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CAYMAN ISLANDS LAW BULLETIN

NO.3

JANUARY, 1991

Cayman Islands Government

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CAYMAN ISLANDS LAW SCHOOL

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The Cayman Islands Law Bulletin is intended to provide an information and reporting service for attorneys and others who may need to be aware of developments in the law of the Cayman Islands.

The material entered in the Law Bulletin is not intended to be exhaustive or authoritative but should be regarded as an index and a record of material which may be of some use in legal work.

While reasonable care is taken in the preparation of material for publication in the Law Bulletin, neither the Cayman Islands Law School nor the Cayman Islands Government accepts responsibility in law for the accuracy of the contents of this issue, nor do the views expressed necessarily reflect the opinion of the Cayman Islands Government.

Contributions

The Editors would like to express their thanks to Professor John Ritson for his contribution to this edition.

An open invitation is extended for the submission of manuscripts on topics of interest to the legal community. If you would like more information please contact the Director of Legal Studies, Cayman Islands Law School, Tower Building, George Town 97999 Ext. 3540.

Edited by the Director of Legal Studies and Law Lecturers, Cayman Islands Law School.

Richard Finlay	Director of Legal Studies
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EDITORIAL NOTE

This is the third edition of the Cayman Islands Law Bulletin which will continue to be published three times a year - January, May and September.

The Law Bulletin is edited and published by the Cayman Islands Law School. The publication, which was approved by the Legal Advisory Council in October 1989, is intended to have two purposes.

First and foremost, to bridge a gap which exists in the law reporting system in use in the Cayman Islands. The need for a timely and accessible system of law reporting has long been recognised. The matter was put succinctly by Professor Peter Rowe, the first Director of Legal Studies, in a paper entitled "A Proposal for Reporting of Judgments of the Courts of the Cayman Islands" (December, 1983).

"The establishment of an efficient system of law reporting on the Islands would now appear to be imperative. Not only has the volume of criminal cases and commercial litigation increased, generating the need for an awareness of the actual decisions of the courts by legal practitioners but with the establishment of the Law School in 1982 the reporting of decisions would assist in the teaching of Cayman Law to students of the School".

The lack of law reporting was addressed with the publication in 1984 of the Cayman Islands Law Reports by Law Reports International under the editorship of Dr. Alan Milner M.A., LL.M., PH.D, Fellow of Trinity College, Oxford. That series now comprises three bound volumes (1980-83, 1984-85 and 1986-87).

Despite the presence of this excellent reporting series, it was felt that there was scope for an additional series of reports in the form of a Law Bulletin, produced locally and with a minimum of delay between the date of judgment and the report. Discussions were held with Dr. Milner who wholeheartedly endorsed the concept.

The current edition contains summaries of the majority of judgments of the Grand Court and Court of Appeal delivered in chambers and in open court during the period to October 1, 1990 to January 31, 1991. Certain judgments contained insufficient information to be usefully summarized and were therefore omitted. In chambers matters,
an attempt has been made to protect the identity of the parties.

The case notes are presented as summaries. The purpose of the Law Bulletin is not to achieve a full reporting of the case but rather to provide sufficient information about the case to allow practitioners and students to determine whether the case is of use to them and allow
them to locate the full text.

The second purpose of the Law Bulletin is to provide a forum in which judges, legal practitioners, lecturers and law students can express themselves on topics of interest to the legal community. In this regard, we are fortunate to have received an article co-authored by Professors Ritson and Finan of Wolverhampton Polytechnic and the University of Akron, Ohio respectively. Professor Ritson has visited Cayman as a guest lecturer at the Law School and is author of a book on the Cayman Labour Law.

Contributions for future editions would be welcomed on any topic.

We would like to thank the officers of the Judicial Department who compiled and submitted the judgments, thus enabling the summarization process to take place, and the Computer Services Department who provided assistance in the publication and binding process. We would also like to thank Attorney-at-Law Myrna Gregson for proofreading the text. Any remaining errors are the responsibility of the Editor.

Your comments and suggestions are most welcome.

Richard Finlay
Director of Legal Studies

CASE NOTES

SUMMARIES OF JUDGMENTS OF THE GRAND COURT AND COURT OF APPEAL

October 1st 1990 to January 1st 1991

ADMINISTRATIVE LAW

Judicial review - Bias - Fair trial - Test to be applied - Declaration - Caymanian procedure for application for prerogative writs to follow pre-1981 English law

Prendergast v Commissioner of Police

Grand Court (280/90)
Malone, CJ
8th November 1990

Cases referred to:
Whittaker and Watler v. R (1984) CILR 153
R v Liverpool City Ex.p Topping [1938] 1 WLR 119
R v Nailsworth Licensing ExP. Bird [1953] 2 All ER 652
Univeristy of Ceylon v Fernando [1960] 1 All ER 631

Mr N Hill QC and Mr G Hampson for the appellant
Mr A Smellie and Miss J Connolly for the respondent

The applicant was convicted by the respondent sitting as a disciplinary tribunal under the Police Law. He applies for certiorari to quash the convictions, and in the alternative for a liquidation on the basis of bias.

Held: (application refused)
(1) The test to be applied for bias is whether a reasonable and fair minded person sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible (Whittaker and Watler v. R, R v Liverpool City Ex.p Topping).

(2) The application of the above test must be tempered by realism. Some circumstances may require proof of a greater degree of appearance of bias than others. But lattitudinarianism must not be taken so far as to require proof of actual bias (R v Nailsworth Licensing ExP. Bird).

(3) The question is not whether the procedure followed at the disciplinary hearing matched the meticulous procedure of a court of law, but whether it sufficiently complied with the requirements of natural justice (University of Ceylon v Fernando).

(4) Under the Caymanian system, which differs from the practice in England and Wales, a declaration is a parallel method of obtaining relief by writ or originating summons, and cannot be obtained on a notice of motion for an order of certiorari.

PH

Judicial Review - Natural Justice - Right to be heard

Bertoli et al v. Cayman Central Authority

Cayman Islands Court of Appeal (5/90)
Zacca, Pres; Georges and Kerr, JJ.A
November 28, 1990

Legislation:
Mutual Legal Assistance (United States of America) Law 1986
Confidential Relationships (Preservation) Law 1976 (as amended)
Police and Criminal Evidence Act (U.K.) (1984)

Cases referred to:
Wiseman v Borneman [1971] Ac 297
LLovd v McMahon [1987] 1 A.C. 625
R v Leicester Crown Court ex parte Director of Public Prosecutions [1987] 1 WLR 1371

R v Manchester Crown Court ex parte Taylor [1988] 1 W.L.R. 705
R v Race Relations Board ex parte Selvararjan [1975] 1 WLR 1686
Public Disclosure Commission v Isaacs [1988] 1 WLR 1043
Yew Bon Tew v. Kenderan Bas Mara [1983] AC 553
Tournier v National Provincial and Union Bank of England [1929] 1 KB 461
Barclay's Bank PLC v Taylor [1989] WLR 1066

Mr Robin Potts QC and Mr C Quin for the appellants
Mr Christopher Clarke QC and Mr R Finlay for the respondent

The appellants are defendants in an indictment pending before the United States District Court of New Jersey. They are charged with offences relating to an alleged course of stock price manipulation participated in by them and by nominee companies controlled by the. In the course of these proceedings, it became necessary to obtain evidence from persons and entities in the Cayman Islands falling within the ambit of the Confidential Relationships (Preservation) Law. The original request was made pursuant to the Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978. This request was later abandoned and a new request made pursuant to the Mutual Legal Assistance (United States of America) Law 1986 ("the Law") which came into effect March 30, 1990.

That legislation gives force of law to a Treaty entered into with the United States of America, the purpose of which was to improve the effectiveness of law enforcement in the prosecution and suppression of crime through co-operation and mutual legal assistance in criminal matters. The Law is administered in Cayman by the Cayman Central Authority ("the Cayman Authority"). The Law is silent on the procedure to be followed by the Cayman Authority in processing a request.

The appellants had been notified by the prosecuting attorneys in the United States of the application to the Cayman Authority. The Appellants sought declaratory relief as follows:

(a) That in any application or request to the Cayman Authority, the appellants are entitled to have a legal right to be heard and oppose the application.

(b) That any steps taken by the Cayman Authority are and will be ultra vires and of no effect.

The trial came on before Schofield, J. who dismissed the claim.

Held: (appeal dismissed)

(1) While the Cayman Authority is under a duty to act fairly in processing a request under the Law, that does not include an obligation to afford to the appellants a hearing, whether oral or written.

(2) The Treaty and Law are silent on the procedure to be followed by the Cayman Authority in processing requests. While courts may supplement procedure where they find that to be necessary, it must be clear that the statutory provisions are insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation. (Wiseman v Borneman, Lloyd v McMahon).

(3) A review of the statutory provisions in question and a comparison of the provisions in force prior to the Law results in the conclusion that there is no necessity based on the demands of fairness that the court should supplement the legislation by the requirement that the Cayman Authority decide whether a target of a request should be heard.

(4) The procedure under the Law and the Treaty resembles that under the Police and Criminal Evidence Act 1984. Cases decided under that legislation have held that to afford the target of a request an opportunity to be heard would be undesirable. The same rationale applies in this case. (R. v. Leicester Crown Court, R v Manchester Crown Court).

(5) The construction of the Law and the Treaty are not affected by the stage at which the proceedings have reached in the United States or by the fact the appellants had notice of the application.

(6) The second issue raised the issue of retrospectivity. The appellants contended the Cayman Authority could not afford assistance by compelling disclosure of information obtained by a person before the operative date of the Law.

(7) On a proper construction of the Law including its purpose, there is no reason why it could not be seen as intended to operate retrospectively. In fact, to adopt the alternate construction would frustrate its intent which was to

"improve the effectiveness of the law enforcement authorities of both the United States of America and the Cayman Islands in the investigation, prosecution and suppression of crime...."(emphasis added)

(8) Further, the Law is not retrospective in the sense of impairing existing rights or obligations (Yew Bon Tew v Kenderan Bas Mara).

(9) The duty and corresponding right to confidentiality existing between a customer and a bank at common law (Tournier v National Provincial Bank) and at statute in Cayman (Confidential Relationships (Preservation) Law) was not vested or absolute. It was always subject, inter alia, to compulsion of law. In such cases, the duty and right did not exist (Barclays Bank v Taylor).

(10) Since there was no vested or absolute right to confidentiality, the principle in Yew Bon Tew v. Herderan Bas Mara has no application.

RF

CIVIL PROCEDURE

Affidavit - Sufficient affidavit for Summary Judgment - Application by Corporate Plaintiff
(See Civil Procedure - Summary judgment)

Default Judgment - Setting aside

ABC Ltd v D and E Ltd

Grand Court (264/90)
Malone CJ
October 9 1990
Mr Levy for the plaintiff
Mr. Collins for the defendant

The first defendant applied to set aside a default judgment. He alleged that the contract had been entered into by the second defendant with the plaintiff. He was an officer of the second defendant but did not assume personal liability for the contract in issue.

Held: (application allowed)

(1) The major consideration on an application of this nature is whether the defendant discloses a defence on its merits. The material here satisfied that requirement.

(2) While the defendant's explanation of delay carried little weight, the plaintiff had suffered no prejudice and the defendant was granted leave to defend on terms.

RF

Limitation of Action - Debt - Whether claim statute barred

Ross v Bank Intercontinental Ltd

Cayman Islands Court of Appeal (3/90)
Zacca, President; Kerr and Henry, JJ.A
November 28 1990

Cases referred to:
Chasemore v Turner [1875] 10 L.R. Q.B. 500
Cooper v Kendall [1909] 1 K.B. 405
Spencer v Hemmerde [1922] 2 A.C. 507

Legislation:
Limitation of Actions Law Ch.86

Mr R Alberga QC and Mr A Turner for the appellant

Mr R Henriques QC and Mr D Bannon for the respondent.

An appeal from an order by Collett C.J. on a preliminary issue that the action was statute barred. The appellant's attorney had written to the respondent requesting details of the amount that they held for the appellant on 10 June 1985. The respondents had replied on 26 June 1985:

'Our records indicate that the account stands at US$314,832.70 as of 1st June 1984. We have used this date because we stopped accruing interest into all deposits as of that date as a useless exercise and expense. Should the bank be successful in acquiring additional substantial funds under certain actions we shall of course commence calculating interest again.'

In addition a report dated June 17 1985 had been sent to all depositors which had been headed "Present status of the Bank and options now available." The respondents argued that the report read with the letter was a conditional promise to pay and the action was statute barred. The appellant argued that the report was nothing more than recommendations as to how the assets of the bank could be realised.

Held:

(1) The Report does no more than set out proposals and recommendations as to how the assets could be realised.

(2) The implied promise to pay is not conditional or narrowed by anything in the letter. The debtor is merely asking for further time to discharge the obligation. The appellant's action is not statute barred.

RO

Limitation of Actions - Company director

(See Companies - **Prospect Properties Ltd. v McNeill et al** at para 12-13)

Parties - Joinder of Defendants - Jurisdiction of Court under Rule 26 Grand Court (Civil Procedure) Rules

Executive Air Services Ltd. Bodden and Bodden v. McDonald (Respondent)

Cayman Islands Court of Appeal (CICA 3/90)
Zacca, Pres; Kerr and Henry, JJA
November 28, 1990

Legislation:
Rules 25 and 26 Grand Court (Civil Procedure) Rules

Cases Referred to:
Edward v Lowther (1876) 45 LJPC 417
Moser v Marsden (1892) 1 Ch 487
Amon v Raphael Tuck & Sons Ltd. [1956] 1 QB 357
Vandervill Trustees Ltd. v White [1970] 3 All ER 16

Mr. Lamontagne Q.C. for the appellants
Mr. Foster for the respondent

The appeal was from an order allowing the respondent, inter alia, leave to add the third defendant. The ground of appeal was that Rule 26 does not confer jurisdiction to add the third defendant in circumstances in which it is alleged she was a joint tortfeasor.

Held: (appeal dismissed)

(1) Rule 26 provides for the addition of plaintiffs or defendants in two categories of persons:

(a) those who ought to have been joined at the commencement of the proceedings, and

(b) those whose presence may be necessary to enable the court effectively and completely to adjudicate upon and settle all questions involved in the cause or matter.

In the present case, the joinder of the defendant was made on the basis she fell within the first category.

(2) The words "ought to have been joined" do not, as the appellant contended, mean that joinder may only be permitted where there was an obligation on the part of the plaintiff at the time of commencement of the action to have that person as defendant (Edward v Lowther).

(3) Different considerations arise in relation to the applicaiton of the Rule in the case of an application by a defendant to be added as a proposed defendant and an application by a plaintiff to add a defendant (Moser v Marsden distinguished).

(4) Rule 25 provides that all persons may be joined as defendants against whom the right to any relief is alleged to exist jointly, severally or in the alternative. It follows, therefore, that a plaintiff ought to join as defendants in one action all persons from whom he wishes to claim relief jointly severally or in the alternative. A joint tortfeasor is such a person and is, therefore, a person who ought to be joined within the meaning of Rule 26.

RF

Pleadings - Amendment - Amendment to defence subject to conditions where defence "Shadowy" (see Civil Procedure - Summary Judgment)

Pleadings - Amendment - Application to amend statement of claim made during trial

Iorgulescu v Swiss Bank and Trust Co. Ltd

Grand Court
Schofield, J
3rd October 1990

Cases Referred to:
Ketteman v Hansel Properties Ltd [1988] 1 All ER 38

Mr. P Lamontagne QC and Mr. R. Nelson for the Plaintiff
Mr. R Alberga QC and Mr. A Foster for the Respondent

It is no longer the law that a judge is obliged to allow an amendment no matter how late it was made nor for what reason provided the other party could be properly compensated by an award of costs (Ketteman v Hansel Properties Ltd).

Allowing the application to amend statement of claim the judge took account of the fact that the defendant was a business corporation which does not suffer the same strains and anxieties of a personal litigant: that the amendment, although applied for at the trial was sought before the trial had commenced, and that the court was not dealing with the special nature of a limitations defence.

The question of a limitations defence, and the effect of lapse of time on the credibility of witnesses were matters for the trial judge to deal with.

PH

Pleadings - Striking out - Abuse of Court's Process - State Immunity

Bertoli et al v Cayman Central Authority et al

Grand Court (407/89)
Schofield, J.
July 10, 1990

Legislation:
State Immunity Act 1978 (UK) as extended to Cayman by SI 458/1979

Mr. R Potts QC and Mr. C Quin for the plaintiff
Mr. R Ground Q.C. and Mr. R Finlay for the defendants

The plaintiffs challenged the right of the defendants to obtain information from Cayman institutions for use in criminal proceedings in the United States of America in which the plaintiffs were defendants. The plaintiffs sought injunctive and other relief against the defendants who preceeded initially under the Evidence (Proceedings in other Jurisdictions) Order 1978 and later pursuant to the Mutual Legal Assistance (United States of America) Law 1986.

Five of the six defendants were the officers of the Justice Department of the United States of America, one being the US Attorney General. The sixth defendant was the Cayman Central Authority constituted under the Mutual Legal Assistance Law

The defendants applied by summons to strike the action as against the first five defendants as being an abuse of the process of the court.

Held: (application allowed)

(1) The State Immunity Act 1978 (UK) as extended to the Cayman Islands provides for immunities from suit in the Cayman Islands in favor of a state which includes any department of a state government.

(2) The plaintiff cannot avoid the operation of the statute by naming the defendants in their individual capacities. To do so is an abuse of process of the court.

RF

Summary Judgment - Affidavit in support to be sworn by plaintiff - Corporate plaintiff - Defence raising triable issue on amendment - Amendment subject to conditions.

A Bank Ltd. v C

Grand Court
Malone, C.J.
October 11, 1990

Legislation:
Grand Court Rules, R23

Mr. Giglioli for the plaintiff
Mr. Grant for the defendant

The plaintiff applied for summary judgment. The defendant had entered an appearance and filed a defence. While the case relied upon by the defendant was "shadowy", it did raise certain triable issues. The defendant resisted the application on grounds, inter alia, that the application was not supported by an affidavit which complied with the requirements of Rule 23.

Held: (application dismissed)

(1) An affidavit sworn by a corporate officer having access to the corporate plaintiff's records allowing him to swear positively to the facts to which he deposes satisfies the requirement of Rule 23.

(2) With amendments, the defence will raise a triable issue as to the capacity in which the defendant entered into the transaction.

(3) Given the "shadowy" nature of the defence, leave to amend is conditional on the defendant giving security for the full amount claimed.

RF

COMPANIES

Action - Security for costs - s71 Companies Law - Whether available in favour of defendant as executrix of a trust fund

ABC Ltd. v D (as executrix of the estate of E)

Grand Court (87/90)
Harre, J
August 28, 1990

Legislation:
Companies Law S.71

Cases Referred to:
Turner v Hancock [1882] 20 Ch 303
Re Beddoe Downes v Cottam [1892] 1 Ch 47
Sandiford v Robinson [1976] 28 WLR 48
Sir Lindsay Parkinson Ltd. & Co. v Triplan Ltd [1973] 2 All ER 273

Mr Grant and Mr Collins for the plaintiff
Mr Lamontagne QC and Mr Nelson for the defendant

The plaintiff company brought an action claiming liquidated damages against the defendant as executrix of the estate of

E. The defendant seeks security for costs under the Companies Law s 71. A preliminary issue was raised as to the availability of such order where the executrix is entitled to be indemnified as to costs out of the estate before any question of security for costs arises.

Held: (dismissing the application)

(1) A trustee is entitled to his proper costs incidental to the execution of a trust as a matter between himself and the author of the trust. That is the price paid by the cestui que trust for his services. (Turner v Hancock, Re Beddoe Downes v. Cottam)

(2) The right of a trustee to be so indemnified is a different thing from his right to recover costs from a plaintiff in the event of his being a successful litigant and to seek security in the proper case. (Sandiford v Robinson)

(3) When it is shown that there is reason to believe a plaintiff company will be unable to pay the defendant's costs if the defendant is successful, the court has a discretion whether or not to order security for costs to be given which should be exercised on consideration of all circumstances of the case (Sir Lindsay Parkinson Ltd. & Co. v Triplan Ltd.)

(4) The purpose of s71 Companies Law is to prevent the manipulation of impecunious limited liability companies for the purpose of litigation and is contrary to the principle that poverty is not to be made a bar to bringing any action.

(5) The plaintiff, while impecunious, says that it is so because the defendant is in possession of assets belonging to it. The chose in action represented by the action is its only significant asset. Balancing the interests of the respective parties, the application is dismissed.

RF

Editors Note: The provision in question was re-numbered as s.73 in the 1990 Companies Law.

Directors - Constructive Trustee (Para 9)

Directors - Fiduciary Duties - Damages for Breach (para 11)

Directors - Fiduciary Duties - To whom owed - Creditors (para 8 to 9)

Dividends - Profit available for distribution of dividends - Definition of profit (para 7)

Meetings - Notice of meetings - Validity of matters decided (paragraph 1 to 3)

Meetings - Unanimous Resolutions (paragraph 4)

Meetings - Voting - Right to vote (para 1 to 3)

Shares - Purchase by company of its own shares - Providing financial assistance for purchase of its own shares (para 5 to 6)

Prospect Properties Ltd. (In Liquidation) v McNeil and Bodden (Jr.)

Grand Court (276/89)
Harre, J
December 3, 1990

Legislation:
Trust Law, s44 and s69
Companies Law, 35
Companies Act (U.K., 1929) s45
Trustee Act (UK, 1888)
Trustee Act (Jamaica, 1897)
Trustee Law (1963)

Cases referred to:
Re Duomatic Ltd [1969] 2 Ch.365
Ho Tung v Man On Insurance Co. [1902] AC 232
Trevor v Whitworth [1887] 12 App. Cases 409
R. v. Lorang [1931] 22 Crim App Rep 169
R v G.M. Holding Ltd. [1942] Ch 235
Sparkes v Sparkes 119 D.L.R. (3d)
Lee v Neuchatel Asphalt Co. Ltd. [1889] 41 Ch D 1
Lubbock v The British Bank of South America [1892] 2 Ch 198
Ammonia Soda Co. Ltd. v Chamberlain [1918] 1 Ch 266
Verner v The General and Commercial Investment Trust [1894] 2 Ch. 239

Dimbula Valley (Ceylun) Tea Co. Ltd [1961] 1 Ch 353

Winkworth v Edward Baron Development Co. Ltd [1987] All ER 114

West Mercia Safety Wear Ltd. v Dodd (1988) BCLC 250

Brady and another v Brady and another (1988) BCC 20

Re Lee Beckress & Co. Ltd. [1932] 2 Ch 46

Re Ward M. Roith Ltd. [1967] 1 All ER 427

Aqip (Africa) Ltd v Jackson [1989] 3 WLR 1367

Belmont Finance Co. V. Williams Furniture Ltd [1979] Ch 250

Rolled Steel Products Ltd. v BSC [1985] 3 All ER 87

Tito v Waddell [1977] 1 Ch 106

Re Exchange Banking Co. Flintcroft Case [1882] 21 Ch 519

Re City Equitable Fire Insurance Co. Ltd. [1925] 1 Ch 407

Mr. R Alberga QC and Mr A Turner for the plaintiff

Mr E Grant and Mr K Collins for the second defendant

First defendant in person

The plaintiff, suing by its liquidator, carried on business of developing and selling real estate in the Cayman Islands. Its shareholders included, at relevant times, Bodden (senior) and McNeil, the first defendant. Bodden Jr., the second defendant claimed to a shareholder also.

The share register did not record the shareholding of Bodden Jr. although a transfer of shares to him had been approved at an earlier date by a director's meeting.

As a result of the desire on the part of the Boddens to control all shares of the plaintiff and on the part of McNeil to sell his shares, negotiations were entered into in 1982 and 1983 to effect a transfer of McNeil's holding to Bodden Jr.

A prospective purchaser was introduced to the Boddens by McNeil in October of 1982. A meeting was held to discuss, inter alia, the proposed sale of McNeil's shares to the prospective purchaser. The minute of that meeting records that the Boddens were reappointed as directors of the plaintiff company. McNeil who had previously been a director was not recorded as having been reappointed.

The sale considered at the October meeting did not come to fruition. It did, however, lead to further discussions between McNeil and the Boddens which culminated in January 1983 in an agreement to effect a transfer of McNeil's shareholdings to Bodden Jr. The purchase price of $500,000.00 was to be financed by financial assistance provided by the plaintiff company to Bodden Jr.: $250,000.00 was to be provided by a dividend expressed as being from the company's profit paid to Bodden Jr. by way of assignment of existing agreement for the sale of company property to Bodden Jr. The remaining $250,000.00 was to be by loan to Bodden Jr. in the form of a collateral charge for security over undeveloped land belonging to the company. Arrangements to that effect were agreed to at a purported shareholders meeting in January 1983.

The funds were paid in part by the company directly to McNeil. No funds were received by Bodden Jr. The payments were funded by accounts receivable of the company and by the sale by it of the land subject to the security.

The company later went into liquidation. The liquidator challenged the arrangement and made certain allegations, inter alia:

a) The defendants were in breach of their fiduciary duties as

directors to the company to act for its benefit or advantage.

b) The meetings of October 1982 and January 1983 were not valid

and lawful meetings of the shareholders.

c) The resolutions passed at the January meeting were, in any event, ultra vires and of no legal effect for reasons including;

(i) the shareholders lackedof power to declare a dividend and the company was not in a position to pay a dividend as it was insolvent.

(ii) the arrangement was illegal as constituting a purchase by the company of its own shares or, alternatively, provision of financial assistance by the company to assist in the purchase of its shares.

(iii) the resolutions were not in the interest of the creditors.

The plaintiff sought, inter alia, a declaration that McNeil was a constructive trustee of the funds he had actually received under the agreement and damages from both defendants for breach of their fiduciary duties.

Held: (for the plaintiff)

(1) The directors' minute of January 1976 approving the transfer of shares to Bodden Jr. was never carried into effect. Bodden Jr. was not shown on the register of members to be a member at the meetings of October 1982 or January 1983. Section 35 and Article 59 together prevent a member from voting unless he is registered on the date of the meeting. Although there were incomplete forms of transfer in existence which may refer to the contemplated transfer approved in 1976, they were ineffective to cause the transfer in the absence of a change to the register of members (Article 8). The annual returns filed in the intervening years did not support the defendant's contention.

(2) The meeting of October 1982 was not valid. Bodden Sr. was not present and there was no evidence of a power of attorney or proxy under which Bodden Jr. could have acted on his behalf. McNeil could not accordingly have resigned automatically as a director as there was no meeting in accordance with Article 98 at which such automatic retirement could have taken place.

(3) The meeting of January 1983 was not valid as members entitled to attend did not receive effective notice. The provisions of the articles permitting short notice were not relevant as the required percentage of shareholdings were not actually represented at the meeting.

(4) Apart from the formality of notice, if all shareholders who have the right to attend and vote at a general meeting consent to a matter which is intra vires the company, such unanimous assent will bind the company (Article 45, Re Duomatic). A long course of acquiescence may have the same effect as a resolution properly passed (Ho Tung v Man On Insurance Co. Ltd.) However, there is no question of unanimous consent of all shareholders in this case. Further, the evidence does not establish an agreement by acquiescence notwithstanding the passage of six years between the resolutions in question and the commencement of litigation.

(5) There is a distinction in law between the purchase by a company of its shares and the provision of financial assistance by a company to another enabling him to do so. The former is illegal, both at common law and by statute. The latter is not illegal per se at common law. It is only made so by statute (in England by section 45 of the Companies Act 1929). That provision is not merely declaratory of the law (R v Lorang, R v. G.M. Holdings). There is no similar provision in Cayman law and a transaction is accordingly not per se illegal for this reason.

(6) Nevertheless, it should be noted that the Supreme Court of Newfoundland has held in Sparkes v Sparkes that a transaction whereby a company gives a mortgage to secure money owing for the purchase of its shares would only be upheld if demonstrably for the material benefit of the company. However, the present transaction can be impeached on larger established grounds.

(7) The dividend is impeachable as there were no profits available for that purpose at the time it was declared. The common thread to all cases where payment of dividends was held to be proper is that some form of profit was available to distribute (Lee v Neuchatel Asphalt Co. Ltd. Lubbock v British Bank of South America. Ammonia Soda Co. v Chamberlain. Verner v General and Commercial Investment Trust). While profit may include unrealised appreciation of the assets of the company for dividend purposes it is subject to certain criteria:

a. The valuation must not be open to criticism

b. The company must have fluid assets available for the payment of a dividend leaving it with assets of sufficient value to meet the commitments shown on the liability side of its balance sheet (Dimbula Valley v. (Ceylon) Tea Co. Ltd.).

(8) In discharging his fiduciary duty to act in the best interest of the company, a director must in appropriate circumstances take into account the interest of the creditors of the company. In this case, while it could not be said with certainty that the company was insolvent when the arrangement in question was entered into, the state of its solvency was "doubtful". That was, however, sufficient to require the defendants as directors to take account of the interest of company creditors and its purchasers. (Winkworth v Edward Baron Development Co. Ltd., West Mercia Safety Wear Ltd. v Dodd, Kinsela v Russell Kinsela Pty. Ltd, Brady and another v Brady and another).

(9) At the time the arrangement was entered into, the interests of the company and of its creditors were almost indistinguishable. It was in the interest of the creditors to be paid and in the interest of the company to be safeguarded against being put in a position where it was unable to pay. The transaction was not reasonably incidental to the company's business, was not bona fide and was not done for the benefit and to promote the prosperity of the company (Re Lee Beckress & Co. Ltd. Re Ward M. Roith Ltd.) The defendants are accordingly in breach of their fiduciary duties as directors.

(10) Irrespective of his position as director, the defendant McNeil is also liable as constructive trustee. A person is liable as constructive trustee, inter alia, where trust property

is transferred to him in breach of trust and he receives it with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust or where he knowingly assists in that purpose. While there is a real distinction between cases of knowing receipt and knowing assistance (the latter requiring proof of participation in a fraud) the former has been made out here (Belmount Finance v Williams. Rolled Steel Products Ltd. v BSC, Aqip. (Africa) Ltd v. Jackson).

(11) Both defendants are also liable for damages arising from the breach by them of their fiduciary duties. The established modern view is that such damages are available, the proper measure being the sum which puts the plaintiff in the same position he would have been in if he had not sustained the wrong.

(12) The Limitation Act and the Imperial Statutes 21 James I Cap 16(1623) having been recognised and received as law are the statutes applicable to limitations of actions in Cayman. Section 8 of the English Act 1888 reproduced in s46 of the Jamaican Trustee Act (1897) has not survived in the laws of the Cayman Islands. Therefore, the benefit of statutory limitation in respect of company property received by a director (6 years) is not applicable (National Bank of Wales. Re Exchange Banking Co. Flincroft case. Re Sharpe).

(13) On the facts of this case, neither laches nor acquiescence by the company afford a defence to the defendants.

(14) Further, the conduct of the defendants amounted to wilful neglect or default and therefore, the protection afforded by Article 129 and by s44 and s69 of the Trust Law is not available to them. That phrase means an act, or omission where the person who acts, or omits to act, knows what he is doing and intends to do what he is doing. If that act or omission amounts to breach of that person's duty and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing and intends to commit a breach of his duty and is recklessly careless as to whether his act or omission is or is not a breach of his duty (Re City Equitable Fire Insurance Co. Ltd.).

RF

CONFIDENTIAL RELATIONSHIPS

Mutual Legal Assistance (United States of America) Law
(See Administrative Law - Natural Justice)

COSTS

Security for costs - s71 companies Law - Impecunious corporate plaintiff - Circumstances where security for costs to be granted
(See Companies - Action - Security for costs)

COURTS

Appeal - Fresh evidence on appeal
(See Evidence - Admissibiliy of fresh evidence on appeal)

Appeal - Matters which the trial judge should set out in his judgment - Circumstances when an appeal court may review the decision of a trial judge on a question of fact

Bertolino v Regina

Grand Court 94/90
Harre, J
October 26, 1990

Cases referred to:
Smith and Ebanks v Summary Court 47 & 61/88
Aqui v Pooran Mahari (1983) 34 WILR 282
Helner v R (1984) 1 CILR
Selvanayagam v University of West Indies (1983) 1 All ER
Bookers Stores Ltd. v Mustapha Ali (1972) 1 WLR 230
Watt v Thomas (1947) 1 All ER 582
R v Carroll Jamaican Court of Criminal Appeal 39/89
Miles v Cain (1989) Times December 14
The S.S. Hontestroom (1927) A.C. 37
Benmax v Austin Motor Car Ltd. (1955) 1 All ER 326
Practice Note: (1962) 1 All ER 448
Reid v R (1978) 27 WILR 254

Mr. Richard Small and Mr. D. Murray for the Appellant.
Mr. Ivor Archie for the Crown

The appellant was convicted of two counts of theft of jewellery, from the proprietor of a business where he had worked. The appellant denied the charges claiming that the jewellery had been made by him and his mother using the expertise they had acquired during their employment. The question of identifying the alleged stolen property therefore assumed central significance.

There were in total seven grounds of appeal all pertaining to alleged deficiencies in the judgment of the presiding magistrate. Harre J. delivering the judgment of the Grand Court, considered the most forceful submission of counsel for the appellant to be that which related to the duty of the magistrate to assess the reliability of the evidence before him.

Held: (retrial ordered)

(1) In a case such as this, where the only evidence tendered in relation to the identification of the alleged stolen property was from the person claiming to have been dispossessed, there existed a heavy duty upon the magistrate to scrutinize such evidence carefully (Watt v Thomas applied).

(2) There were sufficient discrepancies in the prosecution evidence to cast doubt upon the magistrate's finding that the alleged victim of the theft was able to identify his property with certainty.

(3) Public interest required a re-trial in order that the determination of the appellant's guilt or innocence would be unequivocal and not marred by the uncertainties which had been prevalent in the original trial (Reid v R applied).

MD

CRIMINAL LAW

Arrest - Duties incumbent on the arresting officer where an arrestable offence has been committed - Whether a duty exists for the arresting officer to consider alternatives to making an arrest

Regina v Turner

Grand Court
Harre, J
November 1990

Legislation:
Penal Code, ss. 15 & 244
Police Law ss 31 & 33

Case cited:
Dumbell v Roberts (1944) 1 All ER 329

Mr. N Hill QC for the Appellant
Mr. R. Sheehan for the Crown

The appellant was convicted of causing damage to property contrary to s244 Penal Code. She was also convicted of three related offences: assaulting a police officer, resisting arrest and disorderly conduct. Her present appeal was concerned only with the three latter offences.

The basis of the appeal was that the police officer had not properly exercised his power of arrest contained within s33 Police Law.

Held: (appeal dismissed)

(1) The only legal principle involved in the appeal was that no-one should be arrested by the police except where the police officer has a reasonable suspicion that an arrestable offence has been committed (Dicta of Scott LJ in Dumbell v Roberts applied).

(2) Where the police officer holds such a reasonable suspicion there exists no legal duty for him to consider whether alternative action, such as simply taking the name and address of the suspect, would be more appropriate.

(3) On the present facts as found by the magistrate there existed reasonable grounds for suspecting that an arrestable offence had been committed. Accordingly the arrest had been lawfully made.

MD

Burden of Proof - Assault - Prosecution must succeed on its own strength and not on the weakness of the defence

Regina v Webb

Grand Court (SCA 19/90)
Schofield, J.
12 October 1990

Legislation:
Penal Code s. 201

Mr. Furniss instructed by Mr. Collins for the appellant
Ms. Dilbert for the Crown

The appellant was convicted by the court below on two counts of assault contrary to section 201 of the Penal Code. The case for the prosecution was that the appellant had attacked his former cohabitee and her boyfriend (ie the complainants). The allegations were denied by the appellant who countered that on the contrary, it was the boyfriend who assaulted him and he merely repulsed the attack upon himself.

A police witness testified to a report made by the complainants. The witness also produced a medical certificate as to injuries alleged to have been occasioned by the assault upon the boyfriend. The record of the trial did not disclose whether this certificate was accepted in evidence as an admission by the defence. The appellant's version of events was corroborated by his wife who had been present and also by an independent witness. The evidence of the appellant's wife was dismissed by the learned magistrate as motivated by loyalty to her husband and although the independent witness was not shown to have had any axe to grind in the matter, his evidence was also disbelieved.

Held: - (allowing the appeal)

(1) On any independent assessment of the evidence, even without the benefit of seeing the witnesses, it would seem that the trial court had not attached sufficient weight to the defence evidence.

(2) A case of self-defence was sufficiently established. There was the lurking suspicion that the case was brought to court because the complainants were the ones who reported the matter to the police.

(3) A prosecution must succeed on its own strength and not on the weakness of the defence.

BB

Burglary - Entry of a building as a trespasser with intent to rape a woman therein - Victim mental defective unable to give consent

Regina v. Ebanks

Grand Court
Malone, C.J.
November 30, 1990

Case Cited:
Re Bramblevale Ltd. (1969) 3 All ER 1062

Mr. Sheehan and Miss Wong for the Crown
Mr. Hampson for the Defendant

The accused was charged with burglary. It was alleged that he had entered a building as a trespasser with intent to rape the female occupant therein. The intended victim, a Miss A, was mentally handicapped and mute. The medical evidence indicated that she was unable to give consent to sexual intercourse. This view was not opposed by the defence and was accepted by Sir Denis Malone C.J.

The incident had taken place in a small apartment occupied by Miss A which was contiguous to the premises of the B's who owned the apartment in which Miss A stayed, and who looked after Miss A.

Mrs. B was alerted to the accused's presence by the fact that Miss A's light had been put out in her apartment a feat which Miss A was incapable of. Upon entering Miss A's apartment Mrs. B found the accused adjusting his pants. The accused gave no explanation as to what he was doing in the apartment, but claimed to have been beckoned over by Miss A in order to close the door against the rain. The medical evidence showed that no sexual intercourse had taken place.

Held: (conviction entered)

(1) Sir Denis Malone determined that the only explanation accounting for the accused's presence was that he intended to have sexual intercourse with Miss A, knowing of her inability to give consent. The fact that the accused must have turned the light out made any other explanation untenable.

(2) Accordingly the accused was found guilty of burglary as charged.

MD

Guilty Plea - Burglary - Appeal against conviction after guilty plea

Regina v Prendergast

Grand Court, (SCA 55/90)
Schofield J.
12 October 1990

Legislation:
Penal Code S.220(1) (b) Criminal Procedure Code S.158

Mr. Furniss for the Appellant
Ms. Dilbert for the Crown

Appeal against convictions on plea of 'guilty' to two counts of burglary contrary to section 220(1)(b) of the Penal Code. The appellant submitted that he had only pleaded guilty at his lawyer's insistence and, as his mind did not go with the plea, it was negatived by that fact, so that the convictions ought to be set aside.

Held: - (dismissing the appeal)

(1) Section 158 of the Criminal Procedure Code disallows an appeal against conviction where the accused has pleaded "guilty".

(2) Although the appellant alleges that he had not pleaded guilty, the court record shows that he was represented by an attorney well-known to the courts. The learned magistrate heard and carefully recorded the plea.

(3) The appeal against conviction was an afterthought. The sentences were warranted in view of the appellant's fifteen previous convictions including five for dishonesty.

BB

Motor vehicles - Leaving the scene of an accident - Defence of Reasonableness

Pierson v Regina

Grand Court (S.C.A. 108/90
Schofield, J.
9 November 1990

Legislation: Traffic Law S 59(2)(c)

Mr. Furniss for the Appellant
Miss Connolly for the Crown

Appeal against conviction for leaving the scene of an accident contrary to Section 59(2)(c) of the Traffic Law. By careless driving, the appellant ploughed through the fence and into the garden of nearby premises late one night. The appellant alleged that: after the accident, he knocked at the door of the house and as there was no answer he went to his home nearby. He left the car behind. He telephoned the police soon thereafter, (some twenty minutes after the event) to provide details of the accident and his address. No police officer called. He repeated the message to the police by telephone the next day; and he also visited the householder at the place of the accident. There had been no injury to any person.

Held: (allowing the appeal) -
The appellant had not tried to flee the scene to escape detection. He had left his motor vehicle in the garden and it was readily traceable to him. He went home because he lived nearby. He telephoned the police as soon as he could. This showed the reasonableness of the appellant's action in leaving the scene of the accident. Although there was no evidence to confirm the appellant's story, there was, likewise, no evidence to contradict him. In all the circumstances it was not unreasonable for the appellant to have left the scene of the accident.

BB

Motor vehicles - Requirement of third party insurance not applicable to trailers even if on tow by motor vehicle - Definition of a motor car does not include a trailer.

McLean v Regina

Grand Court (SCA 46/90)
Schofield, J.
9 November 1990

Cases refered to:
Rogerson v Stephens [1950] 2 All ER 144

Legislation:
Motor Vehicle Insurance (Third Party Risks) Law 1964 Ss 2 & 3(1)

The appellant was insured to drive a certain motor vehicle on the road: but he was not insured to use the vehicle on the road when towing a trailer. He was thus charged and convicted of driving without insurance, contrary to section 3(1) of the Motor Vehicle Insurance (Third Party Risks) Law 1964.

Held: (allowing the appeal)

(1) As the trailer was not mechanically propelled, it did not come within the meaning of a motor vehicle as defined in Section 2 of the Motor Vehicle Insurance (Third Party Risks) Law 1964

(2) Section 3(1) of the Law which makes it unlawful to use a motor vehicle on the road without there being in force a policy of insurance or other security in respect of third party risks did not, therefore, apply to the trailer.

(3) The motor vehicle and the trailer were separate vehicles: the former requiring insurance against third party risks and the latter not. Accordingly the conviction was quashed (Rogerson v Stephens applied).

BB

Theft - Handling stolen property

Stewart v Regina

Cayman Islands Court of Appeal
Zacca, Pres; Georges and Kerr, JjA
December 6, 1990

Cases refered to:
R v Sevmour (1954) 1 All ER 1006

Legislation:
Penal Code SS 212, 218 & 231

The appellant was charged on indictment with two counts, one of theft contrary to s 212 and 218 Penal Code, and one of handling contrary to S 231 Penal Code. He pleaded not guilty to each count.

The subject matter of the charges was a cash register used in a bar belonging to a Mr. A. At 1.00 a.m. the appellant had been seen in the vicinity of the bar; the next morning the cash register was missing, but by mid morning had been located under the bed of the appellant.

The evidence given by the appellant was that he had found the cash register in a garbage dump near to Mr. A's bar, he had then forced the draws open and taken our $3.80. He then placed the register under his bed.

The trial judge had included in his direction to the jury on the count of handling the following :

"You can convict of handling if you are satisfied that the accused dishonestly came into possession of property stolen by another person - and the accused would have come into possession or control of the cash register when he picked it up..."

Held: (appeal allowed)

(1) The above direction was erroneous. If the appellant's story were to be believed, he considered the register to have been abandoned by the lawful owner and therefore no question of handling could arise.
Accordingly the conviction for handling would be quashed.

(2) Furthermore the appeal court could not consider the theft charge, (which was, according to the appeal court, the only charge which should have been brought,) because the trial judge had directed the jury to convict on the handling charge only if they found the appellant not guilty of theft. The trial judge should have been guided by the principle laid down by Lord Goddard CJ. in R v Sevmour where he stated that if both larceny and receiving were charged if the jury concluded that one charge was properly laid they should be discharged from giving a verdict on the other count. As the above guidelines had not been followed it was not open to the appeal court to substitute a conviction on the theft count.

CRIMINAL LAW (SENTENCING)

COURT OF APPEAL JUDGMENTS

CASE NO.	CRIM NO.	OFFENCE	SENTENCE
277/90	31/90	Disorderly conduct	$800 or 10 days imp.
278/90	31/90	Damage to Property	6 months imprisonment (Consecutive) $1730 fine or 3 months imprisonment
279/90	31/90	Carrying an offensive weapon	3 months imprisonment (Concurrent)
280/90	31/90	Failing to Give Urine specimen	6 months imprisonment (Consec)
223/90	31/90	Wounding	6 months imp.
242/90	31/90	Assault causing Actual Bodily Harm	6 months Imp. (Concurrent)
1170/90	31/90	Poss. of Cocaine with intent to supply	3 years Imp.
1171/90	31/90	Comsumption of Ganja	6 Months Imp. (Concurrent)
1172/90	31/90	Consumption of Cocaine	6 months Imp. (Concurrent)
1173/90	31/90	Consumption of Ganja	6 months Imp. (Consecutive)
4329-47/89		Theft (6 counts) Forgery-5 counts Obtaining Prop. by deception (6 counts) uttering a false document	15 months imprisonment on each count (concurrently)

3443	35/90	Possession of Ganja	9 months imprisonment
3444	35/90	Consumption of Ganja	3 months imprisonment (concurrent)
2122	9/90	Possession of Cocaine with intent to supply	3 years imprisonemnt
3426/89	9/90	Consumption of Cocaine	6 months imprisonment (Concurrent)
4527/89	28/90	Burglary	20 months Imprisonment 6 months suspended
626/90	28/90	Consumption of Ganja	3 months imprisonment concurrent
3198/88 imp.	8/90	Evading Customs Duty	$2,000 Fine or 6 months + $655.59 fine
3199/88	8/90	Evading Customs Duty	$2,000 fine or 6 months imp + $328.89 fine
1356/89	65/89	Driving whilst Intoxicated	$200 Fine or 2 months Imp. disqualified 12 months
4086/89	14/90	Assault	6 months Imprisonment
4855	32/90	Possession of Cocaine - intent to supply	4 years imprisonment $1000 fine or 2 months Imp.
3381/89	12/90	Robbery	10 years Imp.
3388/89	12/90	Conspiracy to Commit robbery	5 years Imp. (Concurrent)

3385/89	13/90	Robbery	9 years Imp.
3386		Poss of firearm with intent to commit an indictable Off.	3 years Imp. (Concurrent)
1759/90	21/90	Rape	3 years Imp.
68/90	19/90	Attempted burglary	15 months Imp.
999/89	23/90	Poss. of Cocaine Int. to Supply	4 years Imp. Deportation Rec.
1002/89	22/90	Poss. of Cocaine Int. to supply	4 years Imp. Deportation rec.
4596/89	15/90	Poss. of Cocaine Int. to supply	3 years Imp.
4832/89	24/90	Disorderly	15 days Imp. (Concurrent)
4833/89	24/90	Resist. Arrest	3 months Imp. (Concurrent)
4834/89	24/90	Assaulting Police	6 months Imp. concurrent)
4835/89	24/90	Failing to give Urine specimen	6 months Imp. (Conc)

MD

Assault - Occasioning Actual Bodily Harm

Regina v. McLaughlin

Grand Court (87/90)
Schofield. J.
12th October 1990

Legislation:
Penal Code S. 202

Mr. John Furniss for the Appellant
Miss Lorna Dilbert for the Crown

The appeal was against the sentence of 6 months imprisonment suspended for two years and a fine of $1500 (or 4 months imprisonment) in respect of an offence of assault occasioning actual bodily harm.

The appellant had pleaded guilty to the charge. The complainant was the appellant's wife who had been dealt a severe beating in her Mariner's Cove apartment after the couple had separated. The appellant considered that the wife's move to Mariner's Cove had been motivated by her affair with another man and it was this belief which led him to attack her.

For the appellant it was argued that the magistrate had adopted a deterrent approach in sentencing which was inappropriate in cases such as the present where an offence had been committed in a "blaze of emotion".

Held: (Appeal dismissed)

(1) Schofield J. referred to the high rate of matrimonial violence in the Islands and stressed the need for a clear signal to come from the courts that they would not condone the use of force by the physically stronger party when matrimonial disputes arose.

(2) The serious injuries in this case would normally have warranted a short term of imprisonment and the fact that a suspended sentence and a fine had been imposed indicated that the magistrate had paid due regard to the emotional state of the appellant.

(3) The severe sentence was commensurate with the severity of the offence.

MD

Assault - Occasioning Bodily Harm

Regina v. Ebanks

Grand Court (13/90)
Malone, C.J.
11 October 1990

The prisoner had pleaded guilty to assault occasioning actual bodily harm. The complainant was his girlfriend and the mother of his child.

(1) Although a custodial sentence would have been usual for a man with his record for disorderly conduct and resisting arrest, the court could spare incarceration on account of the following mitigating circumstances:

a. The assault arose out of a girlfriend/boyfriend dispute which got out of hand.

b. He had compensated for the property damage he caused.

c. He and the complainant had settled their differences and the complainant was unwilling for the matter to proceed any further.

(2) A suspended sentence of 6 months was imposed. A fine was considered inappropriate as the prisoner would need all the money he had for the care of their child.

BB

Burglary and consumption of ganja - Previous suspended sentence

Regina v Bodden

Grand Court (SCA 35/90)
Schofield, J.
18 October 1990

Mr. Furniss for the appellant
Ms. Wong for the Crown

The appellant was convicted of stealing jewellery worth US$21,125.00. A specimen of urine taken from the appellant on arrest proved positive for ganja. He had previous

convictions for disorderly conduct and burglary, six months of the sentence being suspended at the time of this offence.

The appellant was sentenced to twenty months imprisonment for the burglary offence and three months imprisonment for the consumption of ganja offence, to run concurrently. The six month suspended sentence was activated.

Held: (dismissing the appeals)

In view of the nature of the offences, the value of the property stolen and not recovered and the appellant's previous history, the sentences were appropriate.

RO

Drugs - Consumption of cocaine - Approach for offenders convicted of consuming cocaine - Differences in approach between a rehabilitate and other offenders

Diaz v. Regina; Ebanks v Regina

Grand Court (SCA 8/90 Consolidated 95/90)
Schofield, J.
11th September 1990

Mr. Furniss for the appellant Diaz
Mr. Hampson for the appellant Ebanks
Mr. Archie for the Crown

These appeals were consolidated because they raise mutual issues on the proper approach to be applied to sentence in respect of an offender convicted of consuming cocaine.

Held: (allowing the appeal by Ebanks in part; dismissing Diaz's appeal)

(1) The present practice of giving a first offender a suspended prison sentence is the correct one. Although the court is obliged to fine an offender when it imposes such a sentence, it should not normally be a heavy fine.

(2) For repeat offenders there is no alternative but to sentence offenders who are not in the process of rehabilitation to immediate imprisonment. As there are no counselling services, at present, for offenders in prison the purpose of such a sentence is to deter those who may be tempted to take cocaine or who are already dependent on it. In such circumstances, the addict will be sacrificed for the deterrent principle.

(3) The purpose of the court is to identify the rehabilitate offender and in such cases the court should adopt a supportive and rehabilitative approach to sentencing, involving a non-custodial sentence which may involve a suspended sentence even if an offender is in breach of such a sentence.

(4) The appellant, Ebanks is a rehabilitate offender as he contacted the counselling services in February 1989, has undergone in patient treatment at a Drug Treatment Centre and has continued with his treatment. His family is supportive. Unfortunately, a relapse is a feature of drug addiction. Accordingly, his appeal is allowed to the extent of reducing the periods of imprisonment from six months to three months and ordering all sentences to run concurrently.

(5) The appellant Diaz has not sought treatment outside periods of incarceration and an immediate sentence of imprisonment is inevitable. His appeal is dismissed.

RO

Drugs - Possession and consumption of ganja - Previous convictions - Concurrent sentences

Regina v Ebanks

Grand Court (SCA 83/90)
Schofield, J.
12th October 1990

Appellant in person
Ms. Dilbert for the Crown

The appellant was appealing against conviction and sentence on two counts of possession of ganja and two counts of consumption of ganja. The appellant had six previous convictions committed on three separate occasions, all of which were for drug offences. He received concurrent sentences of six months imprisonment for the offences committed in November 1989 and sentences of nine months imprisonment for the offences committed in February 1990, the sentences to run consecutively.

Held: (dismissing the appeal)
The sentences were appropriate.

RO

Motor vehicles - Driving whilst intoxicated - Conflicting evidence - Issue of credibility

Miller v Regina

Grand Court (115/90)
Schofield, J.
26th October 1990

Cases referred to:
Anne Elizabeth Smith v Regina (47/88)
Ian Martin Ebanks v Regina (61/88)

Mr. Furniss for the appellant
Mr. Sheehan for the Crown

The appellant was convicted of driving whilst intoxicated, contrary to s.61 (b) of the Traffic Law. The appellant had been arrested while standing beside his truck when his wife had appeared and said she was the driver of the truck. Later at the police station the appellant told the police officer that his wife did not have a driving licence. Testifying in support of the appellant, the appellant's wife produced a valid driving licence.

Held: (allowing the appeal)

(1) The issue of the driving licence went to the heart of the issue of credibility. The learned Magistrate should have given consideration to this vital matter.

(2) The conviction is quashed and sentence set aside and a re-trial is ordered.

RO

Motor vehicles - Speeding - Identification of vehicle

Redden v Regina

Grand Court (126/90)
Malone, CJ
15th November 1990

Mr. Hampson for the appellant
Mr. Archie for the respondent

The appellant was convicted of driving an Iroc Z Camaro motor vehicle registered number 32913 in excess of the speed limit on the 14th January 1990. The central issue at the trial was one of identification as the appellant denies that at the relevant time he was on the Spotts Bay Road where the Crown alleges the incident took place. The appellant produced a witness in support of his alibi.

Held: (quashing conviction)
(1) The evidence of the Crown's witness was inherently unreliable. For most of the 10 seconds that he saw the car, it would be without the benefit of a street light and in the fraction of a second allowed, a reliable opinion could not be formed of the shade colour and model of the car.

(2) It stretches credibility to believe the witness's contention that there is only one yellow car of that shade on the Island. Nor is the unreliability of the evidence displaced by the witness's contention that there was a 'dash' or 'touch' of black on the car when it was plain yellow.

RO

Motor vehicles - Speeding - Tracking distance - Pursuit distance

Barry v Regina

Grand Court (111/90)
Malone, CJ
26th November 1990

Legislation:
Traffic Law s63(2)

The appellant in person
Miss Wong for the Crown

The appellant was convicted of speeding and appealed on the basis that the speedometer reading relied on was taken over a distance of less than 300 yards contrary to s.63(2) of the Traffic Law.

Held: (allowing the appeal)
(1) In finding that tracking was over 300 yards, the learned Magistrate had included in the distance some of the distance travelled by the police Inspector in pursuit of the Appellant.

(2) No part of the pursuit distance should be included in the tracking distance. The speed cannot be safely determined from the evidence presented.

RO

Motor vehicles - Using an unregistered vehicle - Riding a motor cycle without a licence - riding without insurance - taking and riding away

Regina v Powell

Grand Court
Schofield, J.
14th December 1990

Legislation:
Traffic Law ss 3(2), 68(1)(a), 31(1) & 75 (2)
Motor Vehicle Insurance (Third Party Risks) Law

Mr. John Furniss for the Appellant
Miss Lorna Dilbert for the Crown

The appeal was against the sentence of a $150 fine or three weeks imprisonment imposed in respect of the following offences:

(1) Using an unregistered vehicle contrary to s3(2) & ss 68(1)(a) Traffic Law; and

(2) Riding a motor cycle without being licensed contrary to s(31)(1) Traffic Law.

The appellant also appealed against a $100 fine or three weeks imprisonment, and disqualification from driving for 15 months and 4 weeks imprisonment suspended for two years, imposed respectively for the following offences:

(3) Riding without insurance contrary to s3 (1) Motor Vehicle Insurance (Third Party Risks) Law; and

(4) Taking and riding away without the owner's consent contrary to s75(1) Traffic Law.

The appellant had pleaded guilty to the charges. She runs a business bringing vehicles into the Islands and has a driving licence which does not cover her to ride motor cycles.

In relation to the third charge, the appellant stated that she believed she had insurance cover by reason of her business insurance policy.

The appellant had a previous conviction of driving without insurance and driving a vehicle without the owner's consent.

Held: In these circumstances the sentences were affirmed.

MD

Suspended Sentence - Immediate sentence of imprisonment - Suspended sentence immediate sentence of imprisonment and fine

Regina v Swaby

Grand Court (SCA 80/90)
Schofield, J.
18th October 1990

Cases cited:
Green v Regina (SCA 130/88)
Scott and Rankine v Regina (SCA 26 & 27/90)

Mr. Furniss for the appellant
Ms. Wong for the Crown

The appellant had been convicted of the following offences:-

673/90 Carrying an offensive weapon contrary to s69 of the Penal Code - 3 months imprisonment;

675/90 Threatening violence, contrary to s76 (b) of the Penal Code - 6 months imprisonment, 3 months suspended;

676/90 Wounding, contrary to s94 of the Penal Code - fined $500 or 2 months imprisonment;

678/90 Damage to property, contrary to s.244 of the Penal Code - fined $200 or 2 months imprisonment

679/90 Damage to property, contrary to s.244 of the Penal Code - 3 months imprisonment suspended for 2 years and to pay compensation of $475.44 or 2 months imprisonment in default of payment.

Held: (allowing the appeal in part)
(1) It is generally wrong in principle to pass a suspended sentence at the same time as an immediate term of imprisonment (Green v Regina).

(2) It is generally wrong in principle to sentence an offender to an immediate term of imprisonment and at the same time to fine him (Scott and Rankine v Regina) It is consistent, however, to impose fines and suspended terms of imprisonment.

(3) Sentence in 673/90 is varied to 3 months imprisonment suspended for two years and sentence in 675/90 is varied to 3 months imprisonment suspended for two years.

RO

Suspended sentence - Combining with immediate term - Fine - Means inquiry

Regina v Whittaker

Grand Court (79/90)
Schofield J.
31st October 1990

Appellant in Person
Mr. R. Sheehan for the Crown

(1) It is wrong in principle to impose a suspended prison sentence and fines to be imposed on the appellant's release from prison at the same time as sentencing him to an immediate prison term.

(2) The fine of $1500 was excessive in the absence of a means inquiry.

PH

Theft and Assault

Regina v General

Grand Court (SCA 82/90)
Schofield J.
12 October 1990

Appellant in person
Ms. Dilbert for the Crown

Appeal against consecutive sentences of 18 months imprisonment upon conviction on counts of theft and assault. The offences were entirely unrelated. The appellant has an appalling record for offences of dishonesty and violence. The present offences were committed within about 5 months of his release from prison to which he had been committed for an offence of wounding.

Held (dismissing the appeal)

(1) Having regard to the appellant's record and the fact that the theft was from the person of the complainant, the sentence of 18 months was not excessive.

(2) Similarly the sentence for the assault offence was not excessive in the light of the appellant's record.

(3) A consecutive approach to sentence was warranted for entirely unrelated offences as in the present case.

MD

Theft and deception - Considerations taken into account while sentencing

Regina v Watson

Grand Court (30/90)
Harre, J.
29th June 1990

Cases referred to:
Green v R (SCA 130/88)
R v Clarke 1975 Crim App R 119
R v Newton (1982) 4 Crim App R
Butters and Fitzgerald v R (1971) 55 Crim App R 515

Mr. Hampson for the appellant
Miss Dilbert for the Crown

The appellant was convicted on one count of theft and 12 counts of obtaining property by deception for which she received a mixture of suspended concurrent and consecutive sentences. Her total period of consecutive terms of immediate imprisonment was eighteen months.

Held: (allowing appeal in part)
(1) The learned Magistrate was wrong to regard the offences as one affecting the success and credibility of the Cayman Islands and to take this into account in sentencing.

(2) The consecutive terms of imprisonment are substituted by concurrent terms of imprisonment with the effect that the appellant has to serve consecutive sentences of 9 months in all.

RO

DAMAGES

Fiduciary Duties - Breach - Measure
(See Companies - Directors at para 11)

EVIDENCE

Appeal - Admissibility of fresh evidence on appeal - Custody of children- Children - Delay - Need to avoid prolonging trials involving the custody of children

A and B

Cayman Islands Court of Appeal (2/90)
Zacca, J Pres; Kerr and Henry, JjA
28th November 1990
Cases referred to:
M v M (Minor: Custody Appeal) [1987] 1 WLR 404
G v G [1985] 1 WLR 652
Re O (an infant) [1964] 1 All ER 789
Re C (A) (an infant) [1970] 1 All ER 309

Mr N Hill QC and Mr D Bannon for the Appellant
Mr A Jones for the Respondent

(1) Where the Court of Appeal considers that the judge below had been plainly wrong or had misdirected himself in some material respect then the appeal should be allowed unless in an exceptional case the fresh evidence led to a different conclusion: but if the judge had not so erred the Court could allow the appeal and exercise an original discretion of its own only if the facts disclosed by the fresh evidence invalidated the reasons given by the judge for his decision (M v M (Minor: Custody Appeal)

(2) In cases dealing with the custody of children, the desireability of putting an end to litigation, which applies to all classes of case, is particularly strong because the longer legal proceedings last, the more the children whose welfare is at stake, are likely to be disturbed by uncertainty (G v G).

(3) In this case the learned trial Judge had refused the application for an adjournment on the grounds that any assistance given by the proposed witness would be dearly bought at the cost of more delay in resolving the matter.

(4) There is no general principle that a father and son relationship gives the father a preferred position in competing claims for custody between mother and father (Re O (an infant), Re C (A) (an infant)).

PH

Foreign Court - Assistance to Foreign Court
(See Administrative Law - Natural Justice)

Tortious Necessity; The Privileged Defence

by

John P. Finan and John Ritson

The similarities between the laws of torts in the United States of America and England enable an interesting comparison to be made between the two sets of rules applicable to the general defence of necessity. Although both tort systems are derivatives to a greater or lesser extent of the English common law, they have inevitably developed their own individual jurisprudence over the years. Concepts have been refined and extended to produce significant and curious differences which provide an interesting exercise in legal forensic. The similarities of the two tortious systems make a comparative study possible and the differences provide the justification for the analysis.

The common origin of the defence is the English concept of "the common weal". This doctrine was considered to justify the invasion of private property in times of war and also excused the demolition of a house on fire to protect other property. 1 Coke in reporting the Saltpetre Case commented, "for the commonwealth, a man shall suffer damage; as for saving a city or a town, a house shall be plucked down if the next be on fire ..... and a thing for the commonwealth every man may do without being liable to an action".2 The notion began to develop the idea into a principle and it was suggested by judicial dicta that if flocks of sheep became intermingled it would not be a trespass to drive the sheep of another.3 In 1876 in the case of Kirk V. Gregory,4 it was held that in order to safeguard another's property it was not a trespass to remove that property if it was necessary to do so in order to safeguard it. Since then it has been held that it was justifiable to enter land belonging to someone else and to burn the heather growing thereon to prevent the spread of fire to a defendant's land. 5 Thus, the early cases which launch the defence of necessity are based in the tort of trespass though they do establish a generally applicable principle particularly in the latter instance of Cope V. Sharpe which went further than its predecessors in holding that the Justification sought was primarily for the benefit of the defendant and not the community at large or at least another member of it other than the defendant. In this sense Cope V. Sharp does herald a new era for the defence of necessity in that it marks the emergence of the notion of 'private necessity' as opposed to 'public necessity' whose antecedents in the 'common weal' are well established.

Although it had originated from the 'common weal', he defence of necessity as being available where he community at large was threatened, developed quite easily to affords protection where the community at large was threatened, developed quite easily to afford its protection where only a section of the community was threatened. Thus, it can be seen from Mouses' Case in in 1608 6 that it was justifiable to jettison cargo from a ship in order to save life. These same principles found more recent expression in the case of Esso

the initial ties had weakened. His choice was 1) to cling to the dock thus creating a risk of damaging it or 2) to forego the safety of the dock and risk great physical harm and possible loss of life. He wisely chose the former course and, although originally found guilty of negligence by a jury, was vindicated when the appellate court held as a matter of law that he had acted reasonably and hence was not negligent. The Court reasoned that the balance between the risk of relatively slight ham to the dock and great harm to the ship was such that it was reasonable as a matter of law for the Captain to risk slight damage to the dock rather than risk almost certain destruction of a valuable ship on the open seas. Nevertheless the Court held the Captain liable with without specifying the basis of recovery.

In holding liability, the Court reviewed several cases including Ploof V. Putman 14 where the Supreme Court of Vermont had held that, where, because of weather conditions, a vessel, without permission, was moored to a private dock on an island in Lake Champlain, owned by the defendant, plaintiff was not guilty of trespass. It held further that the defendant was responsible and liable in damages because his representative unmoored the vessel causing it injury. Thus it seems the vessel had not only a privilege but a right to attach itself to the dock. A privilege to do an act merely entails the absence of a duty not to do it; a right entails a duty on the dock owner not to interfere with the defendant's use.

The Court in Vincent also addressed the hypothetical case of a starving man who, according to the Court, theologians hold, may without moral guilt take the necessities of life. However, the Court stated that it could hardly be said that such a person has no obligation to pay the value of the property so taken when he becomes able to do so. The same according to the Court is true of public necessity in times of war of peace. The taking of private property for public purposes may be countenanced but compensation must be made.

The Court uses another example: use of a valuable cable lying upon the dock. According to the Court, no matter how justifiable appropriation of the cable may be, the owner of the cable may recover its value despite the overwhelming necessity of the situation. According to the Court, the Captain prudently appropriated the plaintiff's property for the purpose of preserving its more valuable property. But the plaintiff is entitled to compensation for injury done.

The difficulty with Vincent is that two widely accepted proposition seem to be conflict.

(1) Those in charge of the vessel had a privilege to lash the ship to the dock to prevent harm that greatly outweighed the potential damage to the dock.

(2) The dock owner has a claim for the amount of the damage to the dock.

The contradicting between these two proposition, both of which are not only widely accepted but probably in accord with the sense of justice of most people, is not inevitable. But the contradiction is unavoidable if the liability of those in charge conclusion follows inevitably from the definition of privilege: one has a privilege to do an act when he has no duty not to do the act. It is facially inconsistent to assert the one has breached a duty and one has a no duty. As Western argues: 15 " the more difficult question is not whether A's consumption of B's property is permitted and yet that it 'infringes' a 'right' of B's that A not consume his property, I think one can". This inconsistency has not escaped judicial attention. In a similar case, Anthony V. Haney 16 Justice Cooley states: "But if he (the occupier) were liable for any damage for the entry, it must be because the entry is unlawful, and in the case it might be resisted. There can be no such absurdity as the right of entry and the co-existing right to resist the entry". The above quoted criticism is equally apropos of Vincent V. Lake Erie Transportation Co. If then, there is an absurdity, it must be because the result which Chief Justice Cooley criticizes is in conflict with the theories which he assumes to be the principles which determine the existence of the privilege of common law. The response to this conundrum is found in the just cited Harvard Law Review article, which uses the notion of incomplete privilege to rationalize the results in Vincent. This article also suggests that there is no inconsistence because, as tort law has developed, liability in fact if not in theory is based on strict liability. The strict liability analysis avoids the conflict noted above if :1) tort law support recovery regardless of fault, and 2) such no fault recovery is not based on a breach of duty. The second proposition seems to follow from the definition of strict liability and is consistent with the analysis in the Harvard Law
Review just quoted. The first is addressed in the article by Fletcher 17 which affords support to this theory although is not completely clear that the elements of strict liability in tort are present in the Vincent case 18 and although one who is strictly liable for acting unreasonably, though by definition not acting unreasonable, though by definition not acting unreasonably in the negligence sense, certainly beaches a duty to act reasonably as shown by the case of Rylands V. Fletcher. 19 Surely one has a duty not to unreasonable accumulate water. However, the widespread acceptance of strict liability as liability without fault and thus presumable without breach of duty makes the second proposition accurate. The first presents more difficulty. In Vincent the Court held as a matter of law that the Captain acted reasonable in lashing the vessel to the dock. It may be doubted whether Courts would apply strict liability to acts which are held to be reasonable in the context of Vincent.

The incomplete privilege approach has attracted more support than the strict liability approach. Vincent is frequently explained

as based on the intentional tort of trespass which involves breach of duty and seems to involve the contradiction described above. However, the incomplete privilege to tie up to the dock but no privilege to damage it. Thus, since they have no privilege to damage it there is no contradiction in holding that the liability is based on breach of duty. Thus it follows that under this theory, there is no inconsistency between a finding that liability is based on the intentional tort of trespass and a finding that the act is privileged.

Although conventional wisdom accepts the just described analysis, it is submitted that the incomplete privilege doctrine itself involves a contradiction. To state that one is privileged to lash the ship to the dock, is to state that the privilege of doing the act--lashing the ship--exists. To state that one is not privileged to damage the dock is to say elliptically that one lacks the privilege of doing the act which causes the damage (to talk of a privilege to do damage rather than a privilege to so that act which causes damage is a category mistake). Since the act which caused the damage is the same act one is privileged to perform, ie., lashing the ship to the dock, the contradiction is unmistakable.

If strict liability and incomplete privilege are unsatisfactory rationales of Vincent as suggested, is there any other rationale which reconciles the apparent sense of justice which supports Vincent with legal doctrine? It is submitted that there is namely the doctrine of Restitution. This was hinted at in Vincent itself which analogized the act of those in change of the Vincent itself which analogized the act of those in charge of the vessel to that of a starving person who is appropriating food. Such a person clearly has breached no duty in appropriating a benefit, but must pay for the benefit received. Trespass does not justify recovery. Restitution surely does. Strict liability does only if it is assumed, and this is doubtful, that the elements of strict liability are present.

The elements of Restitution are present because: 1) those in charge of the vessel have appropriated a benefit, and 2) they would be unjustly enriched if not obliged to pay for it. 20. The measure of recovery is benefit to the ship, measured by the damage to the dock. The Restitution theory avoids the contradictions inherent in any basis of liability such as trespass which assumes breach of duty and is superior to strict liability because the elements of restitutions recovery are clearly established. As noted above the elements of strict liability may not be established sine the Captain acted reasonable as a matter of law. to be sure, there is secondary authority supporting strict liability but it is not altogether clear that Courts generally would accept such authority. There is no question of breach of duty if the restitutions basis of recovery is used. The liability of one who lawfully appropriates a benefit, under circumstances that unjust enrichment would ensue if he were not obliged to pay for it, is

not based on breach of duty but rather on the ethical sense of the community which demands restitution.

The restitution analysis, which assumes that a benefit was appropriated and that, if such were not the case, there will be no liability, is consistent with the facts of Vincent. In that case, there was dictum that, had the vessel been held to the dock by the initial lashings and if addition and deliberate action had not been taken by those in charge of the vessel, there would have no liability. This is seems that the case is based on the deliberate appropriation of a benefit under such circumstances that the defendant would have been unjustly enriched if not forced to pay for the damage to the dock.

The decision has had to come to terms with the competing interests of restitution for benefits gained at another's expense and that need for legal symmetry. It is immediately obvious that the United States' Law embraces the former concept while English Law embraces the latter. this it does by remaining true to Hohfeld in considering that if a defendant has a right (privilege) to do an act, then the plaintiff has a duty to permit him to exercise that right. 21

The great interest in the Vincent case for the English Law of Tort is its establishment of the principle (notwithstanding some of its logical infelicities) that a defendant who acts under the compulsion of necessity may have to compensate the plaintiff even though he has committed no legal wrong. Only the maritime law of general average contribution, which is designed to spread loss among cargo owners where the property of one is sacrificed to save the ship reflects the principle in England. The principle emanating from Vincent V. Lake Erie Transportation Co presumably leads to the sacrifice of the less valuable of the two items of property. it could be argued that this approach should also be adopted where the defendant takes the plaintiff's property to save a third party's life. Otherwise the plaintiff would have to bear the financial burden of saving the life of one he was under no legal duty to rescue which would appear to be grossly unfair. However, this principle would create a risk that rescuers might hesitate to take property even to save life, though it has been suggested that even if English law were to accept the Lake Erie solution it is unlikely that it would be extended to this situation.2 In English Law, compensation is not easily forthcoming and is apparently non-existent unless negligence is successfully pleaded. This is exemplified in the case of Rigby v. Chief Constable of Northamptonshire 23 where the police were held liable for firing a c.s. gas canister into the plaintiff's shop to flush out a dangerous psychopath without having adequate fire-fighting equipment available. The shop was as a result, burned out. It was held that necessity was a good defence to trespass as such in an emergency. However, the police were held liable in negligence for their failure to ensure that they had sufficient fire-fighting back up when the canister was released into the plaintiff's property. To put the position at its highest, therefore, the position as to whether compensation is

Payable to the victims of acts committed because of public necessity is obscure. Bohlen 24 and Glanville Williams 25 argue that no compensation is payable, while Scott and Hildesley 26 and Buller J. 27 think it is. On the other hand there is an ambiguous dicta in the Saltpetre case 28 and in inconclusive obiter dicta in the Burmah Oil Co Ltd cases, 29 where a majority of the House of Lords held that the Crown must pay compensation for property destroyed, by an exercise of the Royal prerogative during the War, in order to prevent it from falling into enemy hands. The effect of the judgement has however, been nullified by the War Damage Act 1965. an interesting suggestion is made by Winfield 30 who suggests that bare restitution for an act dome simply in protection of one's own person or property, or simple compensation for the use or consumption of property might be claimed on quasi-contractual grounds in English law as where a neighbour's fire extinguisher is used to put out a fire in one's own house. Although there is not an English authority on this point but an example put by Lord Mansfield in Hambly v. Trott 31 is consistent with the suggestion.

The Rigby case does involve the interesting interplay between the defence of necessity and negligent. Street suggests that where a plaintiff relies on an allegedly negligent act that defence of necessity need not be considered since the same standard is then applied to determine the issue of both necessity and negligence by applying the reasonable man test. 32 A defendant when acting under compulsion of necessity must always be in a position to demonstrate that he has acted reasonably since necessity is not a 'carte blanche' for anyone to behave as they see fit and then retrospectively plead that they acted out of necessity. This is a feature common to both English and United States Tort law. As Lord Devlin 33 has opined in respect of English law, though the same comment may equally well apply to the United States: "The good Samaritan is a character unesteemed by the English law". It is important that people should not in general interfere with the person or property of others without due sense of responsibility, particularly as the obligation to pay compensation for any damage done is uncertain, at least in England, An additional feature that both systems of law have in common is that the defence can only succeed if a defendant can demonstrate that he acted in apprehension of damage occurring as opposed to mitigating the effect of damage that has already occurred. In other words the defendant's action must be to some extent anticipatory and it must be shown that there was a choice between two evils and the lesser of the two was chosen. The position is clearly shown by a comparison of two cases.

The first is the South African case of Greyvensteyn V. Hattingh 34 which was appealed to the Judicial Committee of the Privy Council. The fact concerned a plague of locusts which entered the plaintiff's land. The defendants reasonably believed that they were heading towards their land. Accordingly they entered onto an intervening strip of land belonging to third parties which was located between the two properties. Once thereon they turned away the advancing locusts so that they re-entered the

plaintiff's land and thereupon devoured his crops. The defendants were held not be liable on two grounds. The first was that they were entitled as of necessity to repel an extraordinary misfortune and the second was that if locusts were to be regarded in South Africa as a normal incident of agriculture, they defendants were entitled to get rid of them just as they would be allowed to get rid of any other pests. The defendants actions were taken prior to the occurrence of harm which was a real and apprehended danger in the face of which defendants acted reasonably. These principles again found expression in the latter cases of Gerrard V. Crowe 35 which was also a Privy Council decision. The parties owned land on opposite sides of a river. The respondents erected an earthen embankment on their land with a view to protecting it from flood water. when erected, The embankment succeeded in its purpose but also increased flooding on the plaintiff's land on the opposite bank. It was held that the respondent were entitled to protect themselves and their property by erecting an embankment as they had done, some distance from the edge of their land. They had acted in advance of some real and apprehended danger and since their acts were quite lawful, the were protected by the defence of necessary in relation to the damage which ensued.

The above situation must be distinguished from action taken after the event to get rid of the consequences of harm. Thus, it is not possible to get rid of water accumulated on land by artificial means such as flooding a neighbour's land. 36 This situation prevails even if the accumulation of water is due not to the landowner, but to an extraordinary rainfall as Whalley V. Lancashire and Yorkshire Railway shows. 37 An unprecedented storm and rainfall flooded the drains bordering on the railway embankment owned by the defendants. A result a large amount of water was dammed up against the embankment and it subsequently rose to levels so as to endanger the embankment subsequently rose to levels so as to endanger the embankment itself. The defendants pierced it with gullies and the water flowed away and flooded the plaintiff's land. They were held liable though it would have been possible for them to have lawfully turned away the flood if they had seen it coming. As Lord Justice Lindley explained; 38 ".... there is a difference between protecting yourself from an injury which is not yet suffered by you, and getting rid of the consequences of an injury which has occurred to you.

A further dimension of the defence of necessity is whether the defence justifies the infliction of injuries to the person as opposed to property. The dicta in Scott V. Shepherd 39 were only obiter and Gregson V. Gilbert 40 is not very reliable authority. The facts show that one hundred and fifty slaves were thrown overboard from a ship owing to a shortage of water. It was held, in an action upon a policy of insurance for the value of the slaves that, upon the facts, no sufficient evidence of necessity had been shown for the captain's act. The decision, however is of little value for modern purposes. As Winfield suggests: "All that is safe to hazard is that the principle of reasonableness applies here also, that more latitude would be allowed in the

protection of the actor's person than of his property and still more where he acts for the public safety and not for him own". Thus it is that the driver of a fire engine is not in any way privileged in that he must observe traffic signals according to Ward V. London County Council. 41 However, the Road Traffic Regulation Act 1967 by section 79 exempts fire engines, ambulances and police cars from speed limits but does not as a consequence affect the civil liability of the driver according to Gaynor V. Allen. 42 What little authority there is in the United States seems to deny that a defendant is entitled by virtue of the privilege of necessity to inflict serious bodily harm or death. This tentative proposition derives from Laidlay V. Sage, 43 where it was assumed that a defendant was liable if, about to be shot by a gunman, deliberately seizes a bystander as a shield. However by way of contrast thereto, it was held that no civil liability attached to a person who, after being shot and who was about to fall, instinctively grabbed another for support and who as a result was injured.44

This question raises the question of the ultimate limits of the defence of necessity. The answer to this question is by no means certain. It seems thus, that only a urgent situation of imminent danger can ever raise the defence because necessity could simply be a mask for anarchy. Lord Denning M.R. 45 gave vent to these same sentiments saying: "There is authority for saying that in the case of great and imminent danger, in order to preserve life, the law will permit an encroachment on private property.... The doctrine so enunciated must, however, be carefully circumscribed." ... Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be other who would imagine that they were in need, or would invent a need, so as to gain entry. Each man would say his need was greater than the next man's. The plea would be an excuse for all sorts of wrong doing. So the courts must, for the sake of law and order, take a firm stand." although referring to encroachments on private land, Lord Denning's perception of the need to restrict the ambit of necessity equally applies to the application of the defence where personal injury or death is inflicted., The leading English case, and perhaps the mot remarkable illustration in this century of the scope of the defence is Leigh V. Gladstone. 46 A suffragette prisoner who was fasting was forcibly fed through the mouth and nose by prison officers. She subsequently sued them for battery and it was held that the forcible feeding was necessary to save her life so that there was no liability.

The proper function of the defence of necessity in the context of medical treatment is to justify emergency treatment carried out on patients unable to give consent to treatment at the relevant time. This, it was in the case of Beatty V. Illingworth 47 where the defendant surgeon remove both the plaintiff's diseased ovaries through the plaintiff patient had given consent only to remove one ovary. The court considered that there had been implied consent although necessity appears to be a better ground for the decision and is more consistent with the reasoning

of Leight V. Gladstone. This is so , notwithstanding that questions remain as to whether that decision would have been the same if the plaintiff had neither been a suffragette not in prison. It seems that the decision could be justified on the dual grounds of both the specific detailed statutory obligations of prison officers to preserve life and on those of necessity. 48 If the latter justification is considered, then there is a consistent thread of logic in the medical consent cases where emergency treatment is required. It was precisely this legal reason which was approved of by the court in the case of F. V. West Berkshire Health Authority 49 where a doctor was held to be justified in performing an operation on an adult patient who permanently lacked the mental capacity to give a valid consent. The treatment administered must be in the best interests of the patient.

Despite the consistent legal reasoning it is possible to weave into these cases, they once again raise questions as to the ambit of the defence of necessity. For example, where a defendant has acted in self-preservation there is no English authority on the availability of the defence. However it is possible to consider Scott V. Shepherd 50 as a case on the defence of necessity thereby excusing the two persons who threw on the lighted squib after it had been initially lighted and thrown into a covered market on the basis that they has acted in the emergency of the moment to protect themselves and the property of others. Inevitably, such thoughts direct the mind to the ultimate consideration which the criminal law addressed in 1884 in the case of R. V. Dudley and Stephens. 51 The question is whether the defences of necessity would justify either killing or cannibalism or both in a severe and extreme emergency? The answer is by no means certain and must therefore, be speculative although there seems no logical reason which such action should not be considered within the compass of the defence if circumstances justify. If the courts draw back from this conclusion, then it would appear to be the draw back from this conclusion, then it would appear to be the dictates of public policy rather than the strict application of legal reasoning that would produce this conclusion. This might well be the hidden reason behind the decision in Southward London Borough V. Williams 52 in which the Court of Appeal rejected the argument that necessity could be a defence to trespass by homeless persons in empty public housing. The reasoning was that if homelessness were ever to be a justification for trespass, then no one's house would be safe. This justification of the decision is open to very severe criticism in that the defence was disallowed just because it is open to abuse. Many defences are nonetheless available in law even though they are equally open to abuse. Perhaps the real justification for the decision is public policy in that the courts were not willing to allow unregulated 'self-help' by groups of people such as homeless persons. 53 If this is the case as is suggested, Then the limits of necessity as a defence will always be difficult to draw since pragmatic consideration in particular instances can outweigh legal logic and analysis. Thus it may be that the defence of necessity

cannot conform to a consistent pattern of legal reasoning but will the foreseeable future remain a hotchpotch of decisions representing fragmented logic and lacking consistency. As such the defence may be regarded as representative of much of he law of tort as being subtle though, at times uncertain, and invariably inconsistent.

Notes

1. Year Book 21 Hen VII f27b.
2. Saltpetre's Case (1606) 12 Co Rep 12 at p13.
3. Year Book 21 Hen VII f28a.
4. Kirk V. Gregory (1876) 1 Ex D.53.
5. Cope V. Sharpe (No.2) [1912] 1 KB 496.
6. (1608) 12 Co Rep 63.
7. [1956] AC 218 (HL).
8. Cope V. Sharpe (no.2) [1912] 1 KB 496 at p510.
9. Newark 17 MLR 580-581 & 19 MLR 320-321.
10. Fleming, The Law of Tort 7th Ed at p86.
11. Fleming. The law of Tort 7th Ed at p87.
12. [1953] OWN 962 at p964.
13. (1910) 124 NW 221.
14. (1908) 81 Vt 471. 71 All 188.
15. Weston, Comment on Montaque's Rights and Duties of Compensation, 14 Philosophy & Public Affairs 1985, at p388.
16. (1832) 8 Bing 186 and seek Bohlen 39 Harv' Law Rev' 1926 p307-314 'Incomplete Privilege to Inflict Intentional Invasions of Interest of Property and Personality'.
17. Fletcher 85 Harv' Law Rev' 1972 p537-546 'Fairness and Utility in Tort Doctrine'.
18. Restatement of Torts 2nd Ed section 401 and also UCC 2316 1 Ex CR 94. and Romney Marsh V. Corporation of the Trinity House (1870) LR 5 Ex 204.
19. (1868) LR 2 HL 330.
20. The Restatement of Restitution supports a recovery in restitution. It reads:
122 BENEFITS DERIVED FROM THE EXERCISE OF INCOMPLETE PRIVILEGE.
A person who is privileged to harm the land or chattels of another while acting to preserve himself or a third person or to preserve his own things or those of a third person is under a duty of restitution for the amount of harm done, except where

(a) the harm which he seeks to avert is threatened by the things which he destroys or by the tortious conduct or contributory fault of the owner of possessor, or
(b) his act reasonably appears to be necessary to avert a public catastrophe, or
(c) he is exercising his privilege as a member of the public to enter land adjacent to a highway which become impassable.

See also Keeton, "Conditional Fault in the Law of Torts", 72 Harv. L. Rev. 401, 410 (1959). But see I Palmer, Law of Restitution, pp139-140, he writes:

> In the Vincent case the vessel was saved, but the defendant should have recovered for the damage even if it had been lost, although in the event the defendant would not have benefited. The Restatement (of Restitution) would support restitution in each case, but this almost wholly obliterates the distinction between gain to the defendant and loss to the plaintiff, a distinction which is fundamental in the law of restitution. It is possible to make an analysis of the decision in terms of tort liability, where the vessel was lost or saved. An unjust enrichment (restitution) theory that produces the same recovery solves no problems: it only creates problems to no purpose.

Palmer seems to accept the incomplete privilege rationale (see fn.24, p140) and rejects Keeton's suggestion that if the vessel is lost, The shipowner has avoided a disadvantage (see fn.23, id.). He states that Keeton does not say what the disadvantage is. I suggest that by appropriating the dock, the shipowner received a benefit in that he decreased the risk of the ship sinking even if it does eventually sink. It one steals a lottery ticket, he can hardly claim he took nothing of value because the ticket turned out not to be a winner. The law universally recognizes that avoiding or decreasing risk is of economic value.

21. Munn V. Sit J. Crosbie [1967].

22. The Law of Tort, W V H Rogers at p163.

23. [1985] 2 All ER 985.

24. Op 'cit'.

25. Current Legal Problems vol.6 p216.

26. Case of Requisition at p136.

27. British Cast Plate Manufacturers (Governor & Co) v Meredith (1974) 4 Term Rep 794 at p797.

28. (1606) 12 Co. Rep 63.
29. Burmah Oil CO Ltd. V. Lord Advocate [1965] AC 75.
30. Winfield & Jolowicz on Tort 12th Ed at p681.
31. (1776) 1 Comp 371 at p375
32. Street On Torts. 8th Ed M. Brazier at p85.
33. Samples of Law Making (1962) at p90.
34. [1911] AC 355.
35. [1921] 1 AC 395.
36. Hardman V. North Eastern Railway (1878) 2 CPD 168 and Maxey Drainage Board V. Great Northern Railway (1912) 106 LT.
37. (1884) 13 QBD 131
38. Supra at p140.
39. (1773) 2 WB1 892.
40. (1783) 3 Dougl 232.
41. (1938) 2 All ER 341
42. (1959) 2 QB 403.
43. (1899) 52 NE 679 NY.
44. Filippone V. Reisenbergerr (1909) 119 NYS 632.
45. London Borough of Southwark V. Williams [1971] Ch 734 (CA) at p 743 & 744.
46. (1909) 26 TLR 139.
47. (1896)
48. Zellick, "The forcible Feeding of Prisoners: An Examination of the Legality of Enforced Therapy [1976] PL 15 and Zellick & Brazier, 'prison Doctors and their Involuntary Patients' [1982] PL 45.
49. [1989] 2 All ERR 545.
50. (1773) 2 WBL 892.
51. (1884) 14 QBD 273.
52. [1971] Ch 734.

53. As an illustration of the vagaries of the defence as applied in England, see Ashton V. Turner and Miller V. Jackson [1977].

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LAW SCHOOL REPORT

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The Cayman Islands Law School was founded in 1982 following the report and recommendations of Professor Paul Fairest of Hull University. Originally housed in the Court House, it has expanded from five students and a staff of one to forty three students, a Director, four Law Lecturers and an Executive Officer and is located in modern facilities in the Tower Building, George Town.

Students enrolled in the Attorney-at-Law programme study concurrently for the University of Liverpool LL.B. and the Attorney-at-Law qualification over a five year period while serving under articles of clerkship to members of the Legal Profession.

Recent developments at the Law School include the following:

(a) In January the Director of Legal Studies announced that the Legal Advisory Council had approved conversion of the Law School Programme to a three year full time honours degree. This follows receipt and consideration by it of the Fairest Report and a paper prepared by the Director after negotiations with the University of Liverpool in the summer of 1990. The LL.B. (Honours) will be awarded by the University of Liverpool to students achieving a sufficient standard of performance during the course of their studies. The LL.B. (Ordinary) will continue to be awarded as well. Subject to approval by Executive Council, the programme will be implemented in the 1991-1992 academic year. Full details of the proposal can be obtained from the Law School.

(b) A book authored by Law Lecturer Piers Hill entitled Criminal Procedure in the Cayman Islands is nearing completion. The Cayman Islands Law Soceity has generously agreed in principle to underwrite the cost of publication.

(c) Lord Templeman, the Law School patron, has accepted an invitation to attend the fifth graduation ceremony to be held Monday October 14, 1991 at the Harquail Theatre. It is hoped Lord Templeman will also give a public lecture while in Cayman.

Requests for information about the Law School should be addressed to the Director of Legal Studies, 4th Floor, Tower Building, George Town, Telephone 97999 Ext. 3540.