Drugs Act 1967, not only represented the acknowledgment of international concern for the wide detection and adequate punishment of offences in relation to narcotic drugs, but reflected the increased national anxiety in the same field of health and social welfare of the community generally;

(ii) the provisions of the Customs Act 1901—1971 did not by implication exclude the exculpatory principle by which the person charged with illegal possession of narcotic drugs might prove an honest belief, on reasonable grounds, in the existence of circumstances which, if true, would make innocent that conduct with which he was charged;

(iii) the Crown is not required in such a case to prove that the accused has knowledge or suspicion of, or reason to suspect, the possession of narcotic drugs in a parcel he has received at the Post Office;

(iv) the word "possession" in s. 233B(1)(c) of the Customs Act 1901—1971, in the context in which it is found and having regard to the purposes which the legislative provision was intended to effect, means no more than de facto possession of the narcotic drugs concerned;

(v) the mental element involved in such a case extends no further than the intention inherent in de facto possession of such drugs, namely, the intention to have exclusive physical control of some article which was in fact narcotic drugs or some article or some place wherein such drugs are in fact carried or contained or located. It is not inherent in that mental element that an accused should know or suspect, or have reason to suspect, that an item in his de facto possession comprises narcotic drugs;

(vi) the onus is not upon the Crown to prove that the appellant knew or suspected, or had reason to suspect that the parcel he had collected at the Post Office contained narcotic drugs. It is necessary for the Crown to prove that he had de facto possession of the drugs, something the Crown had in the present case done by showing that he had exclusive physical control of the parcel that contained the drugs;

(vii) it is not necessary for the Crown to prove any further mental element beyond the intention to acquire such control of the article in which the drugs were in fact to be found; and

(viii) where an accused claimed, as here, that he did not know or suspect, or have reason to suspect, that the parcel contained narcotic drugs, it is upon him to satisfy the jury that arising from such a claim as to his mental attitude he had, in all the circumstances, a reasonable excuse for his possession of the drugs.

R. v. *Bush* (1975) 5 A.L.R. 387.

Workers' compensation – whether illness contracted on foreign business trip an "injury" – meaning of "disease" – idiopathic and autogenous diseases – status of decisions of Privy Council in matters where appeals no longer lie to it

The High Court of Australia has dismissed an appeal by the appellant against a decision of the New South Wales Court of Appeal in which that Court had held that the respondent was entitled to workers' compensation, under the provisions of the Workers' Compensation Act, 1926 (N.S.W.), for serious disabilities sustained by him when in the appellant's employment as a result of his having contracted menigo-encephalitis, a disease caused by a virus, when on a business visit to a foreign country.

The High Court held that such a disease was an 'injury', as defined in s. 6(1)(a) of the Act, which provides that:

"'Injury' means personal injury arising out of or in the course of employment, and includes –

(a) a disease which is contracted by the worker in the course of his employment whether at or away from his place of employment and to which the employment was a contributing factor;"

In so holding, the Court had occasion to consider the nature of idiopathic and autogenous diseases, the nature of causation of injury and the meaning of the word "disease", and held that, a morbid condition of the body, a disease, externally caused or excited, may be an "injury" within the meaning of the Act even though the worker's employment has not contributed to the reception or contraction of that condition.

The Chief Justice of the High Court in his judgment posed, without deciding, the question whether the High Court was still bound by an earlier decision of the Judicial Committee of the Privy Council in *Slazengers (Australia) Pty. Ltd.* v. *Burnett* [1951] A.C. 13, assuming the Court felt that the Privy Council's reasoning in that case was incorrect, having regard to the fact that appeals can no longer be brought to the Queen in Council from the decisions in the High Court in such matters. The Chief Justice felt that this question was one on which the High Court as a whole should pronounce, but he affirmed that the Court "accorded respect" to the decisions of the House of Lords and, to a lesser degree, to those of the Court of Appeal. He added that "in line with this approach to decisions which do not bind as precedents no doubt this Court will at least accord a like respect to decisions of the Privy Council to that which it is accustomed to accord to the House of Lords".

Favelle Mort Ltd. v. *Murray* (1976) 56 A.L.J.R. 509.

Dangerous drugs—whether offence of absolute liability created

An appellant has successfully appealed to the Supreme Court of New South Wales, against his conviction for an offence against s. 21(1)(f) of the Poisons Act 1966 (N.S.W.) in that he had been found by the police in possession of "pipes or other utensils for use in connection with the smoking of. . .Indian Hemp".

The Court held that—

(i) s. 21 of the Act, while creating an offence in prima facie absolute terms, was nevertheless to be construed as requiring the prosecution to establish that the alleged offender had knowledge of all the facts that constituted the ingredients of the offence;

(ii) the necessity to establish mens rea was not displaced either by the subject-matter of the legislation or by the language used in the section;

(iii) the words "for use" in the section required the prosecution to establish that the defendant possessed utensils for future use in such connexion;
(iv) there was no evidence that the appellant knew that the utensils found had been used in connection with the smoking of Indian Hemp;
(v) in those circumstances, the appellant's intention with respect to future use could not be inferred, or deduced, from such past use as could be established· and
(vi) there was otherwise no evidence of the appellant's intention with respect to the offence charged.

The Court considered the question whether a statute creating an offence in prima facie absolute terms is to be construed as nonetheless requiring that the prosecution must establish that the alleged offender had knowledge of all the facts which constituted the offence and, in so doing, applied the decision of New South Wales Court of Criminal Appeal in *R.* v. *McGrath* (1971) 2 N.S.W.L.R. 181. With regard to the meaning of the words "for use", the Court applied *R.* v. *Ellames* [1974] 1 W.L.R. 1391, 1395, 1396 and 1397.

Erickson v. *Pittard* (1976) 2 N.S.W.L.R. 528.

Professional disciplinary tribunal—entitled to draw upon expert resources—whether entitled to draw upon own knowledge

The appellant appealed to the New South Wales Court of Appeal, pursuant to s. 19(1) of the Veterinary Surgeons Act 1923 (N.S.W.), against a finding of his profession's disciplinary tribunal, constituted under s. 19E(1) of the Act, that he had been guilty of misconduct in a professional respect and that an order be made that his name should be removed from the register.

In dismissing the appellant's appeal, the Court of Appeal held—
(i) the disciplinary tribunal referred to in s. 19E(1) of the Act was, both in its constitutional and its executive power, an expert professional tribunal comparable with the medical disciplinary tribunal referred to in s. 28(1) of the Medical Practitioners Act 1938 (N.S.W.); and
(ii) such a tribunal was entitled to draw upon its expert resources in reaching its conclusions, and expert evidence, although admissible if called, was unnecessary in such cases.

In so holding, the Court of Appeal also had occasion to consider whether members of a professional disciplinary body are entitled to draw upon their own knowledge in arriving at their decisions and whether an erroneous diagnosis by a veterinary surgeon or the administering by him of the incorrect treatment can amount to professional misconduct.

Kalil v. *Bray and anor* (1977) 1 N.S.W.L.R. 256.

Dangerous drugs—meaning of "possession"

The New South Wales Court of Criminal Appeal has dismissed the appellant's appeal against his conviction for having in his possession prohibited imports, namely, narcotic goods consisting of a quantity of cannabis resin, to which s. 233B of the Customs Act 1901–1975 applied.

The drugs in question were found in a shopping bag that contained some goods to which the appellant claimed ownership. He, however, claimed that he did not know anything about the other contents of the bag, including the drugs.

The Court of Criminal Appeal, in dismissing the appeal, had occasion to compare the meaning of the words "has in his possession" in s. 233B of the Customs Act with the words "have in his possession" in s. 1(1) of the Drugs (Prevention of Misuse) Act 1967 (U.K.) as interpreted by the House of Lords in *Queen* v. *Warner* [1969] 2 A.C. 256.

R. v. *Rawcliffe* (1 April 1977: not yet reported).

Public health—selling adulterated food

The Supreme Court of New South Wales has had occasion to consider a prosecution for selling adulterated food, contrary to s. 10 of the Pure Food Act 1908 (N.S.W.). The defendant company relied on a document in writing, whereby its supplier guaranteed "that the goods or classes of goods hereunder described are, as sold by the company (meaning the supplier), not adulterated,......", and which stated: "The Guarantee is offered in connection with Section 47 of the Pure Food Act 1908......". The defendant also relied on letters of the same date, one from the supplier to the defendant, and the other in reply, in confirmation of the arrangement. The guarantee was in the form prescribed in Regulations made under the Act.

The magistrate dismissed the information in reliance on s. 47(1). On appeal by way of case stated, the Supreme Court held that—

(i) s. 47(1) of the Pure Food Act plainly envisaged that a general guarantee, referred to in s. 47(1)(iii) and (iv), might be a continuing one, and need not refer to, or be given in respect of, a particular identifiable sale, or goods already in existence, but could relate to future, and as yet unidentified or unascertained, goods;

(ii) the guarantee, by referring to "classes of goods......as sold by the company", and taken in conjunction with the two letters of the same date, demonstrated an agreement between the parties that, in consideration that the defendant would either then or in the future purchase goods from the supplier,

the latter would, in relation to all such purchases, and whilst the guarantee remained in force, guarantee that such goods were not adulterated;

(iii) it was not necessary for any mention of the guarantee to be made in subsequent dealings between the parties, and accordingly it was open to the magistrate to infer that all later contracts between them were made upon the basis of its continuance, and of its application to those contracts; and

(iv) therefore, it was open to the magistrate to conclude that the defendant had proved the requirements of s. 47(1)(a).

Boon v. *F. Hannan Pty. Ltd.* (1978) 1 N.S.W.L.R. 31.

Duty of care expected of a medical practitioner—whether hospital liable for negligence of doctor in relation to his patient

The plaintiff, a person who suffered from spina bifida and gross kypho-scoliosis, and who had a hairy naevus on the skin covering her spine, became a paraplegic by reason of a severance of the spinal cord resulting from halo-pelvic traction imposed on her in hospital on the advice of her doctor, who was an orthopaedic surgeon. She brought an action for damages for negligence against the hospital, the orthopaedic surgeon and a consulting neuro-surgeon. At the close of the plaintiff's case, the defendants made an application for a verdict by direction.

The Supreme Court of New South Wales dismissed the plaintiff's action against all three defendants. In doing so, the Supreme Court held that, inter alia,—

(i) in an action such as this, it was for the jury to decide all questions of fact: but there must be a real issue of fact to be decided and, if the evidence was all one way, so that only one conclusion could be said to be reasonable, there was no function left for the jury to perform, in which case the court might properly take the matter into its own hands as being a matter of law, and might direct a verdict to be entered in accordance with the only evidence which was really presented in the case;

(ii) a hospital in New South Wales (in possible contradistinction, in certain circumstances, from a hospital in England) was vicariously liable for the negligence of a doctor in relation to his patient in the hospital only if, in addition to having the power to direct the doctor as to what he was to do, the hospital also had the power, whether or not it exercised it, to direct him as to the manner in which he was to do his work; and

(iii) applying that test in the present case, there was no evidence upon which the jury would be entitled to find that, if either of

the doctors who were the other defendants was negligent, the relationship between them, or either of them, and the hospital was such that the latter was responsible in law for that negligence.

In so holding, Supreme Court distinguished the decisions of the English courts in *Gold* v. *Essex County Council* [1942] 2 K.B. 293, *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343 and *Roe* v. *Minister of Health* [1954] 2 Q.B. 66, preferring to follow the decisions of the High Court of Australia in *Humberstone* v. *Northern Timber Mills* (1949) 79 C.L.R. 389, *Zuijs* v. *Wirth Brothers Pty Ltd* (1955) 93 C.L.R. 561 and *Australian Mutual Provident Society* v. *Chaplin* (1978) 18 A.L.R. 385.

As to the proper standard of the duty of care expected of a medical practitioner, the Supreme Court did, however, follow the English case of *Mahon* v. *Osborne* [1939] 2 K.B.14, as well as referring to the decisions of the English courts in *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582, *Chin Keow* v. *Government of Malaysia* [1967] 1 W.L.R. 813 and *Robinson* v. *Post Office* [1974] 1 W.L.R. 1176.

Albrighton v. *Royal Prince Alfred Hospital and others* (1979) 2 N.S.W.L.R. 165.

Australia— Northern Territory

Prisoners – duty of care owed by prison

The plaintiff, a prisoner imprisoned in the Australian Government's prison in the Northern Territory, successfully sued the Australian Government for damages for personal injuries sustained by him as a result of a violent sexual assault carried out on him by two other prisoners in the prison, one of whom had a previous history of carrying out such assaults.

The Court held that the Australian Government had owed a duty of care to the plaintiff, and that it had failed to discharge this duty. In so deciding, the Court followed the decisions of other courts in similar cases, such as the English Court of Appeal in *Ellis* v. *Home Office* [1953] 2 All E.R. 149, the High Court of Australia in *Howard* v. *Jarvis* (1958) 98 C.L.R. 177, the Supreme Court of Victoria in *Hall* v. *Whitmore* [1961] V.R. 225, the Queensland Court of Appeal in *Ralph* v. *Stratton* [1969] Qd. R. 348, the House of Lords in *Dorset Yacht Co.* v. *Home Office* [1970] A.C. 1004 and the Supreme Court of Western Australia in *Dixon* v. *The State of Western Australia* [1974] W.A.R. 65, and confirmed the principle that there is a well-established common law duty on prison authorities to exercise reasonable care for the safety of prisoners during their detention in custody.

L. v. *Commonwealth* (1976) 10 A.L.R. 269.

Capacity to stand trial—defendant deaf, dumb and member of Aboriginal community—no evidence of mental incapacity

The question of the defendant's capacity to stand trial on a charge of assault of a female in circumstances of aggravation was referred to the Supreme Court of the Northern Territory having regard to the fact that it was either proved or admitted by the parties that the defendant—

(i) was totally deaf from birth and was unable to use speech to communicate;

(ii) was a full blood Aboriginal man who had been brought up in a tribal Aboriginal Community;

(iii) had not absorbed the cultural or moral values of Aboriginal or tribal society;

(iv) had not absorbed the cultural or moral values of European society; and

(v) was of average or above average intelligence, with no evidence of any mental incapacity.

The question of law upon which the case was stated for the opinion of the Supreme Court was whether for the magistrate to proceed in the circumstances would be (a) contrary to law; (b) in excess of the jurisdiction of the court of summary jurisdiction; (c) a denial of natural justice; or (d) improper in the circumstances.

The Supreme Court held that—

the answer to the question posed in the Special Case was that to proceed in the circumstances would be contrary to law.

In so holding, the Court concluded that, on the authority of *R.* v. *Pritchard* (1836) 173 E.R. 135, *R.* v. *Berry* [1876] 1 Q.B. 447, *R.* v. *Presser* [1958] V.R. 45 and *R.* v. *Podola* [1960] 1 Q.B. 325, the defendant should be treated as if he were insane but that, notwithstanding the defendant's disabilities, a committal hearing might proceed because no plea was required from the defendant in such proceedings. The Court concluded that the state of the law in this area was defective and that it would be desirable if a legislative amendment could be introduced whereby the magistrate could have committed the defendant to trial on the assumption that the jury empanelled for the purpose would find the defendant unfit to plead and then to have the Supreme Court order that the defendant be kept in strict custody to await the Governor-General's pleasure.

Re an Information Laid by Ian Edward Pioch Against Sydney Lauder in the Court of Summary Jurisdiction of Alice Springs and in the Matter of a Special Case Stated Under Section 162 of the Justices Ordinance 1928–1976.

Pioch v. *Lauder* (1976) 13 A.L.R. 266.

Australia—Queensland

Drunken driving—failure to provide specimen of breath

The High Court of Australia has had occasion to consider the offence of the driver of a motor vehicle failing to take a breathalyser test, contrary to the requirements of s. 16 of the Traffic Acts, 1949–1974 (Qld.), particularly in relation to the meaning of the words "prescribed" and "fails" which occur in that section.

The High Court also had to consider whether the offence of failing to provide, as prescribed, a specimen of the motorist's breath is constituted unless and until the Crown establishes the making of an appropriate direction by a medical practitioner or authorised member of the Police Force.

Hammond v. *Lavender* (1976) 50 A.L.J.R. 728.

Obscene publications—onus to prove bona fide medical work or treatise

The Full Court of the Supreme Court of Queensland has dismissed an order nisi to review sought by the appellant in a case in which the appellant, a newsagent, had been found guilty of having had in his possession an obscene publication, contrary to s. 15(3) of the Vagrants, Gaming and Other Offences Act 1931 – 1971 (Qld).

The appellant contended, inter alia, that the publication concerned was in fact a bona fide medical work or treatise for the purposes of s. 17 of the Act, and accordingly he was entitled to retain lawful possession of the publication.

In dismissing the appellant's application, the Full Court held that—

(i) upon proceedings brought pursuant to s. 15(3) of the Act, the onus of proof that any article seized was a bona fide medical work or treatise was upon the person showing cause; and

(ii) in considering whether a publication was such a work for purposes of the Act (a) evidence that the publication's editorial board consisted of learned and responsible people and that responsible persons either subscribed to the publication or sought the advice of its editors to assist in resolving the sexual problems of patients was beside the point, (b) the fact that the publication might have a therapeutic effect did not mean that it was not obscene or that it was a medical work or treatise, (c) that it was the product which came under view rather than the motives and objectives of the publishers that mattered; and

(iii) the manner of presentation of the publication was of critical importance, even were one to assume the subject-matter and qualifications and standing of contributors to be typical of such a work or treatise.

Scott v. *Reid; Ex parte Reid* (1979) Qd. R. 37.

Possession of drugs—"have in possession"—entrapment

The Queensland Court of Criminal Appeal has had occasion to consider the meaning of the term "have in possession", as defined in s. 5(1) of the Health Act 1937 – 1976 (Qld). The definition of this term includes the phrase "having under control".

The Court held that where an accused had got a package of drugs into his hands and signed a receipt for them, he "had control" of the destiny of the package for purposes of the Act.

In so holding, the Court also observed that in dealing with cases such as this, and with drug cases generally, those who were trying to administer the law are not to be entirely frustrated by an ideal of fairness out of proportion to the offence, and that where, as here, the accused had made a statement to a police undercover agent corroborative of admissions allegedly made to the police before arrest, the defence of entrapment had not been made out.

R. v. *Warnemide* (1978) Qd. R. 37.

Medical practitioner – claims in access – strict liability for correctness of claims

The appellant, a qualified medical practitioner, was convicted of five charges laid under s. 129 of the Federal Health Insurance Act 1973. She was found to have claimed from the Health Insurance Commission amounts for consultations of 25 minutes or over, whereas in fact these consultations had taken less than 25 minutes, the latter category entitling her to a lesser sum than the former.

The magistrate considered that s. 129 of the Act imposed strict liability on a medical practitioner for the correctness of claims made on the Commission, although he based his decision on the fact that the appellant had herself inspected the record books daily and controlled and authorised her agents to complete and submit forms incorporating the relevant information. From these convictions the appellant appealed and returned orders to review.

The Queensland Court of Criminal Appeal, in discharging the order nisi and dismissing the appellant's appeal, held that—

section 129 of the Health Insurance Act did impose strict liability because –

(a) the purpose of the section was to ensure that the Health Insurance Fund was not made the target of false or misleading claims,
(b) the making of the claim was under the control of a practitioner, who personally signed the form,
(c) the Act could be effectively enforced only if medical practitioners were made responsible for the accuracy of the material in the forms submitted under cover of a claim, and
(d) s. 129(3) of the Act placed the onus on the medical practitioner

charged under the section to show that he did not know, and had no reason to suspect, that the material to which the charge related was false or misleading.

In so holding, the Court of Criminal Appeal applied the judgment of the Privy Council in *Lim Chin Aik* v. *R.* [1963] A.C. 160.

R. v. *White* (1979) 23 A.C.T.R. 432.

Dangerous drugs—importation and possession of heroin—onus on defendant to prove a "reasonable excuse" for possession

The applicant was charged on an indictment containing two counts charging him under s. 233B(2)(b) and (c) of the Customs Act 1901 with, respectively the importation and possession of prohibited imports, namely a quantity of heroin.

Section 233B of the Act provides that a person found guilty of any of the offences specified therein is punishable under s. 235 of the Act. Section 235 provides a penalty and, where "the court" is satisfied that the offence involves a narcotic substance that is not less than the traffickable quantity as defined by the Act, a much more substantial penalty.

Before pleas were taken, the appellant's counsel demurred and moved to quash the indictment. He argued that (a) s. 235 created an offence separate from s. 233B in so far as it required determinations, involving substantial consequences, as to traffickable quantity, and (b) because such determinations must be by a judge and not a jury, s. 235 was invalid as infringing s. 80 of the Australian Constitution which provides that indictable offences must be tried before a jury.

The trial judge overruled the demurrer and disallowed the motion. The trial proceeded.

The accused admitted that he imported the substance found to be heroin and that he had it in his possession, inside his clothing, when apprehended. However, he claimed that he had believed the substance to be a combination of vitamins, steroids and yeast; and that he had not known or suspected that it was a narcotic substance or a substance the possession of which was prohibited by Federal law.

The questions left to the jury included the question whether there was a traffickable quantity of heroin involved. The accused was found guilty on both counts, and appealed.

The Queensland Court of Criminal Appeal, in dismissing the appellant's appeal, held that—

(i) as to both counts, s. 235 of the Customs Act did not infringe s. 80 of the Constitution because—

(a) it was a sentencing provision and did not add a fresh element to offences provided by s. 233B,

(b) s. 80 of the Constitution was concerned with the trial of offences, not the passing of sentence,

(c) the sentencing judge had the responsibility to determine the facts when sentencing provided that his determination did not conflict with the jury's verdict,

(d) the words "the court" in s. 235 meant the sentencing judge, and

(e) the Federal Parliament could properly commit to the jury, as in s. 233B, the determination of elements of an offence and to the judge, as in s. 235, responsibility for sentencing;

(ii) as to count under s. 233B(1)(c)—

(a) if a person was in fact proved to have been in possession of prohibited imports, the onus was on him to prove, on the balance of probabilities, a reasonable excuse for that actual possession,

(b) the words "without reasonable excuse (proof whereof shall lie on him) has in his possession any prohibited imports to which this section applies" must be given the same construction in s. 233B(1)(c) and (ca), and

(c) where a Federal Act was being applied by State courts it was wholly undesirable for different interpretations to be applied by courts of different States;

(iii) as to the count under s. 233B(1)(b)—

(a) there was no onus on the prosecution either to establish mens rea on the part of the accused or to exclude the operation of the defence of mistake of fact,

(b) having regard to the subject-matter of the legislation and the virtual impossibility of proving the state of mind of an importer of narcotic goods in the absence of admissions, while there was much to be said to the contrary, it seemed that the legislature had intended to create the offence by proof of the actual importing or attempting to import,

(c) the absence in s. 233B(1)(b) and (d) of express reference, as in paras (a), (c) and (ca), to onus of proof did not indicate that an onus was on the prosecution to prove an accused's state of mind or that an approach to onus different from that relative to the latter was to be taken to the former paragraphs, and

(d) different considerations applied to the concepts of importation and possession because the provisions as to onus of proof in s. 233B(1)(a), (c) and (ca) were intended to allow a defence based on possible innocent, though actual possession; and

(iv) there had been no miscarriage of justice brought about by the trial judge's questioning of the accused because a trial judge was entitled to question a witness not only to clear up ambiguities but also for the purpose of testing his evidence, if

the judge had reason to believe that the evidence was or might not be in accordance with the truth.

R. v. *Gardner* (1980) 28 A.L.R. 140.

Australia – South Australia

Judicial notice of Gazette – nature of unsworn statements – effect of failure of accused to take objections during course of trial

The South Australian Court of Appeal has dismissed an appeal by the appellant against his conviction for having knowingly, by a false representation, induced a chemist to dispense a false prescription, contrary to s. 9(2)(a) of the Narcotic and Psychotropic Drugs Act, 1934–1974 (S.A.) and with having forged and uttered a prescription, contrary to s. 9(1) of that Act.

By a Proclamation published in the South Australian Government Gazette a particular drug had been declared to be a drug to which the Act applied. At the appellant's trial, counsel for the Crown "notionally" tendered the Government Gazette containing the gazettal of the Proclamation and the trial judge, stating that he had seen the Proclamation, did not require the Gazette actually to be put in evidence. The appellant's counsel did not object to this being done. Oral evidence was then given by a medical witness that the drug that had been found in the appellant's possession was the same drug as that which had been referred to in the proclamation, and the trial judge directed the jury that the drug found in the appellant's possession was one to which the Act applied.

On appeal, the Court of Appeal held, inter alia, that –

(i) in view of the provisions of s. 4(3) of the Act, the trial judge was entitled to take judicial notice of the Proclamation without the Government Gazette actually being tendered in evidence;

(ii) in any event, as the appellant's counsel had remained silent when counsel for the Crown had produced the Gazette and the trial judge had ruled that it was not necessary for the Gazette actually to be tendered in evidence, the appellant was bound by the course of the trial, and was not entitled to complain, on appeal, of the Crown's failure actually to tender the Gazette in evidence;

(iii) in the circumstances, the trial judge had been correct in taking judicial notice of the Proclamation and in directing the jury as he had done; and

(iv) the identification of the drug found in the appellant's possession as the drug referred to in the Proclamation, a matter which depended upon the oral evidence of a medical witness, was a question of fact for the jury, and accordingly should not have been taken away from them.

In so holding, the Court of Appeal gave detailed consideration to the failure of an accused's counsel to take objections during the

course of a trial, the extent of judicial notice, the functions of a court of criminal appeal, and the nature of unsworn statements.

R. v. *Harm* (1975) 13 S.A.S.R. 84.

Narcotic and psychotropic drugs—necessity of evidence of the nature and effects of the drug even where charge admitted

The Supreme Court of South Australia has held that—

in the case of a charge for the offence of illegally possessing Indian hemp, contrary to s. 5 of the Narcotic and Psychotropic Drugs Act 1934—1972 (S.A.), the court of summary jurisdiction must have evidence placed before it of the nature and effects of the drug even where, as here, the appellant had admitted to the charge.

Pearson v. *Samuels* (1976) 13 S.A.S.R. 428.

Dangerous drugs—evidence of nature and effect

The Full Court of the Supreme Court of South Australia has held that—

(i) on the hearing of a charge of an offence against the provisions of the Narcotic and Psychotropic Drugs Act, 1934—1974 (S.A.) in respect of the drug Indian hemp it was not necessary that evidence should be given as to the nature and effect of that drug as it was now generally accepted that the drug was the least harmful of the drugs to which the Act applied;

(ii) the court hearing the charge might proceed to impose sentence upon that basis, unless either side wished to tender more specific evidence about Indian hemp; and

(iii) on the hearing of a charge relating to other drugs, however, evidence as to the nature and effect of those drugs should be given.

The Queen v. *Tideman* (1976) 14 S.A.S.R. 130.

Compensation for criminal injuries—whether emotional upset with consequent ill effects constitutes "injury"

The Full Court of the Supreme Court of South Australia heard an appeal in a case involving an application for an order for compensation under the Criminal Injuries Compensation Act 1969–1974 (S.A.). The application had been made by the widow and three children of a man who had been murdered in the presence of his wife during an armed hold up by three men. One of the three robbers was convicted of murder, and the other two of manslaughter. The applicants claimed that they were entitled to compensation under the Act for the shock and emotional disturbance they had suffered as a result of the death of their husband and father.

The Full Court held—

(i) the applicants were persons to whom compensation might be ordered and paid under s. 4 of the Act;

(ii) the evidence given at the trial of the three men might be used to determine the question of compensation, and that further evidence was admissable for the purpose of determining that question; and

(iii) emotional upset, with consequent ill effects, was an "injury" within the meaning of s. 4 of the Act.

In so holding, the Full Court was particularly concerned with the definition of the word "injury" in the Act, and in interpreting its meaning were influenced by the dictum of Lord Denning, M.R. in *Hinz* v. *Berry* [1970] 2 Q.B. 40, 42.

Battista and ors v. *Cooper and ors* (1976) S.A.S.R. 225 (Sup. Ct.).

Compensation for criminal injuries—"injury"

The Full Court of the Supreme Court of South Australia dismissed an appeal against an award of compensation that had been made to a male inmate of an institution who had been forced by two other male inmates, by threats and fear, to submit to acts of oral intercourse.

In *In re Gage and Bird* (1978) 19 S.A.S.R. 239 the Supreme Court Compensation Act 1969 – 1974 (S.A.) on the ground that the inmate had sustained an "injury" arising out of a criminal act.

The Full Court, in dismissing the appeal, held that the combination of physical revulsion and mental shock caused by the crime which had been committed on the inmate constituted an "injury" for purposes of the Act.

In re Bird (1979) 21 S.A.S.R. 76.

Dangerous drugs — meaning of "heroin" — particulars to be contained in information

An information charged the accused with having in his possession prohibited imports, to which s. 233B of the Customs Act 1901 applied, that were reasonably suspected of having been imported into Australia contrary to s. 233B(1)(ca) of the Act.

Particulars of the offence contained in the information alleged that the prohibited imports were narcotic goods consisting of 10.9 grams of heroin, and evidence given for the prosecution showed that the substance which was the subject-matter of the charge weighed 10.9 grams and contained, inter alia, 12 percent of heroin, otherwise known as "diacetylmorphine."

The Supreme Court of South Australia held—

(i) that the word "heroin" in Schedule VI of the Act meant

"diacetylmorphine", and not the whole substance or preparation containing diacetylmorphine; and

(ii) that the information should be amended so that the amount of heroin stated in the particulars was the amount of diacetylmorphine shown by the evidence to have been contained in the substance which was the subject-matter of the charge.

R. v. *Gligora* (1979) 22 S.A.S.R. 159.

Disciplinary inquiry by Pharmacy Board—whether refusal of legal representation denial of natural justice

The Supreme Court of South Australia heard an appeal by the appellant, a pharamacist, against his being found guilty by the respondent Board of unprofessional conduct and being suspended from registration as a pharmacist.

The Board, which was established under the Pharmacy Act 1935 – 1973 (S.A.) is empowered under s. 19 of the Act to conduct a "full inquiry" into the conduct of any registered pharmacist and, upon a finding of guilty of infamous or unprofessional conduct, to make disciplinary orders against him, including the cancellation of his licence to practise.

In appealing to the Supreme Court, the appellant claimed, inter alia, that he had been denied natural justice by the Board because the Board had refused him the right to legal representation and to cross-examine witnesses.

The Supreme Court, in allowing the appellant's appeal, held that where the Pharmacy Board of South Australia conducted an inquiry pursuant to s. 19 of the Pharmacy Act (S.A.) into the conduct of a pharmaceutical chemist, the chemist was entitled to legal representation before the Board and to cross-examine witnesses who had given evidence before the Board.

In so holding, the Supreme Court examined the nature of inquiries conducted by the Board and the procedure to be followed at such inquiries, and either followed, applied or discussed the decisions in such English and Australian cases as *R.* v. *Assessment Committee of St Mary Abbotts Kensington* [1891] 1 Q.B. 378, *The King* v *The Board of Appeal; Ex parte Kay* (1916) 22 C.L.R. 183, *General Medical Council* v. *Spackman* [1943] A.C. 627, and *Hoile* v. *Medical Board of South Australia* (1960) 104 C.L.R. 157 which considered the right of a person appearing before a disciplinary tribunal to be represented by an agent and to cross-examine witnesses.

The Supreme Court expressly distinguished the recent English decisions in *Pett* v. *Greyhound Racing Association Ltd (No. 1)* [1969] 1 Q.B. 125, *Pett* v. *Greyhound Racing Association Ltd (No. 2)* [1970] 1 Q.B. 44 and *Enderby Town Football Club Ltd* v. *Football Association Ltd* [1971] Ch. 591 on the ground that such cases were "irrelevant", being confined as they were to disciplined forces which

form a group of their own, "possibly on the basis that persons joining such forces may be taken to have voluntarily surrendered some of their freedom and rights in the interests of discipline and in the recognition of the demands of authoritarian structures".

In so saying, the Supreme Court also stated that "For somewhat similar reasons, prisoners may be taken to have involuntarily surrendered certain rights and freedoms".

Kruger v. *Pharmacy Board of South Australia* (1979) 22 S.A.S.R. 339.

Sentencing — whether sentence varies for different drugs

The Full Court of the Supreme Court of South Australia has held, inter alia, that the onus is on the Crown, if it claims that hashish is a more deleterious drug than Indian hemp, to call evidence and demonstrate that fact to the sentencing court.

R. v. *Vivian* (1979) 23 S.A.S.R. 45.

Dangerous drugs — possession of any appliance for "use" — whether includes use by persons other than the accused

Section 5(1)(c) of the Narcotic and Psychotropic Drugs Act 1934–1978 (S.A.) provides that it is an offence for a person to have in his possession "any pipes, syringes or other utensils or any appliance or thing for use in connection with the preparation, smoking or administration of any drug to which this Act applies".

The Full Court of the Supreme Court of South Australia held that the "use" specified in s. 5(1)(c) of the Act is not restricted to use by the person in possession of the pipes or other things referred to in that paragraph, but includes use by other persons.

R. v. *Sims* (1980) 23 S.A.S.R. 115.

Australia—Tasmania

Prepacked food — labels not specifying date of packing — "label"

The Supreme Court of Tasmania, in an appeal by the appellant company from a conviction of having sold packages containing meat and other related goods in a prepacked form, when the label attached to such packages did not specify the date on which they had been packed, contrary to regulation 35(1) and (3) of the Public Health (Food and Drugs Standards) Regulations 1971 (Tas.), held, inter alia, —

(i) the purpose of the Regulations was to protect the buying public from unwittingly buying stale meat;

(ii) when regulation 35 spoke of the word "label" it was speaking of the label required by the Public Health Act 1962 (Tas.);

(iii) the definition of "label" in regulation 2 of the Regulations should be interpreted by inserting before "to a package" the words "on or";
(iv) a plastic container could be regarded as a label in the ordinary sense of that word; and
(v) as the goods were at the relevant time in the possession of the appellant company, it was not an answer to the charge to say that the goods were not for sale unless and until the driver of the appellant's delivery van had checked and found that the packages contained the necessary date labels.

Wignalls Smallgoods Pty Ltd. v. *Kiely* 31 L.G.R.A. 424.

Murder—defence of mental disorder—whether separate defence of automatism can be made on same evidence

The appellant was charged of an indictment for murder by stabbing. The appellant's defence was that by reason of mental disorder his act was not voluntary and intentional.

The trial judge charged the jury that they could find insanity and refused to put automatism as a separate defence. The jury convicted the appellant, who appealed to the Tasmanian Court of Criminal Appeal.

The Court of Criminal Appeal, in dismissing the appeal, held that where there was evidence of mental disorder on which the jury could have found insanity, a separate defence of automatism could not be made on the same evidence.

Williams v. *The Queen* (1978) Tas. S.R. 98.

Australia—Victoria

Insanity — Conceptual nature of — Insane and sane accused jointly charged

The Full Court of the Supreme Court of Victoria has held that —

(i) where there is evidence from which a jury may infer that an accused was not insane at the time of a killing and medical evidence that he was at that time insane, it is imperative that the jury should be adequately instructed as to what is mean by 'knowing' that the act was wrong;
(ii) there may be many different ways of explaining to a jury the conceptual difficulties involved in a disordered mind "knowing" that an act was wrong, but to tell them that if, through the disordered condition of his mind, the accused could not reason about the matter with a moderate degree of sense and composure, he could not "know" that what he was doing was wrong, had for long been accepted as a practical synthesis of the ideas involved;
(iii) there is nothing in the legal concept of insanity which precludes the possibility of a man assenting together with an

insance man to do an act and both men thereafter acting together to do the act;

(iv) such an assent together to do the physical acts which were the necessary part of the actus reus of a crime, made the sane man guilty of the crime if he had the necessary mens rea, although the insane man was not guilty on grounds of his insanity;

(v) in a particular case however the nature of the insanity may preclude the insane man from being capable of the assent which is necessary for the two men to be acting in concert; and

(vi) a sane person could be found guilty of aiding and abetting an insane person.

R. v. *Matusevich and Thompson* [1976] W.R. 460.

Town planning authority – power to impose conditions – statutory interpretation – whether legislation enacted but not yet in force can be called in aid

The Supreme Court of Victoria has held, inter alia, that –

(i) the Court could take into account a statutory amendment to local government legislation when interpreting such legislation even though the amending legislation is not yet in force;

(ii) the power of a town planning authority, or, on appeal, of the appeals tribunal, to impose conditions other than those specified in the relevant town planning scheme is limited to conditions relating to town planning considerations;

(iii) upon an appeal against the refusal or failure of a planning authority to grant a permit, the appeals tribunal may direct that a permit should issue, and that any such permit can contain any condition which may lawfully be imposed and which is specified in the determination;

(iv) a town planning condition is void for uncertainty only if it can be given no meaning, or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results;

(v) in town planning cases an over-technical approach should not be adopted in seeking to give a sensible meaning to conditions imposed in permits;

(vi) a condition in a permit which makes the permissible subdivision and use of the land for detached housing subject to the provision of water supply and sewerage is neither void for uncertainty nor unreasonable;

(vii) the availability of sewerage is a legitimate and proper consideration relevant to town planning; and

(viii) it would be entirely contrary to the concept of town planning for the town planning authority or, on appeal, the appeals tribunal to authorise the subdivision of broad acres into

housing allotments without giving serious consideration to the provision of water supply and sewerage which are most relevant to the preservation of amenities and to the proper use of the land for housing.

In so holding, the Court also gave consideration to the meaning of the words "issued" and "granted" in relation to permits either issued or granted under the Town and Country Planning Act 1961 (Vic.).

Weigall Constructions Pty. Ltd. v. *Melbourne & Metropolitan Board of Works* 30 L.G.R.A. 333.

Sale of unwholesome goods – whether contaminated food required to be positively injurious to health – "unwholesome" – "insect"

The Supreme Court of Victoria has considered whether the applicant retailer, in selling a packet of breakfast cereal to a customer that contained matted and cobwebbing substances and live and crawling grubs, had been guilty of the offences of having possession of unwholesome goods for sale and of selling unwholesome goods contrary to the Cleanliness (Food, Drugs and Substances) Regulations 1953 (Vic.).

The Court held, inter alia, that –

(i) the word "unwholesome" in section 276 of the Health Act 1958 (Vic) means not only positively injurious to health but also not favourable to or promoting good health, or not wholesome or healthful;

(ii) food can be "unwholesome" without it having to be positively injurious to a person's health;

(iii) evidence that grubs found in food can be eaten without ill effects is inconclusive;

(iv) the addition of extraneous matter to otherwise unwholesome food does not make it "unwholesome" if no change is made in its quality, but that principle does not apply where the whole contents of a packet are affected;

(v) when a packet of food is tendered as an exhibit along with evidence of its condition at the relevant time, the court need not rely on expert opinion on the question of the wholesomeness of its contents, but can form its own judgment;

(vi) there is no requirement that an analysis of food must be made before a prosecution is brought on the ground that it is unwholesome;

(vii) accordingly, the fact that in the present case the contents of the cereal were not submitted for analysis did not invalidate the prosecutions; and

(viii) the word "insect" in the regulation 6(j) of the Regulations is used in its popular sense, and expert evidence that the grubs were "insects" was therefore unnecessary.

Minister v. *Woolworths (Victoria) Ltd.* 30 L.G.R.A. 134.

Probation order—whether condition for submission to psychiatric treatment justified

The Full Court of the Supreme Court of Victoria had occasion to consider the circumstances in which a probation order should be made against a defendant on condition that he submitted to psychiatric or psychological treatment.

The Full Court held that –

(i) a probation order should not be made releasing a convicted person on condition that he submit himself to psychiatric or psychological treatment unless –
   (a) there was a practical way of treating his psychiatric or psychological condition,
   (b) he consented to a requirement in a probation order that he submit himself to psychiatric or psychological treatment, and
   (c) the various persons, hospitals and authorities necessary to provide treatment were prepared to accept the accused as a patient; and

(ii) treatment should not be ordered with the consent of a convicted person unless he knew what treatment was intended to be carried out and he was capable of comprehending what was involved in it and of expressing a real and informed willingness to submit to it.

R. v. *Tutchell* (1979) V.R. 248.

Australia—Western Australia

Medical fees reimbursement cheques — obligations of the Health Insurance Commission

The first plaintiff had been a patient of the second plaintiff, a medical practitioner, for some years and it had been his custom when submitting a medical fees reimbursement form to the defendant, a statutory corporation providing patient cover for the cost of hospital and medical expenses, to attach to it a direction addressed to the Manager requesting the fund specifically not to send his refund cheques to the second plaintiff's home address but instead a postal address at which that plaintiff practised. Although initially the fund complied with the first plaintiff's request, it subsequently informed him that it would no longer do so but would insist on sending the cheques to the second plaintiff's home address, claiming that this was required of it under s. 20(2) of the Health Insurance Act 1973.

The plaintiffs each sought declarations that the first plaintiff was entitled to nominate an address, other than his own, for sending "pay doctor" fund cheques, and that the defendant fund's obligations to give the cheque to the second plaintiff pursuant to the Act would thereby be validly discharged.

The Supreme Court of Western Australia dismissed both summonses. In so doing, the Supreme Court held —

(i) under the Act the defendant was not compelled to send or hand the cheques payable to a patient to the patient at an address nominated by the patient;

(ii) the defendant's obligation under the Act was merely to give the cheque to the patient;

(iii) that was accomplished at whatever address or place the patient received the cheque, notwithstanding what other place or address he may have nominated as the address for payment; and

(iv) the second plaintiff had no standing to maintain his action against the defendant because the question of construction of the sub-section that the originating summonses raised was not one which would establish whether or not he was entitled to any legal or equitable right.

Stack v. *The Health Insurance Commission; Kirkman* v. *The Health Insurance Commission* (21 October 1977: not yet reported).

Dangerous drugs—connotation of a word as part of interpretation of statute—trial judge to decide meaning—whether international convention could control or influence expressions in statute

The High Court of Australia granted the applicant special leave to appeal from the dismissal of her appeal by the Western Australian Court of Criminal Appeal (*Yager* v. *R.* (1976) 11 A.L.R. 646) in a case in which she had been convicted of two offences against the Customs Act 1901—1975, namely that she had, in contravention of s. 233B(1)(b), imported into Australia a prohibited import, and that she had, in contravention of s. 233(1)(c), without reasonable excuse had in her possession prohibited imports, namely a quantity of cannabis. The High Court, by a majority, dismissed the applicant's appeal against conviction.

Section 4 of the Customs Act defines "cannabis" as a "cannabis plant" and "cannabis plant" as "a plant of the genus cannabis sativa". At her trial, the applicant admitted every element of the charges against her, except that the substance was a prohibited import. She admitted that the material in her possession was "plant material of the genus cannabis", but did not admit that it was "cannabis sativa". The trial judge ruled that he would direct the jury, as a matter of law, that the phrase "plant of the genus cannabis sativa" in the Customs Act embraced all plants of the genus cannabis. The applicant then had appealed unsuccessfully to the Western Australian court of Criminal Appeal on the grounds that—

(a) because the latest botanic opinion was that there were three species of the genus cannabis, cannabis sativa being one of them, the trial judge had misinterpreted the Act and the question whether the substance possessed by the applicant was or was not cannabis sativa should have been left to the jury; and

(b) the trial judge had erred in directing the jury to return a verdict of guilty.

In arriving at its decision, the High Court held—

(i) it may be accepted that when a statute uses an expression which is not self-explanatory it may be necessary to determine to what the statute is referring in using the descriptive expression;

(ii) once the meaning is assigned, the further question whether some substance or thing in fact falls within the description of the statute properly understood is a matter of fact to be determined by the tribunal of fact;

(iii) where the resolution of the connotation of a word used by the legislature which is not self-explanatory is undertaken as a part of the interpretation of the statute, it is for the judge and not for the tribunal of fact to decide;

(iv) it was for the trial judge to decide the meaning of the descriptive expression "genus cannabis sativa";

(v) the description "cannabis sativa" was an appropriate description of the genus cannabis at the time when the Act was passed;

(vi) the meaning in the Act could not be determined by the circumstance that the description of the genus in the Act did not conform to that contained in the *International Code of Botanical Nomenclature;*

(vii) although reference to that Code might be significant in order to identify the genus cannabis sativa, failure to comply with the Code when describing a genus would not warrant the conclusion that Parliament was specifying only a particular species;

(viii) except, possibly, in the case where a special verdict had been found, a trial judge might never direct a jury to enter a verdict of guilty;

(ix) a trial judge must direct a jury on any question of law that arose;

(x) although there was no reason why the trial judge should not make it clear to the jury that if they do their duty they will return a verdict of guilty, it was still necessary for the judge to leave it to the jury to bring in a verdict, and he could not dictate the verdict they were to return;

(xi) since *Bushell's case* (1670) 6 State Trials 999, it had been a fundamental principle of constitutional law that a juror might not be punished for returning a verdict against the direction of the court, and hence might not be intimidated into returning a particular verdict;

(xii) when the jury was asked to return a general verdict, they had the right and duty to determine, not only the facts of the case, but the guilt or innocence of the accused;

(xiii) although there were exceptional cases in which a judge might ask a jury to reconsider their verdict, if they insisted upon their verdict the judge was bound to receive it;

(xiv) there was no legitimate foundation for resorting to the definitions of cannabis contained in the Narcotic Drugs Act 1961, an Act giving force to the Single Convention on Narcotic Drugs 1961, for the purpose of modifying or qualifying another statutory definition contained in a different Act of Parliament, such as the Customs Act;

(xv) there was no basis on which the provisions of an international convention could control or influence the meaning of words or expressions used in a statute, unless it appeared that the statute was intended to give effect to the convention, in which event it was, on the authority of *Salomon* v. *Commissioners of Customs and Excise* [1967] 2 Q.B. 116 and *The Banco* [1971] P. 137, legitimate to resort to the convention to resolve the ambiguity in the statute;

(xvi) as cannabis sativa was a technical name or description, expert evidence to its denotation and identifying characteristics was receivable; and

(xvii) at best the applicant's case was that Parliament had been mistaken in treating cannabis sativa as a genus, but that could not alter the circumstance that Parliament had prescribed a genus and allow the Court to say that Parliament had prescribed a species.

Yager v. *R.* (1977) 13 A.L.R. 247.

The Bahamas

Death certificate—autopsy report—whether inadmissible as hearsay

In a trial for murder, the trial judge admitted both the death certificate and an autopsy report.

Section 42(5) of the Evidence Ordinance provides—

> Hearsay evidence may not be admitted except in following cases:—
>
> where the statement is contained in any official record, book or register kept for the information of the Crown or for public reference and was made as the result of inquiry by a public servant in discharge of a duty enjoined by the law of the country in which such official record, book or register is kept

Held by the Court of Appeal—

(i) to be admissible under the subsection the document or record must be one "made as a result of inquiry by a public servant in discharge of a duty enjoined by "law";

(ii) the post-mortem examination and subsequent report were performed and made pursuant to such a public duty, and the report was a "record . . . kept for the information of the Crown";

(iii) the subsection was not a statutory codification of the common law of England and fell to be interpretted according to the plain meaning of the words;

(iv) similarly, the death certificate was undoubtedly made "as the result of inquiry" by the doctor, who was a "public servant" however it was not made "in discharge of a duty" enjoined by any law, and so, unlike the autopsy report, it had been wrongly admitted in evidence;

(v) even without both documents, the cause of death had been proved conclusively by admissible evidence.

Newbold v. *Regina* (Appeal No. 21 of 1979: 6 March 1980)

Belize

Murder—absence of apparent motive—whether raises the plea of insanity—prejudicial effect of newspaper reports

The appellant was convicted of murder. In an unsworn statement from the dock he denied being anywhere near the scene of the crime. Counsel did, however, in cross-examination of the doctor raise the possibility of a person not knowing what he was doing while he was drunk or under the influence of drugs. The doctor declined to make any statement on the effects of alcohol or drugs of unspecified quantity on persons in general. Counsel for the appellant submitted that the failure of the judge to put to the jury the possibility of insanity, on the basis of these questions and answers and the absence of proof of any motive, vitiated the conviction.

The Court held—

the absence of apparent motive does not ipso facto raise the possibility of insanity. The mere fact of an apparent lack of motive did not, in the absence of some other fact or circumstance arising from the evidence, raise the issue of insanity and place upon the trial judge a duty to put the matter to the jury. Hypothetical questions put by defence counsel to a Crown witness cannot, in the absence of any factual basis for them, support a submission that the defence of insanity has been raised irrespective of the fact that the answers to such hypothetical questions do not in any way support the suggestion that the accused may have been insane. The obligation of a judge to put to the jury a defence not raised by the accused or by counsel refers to a defence which arises from the evidence.

The prejudicial effect of newspaper reports which disclosed more details than were adduced in evidence was raised as a ground for quashing the conviction. The Court held—

while they should be anxious to avoid the development of a situation where such indiscretions by newspapers would necessarily abort any subsequent criminal trial, a clear warning by the trial judge to the jury to "remove from (their) minds

anything (they) may have heard or may have read in the newspapers" was adequate, without reference to the offending articles, and a more elaborate warning was not called for in view of the strength of the prosecution evidence.

Leopoldo Jones v. *Regina* Criminal Appeal No. 3 of 1977.

Canada—Prince Edward Island

Mentally defective young woman—power of Court to authorise sterilization operation

The applicant, mother of a 24-year-old girl "Eve" suffering from extreme expressive aphasia and moderately retarded, sought—

(a) a declaration that "Eve" was a mentally incompetent pursuant to the provisions of the Mental Health Act;

(b) that the applicant be appointed the Committee of the person of "Eve"; and

(c) that the applicant be authorised to consent to a tribal ligation operation (i.e. sterilization) being performed on "Eve".

The evidence was that little is known of the cause or of any remedy for the condition of expressive aphasia, in which the sufferer is made to communicate her thoughts or concepts. "Eve" was not capable of informed consent, her condition was probably non-inheritable, and she was incapable of using effective alternative means of contraception.

Held—

(i) the question of consent by or on behalf of a mentally incompetent person appears to be a very grey area where the proposed procedure is only marginally therapeutic or is strictly contraceptive;

(ii) while "Eve" might not be able to understand and fully appreciate the fulfillment and privilege of procreation, the court must be scrupulously cautious before depriving her of them;

(iii) an order appointing a person to be the committee of a person in need of guardianship has effect in the words of the Mental Health Act (R.S.P.E.1, 1974, Cap M-9), "in the same manner as a grant to the committee of the person and estate if a lunatic made by and under the order and direction of the Lord Chancellor of England would have done at the time of the passing of the Act 15 Victoria, Chapter 36,......";

(iv) it appears doubtful whether, in early Victorian times, the direction of the Lord Chancellor would have encompassed sterilization procedures;

(v) by s. 45 of the Criminal Code, sterilization performed for purely contraceptive purposes is not illegal if (a) it is voluntarily submitted to by the patient, (b) with informed consent, and (c) it can be found to be for the benefit of the patient. *Dame*

Cataford et al v. *Docteur Morean* (noted at *Canadian Bar Review* Vol LV11, No. 1, p. 89) does not go so far as to say that purely contraceptive sterilization is necessarily legal, even with consent, in all circumstances;

(vi) the decision to carry out a non-therapeutic operation on a minor or a mentally incompetent is not within the parent's subjective judgment, or the doctor's clinical judgment;

(vii) the court was invited to invoke its traditional jurisdiction as *parens patriae*, there being no clear statutory authority for the mother to authorise the proposed surgical procedures, and the fact that there may be no precedent for this should not in itself be a deterrent;

(viii) the court should not exclude the possibility of medical advances discovering a remedy for "Eve's" condition, and as the operation would be irreversible, to permit it to be performed could be to deny her the privilege and right to bear children;

(ix) regardless of how retarded they may be, the "Eves" were persons with rights which the courts must preserve and protect.

In the matter of "Eve" (judgment delivered 14 June 1979: not yet reported).

Gibraltar

Manslaughter – cause of death – trauma and pre-existing natural disease.

The defendant was charged with manslaughter. He admitted having assaulted a fellow seaman, kicking him first in the stomach and then twice or three times on the head. The cause of death was established as rupture of a pre-existing developmental aneurism of the cerebral vessels. The defence accepted that the death was probably the result of the assault but argued that coincidence could not be excluded. The question was whether the probability was sufficient to satisfy the standard of proof.

For the defence, it was argued, relying on *R.* v. *Summers* (1953) 36 Cr. App. R. 14, that the direction to be put to the jury was that they must feel sure of the guilt of the defendant. The Chief Justice rejected this and, relying on *McGreevy* v. *D.P.P.* (1972) 57 Cr. App. R. 424, adhered to the standard of proof beyond reasonable doubt. He directed the jury that the law does not require certainty but a very, very high degree of probability, such that while there are or may be other possibilities, it would be unreasonable to take them into account. The jury convicted. An appeal is pending.

R. v. *William Cooper* (1979: not yet reported).

Articles 19(1)(g), 226 of the Constitution—whether right to receive higher or professional education which is a pre-requisite to practising a trade or profession could be considered to be fundamental right capable of being enforced

The Court has held that—

(i) the decision of the Supreme Court in the case of Maneka Gandhi (AIR 1978 SC 597) would appear to have affixed its seal of approval on the principle that even if a right was not specifically named in the fundamental rights chapter of the Constitution, it may still be fundamental right covered by some clause of its various articles, if it was an integral part of a named fundamental right or partook of the same basic nature and character as an embodied fundamental right, even though it was not enough that the right claimed merely flows or emanates from a named fundamental right or that its existence was necessary in order to make the exercise of the named fundamental right meaningful and effective;

(ii) if the right to receive higher education or a professional education, which is a pre-requisite to practising a particular trade or profession or to exercise some of the fundamental rights, such as the freedom of expression, be in themselves fundamental rights on the basis of the aforesaid theory, there would be no escape from the conclusion that when the petitioner was sought to be deprived of the opportunity to pursue medical education by an improper order, the impugned action (of cancellation by the University of Delhi of his admission when he had reached the fifth and final year of his studies on the ground that on verification it had been found that he did not belong to the Scheduled Caste and had obtained admission by a false representation) would constitute an infraction of his fundamental right;

(iii) in the present state of the law, it is not easy to hold either with reference to the theory of emanation or extension or that of the integral part of a named fundamental right to say that any or every denial of an opportunity to carry out professional or technical education or studies would necessarily impinge on the fundamental right to carry on any trade or profession for which such technical or professional study may be a pre-requisite. There can, however, be no doubt in the context of the legal position that obtains today that where the right to pursue professional or technical studies, the completion of which would directly entitle a student to practise a profession, as in the present case, any improper interference in such a pursuit would attract the fundamental right to carry on the profession because the right to carry on the profession would be directly interfered with by such an improper order.

Inder Parkash v. *Deputy Commissioner, Delhi, AIR* 1979 *Delhi* 87.

Kenya

Medical practitioner struck off—jurisdiction to entertain appeal

The appellant, a medical practitioner, was struck off the Register following an inquiry by the Medical Practitioners Board. Some four months after the decision of the Board the appellant invoked his statutory right of appeal to the High Court. The relevant provision did not stipulate the time in which the appeal must be made and the appellant brought the matter before the court by way of an application for leave to file the appeal out of time. The trial judge was of the view that the appeal must be made "without unreasonable delay" (s. 58 Interpretation and General Provisions Act) and that in the circumstances the delay was unreasonable. The appeal was dismissed. The appellant appealed against this decision.

The argument before the Court of Appeal was whether that Court had jurisdiction to hear an appeal in the absence of specific statutory authority. Counsel for the respondent sought to argue that the court lacked (criminal) jurisdiction on the basis that the appeal was made not from an appeal decision of the Supreme Court but a decision of the Supreme Court refusing leave to appeal out of time. The court refused to follow an earlier ruling of the East African Court of Appeal which supported counsel's argument and took the wider view that once a case had been brought before the Supreme Court "the ordinary incidents of the procedure of that court are to attach and also that any general right of appeal from its decisions likewise attaches" (Lord Haldane, L.C. in *National Telephone Company Limited (in Liquidation) and anor* v. *Her Majesty's Postmaster General* [1913] A.C. 546). It followed that the court held it had jurisdiction to consider an appeal on the question of the time in which an appeal must be brought from the Medical Board. It was accepted that the appeal must be made without unreasonable delay, but in the event the court held that the delay in the present case was not unreasonable.

Dr. Munene v. *Republic* (29 May 1978: not yet reported).

Nauru

Precedent—construction of Criminal Code—cause of death—removal of mechanical respirator

The accused was charged with manslaughter contrary to s. 303 of the Criminal Code (First Schedule to the Criminal Code Act 1899 of Queensland (Adopted)). The accused, whilst intoxicated, drove a motor-cycle and in the course of overtaking another vehicle went on to the wrong side of the road and collided with an oncoming motor-cycle driven by the deceased. The deceased suffered extensive head and facial injuries and died four days later when a mechanical respirator was removed preparatory to transferring him to Australia for further treatment.

Convicting the accused the Supreme Court of Nauru held—

(i) as appeals now lie to the High Court of Australia it was bound by the decisions of that Court on the construction of the Criminal Code;

(ii) even though removal of the respirator may have contributed to death the injuries sustained in the collision were a cause of death so long as they were "an operating cause and a substantial cause of the death";

(iii) the removal of the respirator although unnecessary was not unreasonable and did not break the chain of causation but rather was the same as if treatment had been available but not used.

In so holding, the Court considered and applied the decisions in *Evgeniou* v. *The Queen* [1964] A.L.J.R. 508; *Thomas Joseph Smith* (1959) 43 Cr. App. R. 121; and *Robert Konrad Blaue* (1975) 61 Cr. App. R. 271. The Court doubted the proposition that if the cessation of treatment had been criminally negligent the chain of causation would have been broken, as being logically unsound, but did not find it necessary to decide the point.

Republic v. *Inak Scotty* Criminal Case No. 3/1977 (Sup. Ct.).

New Zealand

Abortion – Meaning of "unlawfully" in s. 183 of Crimes Act 1961

The defendant, a qualified medical practitioner, was acquitted on 12 counts charging that, with intent to procure the miscarriage of the woman concerned, he unlawfully used an instrument on 12 named women contrary to s. 183(1)(b) of the Crimes Act 1961. The trial Judge had directed the jury that the test for whether or not the use of an instrument was unlawful was whether it was necessary to preserve the woman from serious danger to her life or to her physical or health, not being the normal dangers of pregnancy and childbirth. On a case stated, the Crown submitted that the Judge's direction went too far in that the jury was told that serious danger to physical or mental health was a sufficient justification in itself, irrespective of whether such dangers to health carried with it a real danger of the mother dying or her life being shortened.

Held (Wild CJ dissenting) —

for the purposes of the criminal law, at least in the case of induced miscarriage during the first tremester of pregnancy, a bona fide intention to preserve the health of the mother from a real or substantial risk of serious harm prevented an abortion from being unlawful, and the Judge's direction was correct in law subject to the qualification that the concluding words "not being the normal dangers of pregnancy and childbirth" were at best redundant and, although there was no misdirection, were better left unsaid.

R. v. *Bourne* [1939] 1 K.B. 687, *R.* v. *Newton and Stungo* [1958] Crim L.R. 469 and *R.* v. *Davidson* [1969] V.R. 667 considered.

R. v. *Woolnough* (Court of Appeal, Wellington, 22 July 1976; CA 14/7). Noted at [1976] Butterworths Current Law para 593.

Murder — Intent — Defence of automatism

A few hours after taking LSD accused shot a friend at point blank range with a sawn-off shot gun. On the basis of a pre-existing psychiatric disorder or the ingestion of LSD or both the alternative defences were in effect automatism, or insantiy, or incapacity to form the necessary "murderous" intent. The jury found the accused guilty of murder. The summing-up had proceeded on the basis that self-induced intoxication could be a defence to manslaughter, but on appeal it was agreed that the applicability or otherwise in New Zealand of *DPP* v. *Majewski* [1976] 2 All E.R. 142 be kept open. —

Held, dismissing appeal —

(i) it may well be that when the evidence in a case is considered as a whole the initial presumption of sanity (s. 23(1) of the Crimes Act 1961) will fail to lead to a clear inference of mens rea, in which event the accused is entitled to be acquitted. But once, sanity being presumed, the necessary intent is clearly to be inferred, then the onus rests upon the accused in terms of s. 23(2) to show that by reason of disease of the mind he did not appreciate either the physical or the moral quality of his acts. If he fails to do this, the provisional presumption of sanity will not have been displaced nor the consequential inference of capacity and intention;

(ii) on the facts it was unnecessary for the Judge to raise alternative and hypothetical grounds for manslaughter, having on other grounds left such a verdict to the jury;

(iii) the Judge was justified in commenting upon the failure of the accused to give evidence despite the insanity defence, because an important issue put forward on behalf of accused was that he had acted in some sort of trance and his hearsay explanations to the doctors were given by them in evidence;

(iv) Crown counsel must not fight for a conviction nor embark upon a course of conduct calculated to persuade the jury to a point of view on the basis of prejudice or emotion. Certain extracts taken from Crown counsel's final address were unfair and objectionable but taken in context with the rest of the address and balanced against the summing-up there was no real risk that they tipped the balance against the appellant.

R. v. *Roulston* (Court of Appeal, Wellington, 29 July 1976 CA 119/75). Noted at [1976] Butterworths Current Law para. 594.

Witness granted leave to refresh his memory from notes—whether cross-examining counsel entitled to inspect notes

The Supreme Court has held that where a witness uses a document in the witness box to refresh his memory, the document may be seen by the opposing party. The practice of not permitting defence counsel

to look at notes made by prosecution witnesses such as policemen and traffic officers was expressly disapproved.

Brownrigg v. *Ministry of Transport* [1977] New Zealand Recent Law 159.

Income Tax—donation to Society for the Protection of the Unborn Child—whether charitable donation

The taxpayer claimed as a deduction a donation made to a pressure group actively campaigning for restrictive abortion laws. The Commissioner disallowed it.

On appeal by the taxpayer the Supreme Court held—

(i) in determining whether the funds of a society were being disbursed for charitable purposes it was relevant to enquire not only as to the stated objects of the society but also as to the manner in which those purposes were being carried out;

(ii) funds are not disbursed for charitable purposes if the dominant purpose, or one of the main purposes, of a society was political;

(iii) the professed single object of the society was to prevent changes in the statute law and to encourage further legislative safeguards: this was to frustrate an obvious political object, and so was itself a political object and not a charitable one;

(iv) nor were the activities charitable as being for the advancement of education, as the advancement of education does not include the indoctrination with the merits of a cause. It is not for the public benefit to take one side in a controversy, even when the advancement of moral thinking is the means adopted to incline public opinion towards the desired direction.

Molloy v. *Commissioner of Inland Revenue* (1977) 2 T.R.N.Z. 211.

Patents—opposition proceedings

The impact of penicillin was first observed in 1929 by Fleming. Penicillin was isolated during WW2 research and produced biosynethically until 1959 when Beecham demonstrated their new "semi-synthetic" penicillins. In 1959/60 Beecham and Bristol co-operated and during this time "ampicillin" was discovered; it became the standard against which others were tested. In 1964 Beecham filed UK patent specification 978178; this noted and claimed the desirable properties of the *o*–, *m*– and *p*– hydroxy derivatives of ampicillin when tested against certain micro-organisms in mice. "Amoxycillin" is the *p*–(–)hydroxy derivative of ampicillin. Beecham used it in 1968 in tests on humans and found its absorption qualities exceeded those of ampicillin; a patent

application was filed in the UK in 1968 and in NZ in 1969 (No. 157516). The patent rights for amoxycillin have been contested by Bristol in many countries. Barker J. has recently determined the result in New Zealand in a 109-page judgment.

The judgment commences with an explanation of the role of Professor Ferrier of Victoria University who acted as scientific adviser to the Court (a novelty in the country). Another preliminary discussion is of the nature of opposition proceedings (i.e. under s. 21 of the Patents Act 1953): the questions to be asked include: Is there a prima facie case for the grant of a patent? Does justice require that the application be allowed to proceed to resist invalidity claims in proper revocation proceedings (i.e. under s. 41)?

The two grounds advanced by Bristol in their opposition were (i) prior publication (in patent no. 978178) and (ii) obviousness i.e. no inventive step involved having regard to the state of the art). Both failed and the Commissioner was ordered to seal Beecham's patent.

Barker J. sets out a number of reasons for his conclusion on the prior publication point including the fact that 978178 referred to tests on mice (not necessarily applicable to humans), that 978178 referred to compounds of which amxycillin was a component (which was not made until some time later) and that the English Court of Appeal has recently decided the identical contest in Beecham's favour. On the obviousness point, he considered that the Bristol evidence involved too much hindsight.

Beecham Group Limited v. *Bristol-Myers Company,* (Supreme Court—Wellington, M 285/78; 20 February 1980) noted in *The Capital Letter* Vol. 3 No. 6 (87).

Misuse of drugs—whether evidence of propensity admissible

This decision raised important issues relating to the admissibility of evidence tending to establish the propensity of an accused in relation to the class of offence charged. The applicant was found guilty by a jury on the charge of importing cannabis resin into New Zealand. Part of the evidence upon which the Crown relied was evidence of propensity; that is, evidence as to the appellant's wider involvement in the drug scene. The particular evidence to which objection was made was categorised as follows—

(a) two sets of scales found at the applicant's house which on scientific examination revealed minute traces of heroin,
(b) that the applicant was a drug addict,
(c) that morphine had been found at the applicant's house, and
(d) that the applicant disputed the value of the cannabis resin estimated by the Police and used certain colloquial phrases, often attributed to drug users, to describe the various controlled drugs.

Following the rule laid down by *R.* v. *Te One* [1976] 2 N.Z.L.R. 510, 514; that evidence must be excluded if it can do no more than show that the defendant is likely to have committed the crime charged, the Court ruled that—

(i) the relevance of the above-mentioned evidence to the charge was limited to propensity. Its only relevance was to indicate that because of the applicant's involvement in the drug scene he was the type of person who could be expected to commit this type of offence;

(ii) the evidence should not have been admitted by the trial judge on the basis that its prejudicial effect outweighed its probative value. The cumulative effect of the evidence was to create a real risk of a miscarriage of justice.

The Court declined to order a new trial on the basis that the remaining evidence adduced by the Crown amounted to no more than a serious suspicion that the applicant had been a party to the importation of cannabis resin and was therefore insufficient to place before a jury. The appellant was accordingly acquitted.

R. v. *Jennings* [1979] N.Z. Recent Law 339.

Swaziland

Disposal of a child's body—intent to conceal birth—whether death before or after disposal material

The accused had pleaded guilty in the Magistrate's Court of having contravened s. 2(1) of the Concealment of Birth Act 1943 (No. 5 of 1943), but the matter thereafter came to the High Court on review when the Chief Justice directed that it be set down for argument. It appeared from the recorded evidence that the accused had given birth to a child which she dumped in her toilet, from where the child was removed to hospital but who died about three days later from atelectasis of the lung. Section 2 of the Swaziland Act is in practically identical terms with s. 113 of the South African General Law Amendment Act 1935 (No. 46 of 1935). The section under which the accused was convicted on her plea of guilty makes it an offence for a person to dispose of the body of any child with intent to conceal the fact of its birth "whether such child died before, during or after birth". In the case of *R.* v. *Lequila* (1946) E.D.L. 8 Gardner J. on review, not argued before him by Counsel, held that there could be no conviction unless what was disposed of was the dead body of the child. In *R.* v. *Oliphant* (1950) (1) S.A. 48 de Beer J. P. stated that the relevant section "quite clearly envisages the disposal of a dead body and this is an essential element of the crime which should have been alleged".

The Chief Justice Mr. Justice C. J. M. Nathan, however, differed from the decisions in these cases.

Held—

(i) the evil with which the legislature is concerned is the disposal

of the body of a child with intent to conceal the fact of its birth, and should be just as much an offence if the child is alive as if it is dead;

(ii) in the light of s. 2(3) of the Act which is to the effect that "a person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of" (a similar provision appears in the South African section), it was unnecessary to prove that the child was dead before the body was disposed of and that the subsection indicated that it could just as well be a live body.

The conviction was accordingly confirmed.

Rex v. *S. M. Nkambule* (Review Case No. 135 of 1976).

Professional negligence – application of doctrine of res ipsa loquitur – standard of proof in cases of professional negligence

The respondent sued through his next friend for damage to his eye during a forceps delivery at birth. The mother had been in labour for some time and the midwife, realizing that there were complications, called in a doctor, the second appellant. He discovered that the foetus was in the right occipto–posterior position and that there was foetal distress. He tried to rotate the head to the occipito-anterior position but could not do so and hence he manouvred it to the straight occipital position. He inserted the forceps over the head and delivered the baby by traction. The child, however, sustained injury to its eye which was treated during ten days the mother and the child remained in the hospital. The baby was later taken to a Kampala specialist but it was discovered that it was too late to save the sight of the eye.

The High Court held that the doctor had been negligent in not checking the position of the forceps or applying them improperly, and that the principle of res ipsa loquitur applied. The hospital was found negligent in not referring the child to an eye specialist in time. The High Court also accepted a proposition of Lord Denning in *Hucks* v. *Cole* [1968] New L.J. 469 to the effect that standard of proof in a case charging professional negligence against a medical man was higher than in other cases.

On appeal to the Court of Appeal for East Africa, it was held –

(i) the court had never come across a case where the doctrine of res ipsa loquitur had been applied to a mistake or error of judgment by a surgeon in a difficult and tricky operation as the forceps delivery of a baby. It would be placing an impossible burden on a surgeon if the doctrine applied and the surgeon, in any operation not entirely successful, would have the onus of justifying every moment in operation;

(ii) the evidence had established what had occurred and therefore the doctrine of res ipsa loquitur could not apply;

(iii) on the facts it had not been shown that the doctor was negligent;
(iv) the injury to the eye was caused by the operation and not by any failure on the part of the hospital to refer the child to an eye specialist;
(v) the burden of proving negligence against a medical or professional man was not higher than in other cases – the burden being to prove that damage was caused by negligence and not a question of misadventure and that burden must be discharged on a preponderance of evidence.

Pope John's Hospital and another v. *Kasozi* [1974] E.A. 221; [1974] H.C.B. 49.

United Kingdom

Cannabis – definition – whether leaves and stalks containing cannabis resin included in definition

Section 37(1) of the Misuse of Drugs Act 1971 defines cannabis as "the flowering or fruiting tops of any plant of the genus of *cannabis* from which the resin has not been extracted." Held by the Court of Appeal (quashing convictions for possession of cannabis leaves and stalks containing cannabis resin) –

(i) the words "flowering and fruiting tops" were words of limitation indicating a part and not the whole of the plant above the ground, so that the leaves and stalks were not necessarily within the definition even though they contained cannabis resin;
(ii) in the absence of evidence that they were parts of the flowering or fruiting tops the convictions would be quashed.

R. v. *Goodchild* [1977] 1 W.L.R. 473.

Written statements by experts—preferable to have fewer experts give evidence on oath

In a case alleging unlawful possession of a drug the prosecution tendered a large number of statements by experts. On appeal the Court of Appeal observed that this was not always a satisfactory approach. The judge requires the assistance of watching the witness, listening to him and observing his demeanour as much as when dealing with a technical question as when dealing with a running-down accident. It would have been better had the judge had perhaps two or even three experts who could be cross-examined, who could explain matters to assist him if possible.

R. v. *Goodchild (No. 2)* [1977] 1 W.L.R. 1213.

Proceedings for personal injuries—order for production of hospital records—whether jurisdiction to limit production to medical advisers

By s. 32(1) of the Administration of Justice Act 1970—

> "On the application of a party to any proceedings in which a claim in respect of personal injuries is made, the High Court shall have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of that claim (b) to produce to the applicant such of those documents as are in his possession, custody or power".

The hospital records relating to the treatment of the respondent, who was plaintiff in an action arising out of an accident, were in the custody of the appellants. The respondent, the defendant in the action, applied under s. 32(1) of the Act for an order that the appellants should produce them to him, and an order was made for production "to the legal advisers of the defendants". On appeal by the appellants, the Court of Appeal (Northern Ireland) refused to vary the order so as to direct production "to medical advisers nominated by the defendant and the appellant respectively".

On appeal, the House of Lords affirmed the decision of the Court of Appeal, and held that the court had no discretion to order the doing of anything different from that which alone was required by s. 32(1), namely, to produce the documents to the applicant, which in the ordinary course of litigation would be carried out by production to his solicitor. *Dunning* v. *United Liverpool Hospitals' Board of Governors* [1973] 1 W.L.R. 586; *Davidson* v. *Lloyd Aircraft Services Ltd.* [1974] 1 W.L.R. 1042; and *Deistung* v. *South West Metropolitan Regional Hospital Board* [1975] 1 W.L.R. 213 (C.A.) overruled.

McIvor v. *Southern Health and Social Services Board* [1978] I W.L.R. 757 (H.L.).

Abortion—injunction—whether husband can restrain wife from seeking abortion

A husband sought an injunction to restrain his wife, and a charitable organisation, from causing or permitting an abortion to be carried out upon the wife without the husband's consent.

Held that –

since an unborn child has no rights of its own and a father had no rights at common law over his illegitimate child, the husband's right to apply for the injunction had to be on the basis that he had the status of husband; that the courts had never exercised jurisdiction to control personal relationships in marriage and, in the absence of the right to be consulted under the Abortion Act 1967, the husband had no rights enforceable in law or in equity to prevent his wife from having an abortion or to stop the doctors

carrying out the abortion, which was lawful under the Act of 1967.

Per curiam. It would be quite impossible for the courts to supervise the operation of the Abortion Act 1967. The great social responsibility is firmly placed by law upon the shoulders of the medical profession.

Paton v. *British Pregnancy Advisory Service Trustees and another* [1978] 3 W.L.R. 687.

Dentist—professional misconduct—whether assessor's advice to disciplinary committee misdirection—whether sentence wrong or unjustified

The appellant a registered dentist, permitted unqualified staff to insert filling materials into the teeth of a patient. He was charged with having been guilty of infamous or disgraceful conduct in a professional respect. At the hearing before the Disciplinary Committee of the General Dental Council, the legal assessor advised the committee that "infamous conduct" meant "serious conduct in a professional respect," and that in deciding whether the conduct had been serious the committee should apply the ordinary standard of the profession, and not a special standard greater than was ordinarily to be expected. The committee found the appellant guilty of the charge and pursuant to s. 25 (1) (*b*) of the Dentists Act 1957, ordered his name to be erased from the register.

On appeal by the appellant to the Judicial Committee against the finding of guilt, on the ground, inter alia, that the assessor had misdirected the Disciplinary Committee by making no distinction between negligent and infamous or disgraceful conduct, and against the sentence, it was held, dismissing the appeal, that—

(i) a dentist could only be found guilty of infamous or disgraceful conduct in a professional respect if the conduct was such as to deserve the strongest reprobation: that it was for the committee to determine whether in law and in fact the appellant had been guilty of such conduct and, since the committee had been reminded of several decisions which accurately stated the law, the advice tendered by the assessor had not had sufficient significance to the result to invalidate the committee's decision and, therefore, it could not be a ground for quashing the finding of guilt.

Dicta of Lord Jenkins in *Felix* v. *General Dental Council* [1960] A.C. 704, 720, (P.C.) and Lord Guest in *Sivarajah* v. *General Medical Council* [1964] 1 W.L.R. 112, 117 (P.C.) applied;

Per curiam. The Judicial Committee regard Lord Jenkins' exposition in *Felix* v. *General Dental Council* [1960] A.C. 704, 720, as so valuable that, without going so far as to say that his

words should invariably be cited in every disciplinary case, they think that to do so would be a commendable course.

(ii) since the Disciplinary Committee was in the best position to weigh the seriousness of professional misconduct, the Judicial Committee would only interfere with the exercise by the Disciplinary Committee of its discretion as to sentence if the sentence was wrong or unjustified: and that, although the sentence of erasure passed on the appellant was undoubtedly severe, it could not be said to be wrong or unjustified.

Dicta of Lord Upjohn in *McCoan* v. *General Medical Council* [1964] 1 W.L.R. 1107, 1112, (P.C.) applied.

Per curiam. The penalty provisions of the Dentists Act 1957 need to be reconsidered in the light of the fact that unlike the corresponding statutory provisions applicable to doctors the Act has not been amended to permit the imposition of the milder penalty of suspension for a period not longer than 12 months in cases involving what may properly be regarded as the less serious breaches of the professional code.

McEniff v. *General Dental Council* [1980] 1 W.L.R. 328 (P.C.).

Damages for personal injuries—medical examination—conditional agreement

M claimed damages from R for personal injuries. R required M to submit to a medical examination and M agreed on condition that he received a copy of the report. R applied to stay until the examination contending M was not entitled to impose the condition. On appeal, the judge granted the stay holding that the plaintiff was not entitled to impose the condition (R.S.C., Ord. 38, r. 37).

On appeal by M, the Court of Appeal, dismissing the appeal, held that in view of the provisions of R.S.C., Ord. 38, r. 37, a plaintiff in an action for personal injuries was no longer entitled, as a condition of agreeing to submit to a medical examination at the instance of a defendant, to insist upon the disclosure to him of any resulting medical report.

Megarity v. *D. J. Ryan & Sons Ltd.* [1980] 1 W.L.R. 1237 (C.A.).

Restraint of trade—medical practitioner—whether restriction against public policy

Section 35 of the National Health Service Act 1946 re-enacted in the National Health Service Act 1977 provides—

(1) Where the name of any medical practitioner is, on the appointed day or at any time thereafter, entered on any list of medical practitioners undertaking to provide general medical services, it shall be unlawful subsequently to sell the goodwill or any part of the goodwill of the medical practice of that medical practitioner . . .

(2) Any person who sells or buys the goodwill or any part of the goodwill of a medical practice which it is unlawful to sell by virtue of the last foregoing subsection, shall be guilty for an offence . . .

(4) Where in pursuance of any partnership agreement between medical practitioners (a) any valuable consideration, other than the performance of services in the partnership business, is given by a partner or proposed partner as consideration for his being taken into the partnership . . . there shall be deemed for the purposes of this section to have been a sale of the goodwill or part of the goodwill of the practice of any partner to whom . . . the consideration or any part thereof is given . . .

When T joined H in partnership as a general practitioner the agreement contained a clause providing for a five-year bar on T practising within seven miles of the partnership in the event of his leaving. Following the retirement of the third partner and consequent dissolution of the partnership H sought to persuade T to sign a new agreement incorporating a similar term. T refused and H gave notice dissolving the partnership. T joined another local practice and H issued a writ, claiming, inter alia, an injunction.

The Court, dismissing the action, held that—

(i) the purported restriction was void as offending against public policy by preventing a doctor giving care to patients which he was lawfully obliged to give;

(ii) the restriction was further unenforceable upon the usual contractual criteria as being unreasonably wide;

(iii) s. 35 of the 1946 Act, re-enacted in the 1977 Act, clearly and unambiguously operated to render the restriction unenforceable.

Hensman v. *Traill* (The Times newspaper: 22 October 1980).

Abortions—whether nurses' participation in termination of pregnancy lawful

The Court of Appeal allowed an appeal by the Royal College of Nursing from the refusal of Mr. Justice Woolf to grant them a declaration that a statement as to the legality of the role of nurses in the termination of pregnancy by medical intervention contained in a letter and annexes thereto dated 21 February 1980, and circulated by the Department of Health and Social Security, was wrong in law. Giving his reasons for so holding he said, "Where a nurse participates in the process of abortion by medical induction, the treatment is nevertheless conducted by a registered medical practitioner as long as the process is initiated by a registered medical practitioner who remains responsible throughout for its conduct and control in the sense that any actions needed to bring it to a conclusion are done by appropriately skilled staff acting on his specific instructions, and he or another registered medical practitioner is available to be called if required."

Section 1(1) of the Abortion Act provides—

"...a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner..."

The Court of Appeal held that—

(i) under the Abortion Act 1967, an abortion must be carried out by a registered medical practitioner;

(ii) it is not sufficient that it is carried out by a qualified nurse or midwife in accordance with his written instructions;

(iii) accordingly, in the case of an abortion by means of medical induction the whole of the process of administering the abortifacient drugs must be carried out by the practitioner personally.

The Court also ruled that a letter sent by the department to regional medical and nursing officers, with copies to the boards of governors of the specialist postgraduate teaching hospitals, was an attempt to amend the law by means of a departmental circular.

Note: Consequently, the advice to doctors, nurses and midwives about the role of nurses involved in abortions, contained in Circular CMO(80)(2) issued February 1980, is to be withdrawn, though it is still possible that the department may appeal to the House of Lords.

Royal College of Nursing of the United Kingdom v. *Department of Health and Social Security* (The Times newspaper: 10 November 1980).