Judicial Decisions

Administrative Law

NEW ZEALAND

Review of decision of certifying consultants allowing abortion
The Court of Appeal dismissed the appeal and upheld Speight J's decision denying the application to review the decision of the certifying consultants that an abortion be performed on a teenage girl. The certificate was in the form prescribed by the Abortion Regulations 1978 (SR 1978/50). Speight J denied that Dr. Wall had standing to bring the proceedings and expressed the view that the allegation of Dr. Wall could not be accepted on a matter "where medical judgment is crucial".

Both Speight J and the Court of Appeal reviewed the history and purposes of the Contraception, Sterilisation and Abortion Act 1977, which constituted a "comprehensive code", which in general placed administrative decisions made by medical practitioners beyond review on the initiative of an outsider claiming to represent the interests of the unborn child. Reliance was placed on the dictum of Lord Wilberforce in Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd. (1981) 2 All ER 93, 97, 98. Ordinarily, there will be no review of decisions taken under the abortion legislation. The Court used this language to describe the legal situation-

> "If there is scope for such judicial review there are two constraining factors which must inevitably and very severely limit its operation. The first concerns the matter of standing which already has been discussed. The Act constitutes a code governing the procedure to be followed before abortions are carried out. It provides an elaborate screening mechanism dependent almost entirely on medical judgment. It explicitly defines and prescribes the functions of those who have rights and responsibilities under the statutory scheme. Should one of the defined participants in the prescribed process assert a statutory responsibility in a way which impinges on or affects anyone else directly within the expressed scope of the statute it may be arguable perhaps that the latter has a legitimate interest in having the other person's exercise of the responsibility conferred under the Act reviewed by the Court. But to that extent and no more. Whatever their concerns may be, individuals outside the direct ambit of the Act could not possibly show that the exercise of statutory powers under these provisions would operate to their personal advantage or disadvantage. It follows therefore that no individual who is

not one of the statutory participants could ever be regarded as having a sufficient interest to institute proceedings for judicial review.

The second constraining factor is related to the limited scope of any judicial review that may be available. The subject of the review would be the exercise of medical judgment by professional men in discharge of a professional responsibility under a statutory authority. To put the matter in another way, the legislation provides for the formulation of a medical judgment by medical practitioners as to whether the performance of an abortion is authorized by s.187A of the Crimes Act which with two exceptions is entirely concerned with medical considerations. And most significantly, as we have earlier mentioned, the exercise of that medical judgment in individual cases is not subject to review by the supervisory committee, the specialist body established under the Act to exercise oversight of the legislation. Against that statutory background we do not think it can possibly have been Parliament's intention that upon such a delicate matter as this the Courts could freely take under review the conclusions reached by the professional men so exclusively entrusted with the statutory responsiblities. A further consideration in regard to all this was mentioned by Sir George Baker P in the Paton case(1979) 1 QB 276. He said (at p. 272), "any process for the enforcement of the criminal law in a civil suit must be used with great caution, if at all".

The Courts are ordinarily entitled in terms of their responsibilities under the Judicature Amendment Act to determine whether the statutory criteria under any legislation have been or will be met in particular cases. But if that principle is to be applied to this statutory scheme what will always be difficult will be to isolate underlying and strictly legal questions from what will be the heavy overlay of straight-out medical judgment; and then (if a case actually does arise) to discern an adequate evidentiary basis for an argument that the statutory criteria have not been honestly applied by the professional people involved. " Wall v Livingston and Another Court of Appeal, 20th December 1982.
(C.L.B., Jan. 1984 pp.82 - 83).

Bankruptcy and Insolvency

AUSTRALIA

Bankruptcy - execution by wife of bankrupt of mortgage over joint property
The High Court of Australia has held that it was not correct to say that, for the purposes of s.111 of the Bankruptcy Act 1966 - 1973, a wife who joined with her husband in giving a mortgage over land which the two spouses

owned as tenants in common for the purpose of providing a security for the husband's bank overdraft thereby made the land "available" to her husband and, accordingly, the execution of the mortgage did not give the husband any right or power to use or dispose of the wife's interest in the land.
Thompson v. Smith (1977) 12 A.L.R. 513
(C.L.B., July 1977, pp.437)

Bankruptcy proceedings - whether an "engagement ring" a "wedding ring", an "eternity ring" a "settlement" made "in consideration of marriage" or form part of estate of bankrupt
Section 120 of the Bankruptcy Act 1966 provides, in part-

> "A settlement of property, whether made before or after the commencement of this Act, not being-
> (a) a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration; or
> (b) a settlement made on or for the spouse or children of the settlor of property that has accrued to the settlor after marriage in right of the spouse of the settlor,
> is, if the settlor becomes a bankrupt and the settlement came into operation after, or within 2 years before, the commencement of the bankruptcy, void as against the trustee in the bankruptcy."

The Federal Court of Australia has held that-

1. the words "in consideration of marriage" in s.120(1)(a) of the Bankruptcy Act require more than a settlement made in "contemplation of marriage" if a settlement is to escape avoidance under the section by reason of being a marriage settlement.

2. a settlement which was not: (a) made on the occasion of a marriage; (b) conditioned only to take effect on the marriage taking place; and (c) made for the purpose of or with a view to encouraging or facilitating the marriage, was not a settlement made "in consideration of marriage" within s.120(1)(a); and

3. an "engagement ring", a "wedding ring" and an "eternity ring" which a man (who became bankrupt within the relevant period) gave to a woman, after she had accepted his offer of marriage and at about the time of their commencing a de facto relationship which ultimately culminated in marriage, were property the subject of a "settlement" but were not the subject of a settlement made "in consideration of marriage" within s.120(1)(a) and, accordingly, they formed part of the estate of the bankrupt recoverable by his trustee from the wife of the bankrupt.
Re. Walsh; Hamilton v Walsh (1983) 47 ALR 396
(C.L.B. April 1985, pp. 1097-1098)

Constitutional Law

AUSTRALIA

Whether Family Law Act 1976 constitutional
The High Court of Australia has had its first opportunity to consider the validity of the Family Law Act 1975 which provides that irretrievable breakdown of marriage is the only ground of divorce. In two separate actions the court, by a majority, held-

(i) that under the Act both custody and maintenance provisions could be heard separately;
(ii) the provisions of the Act for property divisions were valid only when they were joined with proceeding for divorce or nullity of marriage;
(iii) the Act related only to disputes between married couples in relation to either their maintenance, or that of their children or adopted children, and not to other persons;
(iv) the Act's requirement that State courts exercising Federal jurisdiction under the Act should be closed was invalid;
(v) the Act's requirement that, in effect, dispensed with Judges wearing wigs and gowns were valid; and
(vi) order of State Supreme courts exercising Federal jurisdiction under the Act were not invalidated if the Courts' Judges had worn wigs and gowns.

Apart from the constitutional issues involved, the High Court had occasion to examine, in some depth, the role of courts, particularly whether they were required by law and tradition to remain open to the public in most circumstances.
Russell v. Russell; Farelly v. Farelly (1976) 9 A.L.R. 103
(C.L.B., October 1976, pp.362)

New South Wales

Cancellation of promotions in employment - all female teachers - valid appointments - whether sexual discrimination
The Supreme Court of New South Wales has had occasion to consider a situation where an issue of the States' Education Gazette contained the following statement:"From the beginning of 1965 the system of equal opportunity for men and women will operate at all levels. Women will be regarded as equally eligible with men for all promotion positions in co-educational high or secondary schools. Men will receive preference in boys' schools and women preference in girls' schools".

A female teacher who was the deputy principal of a girls' high school applied, prior to the issue of the Education Gazette, pursuant to the

Teaching Act 1970 (N.S.W.)for the position of principal of that school, which was to become vacant as from the beginning of the school year in 1979, and was duly appointed. Before she had commenced her new duties, and before notice of the new appointment had been published in the Education Gazette, she was informed that the appointment had been cancelled by the delegate of the Director-General of Education appointed pursuant to s.18(2) of the Act, substantially on the ground that it might contravene s.25(2)(b) of the Anti-Discrimination Act 1977 (N.S.W.) There were two other female teachers whose appointments, duly made, were cancelled in the same circumstances.

In proceedings to determine whether the cancellations were valid, it appeared that there were more senior male teachers available for appointment to each of the positions, the Supreme Court held that-

(i) while the court would not usually order specific performance of a contract of service, because of the impossibility of supervising the enforecement of it, there were, nevertheless, cases, particularly where persons were employed in, or appointed to, offices in public or civil services, where the court would make declarations and orders which, in substance, had the effect of compelling a governmental Department to retain in its service, in a particular position, persons upon whom are conferred statutory rights;

(ii) the appointments of the three plaintiffs were validly, and unconditionally, made, pursuant to s.27(1) of the Teaching Services Act;

(iii) the Director-General was not empowered to cancel, set aside, or withdraw the appointments, either prior to the appointee commencing duties, or prior to the advertisement of the appointments in the Education Gazette pursuant s.44(1) of the Act;

(iv) the publication of a notice pursuant to s.44(1) was not a condition precedent to the validity of an appointment: only to make publication conclusive evidence of appointment.

(v) the power of the Director General under s.17(1) of the Act, in particular s.17(1)(f) (which empowered him to determine promotions and transfers of officers), had to be read down in the light of ss.27,31,32 and 37, and gave him no authortiy to do what he had purported to do here;

(vi) assuming, but not deciding, that the appointments of the three plaintiffs had been made in breach of s.25(1)(b) of the Anti-Discrimination Act, nevertheless, the appointments would not be invalid unless, upon the true interpretation of that Act and the Teaching Service Act, considered in conjunction, that was the intended legislative consequence;

(vii) there was nothing in the Anti-Discrimination Act which revealed any such legislative intention;

(viii) because no penalty was provided for breach of s.25(1)(b) of the Anit-Discrimination Act, and since the Anti-Discriminiation Board was empowered by s.113(b)(iv) of the Act to make an order

declaring void, in whole or in part, and either ab initio or from such other time as is specified in the order any contract or agreement made in contravention of the Act, the legislative intention was plain that no transaction entered into in contravention of the Act would, because of that fact alone, be void and of no effect.

(ix) accordingly, assuming the conduct of the Director-General in appointing the three plaintiffs were illegal, that the appointments were nevertheless valid;

(x) the Director-General could not call in aid s.54(1) of the Anti-Discrimination Act, because, upon its true interpretation, that provision was designed to preserve the validity of things done pursuant to another Act of Parliament, and, if anything, supported the view that the Act was not, except as provided in s.113, intended to void transactions; and

(xi) therefore, there was no provision in the Anti-Discrimination Act which affected the validity of the appointments which had been made.

Anderson and others v. Director-General of Education (1978) 2 N.S.W.L.R. 423

(C.L.B., October 1979, pp.1044-1046)

Queensland

Scope of the "marriage power" contained in s51(xxi) of the Australian Constitution

A court of summary jurisdiction in Queensland made an order in 1975, pursuant to the Family Law Act 1975, granting custody of a child of a marriage to the child's mother. At that time the child's parents had separated and the mother was living with another man. In 1978, following an assault on the child by the man with whom the mother was living, an order was made by the Queensland Children's Court admitting the child to the care and protection of the Queensland Director of the Department of Children's Services pursuant to s.49 of the Children's Service Act 1965 (Qld) on the ground that, not having a parent or guardian who exercised proper care of or guardianship over her, she was exposed to physical danger.

On the following day the child's father applied, pursuant to the Family Law Act, to the court of summary jurisdiction for a variation of the earlier custody order that had been made in favour of the child's mother. The application was contested, and was therefore transferred to the Family Court of Australia where an order was made granting the custody of the child to the father. No application for principal relief was made.

Section 10(3) of the Family Law Act prevents the Family Court of Australia from making a custody order with respect to a child already in the custody of a State authority pursuant to State law, unless the Court is satisfied that special circumstances exist justifying the

making of such an order. The sub-section also given precedence to an order so made over previous orders made under State law.

The Director sought an order for prohibition from the High Court of Australia against the Judge of the Family Court of Australia on the basis that s.10(3) was beyond the power of the Commonwealth of Australia. On his behalf, it was submitted (a) that the marriage power contained in s.51(xxi) of the Australian Constitution does not extend to the enforcement of rights of custody by proceedings which are separate and independent of proceedings for annulment or dissolution of marriage; and (b) that, in any event, the marriage power is confined to the definition and enforcement of the rights inter se of the parties to a marriage and that it does not enable Parliament to authorise a court to deprive a person, not being a party to the marriage or the Director of the custody of a child reposed in him by State law.

The High Court granted the order nisi for prohibition, and, in so doing, held that:-

(i) the marriage power contained in s.51(xxi) of the Australian Consititution should be given no narrow or restrictive interpretation;

(ii) in order to be within power the legislation in question must have a close connection with the marriage relationship;

(iii) the marriage power extends to the conferring of jurisdiction upon courts to make and enforce orders for custody of the children of a marriage independently of the grant of principal relief;

(iv) the marriage power is not restricted to a definition of, or to making provision for the enforcement of, the rights of the parties inter se, and, accordingly, orders may be made against persons who are not parties to the marriage;

(v) s.10 of the Family Law Act, as amended, in so far as it would authorise the Family Court of Australia by its order to interfere with the custody or possession of a child in respect of whom an order had been made under s.49 of the Children's Services Act (Qld.), is invalid as not being a law with respect to marriage and is thus beyond the constitutional competence of the Federal Parliament;

(vi) however, regarding the order of the Family Court of Australia as no more than an order inter partes binding only husband and wife as to their respective rights vis-a-vis custody of the child, there would be no ground for prohibition, but it should be declared that the order was not enforceable against the Director; and

(vii) the scope of the marriage power is not so large as to enable an order for custody to prevail over a State law which applies generally to all members of the community or to all children in the community. However, in the present case the State law had legislated with respect to custody itself and custody had been granted to two different persons. In such a case the

Federal Parliament may expressly override the operations of the State law relying upon s.109 of the Australian Constitution to ensure that the Federal law will have effective operation.

R. v. Lamber, Ex parte Plummer (1980) 32 A.L.
(C.L.B. July 1981, pp 901-902)

New South Wales

Sex discrimination complaint - whether misconceived -complainants's right to be notified of reasons for declining to entertain complaint

The plaintiff originally lodged a complaint with the first defendant, who is the New South Wales Counsellor for Equal Opportunity, alleging discrimination against her by her then employer, the University of New South Wales, on the grounds of her sex, contrary to s.24 of the Anti-Discrimination Act 1977 (NSW). The University had required the plaintiff to disclose her current marital status by the use of the title "Mrs." in lieu of the title "Ms." which she preferred, whereas male employees were not so obliged to proclaim a marital status because the equivalent title "Mr." did not differentiate between men who were married and those who were not.

The Counsellor investigated the plaintiff's complaint but ultimately declined to entertain it upon the basis that it was possibly misconceived but definitely lacking in substance. The complaint was then referred to the Anti-Discrimiation Board which, after a hearing, held that the complaint was both misconceived and lacking substance.

Section 90 of the Anti-Discrimination Act provides as follows:-

(1) Where, at any stage of his investigation of a complaint, the Counsellor is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained, he may, by notification in writing addressed to the complainant, decline to entertain the complaint.

(2) The counsellor shall, in a notification under sub-section (1), advise the complainant of:-
(a) the reason for declining to entertain the complain and
(b) the rights of the complainant under section 91(1).

Section 91(1) provides that:-

Where the Counsellor has given a complainant a notification under section 90(1), the complainant may, within 21 days after the date of that notification, by notice in writing served on the Counsellor, require the Counsellor to refer the complaint to the Tribunal.

The Supreme Court of New South Wales, to whom the matter was brought on appeal, held that:

(i) a conclusion by the Counsellor for Equal Opportunity that a complaint is outside the provisions of the Anti-Discrimination

(N.S.W.) is equivalent to declining to entertain the complaint for "any other reason" within the meaning of 2.90(1) of that Act; and

(ii) such a conclusion gives a complainant the right to be notified of the reason for declining to entertain the complaint in accordance with 2.90(2), and thereafter to require the Counsellor to refer the complaint to the Anti-Discrimination Board, in accordance with s.91(1).

In so holding, the Supreme Court observed, inter alia, as follows:-

> "Of the four specific descriptions given by s.90 to a complaint which the Counseller may decline to entertain, three clearly refer to the insufficiency or to the absence of merit of the factual basis for the allegation made in the complaint rather than to whether the complaint is one within the provisions of the Act at all. The adjective "misconceived" is the possible exception. The ordinary English meaning of something which is "misconceived" is something which is founded upon a wrong idea. In the abstract that could perhaps mean a wrong idea as to the application of the Anti-Discrimination Act to the facts which form the basis of the complaint. The plaintiff submits that this word should be so interpreted here, so that a complaint considered to be outside the provisions of the Act should always be dealt with as "misconceived" and thus in accordance with the provisions of s.90.
>
> In its present context, however, the word "misconceived" should not, in my view, be given here a meaning beyond a complaint founded upon a wrong idea as to the facts, so that a common genus or class is maintained with the three other adjectives utilised in s.90(1).
>
> But that is not an end to the inquiry. The counsellor may also decline to entertain a complaint where she is satisfied that it should not be entertained "for any other reason". Normally, such a phrase would be construed ejusdem generis with the four adjectives which preceded it so as to exclude the application of s.90 where the complaint is considered to be outside the provisions of the Act rather than one for which there is an insufficient or unmeritorious factual basis. The ejusdem generis rule must nevertheless give way to an indication that the words are to be read in the general sense in which they are expressed: R v Regos (1947) CLR 613, at pp. 623, 624; Cody v J H Nelson Pty. Ltd. (1947) CLR 629, at p. 639. There is, in my opinion, a strong indication in this statute that the words in question should not be read ejusdem generis.
> Langley v. Niland and Another (1981) 2 NSWLR 104
> (C.L.B. July 1982, pp.928-929)

Person deemed to belong to Bermuda - whether "child" includes illegitimate children

Section 11 of the Constitution of Bermuda provides:-

> " (5) For the purposes of this section a person shall be deemed to belong to Bermuda if that person (a) possesses Bermudian status;.... (c) is the wife of a person to whom either of the foregoing paragraphs of this subsection applies not living apart from such person .....; or (d) is under the age of 18 years and is the child, stepchild or child adopted in a manner recognised by law of a person to whom any of the foregoing paragraphs of this subsection applies".

The Jamaican mother of four illegitimate children all born in Jamaica married a Bermudian in 1972. The mother and the children took up residence with the husband in Bermuda in 1975. At all material times the children were under 18. In 1976 the Minister of Labour and Immigration ordered the children to leave Bermuda. The mother and her husband applied to the Supreme Court to quash the order and for a declaration that the children were to be deemed to belong to Bermuda. The Supreme Court refused a declaration on the ground that the children were illegitimate. On appeal by the mother and her husband the Court of Appeal held by a majority that the children were to be deemed to belong to Bermuda by virtue of s.11(5)(d) of the Constitution.

On appeal by the Minister of Home Affairs (formerly the Minister of Labour and Immigration) and the Minister of Education, the Privy Council, affirming the decision of the Court of Appeal for Bermuda, held that:-

(i) a constitutional instrument should not necessarily be construed in the manner and according to the rules which applied to Acts of Parliament and, therefore the presumption applicable to statutes concerning property, succession and citizenship that "child" meant "legitimate child" did not apply;

(ii) although the manner of interpretation of a constitutional instrument should give effect to the language used, recognition should also be given to the character and origins of the instrument;

(iii) since s.11 of the Constitution was one of the sections dealing with the fundamental rights and freedoms of an individual and subsection (5)(d) in its context was a clear recognition of the unity of the family as a group and acceptance that children should not be separated from a group which belonged to Bermuda, "child" in the subsection was not to be restricted in its meaning and the mother and her husband were entitled to a declaration that the children were deemed to belong to Bermuda.

Minister of Home Affairs v. Fisher (1979) 2 W.L.R. 889(P.C.)
(C.L.B., October 1979 pp. 1050 -1051)

CANADA

Ontario

Abortion clinic - whether in breach of Criminal code - whether code unconstitutional - injunction to restrain enforcement of code in interim refused - principles to be applied in constitutional cases where validity of law in issue
The applicants opened a clinic offering abortion services which did not operate in accordance with the Criminal Code abortion provisions. The applicants took the position that the Code was unconstitutional in that it conflicted with the Charter of Rights and Freedoms. An application for an interim injunction pending the return date of the motion for an interlocutory injunction for an order restraining the defendants from enforcing the law was sought.

The court, in dismissing the application, held that, in appropriate circumstances, injunctions may be issued to restrain the enforcement of unconstitutional laws, even before the ulitmate determination of validity is made. The test applied by the Court in the application was that of American Cyanamid Co v Ethicon, (1975) 2 WLR 316. Although the applicants met the requirement of satisfying the court that there was a substantial issue to be tried , the court held that the other requirements of the test were not met. They had not shown that they would suffer irreparable harm if the injunction was not granted nor did they satisfy the court that the balance of convenience favoured the granting of an injunction. On the point of irreparable harm, the court noted that the harm might befall certain women but not the applicants before the court. Regarding the balance of convenience test, the court suggested that a major public issue, that of what law enforcement agencies may do pending the outcome of constitutional litigation challenging the laws they are meant to enforce, was raised. Halting prosecution and investigation of offences pending the resolution of the constitutional issue would grant to potential offenders an immunity from prosecution in the interim and perhaps forever, the court stated. If the the law was ultimately held to be constitutional, the result would be that the courts would have prohibited the police from investigating and prosecuting what has turned out to be criminal activity. Therefore, the balance of convenience normally dictates that those who challenge the constitutional validity of laws must obey those laws pending the court's decision.
Re Morgentaler et al v Ackroyd et al (1983) 42 OR (2d) 659
(C.L.B., April 1984, pp.585)

CYPRUS

Income tax law providing for aggregation of wife's income with that of husband - constitutionality of law
Held by the Supreme Court-

"The old s.21 of the Income Tax Law 1961 (Law No.58 of 1961)

and new s.22 (which provide for the aggregation of the wife's income from sources other than from her own labour with that of her husband, for income tax purposes) are unconstitutional as being contrary to Article 24.1 of the Constitution (which provides that every person is bound to contribute according to his means towards the public burdens) and Article 28 (which safeguards equality)
Ioannides & others v. Republic (1979) 3 CLR 295
(C.L.B. April 1980, p.449)

Application for a certificate of non-citizenship - qualifications for citizenship - whether being illegitimate child alters position

The applicant was born in Stockholm, Sweden, on the 22 September 1959 and was the holder of a Swedish passport. He came to Cyprus with his mother on 24 January 1960, as a visitor. At the material time his parents were not married but they were later married together. Applicant's father was born on 2 April 1937 at Myrtou, Kyrenia and on 30 May 1962, a Cyprus Passport was issued to him. Attached to the application for the issue of this passport there was a certificate from the mukhtar of Ayios Andreas Quarter, Nicosia, to the effect that during the five years period immediately prior to the 16 August 1960, which is the date of the Proclamation of the Republic, he resided, ordinarily, in the said quarter. On 30th August 1972, another Cyprus Passport was issued to the applicant's father; and on his application for this passport he again stated that his place of residence during the period 16 August 1955 to 16 August 1960 was Cyprus.

On 27 December 1979 applicant applied, through his counsel, to the Chief Immigration Officer for a certificate that he was not a citizen of the Republic on the ground that his parents were permanently residing in Sweden during the period 16 August 1955 to 16 August 1960. The Acting Chief Immigration Officer informed applicant's counsel that both the applicant and his father, were citizens of the Republic of Cyprus by virtue of s.2 of Annex D to the Treaty of Establishment of the Republic of Cyprus. The relevant paragraphs of this section read as follows:-

"s.2(1) any citizen of the United Kingdom and Colonies who on the date of this Treaty possesses any of the qualifications specified in paragraph 2 of this Section shall on that date become a citizen of the Republic of Cyprus if he was ordinarily resident in the Island of Cyprus at any time in the period of five years immediately before the date of this Treaty.

(2) the qualifications referred to in paragraph (1) of this Section are that the person concerned is-

(a) a person who became a British subject under the provisions of the Cyprus (Annexation) Orders in Council, 1914 to 1943; or

(b) a person who was born in the Island of Cyprus on or after the 5th of November, 1914; or

(c) a person descended in the male line from such a person as is referred to in sub-paragraph (a) or (b) of this paragraph.

Section 4 of the Illegitimate Children Law (Cap.278) and ss.9(1) and 3 of the Republic of Cyprus Citizenship Law 1967) which are also relevant read as follows:-

> s.4 Where the parents of an illegitimate child marry one another such child shall acquire, as from the date of his birth, the legal status of a legitimate child in respect of both his father and mother and their relatives by blood.
> s.9(1) An illegitimate child legitimated in accordance with the law of personal status pertaining to him shall, as from the date of such legitimation or the date of the coming into operation of this Law, whichever is later, be treated, for the purposes of this Law, as if he had been born legitimate.
> s.3 Citizens of the Republic are the persons who, on the date of the coming into operation of this Law, either have acquired or are entitled to acquire citizenship of the Republic under the provisions of Annex D or who acquire thereafter such citizenship under the provisions of this Law.

The Court, after finding that applicant's father was, at the material time, a citizen of the United Kingdom and Colonies, that he was born after 5 November 1914, that he was ordinarily residing in Cyprus at some time in the period of five years immediately before Independence and that he did, on the day of the Treaty, automatically become a citizen of the Republic held that:-

(i) the applicant, though at the time illegitimate child of his father, was, on the day of the Treaty, residing in Cyprus and he, too automatically became a citizen of the Republic since he possessed qualification (c) of Annex D to the Treaty of Establishment in that he was a person descended in the male line from a person who was born in the Island on or after 5 November 1914;

(ii) the applicant was, at the material time, an illegitimate child, does not change the position, as qualification (c) only provides that a person possesses the qualification to become a citizen of the Republic if he descends in the male line from a person possessing qualifications (a) and (b) of s.2 of Annex D;

(iii) further, the applicant is a citizen of the Republic by the combined effect of s.4 of the Illegitimate Children Law (Cap. 278) and of ss. 9(1) and 3 of the Republic of Cyprus Citizenship Law 1967 (Law 43 of 1967);

(iv) the Chief Immigration Officer was right in his decision not to grant the applicant a certificate to the effect that he is not a citizen of the Republic of Cyprus.

Zemblylas v Republic (1981) 3 C.L.R. 258
(C.L.B. April 1982, pp 507-508)

GUYANA

Prohibited immigrant-entered country on false passport-subsequently marries Guyanese woman-whether marriage confers right to citizenship under Constitution

A national of Denmark, who had escaped from custody in Denmark where he was serving a sentence of imprisonment for murder entered Guyana on a Danish passport which was issued to someone else. The passport was forged by substituting the photograph of the fugitive for that of the true holder. On the basis of this false passport the permission granted to remain in Guyana was extended on three separate occasions. During this permitted stay he married a Guyanese citizen. The last permit expired on 4 October 1981. On information received from INTERPOL he was arrested on 26 October 1981 and it was then discovered that the passport was a forgery and his true name was Mortensen not Nielsen. A detention order was issued by the Immigration Officer to detain him in custody until such time as arrangements were completed for his removal from Guyana. A person is deemed a prohibited immigrant under the Immigration Act (Cap. 14:02) if he enters the country without a passport (s.5), or fails to leave at the expiration of the permit granted or extended (s.13). The wife applied for the Writ of Habeas Corpus on the ground that since marriage Mortensen, as her husband, was entitled to be registered as a citizen of Guyana under Article 45 of the Constitution, and had in fact applied for permanent residence before 4 October 1981. Even though application for permanent residence was refused, Article 29 of the Constitution conferred equal rights and status on women, and since an alien wife of a Guyanese husband "belongs" to Guyana as a "dependant" under the Immigration Act and therefore cannot be "deemed a prohibited immigrant", then an alien husband of a Guyanese wife is equally a dependant and belongs to Guyana.

The Court of Appeal in dismissing the appeal held that:-

1. by entering with a false passport the applicant's husband had contravened s.5 of the Immigration Act and was an illegal entrant and a prohibited immigrant for the purpose of the Act;
2. the status of illegal entrant was not altered by the subsequent marriage and vitiates any claim to a constitution right to remain permanently in Guyana;
3. under the Immigration Act the detention was legal and deportation enforceable.

Ragner Harry Nielsen v Lloyd Barker The Director of Public Prosecutions
Court of Appeal, Civil Appeal No.57 of 1981
(C.L.B., April 1984, p 585-5)

INDIA

Descrimination on grounds of sex - female employees in Government service - whether provision requiring permission before marriage and denial of right to employment to married women discriminatory

The question for consideration before the Supreme Court was whether the provisions of the Foreign Service Rules requiring a female employee to obtain the permission of the Government in writing before her marriage is solemnised and denying the right to be appointed on the ground that the candidate is a married woman are discriminatory against women.

The Supreme Court held that both the requirements are discriminatory. It also observed that equality of opportunity in matters relating to employment does not, however, mean that men and women are equal in all occupations and all situations, and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern.
Miss C.B. Muthamma v Union of India and others AIR 1979 Supreme Court 1868 (C.L.B., October 1980, p1182)

MAURITIUS

Right to be resistered as citizen - whether Crown prerogative - mandamus - effect of exclusionary clause purporting to exclude judicial review

The applicant, an alien married to an Mauritian citizen, applied to the Minister of Internal Affairs for registration as a citizen of Mauritius on the ground that she was married to a Mauritian, after renouncing her foreign citizenship and taking the required oath of all allegiance. She argued that, as wife of a Mauritian she had an absolute right under s.24 of the Constitution to be registered as a citizen of Mauritius and she prays for an order of mandamus directing the respondent to grant her application.

The Supreme Court, in setting aside the application, held that-

(i) the Crown prerogative runs only to the extent that it has not been controlled by Parliament. Since the Constitution contains provisions relating to the acquisition and deprivation of citizenship and has conferred on Parliament power to prescribe many matters in this respect, it has removed the acquisition and deprivation of citizenship from the Crown prerogative.

(ii) the application of the Constitution and of all enactments fall in general within the jurisdiction of the Supreme court and therefore mandamus would, in principle, lie in a case of this nature;

(iii) the right of the alien wife of a Mauritian to be registered as a citizen of Mauritius is not absolute but subject to the proviso to s.24 of the Constitution which states as follows:-

"Provided that the right to be registered as a citizen of Mauritius under this section shall be subject to such exceptions and qualifications as may be prescribed in the

interests of national security or public policy;

(iv) although s.7 of the Mauritius Citizenship Act which states "....any woman whether of full age or capacity, who is, under ss.21 and 24 of the Constitution entitled to be registered as a citizen of Mauritius, shall be so registered on making application to that effect to the Minister in the prescribed manner" does not specifically mention that alien wives may be refused registration on national security or public policy grounds and that it is the Minister of Internal Affairs who determines the existence of such grounds, it is quite clear that the whole Act was designed to implement the provisions of the Constitution relating to the acquisition and deprivation of citizenship and that s.7 of the Act must be read subject to s.24 of the Constitution;

(v) the Mauritius Citizenship Act by its very structure was "setting up the practical machinery for the purposes of implementing all the discretions and powers conferred upon Parliament itself by the Constitution, including the exceptions and qualifications explicitly contemplated under the priviso to s.24 of the Constitution";

(vi) section 17(2) of the Mauritius Citizenship Act which states that-
"the decision of the Minister on any application under this Act shall not be subject to any appeal or review in any court" cannot be construed as limiting the almost unlimited jurisdiction conferred upon the Supreme Court by the Constitution. The court's intervention will be determined by the manner in which the Minister's discretion has been exercised. The Court would unhesitatingly intervene where, for instance, the Minister evidently refuses to consider an application on its merits or allows himself to be swayed by extraneous factors e.g. the alien wife's race, colour political opinion etc.;

(vii) the Court will undoubtedly exercise self-restraint where the Minister's decision is based on two constitutionally prescribed considerations i.e. national security and public policy "since it would be invidious for the Court to substitute its own notions of what national security or public policy should be" when in fact those matters fall exclusively within the responsibility of the Executive.

G Esther v The Honourable the Prime Minister and Minister of Internal Affairs Supreme Court Judgment No. 233 of 1983.
(C.L.B., October 1983, pp1215-1216)

NEW ZEALAND

Human rights-alleged discrimination against women workers

Three women slaughterboard labourers at the Ocean Beach freezing works applied to join the learners' mutton slaughtering chain for the 1978/79 season (all having similarly applied in at least one previous

season). When they again failed to gain a place their solicitor complained to the Human Rights Commission. After investigation and failing to reach a settlement with the company, the Human Rights Commission commenced civil proceedings against the company before the Equal Opportunities Tribunal (a judicial body comprising an Auckland QC as chairman and any two lay members drawn by him from a panel of ten appointed by the Minister).

The company did not dispute the women's capability to do the work (although the Equal Opportunities Tribunal was independently satisfied by the evidence on the point). The main defence it raised was that appropriate changing and ablution facilities for female "slaughterers " (the Equal Opportunities Tribunal's suggested word) were not available and it was not reasonably practicable to provide them (this defence, under s.17, will expire on 31 May 1982). The Equal Opportunities Tribunal was satisfied from the evidence that female slaughterers could have used the facilities already provided for female slaughterboard labourers and rejected the defence. Four subsidiary defences advanced for the company also failed.

The Equal Opportunities Tribunal's 36-page decision indicates that the company declined to take the women on to the learners' chain because it had good reason to believe that to do so would provoke an Industrial stoppage. The works sub-branch of the Meatworkers' Union had discussed the question of women at Ocean Beach at some length and, while agreeing to their employment in a number of operations, was strongly against women being on the chain.

The Equal Opportunities Tribunal's carefully worded response to the sub-branch attitude was fourfold - (a) Union opposition could not be allowed to nullify the object of the Act; (b) at national level, the Union had supported the Working Women's Charter (which requires equal occupational entry irrespective of sex); (c) a breathing space for Ocean Beach was likely with the retention of slaughtermen (and consequent absence of a learners' chain) for the 1980/81; and (d) the company's position would be borne in mind when remedies (especially damages) were considered.

The Equal Opportunities Tribunal declared that the company had breached s.15 of the Act, ordered it not to refuse places to women on any future learners' chain, and awarded damages for loss, expense and injury to feelings (totalling $2,250) to two of the women.
Human Rights Commission v Ocean Beach Freezing Co. Equal Opportunities Tribunal 3/80: 11 September 1980 (noted in (1980) 3 Capital Letter No. 35(116))
(C.L.B. January 1981, pp70-71)

UNITED KINGDOM

R. v. Secretary of State for the Home Department, Ex parte Phansopkar
R. v. Secretary of State for the Home Department, Ex parte Begum (1975) 3 W.L.R. 322;3 All E.R. 497

The husband of the appellant in the first case was an Indian resident in England and a United Kingdom citizen, thus being a "patrial" having a right of abode in the United Kingdom. His wife had the same right, and she applied to the Home Secretary for a certificate of patriality to enable her to enter; but it was refused on the ground that she should apply to the British High Commission in India, or she would be "jumping the queue".

The second case was similar, the appellant coming from Bangladesh. The Court of Appeal, reversing the Divisional Court, held that a patrial's wife was entitled to come into the United Kingdom "without let or hindrance"; and that since there would have been considerable delay if the applications had been made in India or Bangladesh, and an important part of the inquiries would have to be made in England, the Home Secretary was not justified in refusing to consider the applications.
See R. v Secretary of State for the Home Department, Ex parte Akhtar (1975) 1 W.L.R. 1717, for a decision in the opposite sense where the wife was an alien.
(C.L.B., January 1976 p.41)

Sex discrimination-arrangement for women workers to leave factory 5 minutes before male workers-whether discriminatory against males
Held by the Court of Appeal-

(i) arrangements made in the interest of safety or good administration were not infringements of law, even though they might take notice of the difference between the sexes, such as longer distance to a lavatory or the provision of mirrors in them;
(ii) the Appeal Tribunal had feared that if "benefits" were given it would open a loophole to evasion of the Sex Discrimination Act, but it should not be so afraid if one could see that what was done was done reasonably and sensibly;
(iii) the practice Mr. Peake complained off was perfectly harmless;
(iv) in the last resort the maxim de minimis non curat lex would apply.

Peake v. Automotive Products ltd., Times newspaper, 6 July 1977
(C.L.B., July 1977 p.400)

Sex discrimination in bank scheme-"pay"-whether principle of equal treatment for men and women as regards "working conditions" contained in the EEC Directive applicable-enforceable Community rights of individuals
On the Court of Appeals' reference to the European Court of Justice (see (1982) 8 CLB 1073) it was held that a contribution to a retirement benefits scheme which was paid by the employer in the name of the employees by means of an addition to the gross salary and which helped to determine the amount of that salary was "pay" within the meaning of article 119 of the Treaty.

On the reference back from the European Court the Court of Appeal held that a declaration in agreed terms would be made that pursuant to the

equality clauses in the applicants' contracts of employment by reasons of s.1(1) of the Equal Pay Act 1970, as amended, and article 119 of the EEC Treaty, on terminating their employment with the employers, the applicants were entitled to be paid a sum equal in amount to the refund of pension contributions in respect of the period referred to in s.2(5) of the Act which they would have received if they had been male employees employed on like work in whose name contributions had been paid to a retirement benefits scheme by the employers.
Worringham v Lloyds Bank Ltd (1982) 1 WLR 841(CA)
(C.L.B., January 1983, p.84)

Discrimination- women in wine bar not allowed to stand and drink at bar- whether unlawful discrimination
Section 1(1)(a) of the Sex Discrimination Act 1975 reads-

> A person descriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if-(a) on the ground of her sex he treats her less favourably than he treats or would treat a man.....

and s.29 reads as follows-

> It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a woman who seeks to obtain or use those goods, facilities or services - (a) by refusing or deliberately omitting to provide her with any of them, or (b) by refusing or deliberately omitting to provide her with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in his case in relation to male members of that section.

The plaintiffs, who were both women, entered the defendants' wine bar and stood at the bar where they asked for two glasses of wine. In accordance with the defendants' rule that women were not allowed to stand and drink at the bar or in the bar area; the barman refused to serve them at the bar and told them that if they sat at a table the drinks would be brought to them. There were two tables by the main entrace, and a smoking room at the back where a waitress took orders from customers at the tables. The chairs and tables were also available to male customers. On an action by the plaintiffs alleging that the defendants' practice was in breach of s.29 of the Sex Discrimination Act 1975, Judge Ranking gave judgment for the defendants, holding that they had not unlawfully discriminated against the plaintiffs within the meaning of s.1(1)(a) of the Act, and that they were not in breach of s.29.

On appeal by the plaintiffs the Court of Appeal, allowing the appeal, held that-

(i) the correct approach was to apply the simple words of the statute:
that by allowing male customers to stand and drink at the bar if they so wished but not allowing female customers to do likewise the defendants unlawfully discriminated against women by refusing or deliberately omitting to

provide them with facilities which were afforded to men, contrary to s.29(1) of the Sex Discrimination Act 1975 and that they treated women less favourably than men, contrary to s.1(1)(a);

(ii) since women were being deprived by the defendants of a facility greatly prized by men and sought by the plaintiffs the maxim de minimis non curat lex could not apply: and, accordingly, the defendants had unlawfully discriminated against the plaintiffs by refusing to serve them at the bar.

Gill and another v El Vino Ltd (1983) 2 WLR 155 (CA)
(C.L.B., July 1983, p.62)

Courts Practice and Procedure

MAURITIUS

Criminal trial by jury - Whether exclusion of women constitutional

The plaintiff was charged with murder before the Court of Assizes consisting of a judge and, for the determination of matters of fact, a jury of nine men drawn from the jury list. This list comprises only male jurors as is required by the Jury List ordinance. The plaintiff complained that-
(a) the statutory exclusion of women from the jury list was discriminatory and in breach of ss.3 (fundamental rights and freedoms), 10(protection of the law and trial by impartial tribunal) and 16 (protection from discrimination) of the Constitution; and
(b) his trial by the Assizes Court as constituted was consequently unconstitutional.
Held-

(i) the prohibition against discrimination, on grounds inter alia of sex, in section 3 was limited to the fundamental rights and freedoms specified in the section:

(ii) section 16 applied to all enactments and administrative action which were discriminatory on various grounds from which sex was deliberately excluded;

(iii) discrimination must be distinguished from reasonable differentiation or classification with no bias or hardship as its object, having regard to the aim which is sought to be achieved;

(iv) jury service is, in any event, an obligation and not a right or privilege which confers and advantage.

M.R. Jaulim v. The DPP and the Master and Registrar (1976 Supreme Court Record N.19147)
(C.L.B., July 1976, p.216)

Appeal-Costs-Offer to settle made "without prejudice"-offer unreasonably rejected

In matrimonial property proceedings, the wife was legally aided but the husband was not. The husband's appeal to the Court of appeal succeeded only in part, but did so on the major issue. Prior to the hearing his solicitors had offered to withdraw the appeal should the wife agree to a modification of the lower court order. As suggested in Calderbank v. Calderbank (1975) 3 W.L.R. 586 the letter was written "without prejudice" but the right was reserved to draw it to the attention of the court after judgment on the question of costs. The offer was rejected. The Court of Appeal held-

(i) a Calderbank offer should influence but not govern the exercise of the discretion as to costs and it would be wrong to equate such an offer with a payment into court;

(ii) the question was whether, on the facts known to the wife and her advisers and without the benefit of hindsight, she ought reasonably to have accepted the offer;

(iii) parties who were exposed to the full impact of costs needed some protection against those who could continue to litigate with impunity under a civil aid certificate;

(iv) the wife ought reasonably to have accepted the offer and, on the merits, would be ordered to pay the husband's costs of the appeal incurred after the date of the letter containing the offer, on a party and party basis;

(v) bearing in mind that the wife's only fund from which to meet costs would be the £2,000 awarded to her in the proceedings, her ability to pay would be assessed at £500 (as required by Section 8 (i) (e) of the Legal Aid Act 1974).

McDonnell v. McDonnell, Times Newspaper, 19 April 1976. (C.L.B., July 1976, p.201)

Limitation of actions - Plaintiff unaware she had cause of action

In May 1970 P was injured by a car driven by D. P was illiterate and she left the matter in her husband's hands. While she was in hospital he went to a solicitor and then told his wife that nothing could be done until the solicitor had been paid £20. They did not have £20 and the matter rested. A writ was finally issued in May 1974. D alleged that it was statute-barred. It was argued for P that s.1(3) of the Limitation Act 1963 applied in that there were material facts of a decisive nature which were at all times outside her knowledge and that therefore the limitation period did not apply. Held-

(i) P had constructive knowledge of her rights to sue as soon as she could put the facts before her legal adviser and she was not ignorant of material facts of a decisive character which affected her claim in this case;

(ii) her failure to obtain legal advice was not reasonable or excusable.

Jones v. Bennett (1976) 1 Lloyd's Rep. 484. (C.L.B., October 1976, p.353)

Queensland

Rape-complainant giving evidence as to limited experience with men-whether cross-examination as to credibility permissible

Section 4. of the Criminal Law (Sexual Offences) Act 1978 (Qld) provides, inter alia, the following rules of evidence concerning "sexual offences" as defined in s.3 of the Act-

(2) Without the leave of the court-
  (a) the complainant shall not be cross-examined as to her sexual activities with any person other than the defendant; and
  (b) evidence shall not be received as to the sexual activities of the complainant with any person other than the defendant.

(3) The court shall not grant leave under Rule 2 unless it is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue or is proper matter for cross-examination as to credit.

(4) Evidence that relates to or tends to establish the fact that the complainant was accustomed to engage in sexual activities with a person or persons other than the defendant shall not be regarded-
  .....
  (b) as being proper matter for cross-examination as to credit in the absence of special circumstances by reason of which it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

At the defendant's trial on a charge of rape, the complainant gave evidence of her somewhat limited experience with men. Counsel for the accused sought leave to cross-examine her in relation to her employment for some six weeks in a massage parlour about July 1982 and as to the nature of her experience with men while so employed to the extent that this might involve evidence of sexual activities with persons other than the accused. The cross-examination was proposed to be directed to the complainant's credibility.

The Supreme Court to Queensland ruled that-

1. having regard to the complainant's evidence of her limited experience with men, the answers to the questions sought to be asked in cross-examination might cause the jury to doubt the accuracy of the evidence she had already given on the matter of her experience with men and so cast doubt on the accurancy of her evidence generally;
2. therefore, such a special circumstance had been shown as justified the grant of leave to cross-examine the complainant as sought; and
3. the jury would be directed that the cross-examination and the

evidence resulting therefrom went only to the credit of the complainant and not to show that, because she had engaged in such activities, it was likely that she would have consented to intercourse with the accused.

R v Holt (1983) 2 Qd R 462
(C.L.B., October 1981, p.1536)

Injunction sought to restrain abortion-applicant alleged father of child-whether a breach of criminal law-exercise of court's powers and discretion

K sought the Attorney-General's fiat in order to obtain an interlocutory injunction from the Supreme Court of Queensland to restrain a single woman who had conceived a child of which he claimed to be the father from causing or permitting an abortion to be carried out upon herself. His application was refused, and this was upheld by the Full Court of the Supreme Court.

K then applied to the High Court of Australia for special leave to appeal.

In dismissing the application, the High Court held, inter alia, that it would not be a proper exercise of discretion to grant an injunction in the present case, because to do so would be to act on the assumption that the woman proposed to commit a serious crime when the determination of that issue had been left by the law to a jury.

In so holding, the High Court considered the decisions of the English and Australian Courts in Gouriet v Union of Post Office Workers (1978) AC 435; Ramsay v Aberfoyle Manufacturing Co (Aust) Pty Ltd. (1935) 54 CLR 230; and Paton v BPAS Trustees (1978) 2 All ER 987; (1979) 1 QB 276.

The Chief Justice of the High Court observed in his judgment, inter alia-

(1) While there is no doubt that in appropriate cases the court will grant an injunction to restrain a breach of the criminal law, that is "an exceptional power confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty ..... or to cases of emergency"; see Gouriet v Union of Post Office Workers (1978) AC 435 at 481. In Ramsay v Aberfoyle Manufacturing Co. (Aust) Pty Ltd (1935) 54 CLR 230 at 245, Rich J said that "old fashioned views upon the jurisdiction of courts of equity find the growth of the use of injunction (in the field of criminal law) more repugnant than satisfying". Whether or not that view is shared, it is obviously true to say, as Lord Wilberforce said in Gouriet's case (at 481) that the jurisdiction "is one of great delicacy and is one to be used with caution". As was pointed out in that case by Lord Wilberforce (at 481) and by Viscount Dilhorne (at 470-1) where Parliament had provided for the trial of offences by jury, it may seem wrong, and it may lead to great difficulties, if the court, applying a civil standard, in effect, convicts a subject without the trial to which he or she is entitled. It is true that some of the remarks of Lord Wilberforce in the passage mentioned relate to the exercise of discretion by the

Attorney-General, but similar considerations obtain when the matter comes before the court.

(2) The second argument is that an unborn child is to be regarded as a person whose existence can be protected by the courts. As at present advised, I would agree with the judgment of Sir George Baker P in Paton v BPAS Trustees (1979) 1 QB 276 at 279, that a foetus has no right of its own until it is born and has a separate existence from its mother.

(3) There are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims. Those limits would be over-stepped if an injunction were to be granted in the present case.

Attorney-General for Queensland; Ex rel Kerr V T (1983) 46 ALR 275 (C.L.B., January 1984, pp.119-120)

Criminal Law and Procedure

AUSTRALIA

Western Australia

"Keeping premises for the purposes of prostitution"
The Western Australian Court of Appeal has dismissed an appeal against the appellant's convictions of the offence of keeping premises for the purposes of prostitution, contrary to s.76(F)(1) of the Police Act 1892 - 1972 (W.A.) in circumstances in which the appellant had leased and occupied premises for the purpose of having an employee engage in prostitution for the monetary advantage of both the employee and the appellant. Only one employee was so employed, and the appellant did not engage in prostitution herself. Nor were the premises leased the home of the appellant.

The Court held that-

"the expression "keeping premises for the purposes of prostitution" was not to be equated with keeping premises as a brothel. If (which the Court doubted) the latter offence required that there be the prostitution of more than one woman on the premises, the former offence did not, and a woman who kept premises, not being her home, for the purpose of the prostitution of one woman or more was "keeping premises for purposes of prostitution".

In so holding, the Court who had occasion to consider the offence of prostitution, and the interpretation of the expressions "brothel", "prostitution", "bawdy-house" and "keeping".

Storey v. Wick (1977) W.A.R. 47
(C.L.B., July 1977, p.410)

South Australia

Money received in respect of prostitution-doctrine of "possession"

The Full Court of the Supreme Court of South Australia had to consider what constituted the offence of receiving money paid in a brothel in respect of prostitution, contrary to the provisions of s.28 of the Police Offences Act 1953-1975 (S.A.)

The Supreme Court held that the respondent, a prostitute who had told a police officer to put money paid for purposes of prostitution in a cupboard without actually handling the money, had "received" the money for purposes of the section and should have been convicted of the offence of having "received" money paid in a brothel in respect of prostitution.

In so concluding, the Supreme Court stated that no detailed analysis of the doctrine of possession was necessary, but that the ability to control a thing, as here, had the same effect as the actual exercise of control.

Samuels v. Warland 16 S.A.S.R.41.
(C.L.B., October 1978, p.856-857)

Rape-"mens rea"-mens rea by recklessness

The Full Court of the Supreme Court of South Australia has examined the appropriate direction that should be given by a trial judge to a jury in a case of rape where, as here, the accused in their defence admitted the sexual act but stated that they believed that the female had consented.

In doing, the Full Court compared its own decision in R.v.Brown (1975) 10 S.A.S.R. 139 with that of the House of Lords in Director of Public Prosecutions v. Morgan (1975) 61 Cri.App.R.136 in each of which cases there was some difference of opinion whether the definition of mens rea in rape should be formulated in terms of intention or in terms of belief.

The Full Court concluded that all of the Judges of the Supreme Court of South Australia and all of the Law Lords in the House of Lords who, respectively, had sat on those cases and who had adverted to the topic, had held that, besides the intention to have sexual intercourse without the female's consent, or the intention to have intercourse knowing or believing that she was not consenting, there was an alternative form of mens rea, which could compendiously be described as mens rea by recklessness.

The Full Court observed that-

" it might have been preferable to define the mental element in rape negatively rather than positively and to say that the crime is

committed by a man who has intentional intercourse with a female without her consent and without any belief on his part that he has her consent, instead of saying that it is committed by a man who has intentional intercourse with a female without her consent, knowing that she is not consenting or recklessly indifferent to whether she is consenting or not.

The Queen v. Wozniak and Pendry S.A.S.R. 67
(C.L.B., October 1978, pp.858-859)

Confession by woman charged with rape-unusual charge-failure to warn her constituting trap

Four accused, three men and a woman, were jointly charged with three counts of rape and nine counts of associated violence on the person of a young girl. Each of the accused made a confessional statement to police officers, and at their trial it was contended on behalf of each accused that the confessional statement should be excluded from evidence.

In the case of the female accused, the principal ground of the application was that she had been questioned by a police officer about an assault upon the victim but had not been informed until after the questioning of the possibility of her being charged with the more serious charge of rape.

The Supreme Court of South Australia held in the case of the female accused, that as prosecution of a woman for rape was so rare the failure by the police officers to inform her of the possibility that she would be charged with rape in effect amounted to a trap and that in the exercise of the trial Judge's discretion certain unguarded answers given by her to the police officers which tended to implicate her in the offence of rape should be excluded from evidence.

The Queen v. Hart, Bullock, Peterson and Hill 17 S.A.S.R. 100.
(C.L.B., January 1979, pp.91-92)

Prostitution-whether money "received"

The appellant appealed against her conviction of having received money paid in a brothel in respect of prostitution, contrary to the provisions of s.28 of the Police Offenders Act 1953 - 1975 (S.A.)

A police officer, acting as an agent provocateur, had gone to a brothel and, after the appellant had agreed in a room in the brothel that he could have sexual intercourse with her for $30, had handed her two $20 notes, asking if she had any change. The appellant had then taken the money; said that she could change it; told the police officer to get undressed; and walked towards the closed door of the room. Before she could open the door the police officer produced his police warrant card disclosing his identity.

The Supreme Court of South Australia, in dismissing the appellant's appeal, held that she had "received" the money, within the meaning of s.28 of the Police Offences Act.

In so holding the Supreme Court had occasion to examine the law of possession and distinguished two earlier decisions of the Court- Samuels v. Warland (1977) 16 S.A.S.R. 41 and Oldfield v. Samuels (1978) 18 S.A.S.R. 156- which also involved consideration of the interpretation of s.28 of the Police offences Act.
Samuels v.von Stroheim 19 S.A.S.R.297
(C.L.B., July 1979, p.693)

Trial for rape before jury-newspaper referring to defendant by last initial-whether possibility of prejudice
The defendant was presented to and arraigned before the jury at a Criminal Sessions of the Supreme Court of South Australia for rape in the name of "S" only. After his trial before a jury had commenced, a report of the proceedings was published in a newspaper which referred to the defendant as "S", also known as "M".

The Supreme Court held, upon the application of the defendant, that as there was a possibility of prejudice to the defendant from the suggestion of an assumed name, the jury should be discharged and the case made a remanet to the next Criminal Sessions.
The Queen v. Sherrin (1978)20 S.A.S.R.164
(C.L.B., October 1979, p.1079)

Western Australia

Rape and attempted rape-intention or belief-admissible evidence-discretion of trial judge to exclude material prejudicial to other accused
At the joint trial on indictment of four men on charge of rape and attempted rape of a woman arising out of the same or closely related facts, the trial judge ruled that out-of-court statements made by one of the accused were admissible but that material in the statements which implicated the other accused in the commission of any of the crimes should be excluded even if it was also relevant to the charges against the accused who had made the statements.

The trial judge, at the request of the Attorney-General under s.693A of the Criminal code (W.A.), referred to the Western Australian Court of Criminal Appeal two questions of law which arose at the trial.

The Court of Criminal Appeal held that-

(i) the trial judge did not have a discretion to exclude evidence admissible against an accused against whom it was tendered upon the ground that it was inadmissible against and prejudicial to other accused persons being properly tried together with him;
(ii) section 325 of the Criminal Code, defining the crime of rape, had nothing to say about intention or belief, but if a man had carnal knowledge of a woman, not his wife, without her

consent, mistakenly believing that she was consenting, then upon an application of s.24 of the Code, he would not be criminally responsible for the act but only if his belief was both honest and reasonable; and

(iii) by s.4 of the Criminal Code, however, intention was made an element of the crime of attempted rape and an honest belief that the woman was consenting to the carnal knowledge that the man was attempting to have, would negative his intent to have the carnal knowledge without her consent, whether or not his belief was based on reasonable grounds.

In so holding, the Court applied R. v. Gunewardene (1951) 2 All E.R. 790, distinguished R. v. Rogers and Tarran (1971) Crim.L. 413, and referred to D.P.P. v Morgan (1975) 2 All E.R. 347 and Driscoll v. R. (1977) 15 A.L.R. 47.
(C.L.B., October 1979, pp.1083-1084)

New South Wales

Prosecution for rape-assertion by the accused that the complainant was a consenting party-burden of proof on the Crown to negative mistake
The appellant appealed to the New South Wales Court of Criminal Appeal against his conviction for rape.

At the trial, at which the appellant had unsuccessfully raised the defence that the prosecutrix was a consenting party, the trial judge in his summing up said: "You have heard a matter dealt with by counsel and by the Crown which has been referred to as a defence of honest belief based upon reasonable grounds...This aspect of the law involves three concepts, first, that the accused...in fact held the belief that the woman was mistaken in that belief; and, thirdly, he must point...objectively to circumstances which provide him with reasonable grounds for his mistake..."

The Court of Appeal held that-:

(i) in proving the element of mens rea in the crime of rape, in a case where the accused asserts a belief that the complainant was a consenting party, the Crown must negative any mistake made by the accused as to the consent of the complainant, irrespective of whether the mistake was, or was not, based on reasonable grounds;

(ii) the reasonableness or otherwise of the belief of the accused will be important only as evidence tending to show whether it was really held by him;

(iii) for these reasons, the courts should, in trials of charges of rape, no longer direct the jury that it is relevant to consider whether the accused, at the time, entertained an honest but mistaken belief, based on reasonable grounds, that

the complainant was a consenting party; and

(iv) that in all the circumstances of the case, a judgment and verdict of acquittal should be entered.

In so holding the Court of Criminal Appeal applied the judgment of the House of Lords in Director of Public Prosecutions v. Morgan (1976) A.C.182 and overruled the Court's own previous judgment in R.v.Sperotto (1980) 71 S.R. (N.S.W.) 334.
R.v.McEwan (1979) 2 N.S.W.L.R.926.
(C.L.B., January 1981, p.78)

South Australia

Rape-mentally deficient woman-whether"so mentally deficient as not to understand" amounts to "not to be capable of understanding"
The accused had sexual intercourse with a physically-mature but mentally-deficient 23 year old woman whose mental age was said to be ten years eight months. She had no known previous sexual experience and had not been instucted about sexual matters by her parents, or in the sheltered workshop where she worked. She had, however, been expressing her sexual curiosity to her friends in the workshop. On the day of the offence, the accused had allegedly enticed the woman into his caravan at a country fair, by promising to give her a toy. Intercourse ensued. The woman showed no signs of distress, nor were there any indications that violence had been used. She showed a "carefree attitude" when she left the van.

The accused was charged with rape, contrary to s.48(1) of the Criminal Law Consolidation Act 1935-1976 (S.A.), and with having unlawful sexual intercourse with a mentally-deficient person contrary to s.49(6) of that Act.

The charge of rape was dismissed due to the lack of evidence that the intercourse was against the woman's will or without her consent, but the accused was found guilty of an offence under s.49(6) which, together with sub-section (6) of that section, provide-:

(6) A person who has, or attempts to have, sexual intercourse with another person knowing that other person to be so mentally deficient as not to understand the nature or consequences of the act shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding 7 years.

(7) Consent to sexual intercourse is not a defence to a charge of an offence under this section.

The trial judge rejected the submission that "so mentally deficient as not to understand" should be read as "not to be capable of understanding", and held that the legislative intention was to protect those who had the capacity, but did not in fact understand the nature and concequences of the sexual act, "provided the lack of understanding was due in a relevant sense to the degree of mental deficiency". It was further held

that because the victims' parents and workshop supervisors had not provided her with any form of sex education, her lack of understanding was sufficiently related to her mental deficiency.
R.v.Beattie (1981) 5 Crim. L.J. 176
(C.L.B., October 1981, pp.1278-1279)

Victoria

Rape - discharge after committal proceedings - whether Crown prevented from presenting the accused for trial.
Section 359A of the Crimes Act 1958 (Vic.) provides, in part as follows:

> 359A.(1) Notwithstanding anything in this or any other Act or any rule of law to the contrary the trial of a person for an alleged offence of rape, attempted rape or assault with intent to rape shall not be commenced-
> (a) where a stipendiary magistrate has ordered that that person shall not stand trial for the offence;
> (b) where an information for the offence has not been laid before a justice and the prescribed period has elapsed; or
> (c) in any other case, after the prescribed period has elapsed.
> (2) The prescribed period-
> (a) .....
> (b) for the purpose of paragraph (c) of sub-section (1) means the period of three months after the accused person has been committed for trial or such longer period after the committal is fixed by a judge of the court to which he has been committed for trial before the period of three months or any longer period fixed by a judge has elapsed.

On the appellant's appeal against his conviction for rape, the Full Court of the Supreme Court of Victoria has held that-

(i) where an accused charged with rape is discharged by a magistrate after committal proceedings, s.359A of the Crimes Act does not operate to prevent the Crown presenting the accused for trial;
(ii) the discharge of an accused after committal proceedings is not the same as an order that a person shall not stand trial; and
(iii) where during a trial the judge received a message from the Sheriff that a juror's wife had attempted to commit suicide and was in hospital the judge is entitled to infer that the illness was dangerous within s.44 of the Juries Act 1967 (Vic.); and
(iv) in such a case counsel are entitled to be heard on the question whether the jury should be discharged.

R. v. Tortomano (1981) V.R.31
(C.L.B., October 1981,pp.1386-1388)

Rape and assault with intent to rape - applicant arraigned after lapse of prescribed period - "trial"
Section 359A(1) of the Crimes Act 1958 (Vic.) provides that the trial of a person for rape, attempted rape, or assault with intent to rape, shall not be commenced;-

(a) .....

(b) here an information for the offence has not been laid before a justice and the prescribed period has elapsed; or
(c) in any other case, after the prescribed period had elapsed.

The "prescribed period" is defined in s.359A(2) of the Act, and, in the present case, was a period of three months after the applicant had been committed for trial.

Three months and 13 days after having been committed for trial the applicant was arraigned on a presentment which contained, inter alia, two counts of rape and one of assault with intent to rape. The applicant pleaded guilty to all counts except one of theft, in respect of which the prosecution led no evidence, and in due course he was convicted and sentenced. The sentences on the counts of rape and assault with intent to rape were made concurrent with the other sentences. The applicant applied to the Full Court of the Supreme Court of Victoria for leave to appeal against the sentences for rape and assault with intent to rape, on the ground that the court of first instance was without jurisdiction and that the convictions were therefore nullities.

In allowing the applicant's application, the Full Court held, by a majority that

(i) the word "trial" used in s.359A of the Act is a reference to the arraignment of a person, irrespective of whether he pleads guilty or not guilty, and the proceedings which follow in either case; and
(ii) the convictions on the counts of rape and assault with intent to rape would be quashed, and the sentences varied appropriately.

In so holding, the Full Court had occasion to consider a number of English and Australian cases as to the meaning of the word "trial".
R. v. Symons (1981) V.R. 297
(C.L.B., October 1981, pp.1386-1388)

Rape of wife by husband-husband subject of non-molestation order-whether can be convicted of rape of wife
The applicant sought leave to appeal to the Full Court of the Supreme Court of Victoria against a conviction of rape with mitigating circumstances upon his wife. The offence was committed before the commencement of the Crimes (Sexual Offences) Act 1980 (Vic.). On behalf of the applicant, it was contended that the conviction could not stand as, by reason of his marriage, his wife must be presumed by law to have consented to his exercise of the marital right of intercourse. At the date of the offence the couple were

separated, the wife had obtained an order ex parte in the Family Court of Australia restraining the applicant from assaulting or molesting her or entering upon or remaining near her premises, and the order had been varied to enable the applicant to have access to the child of the marriage but otherwise the non-molestation order continued in force. Section 114 of the Family Law Act 1975 provides-

> (1) In proceedings of the kind referred to in paragraph (e) of the definition of "matrimonial cause" in subsection 4(1), the court may make such order or grant such injunction as it thinks proper with respect to the matter to which the proceedings relate, including an injunction for the personal protection of a party to the marriage .....
> (2) In exercising its powers under sub-section (1), the court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.

It was submitted (a) that the orders were clearly made under s.114(1); and (b) that as an order in respect of conjugal rights fell under s.114(2), s.114(1) must be construed as excluding a power to make an injunctive order affecting conjugal rights.

In dismissing the application, the Full Court held that-

> (i) in the circumstances of this case it was open to the jury to find the applicant guilty of the rape of his wife; and
> (ii) without deciding whether the principle that a man cannot rape his wife remains part of the common law, the order of the Family Court effectively eliminated the wife's matrimonial consent to sexual intercourse.

In so holding, the Full Court examined a number of English cases in this area of the law, including such cases as R. v. Clarence (1888) 22 QBD 23, R. v Clarke (1949) 33 Cr App R 216, R v. Miller (1954) 2 QB 282, R. v. O'Brien (1974) 3 All ER 663 and R. v. Steele (1976), 65 Cr App R 22.

One of the members of the Full Court observed of the effect of a non-molestation order that-

> "I would be clearly of the view that a non-molestation order made for "the personal protection of a party" without any accompanying specific relief by curial order from any obligation to perform conjugal rights would be sufficient to terminate the implied consent of the wife to intercourse said to arise from the marriage contract. If "personal protection" does not mean protection from the violence necessary to achieve intercourse to which the wife is denying actual consent then it means nothing. Such an order was made and it was intended to give the wife immunity, inter alia, from the applicant's unwanted sexual attractions.

Another member of the Full court also observed, inter alia, as follows-

"The legal frame work within which this submission is advanced is based on an ambient principle. The principle was stated by Byrne, J. in R. v. Clarke (1949) 33 Cr App R 216, at p. 217; (1949) 2 All ER 448, at p. 448 in these terms; "As a general proposition it can be stated that a husband cannot be guilty of rape on his wife. No doubt, the reason is that on marriage the wife consents to the husband's exercise of the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them. In such circumstances the marital right of the husband exists by virtue of marriage and not by virtue of a consent given at the time of each act of intercourse, as is the case with unmarried persons. The intercourse between husband and wife is, therefore, not by virtue of any special consent, but is based on an obligation imposed on the wife by reason of the marriage. In Hale's Pleas of the Crown, vol. 1 p.629, the learned author states the law in this way: "..... by their mutual matrimonal consent and contract the wife hath given herself up in this kind unto her husband, which she cannot retract"."

That principle runs oddly counter to modern notions of marriage. There does not seem to have been any recent case in which it was considered whether the principle remains part of the common law. In many cases in Victoria it will no longer operate because of s. 62(2) of the Crimes Act 1958 as amended by the Crimes (Sexual Offences) Act 1980. It is not necessary in this case to examine the validity of the principle.

The cases have engrafted exceptions upon the principle. It has been decided that just as, according to the principle, marriage as a matter of law creates the wife's continuing consent to intercourse, so other legal processes may revoke that consent. If a court order is made which has the effect that the husband no longer has a right to have intercourse with his wife, the order brings about a revocation of the consent given by the wife through marriage: See R v. Clarke, (above); R. v Miller, (1954) 2 QB 282; (1954) 2 All ER 524; (1954) 2 WLR 138; 38 Cr App R 1; R v O'Brien (1974) 3 All ER 663.
R V McMinn (1982) VR 53
(C.L.B., July 1982, pp.964-966)

Tasmania

Rape of five year old child - determination of absence of consent
The defendant was indicted before the Supreme Court of Tasmania on a count of rape of his step-daughter, a child aged five years and three months. There was evidence that he had had sexual intercourse with her, but there was no evidence of resistance, physical injury or her knowledge of sexual matters.

The trial judge ruled that absence of the step-daughter's consent

could be established in three ways-

(i) if the jury were satisfied beyond reasonable doubt that she did not comprehend that the physical act of penetration was proposed;
(ii) if the jury were satisfied beyond reasonable doubt that she had no understanding that the act of penetration was of a sexual character;
and
(iii) if the jury were satisfied beyond reasonable doubt that the child was not able to appreciate that she could refuse to comply with her step-father (on the basis she would not then be so situated as to be able to form a rational opinion on the matter within the terms of s.1 of the Criminal Code 1924 (Tas.)).

Roden (1981) 4 A Crim R 166
(C.L.B., October 1982, pp.1351)

BOTSWANA

Indecent assault on female - whether assault by policeman an aggravating factor

The appellant, a police officer, was charged with indecent assault on a female and was sentenced to three years imprisonment and six strokes. The trial court found that the fact that the assault was committed by a policeman was an aggravating circumstance. The High Court differed from this approach-

"While there is every reason to expect a high standard of conduct from policemen because of the nature of their duties as guardians of the peace and enforcers of the law, that in itself does not preclude a court from taking into account the other considerations which apply if the accused followed some other occupation. He has a right like everyone else, to have a previous unblemished record taken into consideration and that his career is now at an end with all that entails is a factor of some weight."

Mothubi Ngwako v The State High Court; Criminal Appeal No. 33 of 1981
(C.L.B., April 1982, p.536)

GHANA

Custody - Father "kidnapping" son and bringing him to jurisdiction - Effect of foreign order in mother's favour - Discussion of relevant factors

In 1970, the plaintiff (a national of the Federal Republic of Germany and

resident there) gave birth to a child, Thomas, of which the defendant, a Ghanaian national resident in Germany, was the father. The parties were not married and by German law Thomas was illegitimate. On his birth certificate he was registered only in his mother's name and he at all times lived with his mother. The defendant brought proceedings in the German courts to legitimate Thomas without success. Custody was granted to the mother, and the defendant given a limited right of access. In October, 1974, in exercise of this right of access the defendant called for Thomas on the pretext that he was taking him boating, but instead flew with him to Ghana. The plaintiff followed and instituted proceedings for a declaration that she was entitled to the custody of Thomas, an order that he be returned to her, and general and special damages. The defendant returned to Germany before the case was heard, leaving Thomas, who could speak no English, with his brother and sister-in-law, who could speak no German. He instructed them not to allow the plaintiff to see Thomas until she had caused to be withdrawn a criminal charge for kidnapping which was pending against him in the German courts, and which carried a possible sentence of five years' imprisonment.

In support of her claim for custody, the plaintiff sought to tender the proceedings in the German courts. This was objected to on the ground that there was no reciprocity of enforcement of judgments between Ghana and the Federal Republic of Germany. Evidence was given that the defendant had expressed a hope of permanently returning to Ghana in 1975 but his passport had been impounded by the German law enforcement agencies; that since the birth of Thomas, he had married another German woman, and had a child with her; and that the marriage was not a happy one. The defendant nevertheless claimed that as the father he was entitled to the custody of Thomas, and on his behalf counsel submitted that Thomas was a Ghanaian citizen, and that it was in his interest to be brought up in Ghana; that the plaintiff was of limited means; and that Thomas might not be regarded as illegitimate by Ghanaian law. He further urged the court to determine the matter solely by reference to Ghanaian law.

The court held that in questions of custody it was well settled that the welfare and happiness of the infant was the paramount consideration. This had now been given statutory recognition by s.16(2) of the Courts Act, 1971 (Act 371).

In considering matters affecting the welfare of the infant, the court must look at the facts from every angle, and give due weight to every relevant material. The relevant material in the instant case included:-

(i) the fact that this was a kidnapping case where, one the court decided to go into the merits rather than send the child back from whence it came, the duty upon the court was to ensure that the wrongdoer did not gain advantage from his wrongdoing.

(ii) the order of the German court which although impunged by the defendant gave him the opportunity to see the child and kidnap him. That order need not be treated as a matter of binding

obligation in Ghana, but comity demanded its grave consideration, and the court could look at it as gorming part of the evidence.

(iii) the different personal laws of the parties meant that the case should not be decided only by reference to Ghanaian law, and by virtue of Act 372 the court was enjoined to achieve a result confortable to natural justice, equity and good conscience, such a result being one which ensured the paramount welfare of the child;

(iv) the inability of the father to satisfy the court that he could offer in the foreseeable future a home where the happiness and mental stability of young Thomas could be assured. As a natural father the defendant had no right, merely by virtue of fatherhood, to claim custody.

(v) the natural right of the mother of a young child to its custody, and the fact that the mother of an illegitimate child had a prima facie right to its custody in preference either to the reputed father or any other person.

(vi) the defendent, having left others to fight his battle for him, the real contest as to who should have custody was between the mother and strangers.

(vii) the fact that Thomas and his mother needed each other. The affection of a mother for her child must be taken into account, and poverty per se was no reason for depriving a mother of custody when her character had in no way been impeached.

In the circumstances, and regardless of the domicile of the parties, it would be contrary to natural justice, equity and good conscience to deprive the plaintiff of the custody of her son, and he should be returned to her forthwith.

The plaintiff was entitled to damages which were not limited to the loss she incurred, but which should reflect the strong disapproval of the court of the defendant's conduct, and take into account the mental anguish suffered by the plaintiff.
Braun v. Mallet (1975) 1 G.L.R. 81
(C.L.B., July 1976, p.236-238)

Rape - complaint impinging on identification - verdict reached without further directions requested by jury - whether retrial appropriate.
The appellant was convicted of rape on the sole testimony of the prosecutrix. Soon after the alleged offence she complained successively to her mother and the police, on each occasion identifying the appellant as the rapist. The appellant was known to the prosecutrix for some 26 years but the rape was committed in hours of darkness. Before the assault on her commenced she said that she saw his face under a light and also had a conversation with him. The defence was an alibi put forward from the dock.

The Judge summed up impeccably on the question of identification, satisfying the Turnbull criteria. There was no corroboration and the Judge pointed that out to the jury. The jury were directed that the complaints did not go to prove that the appellant had raped the prosecutrix or that (assuming rape was committed) the accused was the man who did it. He directed them that it only helped to enhance the reliability and credibility of her testimony negativing consent. The jury deliberated for nearly three hours and returned to the courtroom requesting further directions on the issue of identification. Because of the unavailability at that moment of a court reporter to take the further directions, the Judge sent the jury back to the jury room to await the appearance of one. Before a court reporter could materialise the jury, without further directions, proceeded to deliberate to a majority verdict of guilty.

Held by the Court of Appeal that-

(i) the majority verdict might have come about in a number of ways including the avoidance of inconvenience through the pressure of a long wait or by the jury giving weight to the complaint of the prosecutrix in resolving their difficulties on the question of identification, or other (unspecified) possibilities. A not unsubstantial degree of uncertainty surrounded the verdict;

(ii) the obvious poverty of the appellant suggested that he would on a retrial, as at the original trial, be unable to afford counsel to probe the prosecution case. His defence had been poorly presented and the appellant ought not to go through the ordeal of a second trial so handicapped. No legal aid would be available at a retrial. Appeal allowed, and conviction set aside;

(iii) Judges in Guyana should continue to sum up on statements from the dock as being the defence of the accused person.

R. v. Coughlan (1977) 64 Cr.App.Rep.11, not followed.
The State v. Lennox Thomas (Criminal Appeal No. 61 of 1978)
(C.L.B., October 1980, pp.1206-1207)

JAMAICA

Sentencing - whether circumstances justify imposition of maximum sentence permitted for rape.

The appellants were convicted before a jury of burglary, larceny and rape, and were sentenced to seven years imprisonment for burglary and life imprisonment with hard labour for rape. They appealed in respect of sentence on the rape counts.

The Crown's case was that the appellants and another man armed with a machete, knife and screwdriver, broke and entered a dwelling house at night and stole sundry articles. One of them held a 71 year-old woman hostage while the other two attached her two young nieces. One girl was raped by two men at knife point and the other by the third man, also at knife point.

Counsel for the appellants contended that having regard to the age of the appellants at the date of the commission of the offence: one having been under 19 years old and the other just over 17 years, and the fact that they were both apprentices learning a trade and had no previous convictions the maximum sentence of life imprisonment was wrong in principle.

In determining the appeal, the Court cited the case of R. v Sergeant (1975) 60 CR APP 74 in which Lawton, L.J. after referring to the four classical principles of sentencing summed up in the words retribution, deterrence, prevention and rehabilitation, stated that "any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them had the greatest importance in the case with which he is dealing", and then went on to deal in turn with each of these principles, and held that -

(i) though there was no scientific scale by which to measure punishment a sentence must be imposed to fit the offender and at the same time to fit the crime;

(ii) the appellants were two young and inexperienced men of fair intelligence who were learning a trade. Neither had previously ran foul of the law and there was nothing to suggest that they had developed such anti-social habits and that they were beyond redemption. There was no medical evidence that either were suffering from any mental disorder which would render them a danger to the community and, heinous as the offence was, a determinate sentence of imprisonment would meet the justice of the case;

(iii) the imprisonment should be for an extensive period demonstrating the Court's utter abhorrence for gang rape.

The sentence of life imprisonment was set aside and one for 12 years at hard labour substituted.
R. v. Sydney Beckford and David Lewis CA, SC, Criminal Appeals Nos. 173, 174.
(C.L.B., April 1982, pp.539-540)

HONG KONG

Indecent assault - forcing women to remove clothes and then taking photograph.

The Court of Appeal has held that forcing a woman to remove her clothes and taking photographs of her amounts to indecent assault.
Mok Pak-wo v. The Queen (Criminal Appeal No. 746/79)
(C.L.B., October 1980, p1209)

MALTA

Voluntary homicide of a child under the age of 12 months by its mother - whether the law presumes imbalance of the mind.
The appellant stood charged with voluntary homicide. In the indictment, the Attorney General alleged that a few minutes after giving birth to a child, appellant maliciously, with intent to kill that child or put its life in manifest jeopardy, did cause its death by throwing it from a window several stories high. The police had originally arraigned appellant on a charge of infanticide; however, following the psychiatric experts' deposition (before the Inquiring Magistrate) to the effect that at the time of the alleged offence she was not suffering either from puerperal psychosis or from any other imbalance of the mind, the Attorney General changed the charge to one of voluntary homicide and subsequently indicted accordingly.

Before the Criminal Court, appellant pleaded, by way of preliminary pleas, the nullity of the committal proceedings subsequent to the change in the charge and the nullity of the indictment. The Court rejected both pleas.

Section 258A of the Criminal Code states-

> 'Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effects of giving birth of the child, then, notwithstanding that the offence would have amounted to wilful homicide, she shall be guilty of infanticide and shall be liable to the punishment of imprisonment to a term not exceeding twenty years.

The Court of Criminal Appeal, dismissing her appeal held that-

(i) it was within the prosecution's right to change the original charge to one of voluntary homicide, just as the jury would be within their rights in returning a verdict of not guilty of voluntary homicide but guilty of infanticide or in returning any other verdict open to them on an indictment of voluntary homicide.

(ii) there was no presumption that a woman who killed her under-12-month-old child was suffering from the imbalance of mind envisaged in s.258A: this imbalance of mind was merely one of elements of the offence of infanticide ot be proved by the

prosecution in case of a charge under that section.

the Republic v. Nathalie Pisani Court of Criminal Appeal, 24 May 1982 (C.L.B., October 1982, p.1360)

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 C.J dissenting)-

> "for the purposes of 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) 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.
(C.L.B., October 1976, p.373)

Keeping a brothel
The appellant knew that the probable result if massaging her male customers whilst in a state of nudity would be to stimulate and excite sexual desire. It was argued that such conduct did not amount to prostitution.

Held that-

> "Prostitution within s.147(1)(a) is not limited to the exposure, by a woman, of her body for sexual intercourse in return for payment. It

is sufficient if a woman offers her body commonly for lewdness in return for payment, and includes the case where a woman offers herself as a participant in either active or passive physical acts of indecency for the sexual gratification of men.

Lowe v. Police (1977) Butterworths Current Law 268
(C.L.B., July 1977, p.412)

Rape - consent - appellant not realising absence of consent until after intercourse had commenced.

The appellant was charged with rape. At the trial his defence was that when he penetrated the complainant, he honestly believed that she was consenting and that he only realised her non-consent during intercourse, but did not desist. The trial judge directed the jury as follows-

> "If, having realised that she is not willing, (an accused who had previously thought the girl was willing) continues with the act of intercourse, it becomes rape, because rape is the act of a person having sexual intercourse without her consent."

The appellant was convicted. The Court of Appeal held (by a majority) that the direction was correct and dismissed the appeal.

The majority (Richmond P. and Richardson J.) took the view that the ordinary and natural meaning of the words used in s. 128 is that rape requires (a) sexual intercourse (not an act of sexual intercourse) plus (b) absence on consent; both factors were established when the accused realised the absence of consent but continued with the intercourse. They noted that there is no legal novelty in a continuing act becoming criminal after it has commenced as a result of change in the accused's state of mind.

The main submission for the appellant was that s.127 makes the moment of penetration the relevant time for assessing whether or not there was consent (or a belief thereof). This submission was supported by a South Australian case (Salmon (1969) SASR 76). The submission was rejected by the majority who preferred a Queensland decision (Mayberry (1973) Qd. R 211) contrary to Salmon and distinguished the Australian statutes from the Crimes Act on the basis that the former use the old English formula as to the deeming of completion of carnal knowledge. Section 127, they said, does not exclude from the s.128 definition of rape all acts in intercourse subsequent to penetration; "complete" in s.127 means "come into existence", not "end".

The dissenting judge, Woodhouse J. would have allowed the appeal and ordered a new trial. He pointed out that the trial judge's direction meant that a single continuing act of intercourse could properly be described as being undertaken both with and without the woman's consent -"a remarkable extension of what has been the common understanding of this crime for generations" He went on to point out that rape has always been concerned with the criminal invasion of a woman's body by a male, that a male defending a rape charge must establish consent prior to penetration and that, as a matter of

commonsense, consent is not just to penetration but to a normal, complete act of intercourse. He regarded the "legally critical" moment as that of penetration.
R. v. Kaitamaki (CA 43/79; 19 March 1980) noted in The Capital Letter vol. 3 No.9 (90)
(C.L.B., July 1980 pp.842-843)

Costs in criminal cases - rape charge - inadequate tests - whether awarded on indemnity basis.
The applicant in this action for costs in a criminal case was a sergeant in the US Army, permanently stationed in Hawaii, but present with his unit at the Papakura military camp for manoeuvres with their NZ counterparts. He was arrested on 27 September on charges of rape and indecent assault. The complaint arose after a late night party at the Corporals' Club at the camp. After hearing all the evidence in a three-day jury trial in the High Court, Holland J. discharged the applicant pursuant to the provisions of s.347 of the Crimes Act 1961. Such a discharge is deemed to be an acquittal.

The application for costs was made under s.5 of the Costs in Criminal Cases Act 1967. That Act replaced, inter alia, s.402, the analogous provision in the Crimes Act 1961, which dealt with costs of trials in the Supreme Court. In spite of the language used in the new section, which might be taken to refer to District Court trials and appeals to the High Court, Holland J. followed recent precedent and concluded that s.5 could apply to High Court trials: R. V. AB(1974) 2 NZLR 425 R. v CD (1976) 1 NZLR 436; R. v Reed (1980) 1 NZLR 758. See also the Regulations, set out at SR 1970/20, and the Schedule to those Regulations.

Holland J. then traversed the heptadic criteria established in sub-section 5(2). The fourth criterion, of the seven, was of greatest relevance: "Whether generally the investigation into the offence was conducted in reasonable and proper name".

The complainant had alleged that the defendant had ripped her panties apart. Evidence called for the prosecution, form the DSIR, was inconclusive on how the cotton stitching in the panties had come undone. Under cross-examination, the expert said that he "could not discount" the possibility that the panties had been ripped apart by strong hands. More exhaustive materials tests were conducted by experts for the defence, and testimony offered that some thread had been unpicked, not torn. The Judge concluded that-

> "If the police had made proper inquiries from the DSIR, and the DSIR had ascertained that the crotch part was unstitched, then it is obvious that the complainant would have been shown to have been wrong in a material aspect and the proceedings should have been withdrawn."

The Judge also considered the behaviour of the defendant, under the seventh criterion of subsection 5(2), in that the defendant, at the outset, made an untruthful, complete denial of any association with the complainant.

As that statement was almost immediately retracted, the behaviour of the defendant did not disqualify his application.

The Court found that the Regulations prescribed a maximal recovery of costs of $100 a day (SR 1970/20) but s.13(3) of the Act allows an order in excess of that prescription. Holland J. ordered that the applicant be paid $1,000 in costs, plus $1.034.64 in experts' fees, but disallowed a claim for $830.30 for a private investigation.
Scott v R (1981) NZ Recent Law 179
(C.L.B., April 1982, p. 92-93)

Rape - deterrent sentence
The appellant was sentenced to 4 years imprisonment for rape. He had forced a young woman to have intercourse with him under threat that he would strike her. There was no actual striking of the woman beyond the intercourse itself. The appellant was 32 years of age, married with two children. He was in regular employment. There was no relevant previous offending.

It was submitted that the lack of violence beyond the rape itself and the absence of weapons indicated that a lesser sentence was appropriate. The Court of Appeal, however, agreed with the observation of the sentencing judge as to the need for a deterrent sentence: "We are aware that the climate of opinion in the community at the present time in relation to the crime of rape is that this Court should uphold the view, expressed by the Judge on imposing sentence."
R ve Mead Court of Appeal, 4 November 1982 (CA 265/81)
(C.L.B., January 1983, p.163)

Rape - penetration with consent or in belief that woman consenting to sexual intercourse - continuation after realisation that woman unwilling - whether rape.
Section 127 of the Crimes Act 1961 provides; "For the purposes of this Part of this act, sexual intercourse is complete upon penetration ....." Section 128 provides; "(1) Rape is the act of a male person having sexual intercourse with a woman or girl - (a) Without her consent ....."

The defendent was charged on indictment with one offence of rape contrary to s.128 of the Crimes Act 1961 and one offence of burglary. The Crown's case was that he broke into a young woman's flat and twice raped her. There was no dispute that sexual intercourse had taken place on two occasions, but his defence was that the woman consented or he honestly believed that she was consenting. His evidence as to the second occasion was that after he had penetrated her he became aware that she was not consenting but he did not desist from intercourse. The trial judge directed the jury that if, having realised she was unwilling, the defendant continued with the act of intercourse, it then became rape. He was convicted and appealed. The Court of Appeal by a majority upheld the judge's direction and dismissed the Appeal. The defendant subsequently applied to the Court of Appeal under s.2(1) of the Offenders Legal Aid Act

1954, which empowered a court having jurisdiction in criminal proceedings to direct that legal aid be granted, for legal aid to prosecute an appeal to the Judicial Committee, but the court dismissed the application holding that it had no jurisdiction to grant it, and that the regulations made under s.3(1) did not make provision for legal aid for appeals to the Privy Council.

On the defendant's appeal to the Judicial Committee against both decisions of the Court of Appeal, the Judicial Committees, in dismissing the appeals, held that-

1. the purpose of s.127 of the Crimes Act 1961 was to remove doubt as to the minimum conduct needed to prove sexual intercourse, and, although sexual intercourse was complete upon penetration in the sense that it had come into existence, it was a continuing act only ending with withdrawal: since rape was defined by s.128(1)(a) as "having" intercourse without consent a man was guilty of rape within the section if he continued intercourse after he realised that the woman was no longer consenting; that although the prosecution case was that there were two rapes there had been no miscarriage of the indictment, and that, accordingly, the defendant had been properly convicted;

2. the Court of Appeal, having disposed finally of the matter before it by dismissing the appeal, no longer had jurisdiction and was therefore precluded by s.2(1) of the Offenders Legal Aid Act 1954 from granting legal aid; and, since under the terms of ss.2(1) and 3(1) regulations were necessary to give effect to the aid, the absence of any provision in the regaulations dealing with an appeal to the Judicial Committee prevented the grant of legal aid for such purpose.

Kaitamaki v The Queen (1984) 3 WLR 137 (PC)
(C.L.B., October 1984, pp 1546 - 1547)

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 come 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)

Carnal relations with girl aged 14 years - marriage under Swazi law and custom - repugnancy test - not age but mental and physical capacities

The accused had been found guilty by the Senior Magistrate for the Hhohho District of a contravention of s.3(1) of the Girls and Women Protection Act 1920 (No.39 of 1920) in that he had carnal connection with a girl aged 14 years. Sentence was postponed for a period of 12 months on condition that the accused was not during the period of suspension convicted of a similar offence. The Magistrate concluded that although a ceremony intended to constitute a customary marriage of the complainant with red ochre only took place the day following the intercourse complained of, the accused when called upon to plead stated that complainant was his "lover", but complainant denied that he was her "boy friend". Apparently, however, she had spent several days alone with the accused and at some stage she was taken to a cattle byre by other women. There some ceremony, not clearly recorded, was performed on her. The accused himself did not aver that he was married to the complainant at the time of the acts of sexual intercourse between them, but her father stated that in view of the formalities which had taken place he "took" the accused as his daughter's husband. The Magistrate forwarded the record to the High Court for consideration under its reviewing powers. He apparently had some doubt as to whether a child of 14 years could consent even to a Swazi marriage and considered that such a marriage would be regarded as repugnant to natural justice or morality under s.11(a) of the Swazi Courts Act 1950 (No. 80

of 1950). The reviewing Judge following the judgment of Bock J in the case of R. v. Smith (1941) G.W.L.D.2., found that in a marriage under Swazi Law and Custom the husband need not wait until the wife had attained the age of 16 years before he indulged in sexual intercourse with her. Although he upheld the Magistrate's finding of fact that the intercourse actually took place before the traditional marriage ceremony he concluded by way of obiter dictum that in cases of this kind it was not the age of the "wife", but her mental and physical capacities which should be the main relevant consideration in the application of the repugnancy test. Amoungst other factors which influenced him in this opinion was that even under the Marriage Act 1964 (No.47 of 1964) the possibility of a girl under 16 years being permitted to marry is not excluded as the Deputy Prime Minister may give special dispensation whereby such a marriage may be entered into.
Rex. v. M.L. Mhlabane Review Case No 83/1978.
(C.L.B., Janaury 1978, pp.89-90)

UNITED KINGDOM

Race Relations Board v. Applin (1974) 2 W.L.R. 541 (H.L.); 2 All E.R. 73
A married couple, registered with local authorities as suitable foster parents, had in the course of 23 years, without reward and as a public service, taken in more than 300 children, over half of them coloured. The appellant and another took action which amounted to incitement to the foster parents to take white children only. The House of Lords (with one dissentient) held that this was to incite the forster parents to act unlawfully contrary to the provisions of the Race Relations Act 1968; the foster parents, in providing a public service by fostering children in the care of a local authority, were "concerned with the provision of ..... facilities, or service" to those children, who were "a section of the public" within the meaning of the Act.
(C.L.B., January 1974, p.27)

R. v. Morgan (1975) 2 W.L.R.913;2 All E.R. 347
In an appeal from a conviction for rape the House of Lords, by a majority, held that, where the appellant had had sexual intercourse with a woman without her consent, yet believed that she did consent, he ought not to have been convicted, even though the jury were satisfied that his belief was not founded on reasonable grounds. The essential element of mens rea, an intention to have intercourse without the consent of the victim, was lacking. There must at least be an intention to commit the act without caring whether the victim consented or not.
(A Private Member's Bill has been introduced into the House of Commons to amend the law)
(C.L.B., October 1975 p.31)

Rape - adoption of statement - cross-examination of victim
Three defendants were convicted of rape. D, appealed against conviction on three principal grounds; that the judge wrongly (a) admitted in evidence contemporaneous notes of alleged admissions by D1, which were unsigned by him; (b) ruled that counsel for D2 and D3 had a duty to cross-

examine D1, where their evidence differed, thereby performing the Crown's task; (c) ruled that D1's counsel could only cross-examine the complainant as to whether she had had sexual relations within the previous five days, but no further.

The Court of Appeal, dismissing the appeal, held that-

(i) the technically incorrect admission of the notes - admittedly an irregularity - could not have effected the outcome;

(ii) the judge rightly pointed out counsel's duty to clarify, by cross-examination, his intention to challenge the co-defendant's evidence, whilst he warned of his duty to comment to the jury should counsel fail to do so, where there was extreme disparity between Ds' evidence. (Browne v. Dunn (1893) 6 R. 67 and dictum of Lord Herschell L.C. at 70 applied);

(iii) the judge had properly exercised his discretion under s. 2 of the 1976 Act by allowing sufficient cross-examination of the complainant for D1 to expand his viewpoint without causing her the further distress of a fishing expedition.

R. v. Fenlon; R. v. Neal (1980) 71 Cr.App.R.307 (C.A.)
(C.L.B., April 1981, p.537)

Cross-examination of rape victims
Section 2 of the Sexual Offences (Amendment) Act 1976 provides -

(1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of a defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.

(2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked .....

The court of Appeal, in allowing an appeal against conviction for rape, also gave guidance on the effect of s.2 of the Sexual Offences (Amendment) Act 1976 concerning leave to cross-examine a complainant in a rape case and to call evidence about her sexual experience with a person other than the defendant. The Court held that -

(i) It was apparent from the statutory words that the first question the judge had to ask himself was whether the proposed questions were relevant according to the ordinary common law rules of evidence and relevant to the case being put against the defendant.

If they were not so relevant that was the end of the matter.

(ii) The second question for the judge's consideration, if the questions were relevant, was whether they should be allowed or not, and that depended on the terms of s.2, which limited the admissibility of relevant evidence.

In R v Mills (Leroy) (1979) 68 Cr app R 327 Lord Justice Roskill gave the judgment of the Court of Appeal approving the decision of Mr. Justice May in R v Lawrence (1977) Crim LR 492: "The important part of the statute which I think needs construction are the words 'if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked. An in my judgment, before a judge is satisfied or may be said to be satisfied that to refuse to allow a particular question or a series of questions in cross-examination would be unfair to a defendant he must take the view that it is more likely than not that the particular question or line of cross-examination, if allowed, might reasonably lead the jury properly directed in the summing-up, to take a different view of the complainant's evidence from that which they might take if the question or series of questions was or were not allowed."

The approval in Mills meant that their Lordships in the present case were bound by Mr. Justice May's words. In the end the judge would have to ask himself whether he was satisfied in the terms expoinded by Mr. Justice May. It would be a problem for him to apply that doctrine to the particular facts of the case.

(iii) It would be both improper and very unwise for their Lordships to state in advance what might or might not be unfair in any particular case.

Mills had referred to Mr. Justice May's decision as an exercise of the judge's discretion. However, it had been agreed on all hands in the present case that it was, perhaps, wrong to speak of a judge's "discretion" in the case. He had to make a "judgment" whether he was satisfied or not in the terms of s.2. Once having reached his judgment on the facts he had no discretion.

If he concluded that it would be unfair to exclude the evidence or question, it had to be admitted and allowed.

(iv) The section was clearly aimed primarily at protecting the credit of a complainant and excluding questions which went merely to credit and no more. The result was that, generally speaking - of course, there would always be exceptions - if the proposed

questions merely sought to establish that the complainant had had sexual experiences with other men to whom she was not married so as to suggest that, for that reason, she ought not to be believed on oath, the judge would exclude the questions or evidence.

(v) On the other hand, if the questions were relevant to an issue in the trial in the light of the way the case was being run - for example, consent as opposed merely to credit - they might as a general rule be admitted.

Their Lordships were far from laying down any hard and fast rules. In such situations there was a grey area which existed between the two types of relevance: credit and issue.

Evidence of sexual promiscuity might be so strong or closely contemporaneous in time as to come near to or reach the boundary. Conversely, the relevance of the evidence as to an issue might be so light as to lead the judge to conclude that he was far from satisfied that to exclude it from the jury would be unfair to the defendant.

(vi) The problem facing the judge of making the decision at an early stage was they type of problem continuously faced on such decisions as whether counts or defendants should be tried separately.

(vii) To what extent was the court on appeal entitled to differ from the judge's conclusion? Their Lorships were in many respects in as good a position as the judge to reach a conclusion. They had to decide whether they believed the judge to have been wrong in the conclusion which he reached applying the test of Mr. Justice May in Lawrence.

Like so many decisions in the grey area it was not easy to make. His Lordship considered the proposed questions against the background of the way in which the case had been put against the appellant and concluded with the greatest possible reluctance that the judge was wrong to have excluded two out of three subjects for cross-examination of the complainant.

Regina v Viola Court of Appel, 10 May 1982 (The Times: 13 May 1982)
(C.L.B., July 1982, pp.982-984)

Sexual offences - masseuses providing sexual services not amounting to full sexual intercourse - whether massage parlour a "brothel".

On appeal, the Queen's Bench Division has held that premises where more than one woman offered herself as a participant in physical acts of indecency for the sexual gratification of men constituted a brothel for the purposes of s.33 of the Sexual Offences Act 1956, that, accordingly, on a charge of assisting in the management of a brothel it was not essential to prove that normal sexual intercourse was provided at the premises.

Kelly v Purvis (1983) 2 WLR 299
(C.L.B., April 1983, p453)

Scotland

Rape - whether husband can be guilty of rape of wife
An accused was charged in the High Court on indictment that he had assaulted and raped a woman. The woman, as was averred on the indictment, was the wife of the accused although they were living apart. No decree of judicial separation had been pronounced. An objection to the relevancy of the indictment was made on behalf of the accused. In argument it was conceded by the Crown that, so far as was known, this was the first time an attempt had been made to indict a husband for the rape of his wife.

Lord Robertson repelled the objection. There were no reported Scottish cases on the matter but the institutional authority of Baron Hume was against the proposition that a husband could rape his wife. However, the whole position of marriage and the status of women was today very different than it was in the time of Hume and although it is not said in the passage where that author treats of the matter, it would appear that he was dealing only with a husband and wife who happened to be living together. In modern times it is quite illogical and unreasonable to treat the question of rape as if it is in some way different from assault. A man can be found guilty of assault in whatever way and in whatever degree of seriousness of violence on his wife and it would be unreasonable if he could not be found guilty of rape if the necessary facts were proved. It might be a question of degree but it could not be affirmed as a matter of principle that the law of Scotland today is that a husband in no circumstances can be guilty of the crime of rape upon his wife.
HM Advocate v Duffy 1983 SLT 7
(C.L.B., October 1983, p.1262)

United Kingdom

Sexual offences - procuring or attempting to procure woman to become common prostitute - reasonable belief in woman being prostitute - whether belief irrelevant - whether genuineness of belief question for jury.
The appellant pleaded no guilty at trial on indictment to a court charging, under s. 1(1) of the Criminal Attempts Act 1981, attempting to procure a woman to become a common prostitute. He wished to raise as a defence that he believed her to be a prostitute. On a submission at the close of evidence for the prosecution the trial judge ruled that the appellant's belief whether or not the woman was already a prostitute was irrelevant to the offence charged. The appellant thereupon changed his plea and was convicted.

On appeal against conviction on the question as to the necessary intention in relation to a charge under s.1(1) and a charge of the full offence contrary to s.22(1)(a) of the Sexual Offences Act 1956 the Court of Appeal, in allowing the appeal, held that -

1. on a charge under s.1(1) of the Criminal Attempts Act 1981 of attempting to procure a woman to become a common prostitute, the intent necessary was the same as the intent to commit the full

offence under s.22(1)(a) of the Sexual Offences Act 1956;

2. a man who genuinely believed on reasonable grounds that a woman was a prostitute could not be said to be trying to procure her to become that which he already believed her to be: that the genuineness or otherwise of the appellant's belief was essentially a question for the jury; and that, accordingly, the trial judge was wrong to rule that the appellant's belief was irrelevant and the conviction would be quashed.

R v Brown (1984) 1 WLR 1211 (CA)
(C.L.B , January 1985, p.75)

Evidence

AUSTRALIA

Victoria

Rape - corroboration

The applicants were convicted of rape, and applied for leave to appeal on grounds, inter alia, that-

(a) evidence of a complaint by the prosecutrix had been wrongly admitted; and
(b) the trial judge had wrongly directed the jury that evidence of the distressed condition of the prosecutrix was capable of amounting to corroboration.

The applicant applied to the Full Court of the Supreme Court of Victoria which held that-

(i) evidence of recent complaint by the prosecutrix in a case of rape was not admitted to prove or tend to prove any of the facts stated in that complaint, nor to prove lack of consent, but was admitted solely to buttress the prosecutrix's evidence given in the witness box.
(ii) evidence of recent complaint was accordingly admissible only if it was made at the first reasonable opportunity and, in the circumstances in which it was uttered, could serve to buttress the prosecutrix's credit as a witness by demonstrating consistency;
(iii) the decision whether to allow evidence of the complaint to go to the jury therefore depended upon whether the complaint was capable of being regarded as a spontaneous and unvarnished narrative. If the complaint was not made as soon as could reasonably be expected in the circumstances after the event, or was the product of suggestion or intimidation, or might have been induced as a consequence of the relationship between the

prosecutrix and the person to whom the complaint was made, then the evidence might be excluded;

(iv) evidence of two complaints might be admissible where each complaint could fairly be regarded as having been made at the first reasonable opportunity after the offence;

(v) where in a rape trail consent was in issue, it was generally advisable that the jury be directed that it should look for corroboration in respect of that issue;

(vi) each separate item of corroborative evidence need not, when taken alone, implicate the accused, provided that in conjunction with other evidence it did implicate or tend to implicate him; and

(vii) while evidence of the distressed condition of the prosecutrix would sometimes carry little weight, evidence given at the trial concerning the prosecutrix's distressed condition only seconds after the event was capable of constituting corroboration because such evidence, in conjunction with the surrounding circumstances, tended to show that it was more probable than not that the acts on intercourse were non-consensual.

R v. Freeman and others (1980) V.R.1
(C.L.B., July 1980 p833-834)

Western Australia

Compellability of spouse - misdirection by trial judge
By s.8(1)(b) of the Evidence Act 1906 - 1978 (W.A.) the spouse of a defendant is a non-compellable witness.

At the trial of K for wilful murder, his wife was called as a witness on behalf of the prosecution. She declined to testify.

On appeal against conviction, the Full Court held that -

> "a reference by the trial judge to the fact that the wife "was not called in defence of her husband" had prejudiced the jury and resulted in a miscarriage of justice.
> If the Crown had any reason to think beforehand that Mrs. Kerr might be unwilling to give evidence - and this may not have been the case - then her unwillingness ought to have been established before the trial judge in the absence of the jury and indeed it would seem to us that in every case it would be a desirable practice to test and to establish the willingness of a wife to give evidence in the absence of the jury."

The appeal was allowed and an order made for retrail.
Kerr v R. (1980) W.A.R.21
(C.L.B., October 1980 p.1232)

South Australia

Rape-admissibility of police testimony of statements made by prosecutrix shortly after the incident complained of -"character" of utterances
Section 34i of the Evidence Act 1929 - 1974 (S.A.), provides as follows-

34i. (1) In proceedings in which a person is accused of a sexual offence, evidence of a statement made by the alleged victim of the offence-

(a) after the time the offence is alleged to have been committed; and

(b) otherwise than in the presence of the accused, is inadmissible unless introduced by corss-examination, or in rebuttal of evidence tendered by or on behalf of the accused.

(2) In proceedings in which a person is accused of a sexual offence, evidence of-

(a) sexual experiences of the alleged victim of the offence prior to the date on which the offence is alleged to have been committed; or

(b) the sexual morality of the alleged victim of the offence

shall not be adduced (whether by examination in chief, cross-examination, or re-examination) except by leave of the judge.

(3) Leave to adduce evidence under this section shall not be granted except where the judge is satisfied that-

(a) an allegation has been, or is to be, made by or on behalf of the prosecution or the defence, to which the evidence in question is directly relevant; and

(b) the introduction of the evidence is, in all the circumstances, of the case, justified.

The two accused were charged with rape. The prosecution sought to lead evidence that not long after the offences had allegedly been committed in a pine plantation, the police had observed the prosecutrix run onto a track and toward the police car in a hysterical condition calling "Help me, help". The police were to give evidence that when she got into the vehicle she said "They're after me. They're going to kill me. I've been raped". Objection was taken on behalf of the accused to the admission of the evidence that related to statements by the prosecutrix as infringing sub-section (1) of s.34i. of the Evidence Act. It was also submitted that if the evidence was admitted it could not be left to the jury as capable of being corroboration.

The trial judge ruled that evidence was admissible and capable of being corroborative because of the importance that may be attached to the police testimony was not derived from the information contained in what the prosecutrix said, but upon the character of her utterances. The test to be applied by the jury in order to determine what use was to be made of the girl's cries and utterances in the instant case as she neared and entered the police car was: Was the girl still in the grip of the emotions created by whatever experiences she had just passed through? Were her cries and utterances the spontaneous and natural outpourings of one who was still reacting to the situation? Or, on the other hand, in the circumstances, and in the time available to her, had she been afforded a real opportunity of

which, viewing the circumstances as a whole, she might fairly have availed herself, for working out, as a narrative, what she was going to assert had happened?
R v Kooyman and Brydson (1980) 2 A Crim. R.18
(C.L.B. October 1981) p.1300-1302)

Queensland

Rape - evidence of distress - weight to be given to such evidence - whether amounting to corroboration - direction to jury
The appellant was convicted of rape. Evidence was given by a friend of the complainant as to the latter's distressed condition at a time when an intruder was observed fleeing from her residence. The trial judge directed the jury that, as a matter of law, evidence of the complainant's condition, if accepted, was capable of corroborating the complainant's evidence of the rape.

The appellant appealed to the Queensland Court of Criminal Appeal which, in dismissing the appeal, held that-

(i) what weight evidence of distress carries depends on the facts of each case;

(ii) a warning that distress may be feigned or may not reflect the complainant's state of mind at the time of the offence is not called for in every case, nor is it absolutely necessary that a jury be told that generally evidence of a distressed condition is of little weight; and

(iii) such a warning was not called for in the present case where the evidence relied on as corroborative of the complainant was that she was observed at the very moment an intruder was seen fleeing from her residence.

R v McDougall (1983) Qd R 89
(C.L.B., October 1983, pp1267-1271)

Victoria

Rape - visual identification - direction to jury - whether adequate warning on circumstantial evidence
The applicant had been convicted of rape and other offences. The alleged offences arose out of the kidnapping of a girl and a young man, the locking of the young man in the boot of a car and prolonged sexual attacks on the girl. Two men committed those offences. It was common ground that one of the offenders was C, and the issue was whether the other offender was the applicant. When the offences were committed, the applicant, having been committed for trial about two months prior to the commission of the instant offences, was awaiting a trial for robbery. The applicant fled to England about a week after the commission of the instant offences. Thereafter the girl and the young man identified the applicant from a photograph.

The applicant was extradited to Australia more than three years later, but no identification parade was conducted. At the trial both the girl and the young man conceded that there were significant differences between the applicant and the relevant offender and the young man in fact said that the applicant could not be the offender. The jury heard evidence of the flight of the applicant and of the fact that he was then awaiting trail for robbery. The question whether the applicant had fled because of the robbery charge or because of the instant offences was left to the jury.

The applicant was convicted, and he applied to the Full Court of the Supreme Court of Victoria for leave to appeal.

The Full Court, in granting the application, allowing the appeal, quashing the applicant's convictions and sentences and ordering a new trial held that-

(i) in deciding on appeal whether a direction on visual identification was adequate, the approach is to ask what warnings would have been expected as adequate in the circumstances and to weigh against that what the trial judge had said;

(ii) the question as to what is an adequate warning depends on the circumstances of the particular case;

(iii) in the circumstances, the warning and directions which had been given by the trial judge were inadequate;

(iv) the absence of objection at the conclusion of the charge did not in the circumstances warrant a rejection of the application;

(v) in a criminal trial it is only the elements (ingredients or ultimate facts) of the crime which must be established by the evidence beyond reasonable doubt;

(vi) in a case depending wholly or mainly on circumstantial evidence it is wrong for a jury to be told that, before they rely on an evidentiary fact as an item of circumstantial evidence, they must be satisfied of its existence beyond reasonable doubt;

(vii) in the present case the Crown did not rely wholly or mainly on circumstantial evidence and there was no call for giving the commonly given general direction on circumstantial evidence; and

(viii) having regard to the inadequate direction and warning in relation to identification evidence, the appeal should be allowed.

R v Dickson (1983) VR 227
(C.L.B., October 1983, p1269-1271)

South Australia

Rape-several counts relating to different incidents with different girls-

striking similarities in circumstances-whether evidence in respect of one incident could be used in others

The appellant was charged upon an information containing eight counts-one of attempted rape and seven counts of rape. The counts related to different incidents with three girls and there were a number of similarities in the circumstances of the offences alleged which the trial judge considered so striking that an application for separate trials was refused. In his summing up the trial judge directed the jury that they could use the evidence in relation to the incident with each girl when considering the incidents in which the other two girls were concerned. The appellant was convicted upon all counts, and appealed to the Full Court of the Supreme Court of South Australia.

The Full Court, in dismissing the appeal, held that upon the evidence the three sexual assaults upon the girls bore such a striking similarity to one another that the trial judge (having given proper and adequate warnings to the jury as to the dangers attaching in the circumstances to identification evidence) was justified in authorising the jury to use an independent finding of guilt in respect of one incident to support proof of identity of the accused and finding of guilt in respect of the other two incidents.

In so doing, the Full Court had occasion to examine the principles upon which evidence of similar facts may be admitted upon a criminal trial, particularly as enunciated by, respectively, the House of Lords in Harris v DPP (1952) AC 694 and The Queen v Boardman (1957) AC 421 and the High Court of Australia in Penny v The Queen (1982) 44 ALR 449.
The Queen v Sutton (No 2) (1983) 32 SASR 553
(C.L.B., April 1984, pp1129-1130)

Prostitution-whether evidence of payment of money essential to charge of keeping a common bawdy house

Upon the hearing in a court of summary jurisdiction of a complaint against the appellants for the offence of keeping a common bawdy house, evidence was given by a number of male witnesses who had visited the premises in question. The entrance to the premises was secured by remote-controlled doors. A customer, on being admitted, was introduced to one of a number of women, and paid to one or other of the appellants a fee. In return he was permitted to take the woman to one of four bedrooms on the premises and have sexual intercourse with her. None of the customers paid any money directly to the women.

The appellants were convicted of the charge. On appeal to the Supreme Court of South Australia, it was contended on their behalf that the convictions should be set aside because there was no evidence of any payment having been made to the women of the establishment.

In dismissing the appeal, the Supreme Court held that evidence of the payment of money to a prostitute is not essential in proving a charge of keeping a common bawdy house.
Jones v Killian; Powers v Killian (1983) 34 SASR 152
(C.L.B., October 1984, pp1537-1539)

Rape-unsworn statement by accused-newspaper publicity criticising generally making of an unsworn statement-whether jury should have been discharged

The appellant was presented for trial before the Supreme Court of South Australia upon charges of rape. After the prosecution case had been completed, the appellant made an unsworn statement, and at the completion of the evidence, on a Friday, the trial was adjourned to the following Tuesday, for counsel to address the jury. On the intervening days a daily newspaper published an article and correspondence in which the making of an unsworn statement by an accused person, particularly in cases of rape, was criticised. Upon the trial being resumed, application was made to the trial Judge by counsel for the appellant for the jury to be discharged, upon the ground that as the appellant had made an unsworn statement the criticism published in the newspaper was likely to have had a prejudicial effect upon the jury. The application for discharge of the jury was refused by the trial Judge, the trial proceeded, and the appellant was convicted.

The appellant appealed to the Full Court of the Supreme Court which, in dismissing the appeal, held that -

1. a Judge of the Supreme court has power, by staying the trial of an accused person, to prevent an abuse of process by the repeated presentation of the accused for trial upon the same charge;

2. it would be only in a rare and very exceptional case that a Judge would interfere with the Attorney-General's exercise of the discretion vested in him to present an accused person for trial; and

3. although it was unfortunate that the criticism of the making of an unsworn statement should have been published immediately following the making of such a statement by the accused, the trial Judge had properly exercised his discretion in refusing to discharge the jury.

The Queen v Donald (1983) 34 SASR 10
(C.L.B., October 1984,pp1537-1539)

Victoria

Rape-whether reasonableness of belief as to consent

The Full Court of the Supreme Court of Victoria held that-

1. on a charge of rape, the Crown must prove that the accused was aware that the prosecutrix was not consenting, or else realised that she might not be and determined to have intercourse irrespective of consent;

2. the reasonableness of a belief that there was consent bears only on whether the accused actually held such a belief;

3. for fresh evidence of fresh complaint to be admissible, a

grievance or an accusation must be expressed, but it is unnecessary that such complaint be of rape; and

4. evidence of complaint is admissible as evidence of consistency of behaviour and may also be admissible to rebut a suggestion of recent invention.

DDP v Morgan (1976) AC 182 followed
R v Saragozza (1983) VR 187
(C.L.B., October 1984, pp1537-1539)

BOTSWANA

Rape-corroboration

In this case the Court in a judgment in review expounded on the principles leading to corroboration in rape cases. The Court held that the Chief Magistrate's attention had not been drawn to the decision in Jacob Mokgopa v The State, Criminal Appeal No 157 of 1981 which followed the decisions of Lord Parker CJ in R v Wilson (1974) 58 CR App R 304 and the decision in R v Knight (1966) CAR, 122 (CA). Furthermore, the learned Magistrate was right to convict the accused but his reasoning left a lot to be desired and "did not take account of the wealth of the law on the subject. He would be well advised to bring himself up to date on the decision of this Court as well as the decisions in the English and South African Courts on the subject". (It may be noted that this is the first occasion in which such strong comments have been made concerning the judicial functions and duties of a Magistrate by a senior memeber of the judiciary.)
The State v Richard Matho Rasetshwane High Court, Review Case No.398 of 1982,
(C.L.B., October 1983, p1240)

Attempted rape - test to be applied

This judgment on review concerned the accused who had pleaded guilty to a charge of attempted rape contrary to s.143 of the Penal Code (Cap 08:01). The High Court discussed whether the accused was rightly convicted of attempted rape and applied the test as enunciated in Davey v Less (1967) 2 All E R 423 where Lord Parker CJ cited as authority Archbold's Pleading, Evidence and Practice at paragraph 4104. The position in South Africa is as is laid down in R v J & A (1942) TPD 284 where it was held that where a man and a woman are found in a prone position with adjusted clothing which in circumstances indicated that but for interruption carnal knowledge would immediately have ensued, the facts constitute an attempt to commit the act (See further Gardner and Lansdown South African Criminal Law and Procedure Vol 1, 6th Edition at page 137).
The State v Sethatu Phuthego Tumeletso High Court, Review Case No 411 of 1982
(C.L.B., October 1983,p1273)

Rape-the nature of corroboration

This was an appeal against conviction on a charge of rape contrary to s.141 of the Penal Code (Cap 08:01), and the sentence of three years imprisonment and six strokes passed by the Senior Magistrate at Maun.

On appeal, the High Court, in dismissing the appeal, held that the approach with regard to corroboration must assess the nature of the recent complaint and the distressed condition of the complainant but these must not be over emphasised and that except in exceptional circumstances little weight should be given to such evidence. With reference to the review case, State v R M Rasetshwana (No 398 of 1982) where relevant authorities in Botswana had been cited, applying the ratio in the Rasetshwana case, the Court found that even though there was not a proper direction the evidence was overwhelming against the accused.
Letswang Dimbo v The State, High Court, Criminal Appeal No284 of 1982 (C.L.B., January 1984, p.175)

CANADA

Rape-whether evidence of similar acts or psychiatric evidence as to disposition admissible in rebuttal
The accused was charged with rape. The accused and the complainant had developed a relationship over the course of two years, during which they had moved into an apartment and considered marriage. After several arguments the complainant terminated the relationship and moved to another apartment. It was at this apartment that the accused was alleged to have raped her. Sexual intercourse was admitted and the issue was whether the complainant had consented. She testified that she had performed intercourse and other sexual acts at knife-point, while he testified that she had consented throughout and that he had accidentally cut her with a knife. The defence called a number of witnesses to testify as to the accused's good character. The Crown then sought to tender in rebuttal evidence of another complainant that the accused had raped her after their relationship had terminated, and also the evidence of a psychiatrist that the accused had told him that during the course of an argument with the present complainant he had threatened her with a pair of scissors and that the accused had a disposition towards violence after a separation. The trial judge ruled that the Crown rebuttal evidence was inadmissible. The jury returned a verdict of not guilty, against which the Crown appealed.

The Court of Appeal, in allowing the appeal and ordering a new trial, held that -

(i) once an accused puts his character in issue, evidence of similar acts or psychiatric evidence as to disposition may be admissible in rebuttal; the former is also admissible to prove guilt;

(ii) evidence of a single act which is a part of a distinctive, albeit unplanned, pattern is admissible as probative of the occurrence of another act which bears the hallmarks of that

pattern. Here the evidence of the two complainants disclosed a remarkably similar pattern of emotional involvement followed by rejection and then violence. So too the evidence of the scissors episode was admissible as a similar act of hostility;

(iii) the psychiatric evidence of disposition must be as to abnormal disposition, and the evidence must fall within the expertise of the psychiatrist. Here the diagnosis of the abnormal disposition by the psychiatrist was admissible to rebut the evidence of the accused's peaceable nature;

(iv) the existence of an order prohibiting the publication of the complainant's identity could not be used to adversely affect her credibility.

R v Tierney (1982) 31 CR (3d) 66 (CA)
(C.L.B., October 1983 pp1241-1242)

MALTA

Admissibility of evidence-attempted murder of wife by husband-whether wife a compellable witness.

Defendant was charged with the attempted murder of his wife. Upon a preliminary plea, the trial judge ruled that defendant's wife was a competent witness but whether the Court would compel her to testify against her will had to be decided at the appropriate stage of the trial after she took the witness stand and not by way of preliminary plea on the admissibility of evidence. Defendant appealed from the interlocutory decree.

The Court of Criminal Appeal, dismissing the appeal, held that-

(i) since the offence charged against defendant was allegedly committed against the person of his wife, the wife was both a competent and a compellable witness;

(ii) however, it lay in the discretion of the trial court, regard being had to the reluctance to give evidence against her husband and to other particular circumstances of the case, not to compel her to testify (R. v Aquilina 3 December 1953 : Criminal Appeal, and R. v Lapworth (1931) 1 K.B. 117, considered).

The Republic v . George Baldacchino, Court of Criminal Appeal : 16 June 1981, (not yet reported).
(C.L.B., October 1981 p.1303)

NEW ZEALAND

Spouse as witness - offence of abscene language over a telephone - whether

when call to wife an offence against the wife

A husband used obscene language over a telephone when calling his wife. As to whether the wife a competent witness, held by the Court of Appeal-

> "the wife was not a competent witness against her husband as the offence was not an offence against the wife in terms of s.5(1) and (3) of the Evidence Act 1908. Whether the offence charged against the respondent was an offence "against" his wife or was an offence "affecting the person or liberty" of his wife must be answered by reference to the legal nature of the offence charged rather than by reference to the evidence given in support of that charge."

Police v Griffiths (1978) Butterworths Current Law 1095.
(C.L.B., April 1979 p.410)

Entrapment - whether police activities exceeded bounds of proper police conduct

The appellant had been convicted of procurring a woman to have sexual intercourse with a man not her husband. The woman involved was an undercover policewoman. She answered an advertisement by the appellant who raised the question of prostitution and indicated that he was "fairly used to setting this sort of thing up". They went to a hotel, a man was indicated, and the appellant made the arrangements. The man was an undercover policeman. It was urged that where the police provided not only a willing purchaser but the vendor as well simply to implicate the offender, the situation went byond the bounds of proper police conduct and evidence from it should be rejected as being unfairly obtained.

Held by the Court of Appeal-

(i) the appellant had shown himself to have attempted to recruit women in general for purposes of prostitution and had taken steps which showed clearly enough that he was prepared to live on the earnings of prostitution;

(ii) in that sense the police were not working in a vacuum and the evidence was admitted.

Lavalle v Police (1979) Butterworths Current Law 164.
(C.L.B., July 1979 p.712)

Rape-corroboration-distressed condition of complainant

Held by the Court of Appeal-

"The time element is all important in assessing whether the appearance and emotional state of a complainant in a sexual case may be regarded as capable of corroborating her evidence. The real question is whether or not it can be said that the condition itself was involuntary and uncontrived. It was felt that a case where nearly an hour had passed before independent witnesses were able to observe the distressed condition of the complainant was a borderline example of distress being capable of validity and significance of the signs of distress must depend entirely on the jury's

evaluation of the woman concerned as an honest person who would not stoop to mere pretence in order to shore up her allegation. Where evidence is just capable of being corroborative but is certainly not strongly so it may be safer and fairer to direct the jury that there is no corroboration but that they should consider all the relevant evidence in deciding whether they are nevertheless convinced of the truth of the essential allegation. There must be a particularly clear direction to the jury to be sure that they are able to exclude the chance of simulated distress or other extraneous reasons."

R. v. Moana and Smith (1979) Butterworths Current Law 264.
(C.L.B., Ocotber 1979, pp.1087-1088)

SWAZILAND

Evidence of spouse-technical defect in marriage ceremony-testimony excluded on ground of public policy

A witness at a preparatory examination had stated that the first accused was her husband who, although he had paid lobola for her, had not smeared her with red ochre. On her evidence being tendered in the High Court objection was taken that she was not a competent and compellable witness against her husband. The Chief Justice who tried the case consulted with the Swazi assessors who had been called to assist him and found that of the ceremonies performed at a Swazi wedding the legally significant one was the annointing of the bride with the red ochre (libomvu). On the basis the witness could not, strictly speaking, rank as a wife. Nevertheless, since she regarded herself as the wife of the accused, who probably also so regarded her as did the populace as a whole, he ruled that the evidence should be excluded, stating, inter alia: "The rule excluding one spouse from giving evidence against the other is based on public policy, the underlying motivation being the sanctity of the marriage and the preservation of marital confidence flowing from the marital state. In England, however, which is a monogamous country, the rule of public policy has been narrowed so as to exclude from its ambit marriages which are potentially polygamous. I am not satisfied that the rule should be similarly cut down in Swaziland where polygamous marriages are the order of the day".

Rex v J.B. Fakudze and J. Makhanya (High Court CRIT S3/76)
(C.L.B., July 1977, p.420-421)

UGANDA

Circumstantial evidence-strange conduct of accused after death of his wife-whether conviction could be based on such evidence

The appellant was convicted of the murder of his wife and sentenced to death. The only evidence against him was his strange conduct after the death of his wife. The evidence accepted by the court was that the appellant and his two wives, who included the deceased, left their home intending to go and

settle elsewhere. They had to cross a deep river 12-30 feet wide by a bridge made of logs. The appellant and his other wife, who were ahead of the deceased, crossed the bridge first. Then the appellant went back to assist the deceased, who was lame, to cross the river. Later the appellant returned to his second wife without the deceased and said nothing about her. The appellant and his second wife proceeded to the home of his father-in-law where they stayed for a night. The father-in-law observed some strange behaviour on the part of the appellant when asked about the whereabouts of the deceased. Later the body of the deceased was found in the river near the bridge. The deceased's head was covered with a piece of cloth which was tied tightly round the neck. An examination of the body did not disclose the cause of death, though the doctor thought that the deceased might have died of strangulation and not drowning. However the doctor made it clear that there was no bone fracture.

At the trial the appellant made a short statement to the effect that as the deceased was walking across the bridge, before he got to where she was to give her the help she had asked for, she fell into the river and was drowned. The incident shocked him so much that he could not raise an alarm but continued with his journey to his father-in-law.

Allowing the appeal, the Court of Appeal held-

(i) although the very strange conduct of the appellant in relation to the death of his wife was no doubted, for purposes of criminal responsibility, this strange behaviour, in the circumstances of this case, did not more than raise very grave suspicion against him.

(ii) there was no evidence to prove that it was the accused who tied the cloth round the deceased's neck or that he pushed her into the river. The possibility that the deceased might have fallen into the river accidentally as she attempted to cross it by the log bridge was not excluded.

(iii) appellant's failure to report the incident may have been due to the fear of being accused of causing his wife's death.

(iv) in view of the shortcomings in the prosecution case in establishing the guilt of the appellant, more especially as he was facing the serious charge of murder, it could not be said that the burden of proof had been discharged and therefore the conviction could not be allowed to stand.

Doroviko Bangizi v. Uganda (1976) H.C.B.41
(C.L.B., July 1977, pp421-422)

Family Law

AUSTRALIA

New South Wales

Position of de facto wife on death of de facto husband-deceased the sole owner of house financed by special loan.
The plaintiff was the executrix of a man who had been her de facto husband and who was at the date of his death the registered proprietor of a house and land which was subject to a mortgage to the Director of War Service Homes under the Defence Service Act 1918-1973. Section 35 of the Act provides that the interest in a Defence Service Home is not to be transferred to another person while any moneys owing on the mortgage to the Director are still owing and unpaid. The plaintiff sought-

(a) a declaration that the deceased had held his right, title and interest in the house and land for her, provided that such trust had no force and effect until the consent in writing of the Director had been obtained thereto, or until the mortgage to the Director had been discharged; and

(b) an order that subject to such consent of discharge, she, as executrix, was at liberty to transfer the property to herself absolutely.

The Supreme Court of New South Wales held-

(i) a resulting trust, such as had arised in the present case, was a "transfer of an interest in land" within the meaning of s.35(1) and (5) of the Act;

(ii) s.35(1) of the Act denied any force or effect to such a transfer only so long as the property in question was subject to a security in accordance with the Act;

(iii) there should be a declaration that there was a trust which would have no force or effect until the mortgage was discharged; and

(iv) there should not, however, be a declaration that there was a trust which should have no force or effect until the Director should consent in writing to the trust, because, to be effective for the purposes of s.35(1)(c), the Director's consent should have been given before, or contemporaneously with, the relevant transfer.

Olsen v Olsen and anor (1977) 1 N.S.W.L.R. 189 (Sup.Ct.)
(C.L.B., April 1978,pp318-319)

Australia

Marriage according to Jewish religious ceremony-undertaking by husband to give his wife a Bill of Divorcement-whether failure to comply with such an undertaking amounts to contempt of court.

The Full court of the Family Court of Australia had occasion to consider an appeal by a husband for a decree of dissolution of marriage under the Family Law Act 1975 (as amended). The husband was resident and domiciled in Australia, whereas his wife was resident in Israel. Both parties were members of the jewish faith and had been married in a Jewish religious ceremony.

At the hearing of the application, the husband undertook to the Family Court to do all things necessary to give his wife a Bill of Divorcement in accordance with the Jewish faith and with the law of the State of Israel. However, subsequent proceedings before the Beth Din Court in Australia were aborted, and a number of applications were made to the Family Court to deal with the husband for his contempt in failing to comply with his undertaking. The Family Court dismissed the contempt application, but ordered the husband to pay the costs incurred by his wife in all proceedings in which she had appeared before the court-

The Full Court held that-

(i) the undertaking which had been sought and received by the Court did not infringe the prohibition against the establishment of religion contained in s.116 of the Australian Constitution;

(ii) as it would create a serious injustice to the wife if she were to remain effectively bound by the marriage by reason of her domicile while her husband was effectively freed from the same marriage, the Court should, consistent with its duty under s.43(a) of the Family Law Act, ensure that the same rights were made available to the wife as would be available to the husband;

(iii) although the usual situation under the Act was that each party should bear his own costs, in cases of contempt, the Court must more readily consider making an order for costs, and, in such a case, the conduct of the parties became significant; and

(iv) the direction in regulation 173 of the Family Law Regulations that in making an order for costs the Court "may" take into account the matters therein set out was a purely discretionary direction and not a mandatory one.

In the Marriage of Shulsinger 28 F.L.R.202
(C.L.B., October 1978, pp877-879)

Matrimonial property-after order made husband filing in bankruptcy-whether bankruptcy should be annulled

The applicant, in proceedings for a dissolution of her marriage to the bankrupt, obtained an order from the Supreme Court of New South Wales that the matrimonial home be sold by the applicant as agent for the bankrupt and the applicant was to use the net proceeds of sale for the purchase of another home for herself and the children of the marriage. A few days later the bankrupt presented his own petition for bankruptcy. The house was not sold immediately but at subsequent meeting of the bankrupt's creditors the Offical Receiver was authorised to join with the applicant in accepting an offer for the house which was then sold for a sum, half of which was credited to the bankrupt's estate. The applicant claimed-

(a) the bankruptcy should be annuled as the bankrupt was in fact solvent and that his bankruptcy petition had been presented solely for the purpose of defeating the order of the Supreme Court; and

(b) alternatively, a declaration in her favour in respect of the sum of $15,000, being part of the sum brought to the credit of the bankrupt's estate as a result of the sale of the former matrimonial home.

In dismissing her application, the Federal Court of Bankruptcy held that-

(i) the applicant was a "person aggrieved" and a "person inter ested" in bankruptcy within the meaning of s.303 of the Bankruptcy Act 1966 and, accordingly her petition was competent;

(ii) on the facts it was not shown that the bankrupt was solvent or had overstated his indebtedness at the time of presenting his petition, and administration of his estate in bankruptcy was therefore desirable;

(iii) where a man was insolvent, or reasonably believed he was insolvent, and presented a petition of bankruptcy against himself, and did not thereby commit a fraud on his creditors, his bankruptcy will not be annulled merely because his notion in presenting petition was "to protect himself from the evils which he might otherwise suffer"; and

(iv) the proceeds of sale of the matrimonial home were to be regarded as realty and the order of the Supreme Court did not confer any interest in the applicant or divest the bankrupt of any interest in the property, and the bankrupt's interest became vested in the Offical Receiver.

Re Mottee; Ex parte mottee et anor (1977) 29 F.L.R. 406
(C.L.B., January pp97-98)

New South Wales

Surname of child of unmarried parents-power of court to change surname-welfare of child paramount consideration

C was the father, and S. was the mother, of a child. C. and S. were not, and had never been, married to each other, and the child was in the custody of his mother. The child's father, who had regular access, conceded that this was best. The child was known by his mother's surname, which was the mother's maiden name. The father had a close relationship with the child, which he intended to maintain and develop. The father sought orders that the mother do all things necessary to cause the child to be known by the father's surname, and that the mother be restrained from addressing or allowing the child to be addressed by her surname.

At the hearing, the mother, who had not been married before, gave evidence that she intended to marry another man, and to take his surname. She stated her wish that, by the time the child commenced school, he should be known by her husband's surname. The father, who had been previously married but was now divorced, gave evidence of his intention to remarry.

The Supreme Court of New Shouth Wales held that-

(i) the Court had jurisdiction to entertain the proceedings (a) because the plaintiff had sought orders "regarding the custody" of an infant within s.5(1) of the Infants' Custody and Settlements Act 1899 (N.S.W.) and (b) under its jurisdiction derived from the Crown's prerogative in relation to the welfare to infants;

(ii) by virtue of s.6 of the Children (Equality of Status) Act 1976 (N.S.W.) the plaintiff was the child's father for the purposes of s.5 of the Infants' Custody and Settlements Act;

(iii) the Court has no power, by order, to change the surname of a child, as the only way in which a child's surname can be changed is as a consequence of usage and reputation;

(iv) in the present case, supposing that the Court had the power to make the order sought-

(a) the fact that the choice was not simply between the father's surname and the mother's maiden name, but rather the mother's married name, would be a factor to be taken into account.

(b) by virtue of s.17 of the Infants' Custody and Settlements Act the first and paramount consideration which should guide the Court would be the welfare of the child, and

(c) on the facts it appeared that it would be more conducive to the child's welfare if his surname, in due course, became that of his mother and her intended husband, especially if they had children of their own;

(v) section 6 of the Children (Equality of Status) Act had no effect upon the surname which a child has or ought to have;

(vi) that was so because there is no rule of law that a child should have, or must be given, the same surname of his father;

(vii) that rather, the position is that there is a rebuttable presumption (whether of fact or law being presently irrelevant) that a child is known by the surname of his father, at least in a case where the parents are married and the mother has taken the surname of the father;

(viii) that in the present case, if any such presumption were to arise by virtue of s.6 of the Children (Equality of Status) Act, it would have been rebutted; and

(ix) that although s.6 of that Act applies to children born prior to its commencement, it should not be construed so as retrospectively to invalidate, or to require any action to be taken to reverse, a past and completed event such as the acquisition by a child of his surname.

C v S (1979) 2 N.S.W.L.R., 598
(C.L.B., October 1980, pp1232-1234)

Custody of illegitimate child-interim custody-main consideration degree of stability pending final hearing

The Supreme Court of New South Wales had occasion to consider the principles applicable in granting custody of an illegitimate child

In so doing, the Supreme Court, inter alia, held that-

(i) the principles applicable in the Family Court of Australia on an application for interim custody of a child of a marriage are applicable also in a New South Wales Court, mutatis mutandis, on an application for the custody of an ex-nuptial child when the parents have separated after living together as a family for a significant period; and

(ii) these principles may be summarised as follows-

(a) it is not the task of the Court, on such an application, to determine whether the interests of the child would be better served by being in the custody of either party on a permanent basis,

(b) whilst the welfare of the child is always paramount, such welfare will not usually be promoted by a decision based only

on such materials as can be prepared and presented on the hearing of an application for interim custody

(c) in general, the interests of the child will best be met by ensuring a degree of stability in its life until the final hearing.

(d) if the child has remained in the family home after its parents have separated, this arrangement should be continued, unless that course is strongly refuted by reason of evidence that the child's physical or mental health or moral welfare will be endangered by remaining where it is, and

(e) if the child has accompanied the party leaving the family home, and becomes established in a new environment before proceedings for interim custody are taken this new situation should be preserved, unless that course, in turn, is strongly refuted by equally cogent evidence.

Holland v. Cobcroft (1980) 2 N.S.W.L.R. 483
(C.L.B., October 1981,pp.1303)

Australia

Alteration of property interests-whether a foreign ante-nuptial agreement capable of being registered as "overseas maintenance agreement"
A husband and wife married in Borneo, then part of the Netherlands East Indies and now a part of the Republic of Indonesia, in February 1946. At the time of the marriage the husband, who was the son of a Dutch civil servant, had acquired a domicile of choice in The Netherlands East Indies and was thus subject to Dutch law.

In accordance with Dutch law, a day prior to their marriage the parties entered into a marriage contract which excluded the operation of any form of community property and provided, inter alia, that property acquired in the name of a spouse was to be the sole property of that spouse.

In 1950 the parties emigrated to Australia and thereafter made their home in Australia. Cohabitation ceased in 1971. At the time of the hearing of an application by the wife for alteration of property interests, she owned a home with a net equity of approximately $A42,000. The husband had sold the former matrimonial home which had been registered in his name for $A95,000 and had invested part of the proceeds in a home owned by some relatives in which he had a right to live during his lifetime. He had invested the balance of proceeds namely $A44,000 in a mortgage loan.

It was submitted on behalf of the husband that the ante-nupital agreement was binding upon the parties and was capable of registration under s.86 of the Family Law Act 1975 as a maintenance agreement; and that in view of the agreement it would not be just and equitable to make any order in favour of the wife pursuant to s.79 of the Act.

The Family Court of Australia held that-

(i) the existance of the ante-nuptial agreement could not oust the Court's jurisdiction under s.79(2) of the Family Law Act to alter the interests of the parties if it was just and equitable to do so;

(ii) the ante-nuptial agreement, having been entered into in and governed by law of a foreign country was incapable of registration under s.86 of the Act as a "maintenance agreement" because neither The Netherlands nor Indonesia were prescribed overseas countries, the agreement was incapable of being registered and enforced as an "overseas maintenance agreement",

(iii) the fact the parties had not married until the day after execution of the agreement in question did not take their agreement outside of the definition of "maintenance agreement" within the meaning of s.4(1) of the Act; and

(iv) that having regard to the appropriate considerations under ss.75 and 79 of the Act the wife should receive 60 per cent of the mortgage moneys and the husband the balance.

In so holding, the Family Court observed, inter alia-

"It is a well-established principle of statutory interpretation that whenever Parliament refers to contractual obligations, or as in the present case, seeks to make enforceable certain agreements hitherto not enforceable at common law, it might be taken to have intended to affect only those relationships which are governed by the law of the forum: Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society (1934) 50 CLR 582. This presumption is re-enforced by the express reference in the definition of overseas maintenance agreement to the agreement having a certain effect under the law of foreign country. For these reasons I agree with the conclusion of McCall J. in In the Marriage of Duncan (1978) 4 Fam LR 282 that the definition of "maintenance agreement" does not cover an agreement which as in the present case, was entered into in, and is governed by, the law of a foreign country.
In the Marriage of Hannema:(1981) 54 FLR 79
(C.L.B., April 1983,p.467)

Dissolution of marriage-marriage in fact bigamous-application for settlement of property-whether proceedings a "matrimonial cause"
The Family Court of Australia pronounced a decree nisi for dissolution of marriage which subsequently became absolute, the Court being unaware that the marriage was bigamous. The applicant later made an application for settlement of property, and a case was stated to the Full Court of the Family Court of Australia.

The Full Court of the Family Court held that-

1. the connection between the property proceedings and principal relief which is required under para.(ca) of the definition of "matrimonial cause" in s.4(1) of the Family Law Act 1975 is that the former be in relation to "concurrent, pending or completed proceedings for principal relief" between those parties;

2. the connection is not between the property proceeding and the decree of principal relief but between the property proceeding and the proceeding for principal relief;

3. if the applicant knew at the time he was seeking a dissolution of marriage that the marriage was bigamous and void then the proceeding would be regarded as a sham and would not provide the necessary connection with para (ca) of the definition of "matrimonial cause" in the Act;

4. however, that deficiency could be overcome by an application under para. (a) or (b) of the definition of "matrimonial cause";

5. the term "matrimonial cause" has long been understood to include not only proceedings as to the validity of a purported marriage but as encompassing proceedings relating to the custody, welfare and financial support of children of that union and the financial support and property rights in appropriate circumstances of parties to that union;

6. accordingly, on the facts, s.71 of the Act is a valid provision; and

7. the power to make laws with respect to marriage may include not only laws relating to the validity of the purported marriage but also laws controlling or regulating the custody, welfare and maintenance of children of that union (though not a valid marriage) and rights to maintenance and property between the parties to that union in relevant circumstances.

In the Marriage of Miller (1983) 49 ALR 689
(C.L.B. July 1984 pp.1161-1162)

New South Wales

Custody proceedings - both parties suitable custodians - whether expert evidence required for an insight into the psychological and other needs of the child

The Supreme Court of New South Wales has had occasion to hear competing claims between a father and the maternal grandmother of a five year old girl at which neither party called expert evidence as to the needs of the child. Both parties were suitable custodians and the child was healthy and normal.

The Supreme court has held that-

1. any child, no matter how normal and healthy it may have been to date, may be put at risk in its psychological development by a custody decision which does not give proper weight to its needs, the strength of the bonds it has formed, its capacity to adjust and so forth;

2. a judge's main hope of getting a real insight into the child's view of the world, the foundations of its security and its psychological needs, is through the evidence of an expert; and

3. therefore, the Director-General of Youth and Community Services ought to arrange for an appropriate expert to interview and report on the child.

Sullivan v Read-Bloomfield (1983) 1 NSWLR 649
(C.L.B., July 1984, pp1161-1162)

BELIZE

Husband and wife - contributions by wife - whether resulting trust giving wife beneficial interest

The appellant and respondent, husband and wife, were married on 12 April 1950. There were ten children of the marriage; the eldest, a daughter, was born in 1951 and the youngest born in 1962. At the time of the marriage the husband was a woodcutter. The wife assisted him in bundling and selling the chopped wood. About 1955 they turned to farming and thereafter farmed 20 acres of land near the village of Bomba which according to the wife they purchased from Government. Both husband and wife worked on the farm growing fruit and vegetable crops and raising poultry. The children were left in charge of neighbours and as soon as she was old enough the eldest daughter looked after them.. The income from the farm was kept by the wife from which farm and family expenses were paid. In February 1964 she opened a bank account into which she deposited part of the surplus income from the farm after paying expenses.

In 1964 a lot of land in Neal's Pen Road, Belize City was purchased on the suggestion of the wife. It was conveyed to the husband alone in fee simple by an indenture dated 7 May 1964, the consideration being $290. The wife said the lot remained vacant until they raised a little money and started to build. The house was built in stages. First to be built was the upstairs portion on poles. Then in 1968 a loan of $1,300 was obtained from the Reconstruction and Development Corporation upon the security of an indenture of mortgage dated 7 November 1968, the husband being the mortgagor. With this money the lower portion of the house was constructed. Later a further extension was built at the back of the upstairs portion of the house.

During these years the farming continued as before until 12 April 1976 when husband and wife separated. At that time the wife gave the husband half the credit balance in the bank account she had opened in 1964 amounting to

$412.

In 1981 the wife sued the husband for a declaration, firstly that the husband held the 20 acres of land near Bomba and the lot of land in Neal's Pen Road with the house built thereon in trust for both husband and wife in equal shares; secondly, that the wife was entitled to a half share of the proceeds of sale in the event of either of the said properties being shold, and thirdly that the wife was entitled to half the rents collected in respect of the Neal's Pen Road property from "12th April 1976 to date".

The trial judge gave judgment in favour of the wife, and the husband appealed against that decision.

The Court of Appeal held that-

1. there were contributions made by the wife without which the properties would not have been bought and in circumstances imputing to the husband a resulting trust giving the wife a beneficial interest in the properties : Falconer V Falconer (1970) 3 All ER 452 Henry V Henry 20 WIR 524, and Smith v Baker (1970) All ER 826 considered;

2. in respect of the Neal's Pen Road property, the land and house were held by the husband in trust for himself and the wife in equal shares beneficially in fee simple: and that the wife is entitled to half the rent collected from any letting of the property, and to a half share in the net proceeds of any sale of it;

3. the evidence did not disclose proof of title and ownership of the 20 acres of land near Bomba, and no declaration can be made as to the beneficial interests over this property.

Flowers v Flowers, Court of Appeal, 10 June 1982, (Civil Appeal No.1 of 1981)
(C.L.B., January 1984, p177-178)

BOTSWANA

Affiliation proceedings-period of time for making complaint-whether directory
The Court disagreeing with the judgment of Edwards J. in Moathlodi v Oduetse 1978 BLR 33 where Edwards J. held that the provisions of the Affiliation Proceedings Act (Cap. 28:02), and in this regard, s.4 specifically, which provides that a complaint may be made against the alleged father "at any time before or within twelve months after the birth of the child" were directory and not peremptory, held on the authority of the English decision in G(A) v G(T) (1970) 3 ALL ER 546 (CA) that a limitation of time should and has been strictly interpreted.
McPherson Sichinga v Annah Phumetse High Court, Civil Appeal 4 of 1981
(C.L.B, July 1982, p998)

Divorce and custody proceedings-defendant wife and children living out of jurisdiction - welfare of children
The palintiff commenced divorce proceedings against his wife in October

of 1980. The action was undefended and a rule nisi for divorce was granted in December 1982. However the defendant was permanently residing in Mozambique and the plaintiff in his application sought custody of the two children, one of whom was born in Mozambique and the other, a boy, was born in Botswana.

The Judge held that-

(1) the domicile of the children follows that of their father and the Court therefore had jurisdiction as regards their custody. However, the children had been living for over three years with their mother in Mozambique and applying the judgment in Handford v Handford (1958) 3 As 378, the Court could not make an order directing the defendant to deliver custody of the child to the plaintiff in view of the fact that the defendant was outside the Court's jurisdiction. Furthermore, in Eilon v Eilon (1965) 1 SA at 725 it was held that the Court's jurisdiction was impaired where it could not give an order which was practically effective. In this case, the court could not order the defendant to surrender the children to the plaintiff;

(2) in deciding custody matters, the welfare of the children is a paramount consideration, and before a Court could come to a decision it had to have a full legal argument on the advantages and disadvantages to the children of living with one parent or the other. Since there was no such information in this case, the proceedings were dismissed.

Verona v Angelina, High court, Matrimonial Cause 98 of 1980
(C.L.B., January 1984, p178)

CYPRUS

Marriage solemnised at registrars office-no religious ceremony-marriage void ab initio

The Supreme Court of Cyprus has ruled that-

> "a marriage solemnised at a registrar office in England between Greek Cypriots whe were permanently resident and domiciled in Cyprus and who were members of the Greek Orthodox Church, but who did not go through any religious ceremony, was void ab initio."

Metaxa v Mita (1977) Judgments of the Supreme Court of Cyprus, Part I, p.1.
(1977) Bulletin of legal Developments 103)
(C.L.B., July 1977, p.425)

Parties members of the Greek-Orthodox Church-civil marriage-religious ceremony condition of essential validity of marriage

By this petition the petitioner, husband, prayed for a declaration that the civil marriage performed between the parties in England was null and void.

The petitioner and the respondent, both Greek Cypriots and members of the Greek Orthodox Church, went through a ceremony of marriage at

Waltham Forest Register Office in London. Later the respondent gave birth to a child. The petitioner alleged that after the celebration of the marriage he did not co-habit with the respondent and that he was not the father of the child. It was also alleged that the marriage was not a valid marriage as it was not celebrated in accordance with the rites of the Greek Orthodox Church.

The respondent, on the other hand, alleged that she and the petitioner had met in Cyprus and had sexual relations first in Cyprus and later in London before the marriage. While in London the petitioner promised to marry the respondent and they in fact went through the civil marriage in London on 3 November 1972, believing it to be valid marriage; that after the celebration of the marriage they lived together as husband and wife and continued to have sexual relations and that she did not have such relations with any other man; that on the 15 July 1973, she gave birth to a female child which was registered at Stoke Newington in the London Borough of Hackney and that in the certificate of birth the name of the petitioner appears as the father of the child.

After hearing the evidence of the parties, a Judge of the Supreme Court held-

(i) matters of marriage between members of the Greek-Orthodox Church are governed by Article 111 of the Constitution which lays down that such matters shall be governed by the law of the Greek-Orthodox Church;

(ii) in accordance with the law of the Greek-Orthodox Church a marriage between members of that Church shall be recognised as a valid marriage only if it is celebrated in accordance with the rites of that Church, that is, it must be an ecclesiastical marriage. Hence a civil marriage celebrated between persons who are members of that Church, anywhere, is void;

(iii) the religious ceremony is not considered to be a mere form of marriage but a condition of the essential validity of the marriage;

(iv) by English law a marriage performed in accordance with the formalities of the lex loci celebrationis is considered to be a perfectly valid marriage in England.

The marriage between the parties is declared void ab initio.
Epaminondas N. Metaxa v Margarita Michael Mita (1977) 1 J.S.C.1 (C.L.B., October 1977, pp609-612)

Separation agreement providing for maintenance-whether contrary to public policy, morals or law
The parties were husband and wife. Owing to certain differences they decided to live apart and made a contract in Tanganyika in 1955, whereby husband overtook to pay maintenance to his wife for life until the dissolution of the marriage. The wife subsequently died and an action was brought in

the District Court of Nicosia by the administratix of her property against the husband.

A preliminary objection was raised by the defendant to the effect that the agreement in question, being a "separation agreement" is void and unenforceable as being contrary to public policy, morals, contrary to law and /or unsupported by consideration.

The Full District Court of Nicosia, dismissing the defendant's objection held-

(i) any direct or indirect act or omission under any guise tending to offend against or by-pass any laws of the State or Church, written or unwritten, or any well-established and accepted principles of justice, morality, human or constitutional rights, may be interpreted as contravening public policy;

(ii) Judicial separation and separation a mensa et thoro is either an alternative to divorce or it may provide an interim arrangement until the dissolution of the marriage;

(iii) agreements for maintenance are considered as valid in law when an actual separation exists;

(iv) no provision is made in the Charter of the Autocephalous Orthodox Church of Cyprus about separation a mensa et thoro and it is not known whether the Supreme Court, in the exercise of its original jurisdiction, can deal with such a matter where the parties are not members of the Greek Orthodox Church;

(v) a separation agreement intended to facilitate a divorce is a completely different thing from an agreement made on account of an actual separation existing between the spouses to provide for a pending matter such as maintenance. Such an agreement in enforceable both in England and in Greece and it should, in the absence of any evidence that the situation regarding public policy/morals is substantially and materially different in Cyprus, be so treated here as well;

(vi) the agreement in question does not provide for a separation to take effect in future but immediately: agreement is not void as being contrary to public policy, public morals for the law.

Constantinidou v. Karadjias (1977) 9-10 JSC 1693.
(C.L.B., January 1979,pp.98-102)

Application for dissolution of marriage on ground of adultery-strict measure of proof required

The petitioner sought the dissolution of his marriage with the respondent on the ground of adultery. He alleged that the respondent committed adultery with the co-respondent in May and June 1973 and that as a result the respondent became pregnant and that he is not the father of the child.

He gave evidence that the co-respondent, who is an electrician, visited his house on many occasions as the petitioner had given him certain electrical jobs and that on many occasions he found the co-respondent in his house when he went home from work, but always on some pretence that he was repairing some electrial appliance; that in May or June 1973 he saw the respondent and the co-respondent travelling in the respondent's car. He also alleged that since August 1972 he had no sexual relations with the respondent and that, therefore, he could not be the father of the child.

Other witnesses gave evidence that the respondent often went to the petitioner's house when the petitioner was not there and that the respondent and co-respondent were together in a cafe and travelling in the co-respondent's car.

On the question of jurisdiction of the Supreme Court of Cyprus, held that it had jurisdiction to entertain a matrimonial petition as the busband petitioner had changed his domicile of origin which was England and acquired a domicile of choice in Cyprus.

On the question whether the respondent had committed adultery the Court held-

(i) that it must be satisfied that there was more than opportunity before it will affix guilt: that there is no direct evidence of any eye witness as to the actual act of adultery and that though the evidence may create a suspicion it falls short of the standard required to prove the offence;

(ii) that though the rule in Russell v Russell (1924) A.C.687 is no longer applicable in view of s.32(1) of the Matrimonial Causes Act 1950, by virtue of which evidence of non-access is admissible, the measure of proof is still a strict one and the evidence required to displace the presumption of legitimacy must be strong, distinct, satisfactory and conclusive. (Cotton v. Cotton (1954) P.305). Having regard to all the circumstances of the case the husband's evidence of non-access was not enough to rebut the presumption of legitimacy.

William Henry Holroyd v. Carol Anne Holroyd and Iacovos Zisimos (1979) 1 C.L.R.,206
(C.L.B., April 1980, pp518-519)

Wife sole beneficiary under a will-validity challenged on grounds of unsound testamentary capacity-"dispose of by will"

A testator by his will, executed on 11 September 1970, gave to his wife the whole of his movable and immovable property which he could "dispose by will". Upon his death he was survived by his wife and his sister (the respondent), who challenged the validity of the said will on the ground that the testator was not of sound mind, memory and understanding, that at the time of the execution of the will he did not know and approve its contents, and that it was executed under the undue influence of his wife (appellant 1). Furthermore, it was claimed that, if the will was

found to be valid, the testator could dispose by it of only half of his estate.

The trial Court found that the legislative provisions applicable to the will, which was a valid will, were those in force at the time of the death of the testator and that by means of the will the testator disposed of only one half of his estate and that, as a result, half of it belonged, according to the will to appellant 1, the wife of the testator, while the remaining half devolved, by operation of law, on the heirs of the testator in case of intestacy, namely, in equal shares to his wife and to his sister, the respondent. The trial Court, after accepting the evidence of Dr. Grangos, the family doctor, further found that the will of the testator was valid in that at the material time he was of sound mind, memory and understanding.
Antoniades and another v. Solomonidou (1980) 1 C.L.R. 441
(C.L.B., April 1981,pp550-552)

GHANA

A wife sued her husband from whom she had been separated for a declaration that she was joint owner with her husband of three houses, an account for all rents collected, and an injunction to restrain the husband, his servants and agents from intefering with the wife's joint interests in the houses. In an amended statement of claim she asked for a declaration that she was the absolute owner of the houses.

In his statement of defence, the husband denied the wife's claim and contended that the houses were built by him alone, and that he provided the initial capital for the wife's trade, and that he in fact set up the wife in trade. The conveyances of the properties were executed in the joint names of both the wife and the husband. The wife's explanation for this was that she was misled into executing the said documents, and that she being an illiterate could not in any case be bound by these documents. On the other hand the husband explained that the documents were executed in their joint names in order to safeguard the interests of the wife and children in case he died intestate.

The trial judge found as a fact that the wife was both a housewife and a trader, and that she acquired the properties in dispute without the aid of the husband.

The High Court held that by virtue of section 2 of the Married Women's Property Ordinance (Cap.131) a wife had legal capacity to acquire her separate property and to bring an action in respect of such property. A wife would be considered as trading separately from her husband even where the husband occasionally ran errands for her in the course of the business or where the husband assisted her in investing the proceeds of her trade by supervising any building she put up out of her earnings. The mere fact that the husband provided the initial capital or actually set up the wife

in trade would not of itself imply that the married woman was not trading separately from her husband. In this case, the evidence was clear that the wife was both a housewife and a trader and that the premises in question were acquired from the proceeds of her trade. Ownership of the properties therefore vested in the wife alone and not in both husband and wife as marriage property.

Although the husband had failed to show that the wife understood the contents of the documents she executed, yet on the evidence the wife would not be allowed to rely on her illiteracy, since she was fully aware that the documents bore the names of the two of them as joint owners of the premises. This , however, did not mean that the wife consented to make a gift of the interest in the houses to the husband, who did not rely on a gift. Parle evidence was in the circumstances admissible to show that even though the wife and the husband were shown by the conveyance to be co-owners, the real purchaser and builder of the properties was the wife who advanced the moneys used in buying the plots and constructing the houses.

Since the properties were purchased in the joint names of the parties with money provided by the wife alone, without the wife intending to make a gift to the husband of the properties, the husband was in such a case presumed to be holding the properties in trust for the wife. In the absence of evidence rebutting the presumption, a resulting trust had been created in favour of the wife.

The judge added that there were certain relationships not peculiar to Ghana, but which had gained colourful names there, where a comparatively rich and elderly woman formed an association with a young man of little or no visible means of support. The young man lived off the rich woman, and might even have his education and further training financed by this rich woman. The relationship sometimes blossomed into marriage and properties were bought by the rich woman in the name of the young husband. These were called the "scholarship" cases. No advancement could be presumed, there must be evidence direct of circumstantial that a gift was intended by the wife to the husband.

The wife was claiming an injunction, and an account and that she was the sole beneficiary and sui juris. By claiming these remedies the plaintiff was in effect putting an end to the trust, and in these circumstances it was held by the Court that she was both the legal and beneficial owner of the properties in dispute.
Reindorf alias Sacker v Reindorf (1974) 2 G.L.R.38
(C.L.B., May 1975, p.36)

Arrears of permanent maintenance-right to levy on immovable property
A High Court Judge made an order for permanent maintenance against the appellant in favour of his former wife and their children. In the order the Judge had described his award by the misnomer of permanent alimony. It was argued on appeal that the order was void. On this issue, it was held by the Court of Appeal that the matter fell clearly within the inherent powers of the court to amend so that the impugned order would

accurately express and carry out the Court's intention which was the making of monetary payments to the wife and children in accordance with law.

Under the order the appellant had fallen hopelessly in arrears and a writ of sale of immovable property was duly sealed by a marshal of the High Court to recover the arrears under the Court's order. The appellant's property was levied on and duly advertised for sale in the Official Gazette. Thereupon, the appellant instituted an action for damages and an injunction restraining the sale of his property. To make assurance doubly sure he launched another action-an opposition action (a Roman-Dutch law procedure for opposing the sale of immovable property). In his notice of grounds and reasons for opposition the appellant contended that it was not competent for his former wife to cause the sale at execution of his immovable property to settle arrears of maintenance due under the order of Court and that the said property, being subject to a mortgage, could not be taken in execution to settle any sum due under the order which the Judge had made payable out of the appellant's "present income".

It was held by the Court of Appeal that a judgment summons was not the only mode of recovering such arrears, that the rules of the Probate, Divorce and Admiralty Division of the High Court of Justice of England would have applied by reason of express provision to that effect in the local Matrimonial Causes Act and that the issue of a writ of execution on the immovable property of the appellant was sustainable. It was also held that a judgment debtor such as the appellant could not use the procedure of opposition to object to a levy by his judgment creditor. The proper course was to institute an ordinary action for an injunction restraining the sale of the property. The principle that it was in the State's interest that there should be an end to litigation would be offended by the opposition proceedings and the trial Judge in those proceedings would really be sitting on appeal from the judgment of a Judge of co-ordinate jurisdiction and causing disorder in the hierarchy of appeal procedures.
Weithers v. Weithers (Civil Appeal No.12 of 1978)
(C.L.B., April 1981,pp552-553)

HONG KONG

Maintenance-jurisdiction of court to set aside or vary consent order sanctioning prior agreement for full and final satisfaction of present and future claims to maintenance

A consent order was made in divorce proceedings commenced by a wife after the court had sanctioned an agreement between the parties whereby, in consideration of certain financial arrangements made for the wife and the child, the wife undertook not to make any further financial claim or demand upon the husband either on her own account or on behalf of the child. The divorced wife subsequently claimed that, by virtue of s.15 of the Matrimonial Proceedings and Property Ordinance, she was entitled to apply to the court to very the financial arrangements previously accepted by her.

Held by the Court of Appeal (by a majority)-

"the wife's undertaking to make no further financial claim or demand contained in the agreement was void and the court had no power to sanction that undertaking. The entire tenor of the matrimonial legislation was to preserve to the court flexibility and jurisdiction to make such orders as the circumstances prevailing at the time of the application demanded, and that either party to a maintenance agreement freely arrived at could seek to have it altered.
de Lasala v de Lasala C.A. No6 of 1976, Part I Hong Kong Law Reports 1977
(C.L.B.,July 1977, pp.425-426)

Maintenance-lumpsum payment for son injured-restrospective effect of legislation
The parties were divorced in 1960, when the respondent was ordered to make periodical payments to the applicant and two sons. Before decree absolute, the respondent purchased a residential property. The respondent remarried in the same year, and that marriage was dissolved in 1976. In 1977, one of the sons was injured and the applicant now had to care for him. Application was made for a lump sum and property adjustment order in 1978. Legislation providing for the right to apply for a lump sum payment was enacted in 1967.

The Court held that-

"the provision relating to lump sum awards was retrospective. Therefore, even though the marriage had been dissolved seven years before the power to award a lump sum was introduced, a Court had power to make such an order."
Chaterjee v. Chaterjee (1976) Fam.199 applied.
P. v P. (High Court) (Mis. Proceedings of No. 501 of 1978)
(C.L.B., April 1979, pp411-412)

Divorce-irretrievable breakdown of marriage-whether wife who had committed adultery was entitled to relief
In divorce proceedings where there was irretrievable breakdown of marriage due to husband's behaviour, the court has held that a wife who has committed adultery is nevertheless entitled to relief even though her confession and continued coldness precipitated her husband's conduct if she can satisfy the court that any right thinking person would conclude (taking into account all the circumstances and the personalities of the parties) that her husband has in fact behaved in such a way that she cannot reasonably be expected to live with him.
Li Kao Feng-ning, Judy v Li Hung-lit Court of Appeal, 28 June 1983, Civil Appeal No. 58 of 1983
(C.L.B., October 1983, p.1282)

JAMAICA

Joint savings account-death of one signatory-whether term of will sufficient to displace rule of survivorship

The plaintiff and his wife (now deceased) had a joint savings account in the City Bank of Lauderhill, Florida, United States of America. Both the plaintiff and his wife, although Jamaicans by birth, were naturalised American Citizens but were resident in Jamaica at the time of the deceased's death.

On the death of the plaintiff's wife, the plaintiff authorised the defendant, an attorney-at-law, to withdraw the balance standing to the credit of himself and his wife in the Florida bank account, and to hold the sum on his behalf.

The plaintiff later sought to obtain the proceeds held by Mr. Jones on his behalf through another attorney-at-law but was unable to do so, as Mr. Jones faced with competing claims to the same sum by the executors and other beneficiaries paid the sum into Court to await the determination as to who was rightly entitled to the said sum.

The competing claim by the executors and beneficiaries arose as a result of a clause in the purported last will and testament of the plaintiff's wife in which she bequeathed "all money, in financial institutions to her two nieces, Joyce Nelson and Gwendolyn Peters."

It was contended on behalf of the executors and beneficiaries that this clause provided the necessary intention to displace the rule of survivorship which ordinarily applies in joint accounts. There were also a number of affidavits filed by the contesting parties which sought to prove that the testatrix intended certain persons to benefit from the moneys in the two joint accounts which she had.

The issue to be decided was whether this money was to be paid over to the plaintiff as husband and survivor under the survivorship clause in the joint account, or whether it should be paid over to the executors and personal representatives of the deceased, to be distributed under the terms of the testatrix's will. The beneficiaries under the testatrix's will would have had to satisfy the court that the clause in the will giving all money in financial institutions-to her two nieces....."was sufficient to provide a contrary intention to defeat the rule of survivorship that normally applies in cases of joint ownership/accounts, by producing documentary evidence to show that the deceased had by some unequivocal act cancelled the original mandate or authority given to the bank."

Held that-

(i) the mere fact that the entire proceeds of the joint account earnings might have been furnished by the deceased could only fix her husband as trustee if the mandate to the bank so indicated or, if the testator by her own act sought during her lifetime to exercise control over the sums in the account to the exclusion of her husband, and on the facts of the case, there was no evidence of this, as both had the power to withdraw funds from the account (Reid v Grant distinguished).

(ii) the conduct of the Bank in paying the entire balance in the account to the attorney on the basis of a power of attorney given to him by the plaintiff provides irresistable inference that the authority/given to the bank was one authorising payments to the plaintiff or his wife, hence the survivorship clause to the plaintiff or his wife, hence the survivorship clause operated to give the plaintiff the entire beneficial interest in the fund and this cannot be displaced by an cluase in the purported will of the testator (Re Figgis applied);

(iii) at date of the execution of the will, the testatrix had only power to dispose of such sums in financial institutions to her nieces as belonged absolutely and indefeasibly to her and did not relate to any joint accounts which were opened and maintained during her lifetime along with her husband, the plaintiff;

(iv) there was no triable issue raised on the affidavits of the respondents or on the legal arguments advanced by attorneys for the contesting beneficiaries and therefore the sum paid into court by the defendant was to be paid over to the plaintiff forthwith. (Reid v. Grant Volume 23 1 WIR 91 distinguished; and Re Figgis (1969) 1 Ch Rep. 124, Shepherd v Cartwright (1954) 3 All E.R. 649 and Russell v Scott C.L.R. 440 applied)

Osmond Reid v. Gresford Jones (S.C. Suit Np. 74/1979)
(C.L.B., October 1980, pp1234-1236)

MALTA

Nullity of marriage-grave homosexual tendencies of the husband-impossibility of fulfilling essential obligations of marriage-whether fraud as to matrimonial consent

If her writ of summons the plaintiff requested the Court to declare that her marriage to defendant was null and void. The evidence showed that P. and D. were married on 31 October 1976 and lived under the same roof for a year and a half. Two days after the marriage D abandoned the matrimonial bed for three days and declared to P that he felt himself shackled by marriage and that he was not happy. For the remainder of the time they lived together D did not seek his wife. On a number of occasions he invited men and slept with them in the spare bedroom. Before their marriage D had not told P anything about his homosexual propensities. There were no children from the marriage.

Section 19(19)of the Marriage Act 1975 provides that-

a marriage shall be void ....

(a) if the consent of either of the parties is extorted by fraud about some quality of the other party which could of its nature seriously disrupt matrimonial life;

(b) if the consent of either of the parties is vitiated by a serious defect of discretion of judgment on the matrimonial life, or on its

essential rights and duties, or by a serious psychological anomaly which makes it impossible for that party to fulfil the essential obligations of marriage.

In declaring the marriage null and void the First Hall of the Civil court held that-

(i) grave homosexual tendencies were a quality which could of their nature seriously disrupt matrimonial life because they made very difficult the conjugal act:

(ii) in the case of grave homosexual tendencies it was sufficient to constitute "fraud" for the purpose of paragraph (c) of s.19(1) that the husband had not mentioned or said anything about his propensities to the other party before the marriage and that the other party was not aware of these propensities before the marriage;

(iii) the defendant's tendencies amounted also to a serious psychological anomaly vitiating his matrimonial consent and which made it impossible for him to fulfill the essential obligation of marriage: "impossibility" did not have to be "absolute impossibility": it was sufficient that the fulfilment of the essential obligations of marriage was "impossible" by the standards of the bonus pater-familias.

Olivia Williams sive Schembri v Emmanuel Schembri First Hall of the Civil Court, 23 March 1983
(C.L.B., October 1983, p1283)

NEW ZEALAND

Enforcement of separation deed vesting home in husband

The husband instructed his solicitor to prepare a separation deed based on a handwritten note from his wife. The wife was told by the solicitor that she was at liberty to take independent advice but she declined to do so. She signed the deed, but later refused to sign memorandum of transfer.

Held -

(i) the evidence disclosed an unfair bargain:

(ii) that by reason of her emotional condition and distress the wife was bereft of proper judgment: and

(iii) the husband had failed to establish that the transaction was fair, just and reasonable and that no advantage had been taken: Morrison v Coast Finance Ltd. (1966) 55 DLR (2d) 710, Blomley v Ryan (1954-56) 99 CLR 362 and Saltor v Nolan (1877-1878)11 Ir Eq 367 referred to - Specific performance refused.

Henley v Henley(Supreme Court, Wellington, 15 March 1976)
(1976 Butterworths Current Law 205)
(C.L.B., July 1976,p238-239)

Matrimonial property-wife's contribution as wife and mother
A husband received a gift of a farm from his father which he developed and it substantially increased in value. His wife cared for the children and managed the home. The parties separated and the wife applied to the Supreme Court under s.5 of the Matrimonial Property Act 1963 for an order that the husband should pay her such sum as the court thought fair and reasonable. On the question of determination of the wife's contribution to the family assests, the Privy Council, allowing an appeal by the wife held-

(i) for the purpose of the Act the performance of domestic duties in the matrimonial home is to be regarded as an indirect contribution to the matrimonial home;

(ii) the court had discretion whether to take into account a wife's domestic contribution in relation to assets other than the matrimonial home;

(iii) there was no justification for treating a farm differently from any other commercial enterprise;

(iv) apart from assets outside the Act and the need to consider separately the question of the matrimonial home, there can be no justification of an "asset by asset" approach;

(v) conduct of parties is irrelvant except in so far as it has a direct or indirect effect on the family fortunes.

Cases considered included Hofman v Hofman (1965) N.Z.L.R. 795, Keswick v Keswick (1968) N.Z.L.R. 6 and E v E (1971) N.Z.L.R.859 Haldane v Haldane (1976) 3 W.L.R. 760
(C.L.B. January 1977, pp74and 75)

Variation of deed of separation - possession of home by wife after children no longer required accommodation
In a deed of separation it was agreed that the wife would have custody of the children and that the matrimonial home should remain jointly owned by husband and wife and that possession be given to the respondent wife until death or remarriage. That deed was entered into in 1969. It was considered that the welfare of children was an implicit controlling factor behind the drafting of the clauses dealing with possession of the home. That the children no longer required accommodation was regarded as a material change in circumstances justifying variation in terms of s.79 of the Matrimonial Property Act 1976. Preservation of the clause granting possession to the wife until remarriage or death was felt to be unwarranted on the altered facts and undesirable in principle.
Worthington v Worthington (1979) Butterworths Current Law
(C.L.B., July 1979,pp720-721)

Extra-marital cohabitation-residential property-whether a constructive trust
The appellant appealed against a decision of Moller J determining that he had no interest in the estate of a Ms. Sanders, deceased, a woman with whom

he had lived for five years prior to her death. The deceased had owned a house when the relationship commenced. During the relationship the appellant had done a considerable amount of work on the property. The couple had pooled their resources. By a will executed prior to the relationship the property was left to the respondent. A later, unwitnessed "will" was discovered, leaving the property to the appellant.

Moller J had rejected the appellant's claim to a half share in the property as he was unable to find an agreement or common intention that there should be joint beneficial ownership. The appellant had declined the deceased's offer to register the home in their joint names. He had declined because he considered it an unnecessary expense. He was 20 years older than the deceased and believed he would die first.

Their Honours agreed that the appellant should be granted a half share in the property on the basis of a resulting or implied trust. They accepted that such a trust exists where there is a common intention of the parties that each is to have a beneficial interest. The intention may be expressed or implied from conduct.
Hayward v Giordani court of Appeal, 27 June 1983, CA 76/81((1983) 9 N.Z. Recent Law 355)
(C.L.B., July 1984, pp.1163-1164)

ST. VINCENT

Nullity-marriage performed in private house at 7 a.m.-whether provisions of the Marriage Ordinance as to time and place of marriages directory or mandatory
The parties went through a ceremony of marriage at a private house at about 7 a.m. on morning. It was performed by a Registrar, in the presence of witnesses and in all respects other than time and place conformed with th Ordinance, Section 27 of the Ordinance states that "if the parties so desire, they may ..... contract and solemnize marriage at the office and in the presence of a Registrar .... with open doors, and between the hours of ten a.m. and four p.m. ....."
Held by the High Court-

(i) the effect is that parties who desire to contract and solemnize marriage in the presence of a Registrar qua Marriage Officer may only do so at the office and in the presence of the said Registrar, and in the presence of two witnesses, with open doors and between the hours of ten a.m. and four p.m.;

(ii) these provisions are fundamental and as such are mandatory, not merely directory;

(iii) decree of nullity pronounced.
Da Silva v Da Silva (judgment 12 January 1979)
(C.L.B., April 1979, pp412-413)

SRI LANKA

Marriage-parent's gift of house and property to son-in-law-dissolution of marriage on wife's desertion-whether gifted property recoverable by wife

S and P were married in December 1952. Just prior to their marriage S's parents gifted a house and property to P "the intended son-in-law" on the condition that the gift was to be operative after the solemnisation of the marriage.

In November 1966 the marriage between S and P was dissolved on the ground of malicious desertion on the part of S. She however continued to live in the house gifted to P and in February 1972 instituted action in the District court for the recovery of that property. After trial the District Judge dismissed S's action and declared P entitled to the premises and made an order for the ejectment of S therefrom as prayed for by him. S then appealed to the Court of Appeal.

In delivering the judgment the Court of Appeal stated that on the authority of the decision in Fernando v Fernando S had no cause of action to sue P: reliance was placed on the following passage from Nathan's Common Law of South Africa (Vol. 1, 2nd Edition, Pages 266 and 267): "Dos or dowry consists of the property which is given by a wife or by some other person on behalf of the wife, to the husband, for the purpose of sustaining the burdens of the marriage. If the marriage does not take place, the giving of the dowry is null and void. If it takes place, the giving of the dowry is irrevocable, if the contract relating to it is entered into by the person who gives it with the intent that it shall always remain with the husband".

On behalf of S it was argued that the District Judge had overlooked the Roman Dutch Law principle that enables the wife to sue for the recovery of the dowry. While conceding that the wife does have this right to sue for restitution of her dotal property by an action known as the actio ex stipulatu, Justice de Silva quoted Voet as authority for the qualification to this principle, namely, that the right of the wife to claim a restitution of the dowry may be forfeited if the husband obtains a divorce by reason of misconduct on the part of the wife. Since S was admittedly the offending spouse as she was guilty of maliciously deserting P, the decision of the Court of Appeal was that she had forfeited her right to recover the house and property gifted to P.

As regards the order for ejectment, however, the Court considered sympathetica the facts that S had been in occupation of these premises for the last 30 years, that she had no other properties, that the house once belonged to her parents and was gifted to P presumably to enable the new couple to establish their matrimonial home and that the search for alternative suitable accommodat would very probably be a long and painful process, in the context of the prevailing housing shortage. In conclusion Justice de Silva said, "In these circumstances, it would be inequitable to place the plaintiff (S) in the evening of her life, in a situation where she would have no roof over her head. We accordingly direct writ of ejectment not to issue till 1 August 1985"

Somawathie v Perera, court of appeal, 2 Febuary 1984
(C.L.B., October 1984, pp1584-1588)

SWAZILAND

Adultery-husband's claim for damages against man who committed adultery with his wife-whether marriage by civil rights or Swazi law and custom material

The appellant had been ordered by the Swazi National court to give five head of cattle to respondent by reason of the appellant's adultery with respondent's wife. After appeals to the Swazi National Court of Appeal and the Higher Court of Appeal and the High Court the matter reached the Swaziland Court of Appeal which was called upon to decide whether in the circumstances the Swazi National Court had jurisdiction. It appeared that respondent and his wife were at the time of the adultery married to each other both by civil rites and in accordance with Swazi Law and Custom. It was contended on behalf of the appellant that by reason of the provisions of s.9(b) of the Swazi Courts Act 1950 (No.80 of 1950) the Swazi National Court had no jurisdiction by reason the the subsistence of a civil marriage at the time of the adultery. This section provides inter alia, that no Swazi Court shall have jurisdiction to try cases in connection with marriage other than a marriage contracted under or in accordance with Swazi Law and Custom, except where and in so far as the case concerns the payment or return or disposal of dowry. Smith J.A. with whom the rest of the Court of Appeal concurred, concluded that a civil marriage contract and customary law marriage contract were not mutually destructive and could stand side by side.
Held-

(i) a husband had a claim for damages against any man who has sexual intercourse with his wife whether he is married to her by civil rites or by Swazi Law and Custom and that the respondent had based his claim for damages on his customary marriage;

(ii) a civil rites marriage does not dissolve the customary one and that the jurisdiction of the National Court was not limited only to those customary marriages which stood alone and excluded those cases where such marriage formed part of a "dual marriage" ie. one where the parties had contracted both a civil and traditional marriage.

The appeal was accordingly dismissed with costs.
E.F. Dladla v S.J. Dlamini (1976) Civ. App. No.2 of 1976 (C.A.)
(C.L.B., July 1977, pp426-428)

Illegitimate child-guardianship-whether Swazi law and custom applicable

The applicant, a major spinster and the mother of an illegitimate male child, applied for an order against the respondent, the father of the child, to return to her the child whom she alleged had been removed from the care of her mother. She also asked for custody of the child and maintenance. It appeared that the respondent had married some other person and that he had never paid damages for the seduction of the applicant nor "bought" the child. The respondent contended that he and the applicant were Swazis by birth and that he had at all material times followed Swazi law and custom in regard to the custody of the child. He stated in his affidavit that there was no obligation upon him to pay damages for the seduction of the applicant as this was her second child and that it was her

duty to bring the child to his family for "tinyamatane" - that is that he should pay "tinkomo tekutsenga mntwana" (the cattle for buying the child). The applicant joined issue with the respondent on the contention that the matter was to be decided in accordance with Swazi law and custom.

The Chief Justice held-

(i) under Roman-Dutch law an illegitimate child is normally given to the natural guardianship of the mother (Hallo and Kahn's The Union of South Africa (1960 edition) 354);

(ii) in terms of s.3 of the General Administration Act 1905, the Roman-Dutch common law, save in so far as it had been or was from time to time modified by statute, is the law in Swaziland;

(iii) following the Swaziland Appeal Court case of Kealeboga Baruti v Solomon Nndiniso (1961) 2 H.C.T.L.R. 46,48, that there was no provision specifically making Swazi law and custom applicable in the High Court or in the Subordinate courts, although in regard to Swazi Courts the Swazi Courts Act 1950 provided that a Swazi Court administered the Swazi law and custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law enforced in Swaziland. The law therefore to be applied was the Roman Dutch law;

(iv) accordingly the mother was entitled to the custody of the child and that the ancillary prayers should also be granted.

J.T. Dlamini v D.M. Nhlengethwa (Civil Case No.62/77)
(C.L.B., July 1978, pp563-564)

UNITED KINGDOM

Chaudhry v Chaudhry (1975) 3 W.L.R. 559:3All E.R. 687
A divorced wife applied under section 17 of the Married Women's Property Act 1882 for a declaration of her interest in the former matrimonial home in London. The parties were domiciled in Pakistan and had been married in Pakistan under Islamic law. Rejecting a contention on behalf of the husband that there was no jurisdiction to hear the summons because the words "husband and wife " in the Act of 1882 did not apply to parties to a polygamous or potentially polygamous marriage, the High Court held that they parties, having been married according to the law of their domicile, were "husband and wife" for the purpose of any application under section 17 of the Married Women's Property Act 1882.
(C.L.B., January 1976 p.39)

Family home jointly owned-On divorce husband applied for order for sale-Reasonable for wife and children to continue living there
A family home was bought in joint names. It became subject to a trust for sale on the granting of a divorce. The wife remained in the home with the children, the youngest of whom was 13. The husband invoked s.30 of the Law of Property Act 1925 which provides; "If the trustees for sale refuse to sell any person interested may apply to the court.....for an order directing the trustees to give effect thereto, and the court may

make such order as it thinks fit".

Held by the Court of Appeal-:

(i) in recent years the courts have regarded matrimonial home not as an investment to be realized for cash but as a home in which the family was to be brought up;

(ii) if it was reasonable that the house should continue to be a home for the partner who remained in it and had the children, that was the primary matter and means should be considered by which it could be preserved as a home and the outgoing partner receive such compensation as was reasonable by being bought out or in some other way;

(iii) it would not be proper in the circumstances to order a sale unless it was clearly shown to be a practical proposition with alternative accommodation provided for the family in a cheaper house so that the husband's capital could be made available to him;

(iv) the discretion given by s.30 should be operated in the light of more recent statutes concerning matrimonial property.

Williams v Williams, Times Newspaper, 11 May 1976
(C.L.B. July 1976, p.239)

Lump sum payment - Prospective assets of the husband to be taken into account
The Court of Appeal held that in assessing the amount payable to a wife on divorce, the husband's prospect of becoming entitled to an inheritance should be taken into account. The husband's mother enjoyed a large income from two settlements of Canadian properties created by her father. The husband had a vested interest in one settlement if he survived his mother, and a contingent interest in the other. The Court held that the husband's interest in the Canadian settlements could not be ignored, and therefore increased the lump sum payable to the wife from £30,000 to £60,000 but postponed payment until the death of the present life tenant under the settlement.
Calder v Calder, Times Newpaper , 29th Juen 1976
(C.L.B., July 1976 p.240)

Name of child-change of name by deed poll by mother
A woman left her husband to live with another man after she had conceived a child by her husband. She changed her name by deed poll and when the child was born registered him under the name she had assumed for herself and any children she might have.

Held-

(i) the mother was not competent to change the child's surname, either by declaration evidenced by deed poll before birth or on registration of birth, without the consent of the father or by order of the court;

(ii) this principle applied even though the mother had changed her name before the birth and the father had never seen the child.

D v B (orse D (1977) 2 W.L.R. 1011
(C.L.B., July 1977 p428)

Injunction-domestic violence-man sole tenant of house-jurisdiction of county court to grant

The parties, living together as man and wife in a house of which the man was the sole tenant, had two children. Following the deterioration of their relationship and acts of violence, the woman left the house and went to stay with a friend in accommodation where she could not have the children with her.

She applied under the Domestic Violence and Matrimonial Proceedings Act 1976, requiring that the man vacate the house, and later also under the Guardianship of Minor Act 1976, for the custody and care and control of the children. The judge took the view that it would not be reasonable to expect the woman to live under the same roof as the man, and it was in the interests of the children that they should be with their mother rather than with their father. He ordered that the man vacate the house, and made provision for the custody, care and control of the children.

The Court of Appeal, allowing an appeal by the man, held-

(i) on the true construction of s.1 of the Domestic Violence and Matrimonial Proceedings Act 1976 its purpose was to give jurisdiction to the county court to grant injunctions of the types specified independently of other relief;

(ii) it did not alter the substantive law as to the rights of the parties to occupy premises, and the judge had no jurisdiction to order the man to vacate the house which at common law he had an indefeasible right as against the woman to continue to occupy by virtue of his tenancy;

(iii) where the children had a roof over their heads and were being well cared for by the man, the court's inherent jurisdiction to override property rights for the protection of children would not have entitled it to order the man to vacate the houses simply because it felt that the children ought to be with their mother;

(iv) on the evidence there was no basis for inferring any contractual licence of the woman to occupy the house; and such contractual licence would not in any event have given the court power to evict the man, overriding his common law rights as tenant.

B. v B. (Domestic Violence:Jurisdiction) (1978) 2 W.L.R. 160 (C.A.)
(C.L.B., April 1978, pp301-302)

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

A husband sought an injunction to restrain his wife, and a charitable organisation, for 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
(C.L.B., January 1979 pp102-103)

Divorce-marriage dissolved by talaq in Pakistan-recognition of foreign decree-whether "judicial or other proceedings"

The parties, who married in India in 1963, were Muslims, born in India and nationals of Pakistan. They moved to Pakistan in 1964 and to Thailand in 1965. In 1968, while still living in Thailand, they made a khula, which was recognised as a form of divorce under Muslim law by which the parties signed a document terminating the marriage. They continued to live together in Thailand and then in Penang. Early in 1973, they returned to Pakistan but did not live together. The husband only stayed in Pakistan for a few weeks and then came to live in England. He bought a house and his son and members of his family came to live with him. In 1974 against the husband's wishes, the wife came to live in the house. The husband doubting the validity of the khula, flew to Pakistan and there purported to divorce the wife by pronouncing the talaq in accordance with the laws of Pakinstan. He return to live in England.

The husband presented a petition for a declaration that the marriage had been lawfully dissolved either by the khula in 1968 or by the talaq in 1974. Wood J. held that

(a) although the khula was not "judicial or other proceedings" within the meaning of s.2(a) of the Recognition of Divorces and Legal Separations Act 1971, the parties were domiciled in Thailand in 1968, where the khula would be recognised as disolving the parties' marriage and, in those circumstances, the divorce would be recognised by the court under s.6 of the Act,
(b) the talaq had been pronounced in accordance with the laws of Pakistan and therefore was a divorce obtained by judicial or other proceedings within the meaning of s.2(a) of the Act and would also be recognised by the court as dissolving the marriage.

The Court of Appeal allowed an appeal by the wife, holding that the phrase "judicial or other proceedings" in s.2(a) of the Act of 1971 excluded from recognition a foreign decree which depended for its legal efficacy soley on the acts of the parties to the marriage and that, since both the khula and talaq were so dependent, neither was within the meaning of that section, and that neither divorce was entitled to recognition under s. 6 of the Act.

On appeal by the husband, it was held, allowing the appeal, that-

(i) the words "other proceedings" in s.2(a) of the Recognition of Divorces and Legal Separations Act 1971 were not to be limited to quasi-judicial proceedings by being construed ejusdem generis with "judicial" proceedings: that they referred to any proceedings, other than judicial proceedings, which were officially recognised in the country in which they were taken, and that a divorce obtained by talaq in Pakistan in accordance with the requirements of Pakistani law was a divorce obtained by such "other proceedings";

(ii) since the wife's place of residence at the time of talaq was Karachi, despite her temporary absence in London, and since all other steps necessary to render the divorce effective in Pakistan had been taken, the talaq was entitled to recognition under s.2(a) of the Act and the husband was entitled to a declaration that the marriage had been dissolved thereby.

Quazi v Quazi (1979) 3 W.L.R. 833 H.L.
(C.L.B., April 1980, pp519-521)

Disposition of estate-no share for ex-mistress
The plaintiff, who was intermittently over ten years mistress of the deceased, claimed a share of the estate under the provisions of the Inheritance (Provision of Family and Dependants) Act 1975.

In considering the claim it was necessary to decide whether she was a person "who immediately before the death of the deceased was being maintained wholly or in part by the deceased" if so, whether the statutory provisions relating to intestacy operate so as not to make reasonable financial provision for the plaintiff mistress. The Court held that-

(i) the deceased had divested himself of financial responsibility for his mistress and had left her shortly before his death;

(ii) the defendant was the deceased's widow

Kourkey v Lusher 8 December 1981 (The Times newspaper; 9 December 1981)
(C.L.B, April 1982, p557)

Trust for sale-family home-beneficial interests-unmarried couple-man acquiring house in sole name-woman not directly contributing to purchase price or mortgage instalments-couple living in house for 17 years-woman performing domestic duties and caring for children-whether common intention that woman to have beneficial interest in house
The plaintiff and the defendant set up home together in 1961 in rented accommodation where their first child was born. In 1963 when the plaintiff was expecting the second child, the defendant decided that it would be a better use of his money to buy a house. The house was purchased and conveyed in the sole name of the defendant who financed the purchase

price out of his own money and by way of a mortgage. The plaintiff did not directly contribute to the purchase price or to the mortgage payments. She remained at home to look after the children and to perform domestic duties and was thus unable to earn until 1975 when she started working as a driving instructor. Although the defendant continued to give her a generous housekeeping allowance and did not ask her to contribute to the household expenses, she used her earnings to pay the rates and the telephone bills and to buy fixtures, fittings and certain domestic chattels for the house. She also redecorated the interior of the house. The plaintiff left the defendant in 1980 and brought proceedings against him claiming that she was entitled to a beneficial interest in the house by reason of her contributions to the household over the 17 years they had lived there. The judge dismissed the plaintiff's claim.

On appeal by the plaintiff to the Court of Appeal, in dismissing the appeal, held that-

1. since the plaintiff had not made a substantial financial contribution to the acquisition of the house the court could not impute a common intention that she should acquire a beneficial interest in it;

2. the plaintiff's domestic duties of the household and bringing up the children were not factors which could be taken into account in determining whether or not she had acquired a beneficial interest in the house: and accordingly, the plaintiff had failed to demonstrate the existence of any trust in her favour.

Pettitt v Pettitt (1970) AC 777 (HL) and Gissing v Gissing (1971) AC 886 (HL) applied.
Burns v Burns (1984) 2 WLR 582 (CA)
(C.L.B., July 1984, pp.1165)

Administration of estates-wife convicted of husband's manslaughter-and thereby precluded from taking under will-whether entitled to financial provision from deceased's estate-whether statutory modification of forfeiture rule applying retrospectively

The plaintiff, who was convicted of the manslaughter of her husband with a finding of diminished responsibility, was the sole beneficiary under his will. Following conviction, she was committed to a mental hospital under s.60 of the Mental Health Act 1959 and detained for a period of about 20 months. After her release and before the Forfeiture Act 1982 came into force, she applied for an order under the Inheritance (provision for Family and Dependants) Act 1975 that such provision as might be just be made for her out of the estate of her deceased husband, since she was precluded by her conviction from taking any benefit under his will. On the defendants' summons, the judge ordered that the plaintiff's application be struck out as disclosing no reasonable cause of action

On appeal by the plaintiff the court of Appeal, in dismissing the appeal held that-

1. since by the deceased's will reasonable financial provision would have been made for the plaintiff, her application was precluded by ss.1 and

2 of the Inheritance (Provision for Family and Dependants) Act 1975 but, in any event, the rule that no one could benefit by a criminal act applied to the Act; and therefore, the court had no discretion to consider making an order under the terms of the Act.

2. even if the Forfeiture Act 1982 were capable of applying retrospectively, any application by the plaintiff for an order under s. 2 of the Act of 1982 modifying the effect of the forfeiture rule must be time barred under s.2(3) as it had not been brought within three months of her conviction for manslaughter; and, accordingly, the plaintiff's appliction was bound to fail as it disclosed no reasonable cause of action.

Royse, In re descd.(1984) 3 WLR 784 (CA)
(C.L.B., January 1985, p.85)

ZIMBABWE

Customary law-seduction of daughter-action for damages-daughter of majority age-whether father as guardian has locus standi

The respondent, the father, brought action in the Community Court against the appellant claiming damages for the seduction of his daughter who, at the time of the seduction had attained the age of 18 years. The Community Court awarded damages; and on the appellant's appeal to the District Court, that Court dismissed the appeal with costs.

The appellant appealed to the Supreme Court on the sole ground that as the respondent's daughter was a major at the time when she admitted having first had sexual intercourse with the appellant, the respondent had no locus standi and is not entitled to claim damages for the seduction of his daughter.

It was common ground (and the court agreed) that the effect of the Legal Age of Majority Act which came into effect on 10 December 1982 was to do away with the old customary law concept that an African woman was a perpetual minor who needed a guardian to assit her in contractual obligations, because under the Act every person acquires status on the attainment of the age of 18 years. It was also common ground that an African woman with majority status can contract a marriage without the consent of her guardian because she no longer needed a guardian.

the Supreme court held that-

1. under customary law and as long as the daughter remained a minor under the guardianship of her father, the father has a right to sue and is entitled to damages for seduction;

2. as a major, the daughter acquired the capacity and right to sue for damages under the general law of Zimbabwe. She cannot vest her own right in her father;

3. the daughter having attained majority status, the respondent father had

lost his right under customary law to sue for damages for seduction and, accordingly, lacked locus standi in the action.

In its judgment the Supreme Court also made observations regarding the customary practices and requirements of lobola and roora.

Katekwe V Mhondoro Muchabaiwa, Supreme Court, Harare, 1 August and 7 September 1984
(C.L.B., January pp.85-86)

Finance, Trade and Economic Development

CYPRUS

Income tax assessments-whether legislative provisions unconstitutional-incomes of husband and wife aggregated-whether discrimination on ground of sex-doctrine of judicial precedent

The appellants, the Minister of Finance and the Commissioner of Income Tax, appealed from the judgment in the first instance of a single Judge of the Supreme Court given in a recourse made under article 146 of the Constitution; by this judgment there were annulled the income tax assessments relating to the income of the respondent in respect of the years of assessment 1962-1968 on the ground that the relevant legislative provisions concerning taxation of income, on which the assessments had been based, were unconstitutional.

The Judge found that the legislative provisions were contrary to articles 24 and 28 of the Constitution. Relying on these enactments the Commissioner of Income Tax aggregated the income of the respondent with that of his wife for the purpose of taxation.

It was common ground in the appeal that the legislative provisions in question were those enacted on the basis of the decision in 1961 in the case of Mikrommatis v The Republic, 2 R.S.C.C. 125, where it was held by the Supreme Constitutional Court that it was unconstitutional, as amounting to discrimination on the ground of sex contrary to article 28 of the Constitution, to aggregate the income of the wife from her own labour with that of her husband for purposes of income tax; the wife's "income from her own labour" was defined in the decision in the Mikrommatis case as meaning "income derived from exercise of the right safeguarded by article 25 of the Constitution". Article 25 protects the "right to practise any profession or to carry on any occupation, trade or business".

In the same case it was held that the aggregation of the income of the wife from any other source with that of her husband, for income tax purposes, was not unconstitutional.....

Relevant legislative provisions in Cyprus are similar to those in England and according to these the family is treated as one tax unit with the result that the income of the spouses for income tax purposes is aggregated. In this connection reference was made to the English case of Leitch v Emmott (1929) 2 K.B.236, which was confirmed in Elmhirst v Commissioners of Inland Revenue (1937) 2 Q.B.551. and to s.23 of the Finance Act 1971.....

The Court reached the following conclusions-

(a) the sub-judice assessments were annulled;

(b) the Mikrommatis case was rightly decided at the time when it was determined.

The Court left entirely open the issue whether or not the decision in the Mikrommatis case has to be treated as being no longer valid.
The Republic of Cyprus v. Demetrios Demetriades (1977) 12 J.S.C.2102.
(C.L.B. January 1979 pp.103-105)

Health, Education and Social Welfare

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, shought-
(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 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.p89) 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 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 14th June 1979
(C.L.B., January 1980, pp.77-78)

UNITED KINGDOM

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 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)
(C.L.B., January 1981, pp118-119)

Industrial Relations

AUSTRALIA

New South Wales

Complaint of victimisation and "Sexual harassment" - whether amounts to discriminatory behaviour
The New South Wales Industrial Tribunal, which is presided over by a Judge, had occasion to consider whether the complainant, a female lift operator in a Department of State of the New South Wales Public Service, had been the victim of discrimination by the defendant, who is the Permanent Head of that Department.

The complainant complained of being made the victim of sexual harassment, and the Judge found that jurisdiction existed in the Tribunal to hear the complaint.

In so doing the Judge observed, inter alia-

(1) there is no reference in the Anti-Discrimination Act to sexual harassment, and therefore no statutory definition of it. Accordingly an appropriate starting point is to define sexual harassment. In view of the nature of this preliminary enquiry. I propose at this stage to place the widest possible meaning upon that phrase. I then propose to examine it, so defined, together with the relevant sections of the Anti-Discrimination Act, in order to determine whether, and to what extent, sexual harassment is capable of amounting to a contravention of the Act.

Ascribing then the widest possible meaning to the words, I adopt as a starting point that a person is sexually harassed if he or she is subject to unsolicited and unwelcome sexual conduct by a person who stands in a position of power in relation to him or her.

The above definition is obtained from a reading of the relevant literature and case law on the subject. Issues relating to the extent to which sexual harassment is proscribed by anti-discrimination laws have arisen on a number of occasions over recent years in both the United States and Canada. However, I am aware there are no prior occasions on which a Court or tribunal in this country or the United Kingdom has been called upon to made such a determination. It is largely for this reason that this preliminary question has been treated by all parties, and by the Tribunal itself, as one of great importance.

(2) it follows from the above provisions that a complainant alleging sexual harassment must, in order to establish a contravention of the Act, prove the following:

(i) that he or she has been treated less favourably than in the same circumstances, or in circumstances which are not materially different, a person of the opposite sex would have been treated;

(ii) that the ground upon which he or she received that treatment was either his or her sex, or a characteristic appertaining generally to persons of that sex, or a characteristic that is generally imputed to persons of that sex;

(iii) that the person committing the act of harassment was either the employer or the complainant or a person made liable by sec. 52 of the Act; and

(3) the essence of sexual harassment is that the sexual conduct was neither solicited nor incited, and was regarded by the complainant as undesirable and offensive. It goes without saying that the Anti-Discrimination legislation was never intended to proscribe sexual relationships, whether inside or outside the workplace,

which are or have the potentiality of being, consensual. As Spottwood Circuit Judge, said in Barnes v Costle 46 ALR Fed 198 at p. 223: "Sexual advances may not be intrinsically offensive and no policy can be derived from the equal opportunity laws to discourage them. We are not here concerned with racial epithets or confusing union authorisation cards, which serve no-one's interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm".

We are assuming, for the purposes of this preliminary enquiry, that the complainant will be able to establish the factual basis of her complaint. If she does, then it will be likely to indicate heterosexual tendencies on the part of the respondent. The only situation in which male employees could also be subjected to similar treatment would be if the employer were bisexual. I think it is an appropriate matter for the taking of judicial notice that heterosexual people substantially outnumber bisexual people in the community and that therefore heterosexual activities are much more likely to be undertaken by heterosexual persons than by bisexual persons.

As to the homosexual employer, if an employee were to be sexually harassed by an employer of the same sex, then in my view, that employee would have precisely the same rights under the Anti-Discrimination Act as the complainant has in this case.....

After considering the case of Ministry of Defence v Jeremiah, (1979) 3WLR p.857 the learned judge went on:-

This Tribunal is not bound by decisions of the English Court of Appeal, but they must be highly persuasive. In the circumstances, I consider that we should adopt the meaning ascribed to the word "detriment" by Brandon L.J., and treat it as requiring that a complainant has been placed under a disadvantage in comparison with employment of the opposite sex.

The disadvantage must be a matter of substance; the legislation is not directed to trivial distinctions in the treatment afforded to men and women. Subject to that it is difficult to define the limits of a concept which is, as Brandon L.J. said, essentially a matter of fact to be determined in each individual case.

I therefore consider that this Tribunal should not, in this inquiry, try to establish the boundaries of what might amount to a "detriment" under sec. 25(2)(c). This is the first case in which we have been called upon to define that concept, and there are no facts before us upon which to base our determination.

However, I can say this: that in the context of sexual harassment, the type of conduct which I described as creating an "unwelcome feature of the employment" and therefore falling under s.25(2)(a)

would also, in my view, lead to a "detriment" under s.25(2)(c). Callaghan v Loder (1983) 25 Australian Industrial Law Review 318 (C.L.B., January 1984, pp181-186)

INDIA

Air hostesses-retirement in the event of marriage or on first pregnancy-whether regulations discriminatory-guidelines for determining discrimination in service matters

The Supreme Court, in dismissing the writ, held that, having regard to the various circumstances, incidents, service conditions, promotional avenues, etc of the Assistant Flight Pursers and Air Hostesses of Air India, the inference is irresistible that Air Hostesses though members of the cabin crew are an entirely separate class governed by different sets of rules, regulations and conditions of service. Therefore, though peculiar conditions did form part of the regulations governing Air Hostesses, that could not amount to discrimination as as to violate Aritcle 14 of the Constitution.

In so holding the Supreme Court also laid down guidelines, for determining the question of discrimination in service matters, in the following terms-

(i) In considering the fundamental right of equality of opportunity a technical, pedantic or doctrinaire approach should not be made and the doctrine should not be invoked even if different scales of pay, service terms, leave, etc. are introduced in different or dissimilar posts.

Thus, where the class or categories of service are essentially different in purport or spirit. Article 14 cannot be attracted.

(ii) Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having a close nexus with the object sought to be achieved so that in such cases Article 14 will be completely out of the way.

(iii) Article 14 certainly applies where equals are treated differently without any reasonable basis.

(iv) Where equals and unequals are treated differently Article 14 would have no application.

(v) Even if there be one class of service having several categories with different attributes and incidents, such a category becomes a separate class by itself and no difference or discrimination between such category and the general members of the other class would amount to any discrimination or to denial of equality of opportunity.

(iv) In order to judge whether a separate category had been carved out of a class of service, the following circumstances have generally to be examined-

(a) the nature, the mode and the manner of recruitment of a particular category from the start;
(b) the classifications of the particular category;
(c) the terms and conditions of service of the members of the category;
(d) the nature and charater of the posts and promotional avenues;
(e) the special attributes that the particular category possess which are not to be found in other classes, and the like.

Air India v Nergesh Meerza AIR 1981 Supreme Court 1829
(C.L.B., July 1982, pp.1013-1014)

UNITED KINGDOM

Concession given to wives of retired employees not extended to husbands-whether discriminatory

The railways' policy of not allowing the husbands of women employees to continue their concessionary free travel after retirement while allowing the wives of male employees to continue to enjoy the privilege has been held by the Employment Appeal Tribunal to be unlawful discrimination on the grounds of sex and within the meaning of the Sex Discrimination Act 1975,

Garland v British Rail Engineering Ltd. (Times newspaper, 15 November 1977)
(C.L.B., January 1978, p.91)

Employment-age limit on applicants-whether discriminatory on grounds of sex

The applicant, aged 35 and a married women with children, complained to an industrial tribunal that the Civil Service Commission was unlawfully discriminating against her on the ground of her sex contrary to s.1(1)(b) of the Sex Discrimination Act 1975, in that the condition imposing an upper age limit of 28 (that the candidate for appointment as an Executive Officer in the Civil service should be "at least 17½ and under 28 years of age") was such that the proportion of women who could comply with it was considerably smaller than the proportion of men who could do so, and was therefore discriminatory within the meaning of s.1(1)(b)(i) of the Act.

The industrial tribunal dismissed the complaint on the ground that the phrase "can comply with it" in the said section was to be strictly construed as meaning physically able to comply, and since the total number of men and women in the population was not very different, it was impossible to say that the proportion of women who could comply with the age requirement was considerably smaller than the proportion of men.

On appeal, the Employment Appeal tribunal, allowing the appeal, held by a

majority-

(i) "can" in s.1(1)(b)(i) of the Sex Discrimination Act 1975 should not be construed so as to mean "theoretically possible" but that it was necessary to see whether the condition could be complied with in practice;

(ii) accordingly, it was relevant in determining whether women could comply with the condition imposing an upper age limit of 28 to take into account the usual behaviour of women.

(iii) since a considerable number of women aged between 25 and 35 were occupied rearing children, there were, therefore, a certain number of women who could not comply with the condition because they were women; and

(iv) since the industrial tribunal had made no findings on the further question, namely, whether the proportion of women who could comply with the condition was considerably smaller than the proportion of men who could comply with it, the case would be remitted to an industrial tribunal for rehearing.

Price v Civil Service Commission and another (1977) 1 W.L.R. 1417 (E.A.T.) (C.L.B., April 1978, pp310-311)

Discrimination in employment-seniority requirement in allocation of postal walks-whether unlawful discrimination

Under a system operated by the Post Office vacant postal walks were awarded according to seniority in terms of permanent status. The complainant had worked as a temporary post woman for some period and then as a permanent full-time post woman. Her application for a vacant postal walk was refused on the ground that she lacked the necessary seniority for the job. The walk was given to a man whose total employment was shorter, but who had achieved permanent status earlier. She complained to an industrial tribunal alleging discrimination contrary to ss.1(1) and 6(2) of the Sex Discrimination Act 1975, but as she stressed that the complaint was against the union not the Post Office, her complaint was dismissed.

The Employment Appeal Tribunal, allowing the appeal, held-

(i) the requirement that postal walks were awarded according to seniority was such that the proportion of women who could comply with it was considerably smaller than the proportion of men who could do so within the meaning of s.1(1)(b)(i) of the Act, and the requirement was to her detriment within s. 1(1)(b)(iii);

(ii) unless the Post Office could show that s.1(1)(b)(ii) did not apply on the ground that the requirement was justifiable irrespective of sex, there had been an act of discrimination against the complainant.

Since the industrial tribunal had not made a finding whether the Post Office could justify the requirement or condition as to seniority under s.1(1)(b)(ii), the case was referred back to the industrial tribunal, to consider whether the Post Office could discharge the heavy onus of showing

that the needs, and not the convenience, of the enterprise outweighed the discriminatory effect of the requirement of seniority.
Steel v Union of Post Office Workers (1978) 1 W.L.R. 64 (E.A.T.)
(C.L.B., April 1978, pp311-312)

Equal pay-whether less work a "material difference"
Section 1 of the Equal Pay Act provides-

(3) An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material difference (other than the difference of sex) between her case and his.

Article 119 of the EEC Treaty provides-

Each member state shall .... ensure and subsequently maintain the principle that men and women should receive equal pay for equal work.

The Employment Appeal Tribunal allowed an appeal by the employer, Albion Shipping Agency, from a decision of a Hull industrial tribunal that the employee, Mrs. Lynn Arnold, was entitled to pay equal to that previously paid to a male employee. The employer had appealed on the ground that the tribunal had erred in law in failing to determine the application by reference to Article 119.

The Tribunal held that-

(i) it was open to an employer to justify paying a woman employee a lower wage for doing the same job as her male predecessor by relying on a reduction in the volume of work and profitability of the business as being a "material difference" other than sex, within the meaning os s.1(3) of the Equal Pay Act 1970;

(ii) that was so whether the claim for equal pay was to be considered under Article 119 of the EEC Treaty alone, or under the Equal Pay Act 1970 as impliedly amended by the Treaty.

Albion Shipping Agency v Arnold EAT, 21 October 1981 (The Times newspaper: 24 October 1981)
(C.L.B, April 1982, p564)

Discrimination in rail travel facilities granted to employees-whether "pay"
The appellant, Mrs. Garland, is a married woman employed by the respondents. During the period of their employment all employees of British Rail Engineering enjoy certain valuable travel facilities which are also extended to their spouses and dependent children.

On retirement former employees, men and women, continue to enjoy travel facilities but they are reduced in comparison with those which they enjoyed during the period of their employment. However, although male employees continue to be granted facilities for themselves and for their wives and dependent children as well, female employees no longer have such facilities granted in respect of their families.

According to the House of Lords: "These facilities are not enjoyed by former employees as a matter of contractual right, but employees have a legitimate expectation that they will enjoy them after retirement and it would be difficult in practice for the respondents to withdraw them 'unilaterally' without the agreement of the trade unions of which its employees are members."

Mrs. Garland commenced proceedings complaining that the respondents were discriminating against her contrary to the provisions of the Sex Discrimination Act 1975.

The issues of Community law were raised in the House of Lords which referred the following questions to the Court of Justice of the European Communities-

(1) Where an employer provides (although not bound to do so by contract) special travel facilities for former employees to enjoy after retirement which discriminate against former female employees in the manner described above, is this contrary to-

(a) Article 119 of the EEC Treaty?
(b) Article 1 of Council Directive No. 75/117/EEC?
(c) Article 1 of Council Directive No. 76/207/EEC?

(2) If the answer to questions (1)(a), (1)(b), or (1)(c) is affirmative, is Article 119 or either of the said directives directly applicable in member States so as to confer enforceable Community rights upon individuals in the above circumstances?

(a) In its judgment in Case 80/70 Defrenne (1971) ECR 445, at p451, it stated that the concept of pay contained in the second paragraph of Article 119 comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.

(b) It appears from a letter sent by the respondents to the trade unions that the special travel facilities granted after retirement must be considered to be an extenstion of the facilities granted during the period of employment.

(c) It follows from those considerations that rail travel facilities such as those referred to by the House of Lords fulfil the criteria enabling them to be termed pay within the meaning of Article 119 of the EEC treaty.

(d) The argument that the facilities are not related to a contractual obligation is immaterial. The legal nature of the facilities is not important for the purpose of the application of Article 119 provided that they are granted in respect of the employment.

The Court of Justice of the European Communities held that-

(i) where an employer (although not bound to do so by contract) provides special travel facilities for former male employees to enjoy after their retirement this constitutes discrimination

within the meaning of Article 119 against former female employees who do not receive the same facilities;

(ii) where a national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the grant of special travel facilities solely to retired male employees represents discrimination based on difference of sex, the provisions of Article 119 of the Treaty apply directly to such a situation.

Eileen Garland v British Rail Engineering Ltd. Court of Justice of the European Communities, 9 February 1982 (Case 12/81: Preliminary ruling under Article 177 of the EEC Treaty on a reference by the House of Lords) (C.L.B., April 1982, pp760-763)

Discrimination on sex on retiring ages-whether unlawful

The appellant was employed by the British Railways Board, the respondent, who offered voluntary redundancy to some of its employees and a memorandum was drawn up embodying the terms of a collective agreement between management and trade unions on reorganisation which included the following paragraph: "Staff aged 60/65 (male/female) may leave the service under the redundancy and resettlement arrangements when the function in which (they are) employed has been dealt with under organisation planning."

He applied for voluntary redundancy but was refused because he was under 60 and he complained unsuccessfully to an industrial tribunal under the provisions of the Equal Pay Act 1970, as last amended by the Sex Discrimination Act 1975. He appealed to the Employment Appeal Tribunal where it was conceded on his behalf that by virtue of s.6(4) of the 1975 Act it was not contrary to the Act for an employer to treat a male employee less favourably than he treated a female employee as regards access to voluntary benefit. He contended however that s.6(4) had to be construed in the light of European Community law and the Employment Appeal Tribunal requested a preliminininary ruling concerning inter alia Directive No. 76/207/EEC of 9th February 1976.

The principal issue raised by the Employment Tribunal's questions was whether the requirement that a male worker should have reached the age of 60 in order to be eligible for payment of a voluntary redundancy benefit whereas women workers became eligible at the age of 55 amounted to discrimination, and, if so, whether the relevant provision of Community law might be relied upon in the national courts.

The Court of Justice of the European Communities had held that-

(i) in deciding whether the difference in treatment of which the appellant complained was discriminatory within the meaning of the directive, account had to be taken of the relationship between meansures such as that at issue and national provisions on normal retirement age. Under United Kingdom legislation the minimum qualifying age for a State retirement pension was 60 for women and 65 for men. Council Directive No. 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, provided that the Directive should be without prejudice to the right of member States to exclude from its

scope the determination of pensionable age for the purpose of granting old-age and retirement pensions and the possible consequences thereof for other benefits: it followed that the determination of a minimum pensionable age for social security purposes which was not the same for men as for women did not amount to discrimination prohibited under Community law;

(ii) the principle of equal treatment contained in Article 5 of Council Directive No. 76/207 of 9 February 1976 applies to the conditions of access to voluntary redundancy benefit paid by an employer to a worker wishing to leave his employment;

(iii) the fact that access to voluntary redundancy is available only during five years preceding the minimum pensionable age fixed by national social security legislation and that that age is not the same for men as for women cannot in itself be regarded as discrimination on grounds of sex within the meaning of Article 5 of Directive No. 76/207.

Burton v British Railways Board of Court of Justice of the European Communities, 16 February 1982 (Case 19/81: Preliminary ruling under Article 177 of the EEC Treaty on a reference by the Employment Appeal Tribunal)

Land

AUSTRALIA

Western Australia

Joint tenants-husband and wife-action by wife to sell and distribute property-whether a severance of joint tenancy

This action concerned property which was owned by a husband and wife as joint tenants. In 1977, the defendant wife instituted proceedings in the Supreme court under s.126 of the Property Law Act, seeking an order that the land be sold and the proceeds of sale distributed. After the writ was issued no further action was taken.

In 1978, the marriage was dissolved and the defendant wife made an application to the Family Court for an order that the land be sold and she be paid $5,250 from the proceeds, with the balance being divided equally. This application was supported by affidavit and notice of the application and a copy of the affidavit was served upon the husband.

In 1979, the husband died, and letter of administration of his estate were granted to the plaintiffs. Meanwhile the defendant formally withdrew her application in the Family Court, no further action having taken place on it.

The plaintiffs in this action sought a declaration that the joint tenancy was severed by the action taken by the defendant in 1977 or by the appliction

to the Family Court in 1978, thereby defeating the defendant's right to take the husband's interest in the land by survivorship. The arguments presented to the court by the plaintiffs centred around the proposition that in the absence of any statutory provision a declaration by any one of a number of joint tenants of an intention to sever the joint tenancy, when communicated to the other joint tenants, operated as a severance.

The Court distinguished and disapproved the authorities in favour of this proposition which were presented to the court by the plaintiffs and held that a mere declaration by a joint tenant of an intention to sever a joint tenancy when communicated to the other join tenant was insufficient to operate as a severance.
Davies v Davies (1983) WAR 305
(C.L.B., October 1984 p.1611)

Private International Law

BELIZE

Petition for divorce-domicile-whether court has jurisdiction
This was a petition for a divorce by a wife. They were married in 1977 in the USA the country of their birth and domicile of origin. There were two children of the marriage both in the USA. The family moved to Belize in 1980. While the wife brought all her belongings with her the husband didn't do so then. They ceased living together as man and wife. The husband and the two children lived together after he brought them back to Belize in 1981 when he also brought his tools of trade. The question of domicile was put in issue. The Court ruled that on the evidence the husband had not abandoned his domicile of origin therefore the Court had no jurisdiction to hear the petition.

On appeal against this ruling it was held, dismissing the appeal, that the husband did not on the evidence, made Belize his domicile of choice: In re Estate of Fuld (No. 3) (1968) P675 followed. Appeal was therefore dismissed.
Dixie Westerhold v John Westerhold Court of Appeal (Civil Appeal No. 1 of 1982)
(C.L.B., October 1982, pp1398-1399)

Torts

AUSTRALIA

Damages for death of wife-whether husband can sue for damages for loss of consortium
The appellant authority appealed to the New South Wales Court of Appeal

against the judgment of a Judge of the Supreme Court of New South Wales awarding the first-named respondent damages following the death of his wife in a serious railway accident in which the respondent's wife had been killed.

Section 4(1)(a) of the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) provides that a cause of action exists in respect of a statutory wrong.

The Court of Appeal, in dismissing the appeal, held that-

(i) a husband's action for loss of consortium lies against anyone who has wrongfully injured the wife with the consequence that she is rendered less able than previously to provide domestic services and conjugal society to her husband; and

(ii) accordingly, a husband may sue for damages for loss of consortium in respect of an injury (albeit mental and nervous shock only) actionable by his wife under the section.

In so holding, one of the members of the Court, with whom the other members concurred, observed, inter alia, as follows:-

> It can scarcely now be suggested that the law does not recognise a psychological, psychogenic, psychoneurotic, psychosomatic or functional injury (whatever the correct term may be) as of equal potency in the production of compensatable detriment as a direct physical trauma. We all know now that a neurotic illness may be just as incapacitating as a direct physical injury. To ignore this well established medical fact would be to add unwanted emphasis to Windeyer J's apophthegm in Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383, at p. 395: "Law, marching with medicine but in the rear and limping a little ....." There his Honour referred to Victorian Railways Commissioners v Coultas (1888) 13 App Cas 222 where the Privy Council decided that damages sought for nervous shock or mental injury caused by fright at an impending collision were irrecoverable as too remote. It is noteworthy, however, that in the Full Court of Victoria Coultas v Victorian Railways Commissioners (1886) 12 VLR 895, their Honours not only held those damages recoverable, but awarded the husband the amount of the expenses which he had incurred as a consequence of his wife's illness. I do not think that Coultas can be regarded as having survived Chester v Waverley Corporation (1939) 62 CLR 1, at p.46, where Evatt J said: " I am of opinion that the Privy Council decision should not be regarded as ruling that in the absence of physical impact to the plaintiff, damages for illness caused by nervous shock can never by recovered."
>
> In Hambrook v Stokes Brothers (1925) 1 KB 141, at pp 153, 154, Atkin LJ as he then was, described the theory that damages at law could not be proved in respect of personal injuries unless there was some injury which was called "bodily or physical" thus "There can be no doubt at the present day that this theory is wrong". And he mentions that Coultas (1888) 13 App Cas 222 had been pronounced by Lord Shaw to be no longer a decision of binding authority.
> State Railway Authority of New South Wales v Sharp and Another (1981) 1 NSWLR 240
> (C.L.B., April 1982, pp138-139)

HONG KONG

Fatal in traffic accident-claim for "lost years"
A young married woman was killed when the motor-cycle on which she was passenger collided with a Kowloon Motor Bus. Negligence was apportioned between the Bus Company and the motor cyclist. The plaintiff (widower and administrator) and the deceased's parents made a claim under the Fatal Accident Ordinance (Cap. 22) based on lost dependency.

The Court held that-

(i) the deceased's mother received $2,000 per month from the deceased. "Little is to be achieved by scrutinising accounts in the name of husband and wife when the reality of the situation is that all family resources were pooled." The loss of the plaintiff and the plaintiff's two parents was fixed at $500 each per month, 8 years was the multiplier: "I realise that this is a somewhat rough and ready approach but I am doubtful if it is possible to deal with the matter with much greater precision".

(ii) applicant propose the "lost years" claim. The approach of the Chief Justice "what seems to me can best be described as robust common sense" in Yeung Wing v VSL Engineers (HK) Ltd and Technic Construction Co Ltd (Civil Appeal 27/80) was followed-to estimate a percentage of earnings which might have been saved was the only realistic way. Here the figure was 20 per cent of monthly income as compared to 10 per cent in the VSL Case.

Cheung Kun-yeu v The Attorney General (sued on behalf of the ICAC), Tam Tak-sun, The Kowloon Motor Bus Co. (1933) Ltd and Tong Hoi Civil Case No. 5581 of 1980.
(C.L.B., July 1982, pp1030-1031)

NEW ZEALAND

Husband injured in accident-wife also his business partner-whether wife can sue
Held-

(i) no claim exists at common law for a wife to sue based on injuries suffered by her husband to recover loss of profits in a business partnership;

(ii)the wife could not recover by virtue of any duty of care owed to her by her husband

Coleman v Millar (Supreme Court, Beattie, J.) Noted at (1976) Butterworths Current Law page 254.
(C.L.B., January 1977, pp90-91)

UNITED KINGDOM

Conspiracy-whether husband and wife can be sued in tort

The Court of Appeal has held that although a husband and wife cannot conspire together in criminal law this immunity does not extend to liability for the tort of conspiracy.
Midland Bank Trust Co. v Breen (No. 3) (1981) 3 All ER 744 (CA); (1982) 2 WLR 1
(C.L.B., April 1982, p585)

Damages-public policy-child born after sterilisation
In October 1977, the plaintiff underwent a sterilisation operation which was performed by a surgeon employed by the defendants. Due to the surgeon's negligence, clips which should have been placed on both her fallopian tubes were incorrectly located so that one was placed on a ligament and the other was found wandering free in her abdomen. For several months after the operation the plaintiff suffered pain and discomfort and was prescribed painkillers, transquilisers and other drugs. The symptoms continued and in June 1978 she was diagnosed as being 16 weeks' pregnant. Thereafter she suffered acute anxiety lest the drugs she had been taking before the pregnancy was diagnosed had harmed the unborn child. In November 1978 the plaintiff gave birth to a normal, healthy boy and she and her husband, who had four daughters and no sons, were delighted. She then had to undergo an operation for resterilisation and a further operation to remove the last vestiges of the unsuccessful operation in 1977. In an action against the defendants for negligence, the plaintiff claimed damages for her pain and discomfort, particularly the fears and anxieties engendered by the unsuccessful operation, her loss of earnings during the pregnancy, birth and early rearing of the baby, the cost of enlarging the family home to accommodate the new baby and the cost of the child's upbringing until the age of 16 years. The defendants admitted liability.

On the quantum of damages, the Court held that-

(1) although, as it was conceded, the plaintiff was entitled to damages for her pain and suffering and her loss of earnings during pregnancy, the measure of damages should also reflect the disturbance to the family finances that the unexpected pregnancy caused;

(2) it was contrary to public policy as being disruptive of family life and contrary to the sanctity of human life that damages should be recoverable for the costs arising from the coming into the world of a healthy, normal child; and that, therefore, the plaintiff's claims for the cost of the child's upbringing from birth to the age of 16 and for the enlargement of the family home were irrecoverable.

Dicta of Lord Denning MR in Spartan Steel & Alloys Ltd. v Martin & Co (Contractors) Ltd. (1973) QB 27, 37 (CA); Lord Wilberforce and Lord Edmund-Davies in McLoughlin v O'Brian (1983) 1 AC 410, 420, 427 (HL) and McKay v Essex Area Health Authority (1982) QB 1166 (CA) applied.
Updale v Bloomsbury Area Health Authority (1983) 1 WLR 1098
(C.L.B., January 1984, pp.216-217)

Damages for personal injuries-plaintiff severely injured due to defendant's negligence-break up of marriage because of injuries-whether extra expense of maintaining wife and family in separate establishments recoverable

The plaintiff was severely injured in a road accident caused by the negligence of the defendant. As a result of his injuries the plaintiff became incapable of managing his property and affairs and his marriage broke up. Agreement was reached between the parties for damages for future loss of earnings. The plaintiff claimed further damages for sums likely to be awarded against him to his wife and children in the matrimonial proceedings for the dissolution of the marriage. At the hearing of the action on 5 November 1982 the Court held that, although any increase in the expenses of maintaining his former wife and children in a separate establishment was not too remote to be recoverable by way of damages, no such damages were recoverable as the plaintiff had failed either to prove or quantify any such loss. On 19 February 1983 a consent order was made in the matrimonial proceedings whereby the plaintiff was ordered to make periodical payments to his wife of £2,445 per annum less tax, £64.75 a month to each of his two children and to make a lump sum payment to his wife of £25,000. The lump sum payment was used to purchase a house for the wife and children.

On the plaintiff's appeal on the ground, inter alia, that evidence of the sepcific loss caused to him as a result of his marriage breaking up was now available the Court of Appeal, in allowing the appeal, held that-

1. since the plaintiff's marriage had broken up because of injuries that he had suffered, the defendant was liable in respect of any loss to the plaintiff that was a reasonbly foreseeable consequence of that break up: any loss to the plaintiff that was caused by the additional cost of maintaining his wife and children under the orders for periodical payments was not quanitiable and could not be recovered, but that the loss to the plaintiff of making the lump sum payment to his wife for the provision of a separate establishment flowed from the divorce and could be recovered;

2. accordingly, after making a deduction for a sum that the plaintiff might reasonably have been expected to give to his wife out of the damages awarded to him had she remained with him, he was entitled to an award of £15,000.

Jones v Jones (1984) 3 WLR 862 (CA)
(C.L.B., January 1984, p.107)