Enright, Legal Technique eWorkbook

Working with Cases

THE QUESTIONS

These questions involve analysing six cases. These cases are:

- Corkery v Carpenter [1951] 1 KB 102
- R v Tahau [1975] 1 NSWLR 479
- R v Smith [1974] 2 NSWLR 586
- Tanner v Marquis Jackson (1974) 3 ACTR 32
- Murray v Ministry of Defence [1988] 1 WLR 692
- Halliday v Nevill (1984) 155 CLR 1

This list sets out the cases in order of difficulty, simplest first, hardest last.


Two cases involve interpretation of common law – Murray v Ministry of Defence [1988] 1 WLR 692 and Halliday v Nevill (1984) 155 CLR 1. It may be advisable to do the common law cases, Halliday v Nevill and Murray v Ministry of Defence, in stages because they have more than one issue. Also, the judgments are not well set out which means, in consequence, that they are not easy reading.

Structure of Case Analysis

There is a logical structure to case analysis. This is reflected in the answers to these questions which use standard headings and categories. Obviously, answers to these questions should generally use these same headings and categories. In some cases, though, there may be benefit in making an intelligent variation of these headings in an analysis of a case. Yet even here, do not abandon the logic underlying use of these headings and categories.

This structure, which is explained below, has two major divisions – Necessary Background and Reasoning. Each of these has subheadings.

Necessary Background

This, as the heading indicates, gives the background necessary to understand the reasoning in the case.

Introduction

Give the citation of the case and indicate who gave the judgment(s). If judges concurred or dissented, indicate this. Make any other appropriate comments.
Facts
State the essential facts and flesh them out enough to make your analysis of the case coherent.

Proceedings
Mention prior proceedings and indicate the nature of the present proceedings.

Applicable Law
State the law which applies to the case. Then break it into its elements.

Issues
State the issues. In one sense a statement of the issues is background, but it can also be put as the first item under the heading Reasoning since it logically starts the chain of reasoning.

Issues have two components. One is law – the part of the element which is ambiguous. The other consists of the facts – the facts which may or may not satisfy the element depending on how it is interpreted.

Reasoning
Reasoning is the engine room of the case. This part of the analysis uses the three components of the model for legal reasoning.

Ambiguity
State all of the meanings of the ambiguous element. If you can, state the effect which the judge believed each meaning will cause.

Reasons
State the reasons used as arguments for and against each meaning. Reasons will come from any of several sources, most obviously principle, policy, precedent, secondary sources and rules of statutory interpretation. Although courts tend not to weigh reasons in the manner proposed in Chapter 19 of Legal Technique, they do sometimes appraise particular reasons or arguments, so identify these if you can.

In the answers reasons are described in two stages. First, there is a summary of the reasons in point form. Then follows a full account of the reasons. These extremes set outer limits within which student answers should fall. Exactly where they fall is determined by a number of factors such as the time available for doing the exercise, the number of pages that the answer must be or must not exceed, the requirements of lecturers running the course and so on.

Decision
State the decision reached by the court. This will, of course, entail the court choosing one or more of the meanings of the ambiguous provision as the correct legal meaning.
Content of Case Analysis

There are some important points to note about the content of the case analysis in the suggested answers. These become advice for students in doing their answers.

Sources

Material (mainly analysis of ambiguity and reasons) is gathered from all parts of the case. Obviously the main source is the judgment of the judge whose decision is being considered, but the answers are not confined to this. Relevant material can also be in other parts of the case as well. Major examples are:

- Arguments made by counsel
- Arguments put or considered by other judges (even if dissenting)
- Judgments of the lower court
- Arguments which are obvious or inferred but not stated.

There are several reasons for gathering arguments from all of these sources:

- It shows the full strength of a decision.
- In later cases parties and the court will not confine themselves to the reasons of the particular judges who made the decision.
- It shows the full technique of organising legal reasoning by marshalling arguments and putting like things with like, and by putting text in some reasonable order.

Citation of Text of Case

The suggested answers to the questions on case analysis have numerous quotations from the case. This shows the source of the analysis and allows the analysis to describe the case in the judges’ own words. Even more importantly, it enables readers to see how the analysis in the answer is derived from the judgment.

Levels of Answer

Students’ answers to these questions, particularly analysis of the court’s reasoning, can be at any of a number of levels of detail. At the major level, an answer is a rewriting of the judgment. At the lowest level an answer is a condensed account or summary of the reasons of the court.

These two extremes, it is worth pointing out, are generally reflected in the model answers. There the analysis of reasons starts with a summary (except where the reasons themselves are brief anyway). Then follows a detailed analysis of the reasons.

For some lecturers the summary of reasons may be sufficient along with the other analysis necessary to put the reasons in their location. Some lecturers may want a rewrite of the judgment. Other lecturers may want something in between.
Rewrite of Judgment

As the preceding discussion has indicated, a full analysis of a case, as there is in the suggested answers to these questions, amounts to a rewrite of the judgment. In this way the answers illustrate how much easier judgments would be to read if they were set out in a more structured way, and used appropriate headings to reflect that structure. As the reader will observe, the cases here, in varying degrees, are harder to read than needs be precisely for this reason.

There are some specific illustrations of this in the model answers:

What is the text of a statute which contains the law applicable to the case? In Corkery v Carpenter [1951] 1 KB 102, see how much harder it is to find the text of a statute relevant to the case when it is buried in a judgment rather than set out at the front of a case under a separate heading.

What are the elements of the law? See in all cases, but particularly in the common law cases – Murray v Ministry of Defence [1988] 1 WLR 692, Halliday v Nevill (1984) 155 CLR 1 – how hard it is to find the issue when the judgment does not set out the elements of the law and indicate the element in which the issue arises. This is less of a problem with cases based on statute law because, if the text of the statute is stated as it usually is, the reader can work out the elements for themselves. With common law, readers who do not know the area of law are left to their own devices if judges do not state the elements.

How do multiple judgments interrelate? In Halliday v Nevill (1984) 155 CLR 1, see how lack of coordination between the different judgments adds further difficulty to the reader’s task, difficulty which is already severe because the individual judgments, particularly the judgment of the majority, are not well organised anyway.
**INTRODUCTION**

This is an analysis of *Corkery v Carpenter* [1951] 1 KB 102 (“Corkery”), a decision of the Court of King’s Bench.

Lord Goddard CJ gave the main judgment. The other two justices, Hilbery J and Byrne J, simply agreed with the judgment of Goddard CJ (*Corkery* at 107). The model analysis covers the judgment of Lord Goddard, but also includes arguments taken from the summary in the report of the case of argument on behalf of the defendant by his counsel, DM Scott (at 103-104).

**FACTS**

Shane John Corkery, the defendant, was pushing his pedal bicycle along Broad St, Ilfracombe. He was drunk. He was arrested and resisted the arrest. He was taken to the police station and locked in a cell. While locked up, Corkery did damage to the cell.

**PROCEEDINGS**

Corkery was convicted before justices under s 12 of the *Licensing Act 1872* (UK) with the offence of being drunk while in charge of a carriage on a highway, and of an offence under s 14(1) of the *Criminal Justice Administration Act 1914* (UK) of maliciously damaging property (at 102). He appealed to Devon Quarter Sessions, which dismissed his appeal (at 102-103). He then took his case to the Court of King’s Bench by way of a stated case (at 102).

**APPLICABLE LAW**

The case is directly concerned with the charge against the defendant under s 12 of the *Licensing Act 1872* (UK). Its elements and consequences are as follows:

**Elements**

- Element (1) The defendant is a person.
- Element (2) The defendant is drunk.
- Element (3) The defendant is on either of the following:
  - (a) A highway.
  - (b) A public place. The public place may or may not be a building.
Element (4) The defendant is in charge of any of the following:
(a) A carriage.
(b) A horse.
(c) A cattle engine.
(d) A steam engine.

Consequences
Consequence (1) The defendant can be arrested.
Consequence (2) The defendant is guilty of an offence.
Consequence (3) The defendant is liable to a fine of up to 40 shillings or to imprisonment with or without hard labour for up to one month.

ISSUES
The defendant challenged the legality of his arrest and his subsequent conviction on both offences. The key to his defence was the argument that a bicycle was not a “carriage” within the meaning of s 12 of the Licensing Act 1872. For this reason, he argued, he was not guilty of the offence under s 12 of the Licensing Act 1872 (UK) and so there was no power to arrest him. Therefore he was justified in damaging the cell because it was done in an attempt to escape from unlawful custody. This meant that he was also not guilty of the charge under s 14(1) of the Criminal Justice Administration Act 1914 (UK) of maliciously damaging property (at 103).

AMBIGUITY
The issue in this case was whether a bicycle was a “carriage” within the meaning of s 12 of the Licensing Act 1872. There is no doubt, as a matter of ordinary usage, that “the word ‘carriage’ is wide enough to include a bicycle” (at 105). A bicycle is a carriage simply “because it carries” (at 106). This does not mean, however, “in every Act of parliament a bicycle is a carriage” because whether it is or not “depend[s] on the particular words [and context] of the Act in question” (at 105). Thus, the ambiguity was whether the word “carriage” in s 12 of the Licensing Act 1872 included a bicycle, or whether it was read subject to an implied qualification which excluded a bicycle from its scope.

There are, we should note, several kinds of bicycle. A bicycle could be “a tradesman’s tricycle or the ordinary passenger bicycle – ordinarily called a push bicycle – as was the case here” (at 107). There was, however, no attempt in this case to distinguish between these types of bicycle, and nothing rested on this distinction.

REASONS
There were several arguments that a bicycle was and was not a carriage. Some were based on policy, some on precedent and some on secondary sources. Before we discuss these reasons in detail let us summarise them.
Summary of Reasons

Policy

Prosecution
Section 12 of the Licensing Act 1872 was passed for “the protection of the public and the preservation of public order” (Corkery at 105). It furthers “this purpose” if “a carriage” is interpreted so as to “include any sort of vehicle” which would, therefore, include a bicycle (at 105).

Defence
There were two arguments:
(1) In an Act “general public words are presumed to be used in their popular meaning”, and in its popular sense a carriage does not refer to a bicycle (at 103).
(2) There is a maxim that a penal provision such as s 12 of the Licensing Act 1872 should be read narrowly and in favour of the accused.

Precedent

Prosecution
Several cases were relied on:
(1) Cases cited by the editors of Stones Justices Manual, although these cases are not identified. Probably they refer to the some or all of the cases on which the prosecution relied.
(2) Taylor v Goodwin (1879) 4 QBD 228, cited and discussed at 105-106
(3) R v Parker (1895) 59 JP 793
(4) Cannan v Abingdon (Earl) [1900] 2 QB 66

Defence
There were two cases:
(1) Williams v Ellis (1880) 5 QBD 175, discussed at 106-107
(2) Simpson v Teignmouth and Shaldon Bridge Co [1903] 1 KB 405, discussed at 106-107

Secondary Sources

Prosecution
The prosecution relied on Stones Justices Manual.

Defence
There were two secondary sources:
(1) The music hall song, Daisy Bell.
(2) Webster’s Dictionary 1920.
Policy

There were arguments based on policy supporting both the prosecution and the defence.

Supporting the prosecution was the argument that s 12 of the Licensing Act 1872 was passed for “the protection of the public and the preservation of public order” (Corkery at 105). It furthers “this purpose” if “a carriage” is interpreted so as to “include any sort of vehicle” which would, therefore, include a bicycle (at 105).

Two policy arguments supported the defendant’s claim that a bicycle was not a carriage:

(1) There is a presumption of interpretation that “general public words are presumed to be used in their popular meaning” (at 103). Two sources suggest that according to this popular meaning, a bicycle is not a carriage. First, the well known music hall song, Daisy Bell, has a verse which shows that a carriage and a bicycle are distinct. It says: “It won’t be a stylish marriage, I can’t afford a carriage, But you’ll look sweet upon the seat, of a bicycle built for two” (at 103). Second, Webster’s Dictionary of 1920 says that the word “carriage” “is obsolete or archaic except in the case of wheeled vehicles or railway carriages” (at 104). (This draws on, without stating, the presumption of statutory interpretation that words are interpreted according to their current scope.) So, if the meaning of a word has narrowed over time, as “carriage” has done according to Webster, a court should now interpret it according to this current and narrower meaning.

(2) Section 12 of the Licensing Act 1872 is a “penal section providing for the arrest without warrant of an offender” (at 104). This is “sufficient to require the court to put a narrow construction on it” (at 104). (By doing this the court implements the maxim of statutory interpretation that a penal statute should be read narrowly and in favour of the accused, although this maxim was not explicitly stated.)

Precedent

There were arguments based on precedent. We will consider the precedents in stages.

Cases Cited in Justices Manual

Counsel for the defendant, DM Scott, said in argument that the editors of Stones Justices Manual referred to cases supporting the opinion of the editors that a bicycle could be a carriage for the purposes of s 12 of the Licensing Act 1872 (at 103). These cases are not identified by DM Scott in the report of his argument, nor are they identified as such by Lord Goddard in his judgment. (It is quite unlikely, however, that some of these cases were discussed in the judgment. The point is that Lord Goddard does not say in his judgment that any cases which he considered were cases cited in Stones Justices Manual.)

DM Scott pointed out that the cases cited in the Manual were not cases which had arisen under the Licensing Act 1872. They had arisen “under other statutes” and so were “not authorities for the interpretation of the Licensing Act” (Corkery at 103).
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Taylor

Lord Goddard relied heavily on Taylor v Goodwin (1879) 4 QBD 228, cited and discussed in Corkery at 105-106. Taylor v Goodwin held that, for the purposes of s 78 of the Highway Act 1835, a bicycle was a carriage. According to Lord Goddard, Taylor v Goodwin was decisive “so far as this court is concerned” in deciding that a bicycle was a carriage (Corkery at 105). Despite the fact that it was decided under a different Act, the policies of the Acts were similar. They were “passed for the same purpose, both of them concerning the conduct of a person on the highway and the preservation of public order” (at 105).

Counsel for the defendant put two arguments against this assessment of Taylor v Goodwin as a precedent. First, some time after Taylor v Goodwin was decided in 1879, s 85 of the Local Government Act 1888 was enacted. Section 85 expressly declared that a bicycle was a carriage for the purpose of the Highway Acts. This suggested that parliament “lacked confidence in the correctness” (Corkery at 105) of Taylor v Goodwin. Second, the words in the statute in Taylor v Goodwin “differ from those in s 12 of the Licensing Act and are wider” (Corkery at 104). Thus, in part at least, the decision is based on this difference in the scope of the words used. In reply to this the prosecution argued that the differences in wording between the two provisions were not material (at 105-106).

Parker

R v Parker (1895) 59 JP 793 favoured the view that a bicycle was a carriage. Lord Goddard does not mention it in his judgment but we know of it because it is mentioned by counsel for the defendant who put an argument against the use of it as a precedent. The argument against it was that the words of the statute in R v Parker differed “from those in s 12 of the Licensing Act and [were] wider” (Corkery at 104).

Toll Cases

Several cases had arisen on the question of whether a bicycle was a carriage in connection with the liability of the user of a bicycle for a road toll. These cases were Cannan v Abingdon (Earl) [1900] 2 QB 66, Williams v Ellis (1880) 5 QBD 175, Simpson v Teignmouth and Shaldon Bridge Co [1903] 1 KB 405, Smith v Kynnersley [1903] 1 KB 788 and Pollard v Turner [1912] 3 KB 788.

Counsel for the defendant, DM Scott, referred to all five in argument (Corkery at 104). Lord Goddard referred to, and commented upon, three of them in his judgment (at 104), Cannan v Abingdon (Earl), Williams v Ellis and Simpson v Teignmouth and Shaldon Bridge Co. Cannan v Abingdon (Earl) took the view that a bicycle was a carriage. Two others, Williams v Ellis (discussed in Corkery at 106-107) and Simpson v Teignmouth and Shaldon Bridge Co (discussed in Corkery at 106-107), were of the opposite view. Counsel for the defence used this difference of opinion in his argument (Corkery at 104). He pointed out that “opinions differed on the question whether ‘carriage’ includes a bicycle” (at 104). Therefore, these cases were weakened as precedents.

Cannan

Lord Goddard relied on Cannan v Abingdon (Earl) [1900] 2 QB 66 as a precedent to support his decision (Corkery at 106). Cannan held that a “bicycle or tricycle” was a carriage because it “is a thing which carries” (Cannan at 71, cited in Corkery at 106).
DM Scott for the defendant argued against this view. Cannan was a toll case (Corkery at 104). It was, therefore, not decided under the Licensing Act 1872, but under an Act which had a different purpose “from the Licensing Act” (at 104). Hence its value as a precedent was diminished.

Williams and Simpson
Two of these toll cases, Williams v Ellis (1880) 5 QBD 175 and Simpson v Teignmouth and Shaldon Bridge Co [1903] 1 KB 405, favoured the defendant because they held that a bicycle was not a carriage. (Counsel for the defence referred to the toll cases in general terms in his argument in Corkery at 104, but without making specific reliance on them.) In his judgment, Lord Goddard argued that these cases were severely diminished as precedents because in each the court held that a bicycle was not a “carriage” only by taking an artificially restricted meaning of the expression. The court was able to do this because the reference to “carriage” was preceded by reference to particular types of carriage. Applying the *eiusdem generis* maxim, the court read down “carriage” to mean a carriage similar to those particular types of carriages which were specified (Corkery at 104).

Secondary Sources
There were arguments based on secondary sources.

Prosecution
First, an argument for the prosecution. The “editors of Stones Justices Manual express[ed] the opinion that a bicycle could be a carriage” for the purposes of s 12 of the Licensing Act 1872 (Corkery at 106-107). Counsel for Corkery, however, pointed out that this opinion was based on precedent and that the cases cited were not under the Licensing Act 1872 but “under other statutes” and so are “not authorities for the interpretation of the Licensing Act” (at 103).

Defence
Second, there were two sources for the defence. Webster’s Dictionary of 1920 says that a “carriage” is “obsolete or archaic except in the case of wheeled vehicles or railway carriages” (this is cited in Corkery at 104). Daisy Bell, a well known music hall song, referred to both a bicycle and a carriage in a way which intimated that there was a distinction between them (Corkery at 103).

DECISION
Lord Goddard CJ found that the word “carriage” in the Licensing Act 1872 was “wide enough to embrace a bicycle” (Corkery at 107). This bicycle could be “a tradesman’s tricycle or the ordinary passenger bicycle – ordinarily called a push bicycle – as was the case here” (at 107). Hilbery and Byrne J simply agreed with Lord Goddard (at 107). This meant that Shane John Corkery lost his appeal. Consequently he was guilty of the offences with which he had been charged and convicted before the justices.
**R v TAHAU**

**Introduction**
This is an analysis of the decision in *R v Tahau* [1975] 1 NSWLR 479 ("Tahau"). The case was heard in the Criminal Jurisdiction of the New South Wales Supreme Court before Yeldham J and a jury of 12.

**Facts**
These are the facts (*Tahau* at 479, 480-481). Tahau was in Flat 4 of a block of flats. He set fire to some portion of the interior of this flat. There was no one else in Flat 4 at the time besides Tahau himself, but there were people in the adjoining flat, Flat 3.

**Proceedings**
Tahau was charged under s 196 of the *Crimes Act 1900* (NSW) in relation to his action in starting the fire. His case was heard in the Criminal Jurisdiction of the New South Wales Supreme Court before Yeldham J and a jury of 12 (*Tahau* at 479).

**Applicable Law**
The report of this case does not quote the main relevant provision, namely s 196 of the *Crimes Act 1900* (NSW). Instead there is a description. This appears to be comprehensive (*Tahau* at 480-481), but there is no certainty that it is, nor that it is accurate.

**Elements**
Element (1) There is a dwelling house. Dwelling house is defined in s 4 of the *Crimes Act 1900* (*Tahau* at 481). So far as relevant, this definition provided that a dwelling house included something with the following characteristics:
- (a) It was a building or other structure.
- (b) This building or structure was intended for occupation as a dwelling.
- (c) This building or structure was capable of being occupied as a dwelling.
- (d) The building or structure may or may not have been occupied as a dwelling.

Element (2) There is a person in the dwelling house.
Element (3) The accused knows that there is a person in the dwelling house.
Element (4) The accused sets fire to the dwelling house.
Element (5) The accused does this maliciously.
Consequences

The accused is guilty of an offence.

Issues

The issue is not well defined in the case (Tahau at 481) but it is as follows. Was the block of flats as a whole a dwelling house? If it was, and the other elements of s 196 established, Tahau was guilty. If, however, the block of flats was not a dwelling house, then the individual flats were. In this case Tahau was not guilty because there was not a person in Flat 4, apart from Tahau himself, when he started the fire. (Note that the requirement in s 196 that there be a person in the dwelling house means a person “other than the accused” (at 481.)

Ambiguity

The ambiguity was in Element (1). Where there is a block of flats in which people live, for the purposes of s 196 there are two possible meanings of “dwelling house”.

(1) It can, and generally will, refer to “individual residential flats” within the block (Tahau at 482, and see also at 481). This is probably the case whether the flats or units are side by side, like a “semi detached house” (Tahau at 482, quoting Grant v Langston [1900] AC 383 at 391 per Halsbury LC), or are “one above the other” (Tahau at 482, quoting Yorkshire Fire and Life Insurance v Clayton (1881) 8 QBD 421 at 424 per Sir George Jessel, which was quoted in Grant v Langston at 392 by Halsbury LC).

(2) Does it also refer to the block as a whole, ie the “entire structure which contains within itself a number of individual flats” (Tahau at 482, and see also at 481)?

As well as stating the ambiguity in this way, Yeldham J made some general comments on the meaning of the expression “house” (and hence “dwelling house”). It “is no longer the expression of a simple idea” (Tahau at 482, quoting Grant v Langston at 390 per Halsbury LC). It has “no common or ordinary meaning so fixed and definite that by mere use of the word you can determine in what sense the Legislature has used it” (Tahau at 482, quoting Grant v Langston at 391 per Halsbury LC).

Reasons

Summary of Reasons

It is not necessary to summarise the reasons because they can be briefly stated.

Maxims of Interpretation

Literal Rule

Yeldham J invoked the literal rule of interpretation but without naming it. This rule requires a court, in the first instance, to try to make sense of a provision by taking words in their plain, ordinary or literal sense. Yeldham J said that “the
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ordinary man in the street” would not regard “an entire block of flats” as a dwelling house (Tahau at 482). Note, though, that this view seems at variance with His Honour’s statement above that the word “house”, and hence “dwelling house”, “is no longer the expression of a simple idea” (Tahau at 482, quoting Grant v Langston [1900] AC 383 at 390 per Halsbury LC) – it has “no common or ordinary meaning so fixed and definite that by mere use of the word you can determine in what sense the legislature has used it” (Tahau at 482, quoting Grant v Langston at 391 per Halsbury LC).

Penal Statutes
There is a maxim of interpretation that a penal statute, such as the Crimes Act, deals with the “personal liberty” (Watson v Marshall (1971) 124 CLR 621 at 629 per Walsh J, cited in Tahau at 481-482), ie the “liberty of the subject” (Tahau at 481). Hence it must be construed strictly or narrowly so that a court “must not depart from a strict application of the words used” by attempting to extend them “to cover the particular situation which [a judge] might think should be covered” because the legislature “has acted inadvertently” and left something out that it should have put in (Tahau at 481). Put another way, there is no place for “supposition as to the intention of the legislature” (Watson v Marshall at 629 per Walsh J, cited in Tahau at 481-482).

Precedent
Some precedents supported the case for the Crown:

(1) Kimber v Adams [1900] 1 Ch 412 (cited in Tahau at 482). This held that “a building containing several residential flats constituted only one house” (Kimber v Adams at 413, 415, cited in Tahau at 482). Kimber v Adams relied, for this conclusion, on a statement by Sir George Jessel in Attorney General v Mutual Tontine Westminster Chambers Association (1876) 1 Exch D 469 at 475, 476 (cited in Tahau at 482). This, however, could be discounted because it had been disapproved by the House of Lords in Grant v Langston [1900] AC 383 at 390, 392 (cited in Tahau at 482).

(2) Ex parte High Standard Constructions (1928) 29 SR (NSW) 274. There Sir John Harvey CJ in Eq said that “whether a building occupied as several residential flats can or cannot be properly described as one dwelling house depends on the nature of its construction” ((1928) 29 SR (NSW) 274 at 278, cited in Tahau at 482-483). Applying this principle, His Honour found that “an ordinary two-storey building having been used, after its erection, as two flats” was “one dwelling house” ((1928) 29 SR (NSW) 274 at 279, cited in Tahau at 483). However, Yeldham J that this was “a very special situation” so that the case did not assist the Crown’s argument (Tahau at 483).

(3) Re Marshall and Scott’s Contract [1938] VLR 98 (cited in Tahau at 483). This involved a covenant on land requiring that only one dwelling house should be erected upon the land. One of the parties had erected a “building divided into two dwellings by a brick wall”, and this was held to be in breach of the covenant (at 100, 101, cited in Tahau at 483) because it constituted two dwelling houses.

(4) Hollyhomes v Hind [1944] 2 All ER 8 (cited in Tahau at 483). This case held for the purpose of a vagrancy statute that a vagrant was in a dwelling house when he “was in the common entrance hall of a block of flats” (Tahau at 483).

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Humphreys J did say that “the whole building was clearly a dwelling house” but this was a “very special case” (at 483). First, it involved a vagrancy provision which had a different purpose from s 196 of the Crimes Act 1900 (at 483). Second, residents of each flat in the block had “a right of ingress and egress” over the hall where the accused was found (at 483). Hence (although Yeldham J did not articulate this), the common hall was part of each flat in the block.

Some precedents supported the case for the accused:

(1) Grant v Langston [1900] AC 383 at 390 per Halsbury LC. (a) The “original idea of an inhabited house [a dwelling house under another label] was that of a building inhabited by one person (with his family)” ([1900] AC 383 at 391 per Halsbury LC, quoted in Tahau at 482). (b) “Even semi-detached houses were recognised as two houses” ([1900] AC 383 at 391 per Halsbury LC, quoted in Tahau at 482).

(2) Yorkshire Fire and Life Insurance v Clayton (1881) 8 QBD 421 at 424 per Sir George Jessel (quoted with approval in Grant v Langston [1900] AC 383 at 391 by Halsbury LC, and quoted in Tahau at 482). Here Sir George Jessel said (in 1881) that where houses “are built in separate flats or storeys”, so that they are “one above the other”, they are “separate houses” (Yorkshire Fire and Life Insurance v Clayton at 424 per Sir George Jessel, quoted with approval in Grant v Langston at 391 by Halsbury LC, and quoted in Tahau at 482).

Policy

Because the expression “house”, and consequently “dwelling house”, has “no common or ordinary meaning” that is “fixed and definite”, it is not possible to consider just the word itself (Tahau at 482, quoting Grant v Langston [1900] AC 383 at 390 per Halsbury LC). Instead it is necessary to look at the policy behind the law in which the expression occurs and thus “understand the subject matter with respect to which it is used” in order to understand its sense or meaning (Tahau at 482, quoting Grant v Langston at 390 per Halsbury LC). In other words, what is or is not a dwelling house when that word is used in a statute will vary according to the purpose behind the statute. Hence, ascertaining this purpose or policy is of primary importance. In the case, however, there was no specific reference to the policy behind s 196 of the Crimes Act. However, as noted above, some potentially relevant precedents were distinguished because they dealt with special circumstances, namely building covenants and vagrancy.

Decision

His Honour decided that “the ordinary meaning of dwelling house” did not include “a block of residential flats as a whole, as distinct from individual flats in that block” (Tahau at 483). In consequence the accused was acquitted of the charge under s 196.
R v SMITH

Introduction

This is an analysis of R v Smith [1974] 2 NSWLR 586 ("Smith"), a decision of the New South Wales Court of Criminal Appeal. The main judgment was given by Street CJ (at 586-589). McClemens CJ at CL gave a short judgment agreeing with Street CJ (at 589-590). Nagle J merely expressed agreement with both of these judgments (at 590).

Facts

These are the facts (at 586-587). Gregory Smith was sitting with two other men on the lower step of a bank building in Forster. They had their legs stretched out on the footpath. Smith was smoking a cigarette. They were asked to move by police. Smith made a rude gesture which was agreed between prosecution and defence as offensive in the sense that it was displeasing or offputting.

Proceedings

These are the proceedings (at 586-587):

(1) Smith was charged with an offence under s 7 of the Summary Offences Act 1970 (NSW). His offences consisted of behaving in an offensive manner.
(2) Smith appealed to the District Court. Cross DCJ dismissed his appeal.
(3) Smith then applied for a stated case to bring his case to the Court of Criminal Appeal on two questions of law, one involving interpretation of s 7 and the other involving the separation of powers. (Application for a stated case is authorised by s 5B of the Criminal Appeal Act 1912 – see Smith at 586.) Strictly this is not an appeal because when the Court of Criminal Appeal has decided the case their determination of the questions is sent back to the District Court to be resolved in accordance with that determination. This is why the case is still cited by its name at first instance, “R v Smith”. But obviously, in a practical sense, Smith the defendant is also, in these proceedings, the “appellant” (at 586).

Applicable Law

Offensive Behaviour

Offensive behaviour is made an offence by s 7 of the Summary Offences Act 1970. It says: “A person who in or within view from a public place or a school behaves in a riotous, indecent, offensive, threatening or insulting manner is guilty of an offence” (at 586). Its elements and consequences are as follows:
Elements
Element (1) The defendant is a person.
Element (2) This person behaves in a manner.
Element (3) This person behaves in this manner in either of two places:
   (a) In a public place or school.
   (b) Within view from a public place or school.
Element (4) This manner is any of the following:
   (a) Riotous
   (b) Indecent.
   (c) Offensive. (This was the provision in Element (4) delineating the offence
       with which Smith was charged.)
   (d) Threatening.
   (e) Insulting.

Consequences
The consequence, stated in s 7, is that the person “is guilty of an offence”. Punishment following this guilt was provided by other provisions of the Act.

Separation of Powers
In the case the court did not elaborate on the separation of powers so I need to state the principle here. I will do so in a way which relates it to the issue in this case.

Separation of powers is a constitutional principle which decrees that legislative, executive and judicial functions are distinct (there is, however, vehement dissent from this proposition in Christopher Enright Federal Administrative Law, 2001, Federation Press, Chapter 6) and should be performed by separate bodies. The major rationale for this principle is that separation of power prevents abuse of power.

In practical terms, separation of powers means that parliament should legislate and courts should adjudicate. There is, however, a problem with this. Interpreting law is a legislative process, and when courts adjudicate a case they interpret law. This, however, is only a matter of practice and not an inherent necessity. In principle parliament could assume responsibility for interpreting law.

If courts are left with the task of interpreting law, separation of powers can still operate even if in a confined way. It can be implemented by permitting courts to engage in genuine interpretation (for want of a better phrase) but not interpretation to fill gaps in a statute. There are two sorts of gaps to consider. One is where a necessary or appropriate word or phrase has been omitted from a statute. This is the casus omissus (literally, the omitted case or category). The other is where the word or phrase is vague or open ended. This is the case here with the term “offensive”. As we see below, whether a court can properly interpret a vague term of such as “offensive” was the second issue in the case.

Elements
It is hard to be precise with elements of a non-statutory law, but they would go something like this for using separation of powers in this context:
Element (1) There is a court.
Element (2) There is a provision of a law.
Element (3) It is necessary that this provision be interpreted to decide a case which is before the court.
Element (4) This provision is vague.
Element (5) This provision is so vague that for a court to interpret it would involve performing a legislative function substantially larger than courts normally do with interpretation.

Consequences
To uphold the principle of separation of powers the court should refuse to interpret the provision and so it should decline to hear the case. Effectively, this makes the law void for vagueness, to use the United States formula.

Issue: Offensive Behaviour
This issue arose in Element (4)(c). Was Smith’s behaviour offensive as that expression is used in s 7 of the Summary Offences Act 1970. This issue, obviously, depended on the meaning given to “offensive”.

Ambiguity
According to the Oxford English Dictionary, the word “offensive” has six meanings (Smith at 587, citing the Oxford English Dictionary), of which two were applicable here:

(1) It means: “Pertaining or tending to offence or attack; attacking; aggressive; adapted or used for the purpose of attack; characterised by attacking. Opposed to defensive”. This is the narrow meaning of offensive. For convenience I refer to this meaning as aggressive (at 587, citing the Oxford English Dictionary).

(2) It means: “Giving, or of a nature to give, offence; displeasing; annoying; insulting” (at 588 citing in both instances the Oxford English Dictionary). This is the wide meaning of offensive. For convenience I refer to this meaning as annoying.

Reasons
Summary of Reasons
Since the reasons are both simple and short it is not necessary to summarise them.

Defendant
The argument for the defendant was based on a maxim of statutory interpretation. It applies in criminal cases where, as is the case here, a provision has two meanings, one of which is wide and the other narrow. This maxim requires that any ambiguity be resolved by the narrow interpretation, and hence in favour of the defendant (at 587-588). There is a simple rationale for this rule - no person should be put in peril because of an uncertainty in the law.
Prosecution

Several arguments favoured the case for the prosecution:

1. Maxim of statutory interpretation. One argument for the prosecution countered the defence argument that criminal statutes should be construed narrowly and in favour of the accused. This maxim did not apply, and so a narrow meaning had to yield in favour of a wider meaning when it is clear “from the words which the legislature has used” (at 587) that the legislature intends the wider meaning (at 587-588). This argument did not itself promote the wide meaning of offensive, but it cleared the way for the court to establish the wide meaning and indorse it in its judgment.

2. Maxim of statutory interpretation. There is a maxim of interpretation labelled noscitur a sociis. This translates literally that something is known by its associates. With regard to interpretation it says that we should resolve ambiguity by taking a meaning that is consonant with the context in which a word is used. Applying this to the term “offensive”, it does “not stand alone” in s 7 (at 588). Instead it is one of five types of behaviour which s 7 makes criminal. The other four are behaviour which is riotous, indecent, threatening or insulting. Although the court did not articulate the noscitur maxim it was in fact doing so (at 588).

3. Precedent. Street CJ noted that provisions similar to s 7 had “many times been the subject of judicial consideration” (at 588). Two points are made here by inference. (a) These other cases all support the wide meaning. (b) His Honour is relying on them.

4. Policy. This provision, which has equivalents both in earlier legislation and in other jurisdictions, has a policy which is “clearly discernible from the words of the section and their context” (at 588). It is the “preservation of order and decorum in streets and other public places” (at 588, citing Anderson v Kynaston [1924] VLR 214).

Decision

The court decided that the correct meaning of “offensive” was the “third of the Oxford English Dictionary’s meanings, that is to say, offensive in the sense of giving, or of a nature to give, offence; displeasing; annoying; insulting” (Smith at 588). This decision was unanimous (at 588 per Street CJ, 589-590 per McClemens CJ at CL, 590 per Nagle J).

Issue: Separation of Powers

There were two related issues involving separation of powers.

Issue 1

This issue arose in Element (5). Is the word “offensive” in s 7 of the Summary Offences Act 1970 too vague, ie is it so vague that for a court to interpret it would involve performing a legislative function substantially larger than courts normally perform with interpretation? In the words of Street CJ, would the court find itself “laying down or ascribing meanings which the legislature has itself refrained from laying down or prescribing” (at 588-589).
Issue 2
The other issue arose with regard to the consequences of being too vague. Did it require a court to refuse to interpret the provision and thus refuse to decide the case? In other words, should the court treat the “statute as meaningless” (at 589)? Should a court “take care lest it be drawn out from the true judicial role into a legislative role” (at 588)?

Ambiguity
There were two related ambiguities:

(1) The degree of vagueness of the word “offensive”. One possibility was that it was so vague that for a court to interpret it would involve performing a legislative function substantially larger than courts normally perform with interpretation. The other possibility is that it was not as vague as this.

(2) The consequences of extreme vagueness, ie where a word or phrase in a statute is so vague that interpreting it would be a substantial legislative task. One possibility is that the court should decline to interpret it because it breaches separation of powers. The other is that the court should interpret it regardless.

Reason
Summary of Reasons
Since the reasons are both simple and short it is not necessary to summarise them.

Issue 1
Counsel for the defendant were not able to cite any precedent to support their argument on this issue. Instead, although it is not stated in the report, they relied on the obviously subjective nature of the word “offensive”.

An argument for the prosecution’s case was based on the literal rule, although this maxim is not referred to by name. Simply put, the maxim allegedly applied because the “word ‘offensive’ is an ordinary English word” (at 589). Further, there is no statute which the Chief Justice could recall which should be ascribed “so extreme a fate as to be regarded as meaningless” (at 589).

There was also an argument for the prosecution founded on precedent. In a case involving the charge of offensive behaviour, Kerr J said: “I recognise that the task which I have to perform is merely to interpret the section and apply it to the facts” (Ball v McIntyre (1966) 9 FLR 237 at 244, cited in Smith at 589 by McClemens J). This case did not directly face the issue because it was not raised there. Nevertheless, it seems clear that Kerr J saw no difficulty with interpreting the term “offensive”.

Issue 2
Australia lacks a constitutional provision asserting, like the United States Constitution, a right to “due process” (at 589). Hence there is no constitutional mechanism which automatically strikes down a law which the court considers to be too vague.
Consequently, if a court is to refuse to interpret an extremely vague provision, it has to do so of its own initiative. Effectively, it has to create a common law rule that it is allowed to do so.

There is support for such a rule in *Halsbury’s Laws of England* (3rd ed, vol 36 p 389). It starts by laying down the general proposition that it “is not permissible to treat a statutory provision as void for mere uncertainty” (3rd ed, Vol 36 p 389, cited in *Smith* at 589). Then it states a qualification. A court may treat a statute as void for uncertainty when “the uncertainty cannot be resolved, and the provision can be given no sensible or ascertainable meaning and must therefore be treated as meaningless” (3rd ed, Vol 36 p 389, cited in *Smith* at 589).

**Decision**

**Issue 1**

The court found that the term “offensive” was not too vague. By “no stretch of indulgence towards the appellant’s counsel could the present section be regarded as so uncertain as to be meaningless” (*Smith* at 589). Determining its meaning does not stray “in the slightest degree from the proper province of an exercise of a judicial function” (at 589).

**Issue 2**

Resolution of this issue was not necessary, so the court declined to decide it. Street CJ said that for a court to decline to interpret a vague provision was “a far reaching proposition” that he would “prefer to leave open for due deliberation when occasion arises” (at 589).

**Overall Decision**

A unanimous court answered both issues in favour of the prosecution and against Smith (at 590). Consequently, the court effectively dismissed his appeal. Since the appeal was a stated case the Court of Criminal Appeal “remitted” the case to the District Court with their statement of opinion on the two questions (at 590). Following this, the District Court would finalise its finding on Smith’s guilt by reference to the decision of the Court of Criminal Appeal.
TANNER v MARQUIS JACKSON

Introduction
This is an analysis of Tanner v Marquis Jackson (1974) 3 ACTR 32 (“Tanner”), a case decided by the ACT Supreme Court. The reports in 3 ACTR are bound with Volume 3 of the Australian Law Reports (ALR). The judgment was given by the sole judge constituting the court, Blackburn J (Tanner at 32, 33).

Facts
The facts are set out in the headnote (Tanner at 33) and in the judgment of Blackburn J (at 33). The appellant, Tanner, suffered serious mental and physical injuries in the course of her employment. For this she received an award of compensation for her injuries from the ACT Court of Petty Sessions. The award was made under the Workmen’s Compensation Ordinance 1951 (ACT).

As a result of her injuries the applicant was not able to look after herself. Consequently, she lived in an institution, Cherrywood Village. There she received constant help from nursing aides by way of “supervision, guidance, and encouragement with acts of daily living – bathing, dressing, hair care, brushing her teeth, changing her clothes, cutting up her food and so on” (at 37). Tanner needed to be reminded or invited to perform these functions because “without such invitation or stimulation” she would be “likely to do nothing” (at 37).

In addition to providing this care, Cherrywood had a sheltered workshop where Tanner worked (at 36, 37). This gave her “some degree of satisfaction” (at 37).

Tanner’s condition was “static” (at 37). There was virtually no hope of any improvement. The point to the care provided to the appellant at the Cherrywood Village was to stop her condition deteriorating, which it successfully did (at 37, 38). Without it, according to a medical witness, she would “rot” (at 37).

Proceedings
Tanner received an award of compensation for her injuries from the ACT Court of Petty Sessions (Tanner at 32, 33, 35). The award was made under the Workmen’s Compensation Ordinance 1951 (ACT) (at 32, 33, 35). She now takes her case on appeal to the ACT Supreme Court under s 26 of the Ordinance on the question of the amount of compensation to which she is entitled (at 33).

Applicable Law
Compensation for injuries at work in the ACT was covered by the Workmen’s Compensation Ordinance 1951 (ACT). There was no dispute that the appellant was entitled to compensation. The case concerned the extent of the compensation.
Provisions determining the amount of compensation were s 11(1) and s 6(1). Section 11(1) provided as follows: “Where ... compensation is payable by an employer under this Ordinance to ... a workman ... the employer is liable to pay, in respect of the cost of medical treatment obtained in relation to the injury ... in respect of which [injury the] compensation is so payable ... compensation of such amount as is appropriate to that medical treatment” (Tanner at 36). Medical treatment was defined in s 6(1) to mean, so far as was relevant to the case, “(d) treatment and maintenance as a patient at a hospital; ... (f) nursing attendance, medicines, medical and surgical supplies and curative apparatus supplied or provided in a hospital or otherwise” (Tanner at 36).

It is necessary to arrange these provisions in a structured way in terms of elements and consequences. Doing this, we can set them out as follows:

**Elements**

Element (1) Compensation is payable by an employer under the Workmen’s Compensation Ordinance 1951 in relation to an injury.  
Element (2) The compensation is payable to a workman.  
Element (3) Medical treatment has been obtained in relation to the injury.  
Medical treatment is defined in s 6(1)(d) and (f) of the Ordinance to mean any of the following:  
(a) Treatment as a patient at a hospital.  
(b) Maintenance as a patient at a hospital.  
(c) Nursing attendance etc supplied or provided in a hospital or otherwise.  
(There was an alternative construction of these provisions. It was that treatment and maintenance in para (d) of s 6(1) should be read “conjunctively” and not “disjunctively” as they are read here. This was dismissed fairly quickly by Blackburn J so I do not deal with it in the analysis of the judgment below. See Tanner at 36.)

**Consequence**

The employer is liable to pay compensation in respect of the cost of medical treatment obtained in relation to the injury. The employer’s liability is to pay compensation of such amount as is appropriate to that medical treatment. Logically this means that they pay the total cost.

**Issues**

The appellant had satisfied all of the elements of s 11(1) so her employer was liable to pay compensation in respect of the cost of medical treatment obtained in relation to the injury. The dispute was over what constituted medical treatment. This dispute arose in relation to the fees which the applicant paid to stay at Cherrywood Village. Specifically, as will be explained, it arose over the question of whether Cherrywood Village was a hospital.

There were two aspects to the appellant’s compensation. One concerned s 6(1)(f) and the other s 6(1)(d).
Section 6(1)(f)

Section 6(1)(f) was a non-contentious part. In s 6(1)(f) the definition of “medical expenses” referred to “nursing attendance … supplied or provided in a hospital or [supplied or provided] otherwise”. Part of the charges from Cherrywood Village fell into the category “nursing attendance”. The employer was liable for these because para (f) specified that they could be provided by a hospital or otherwise. Thus, for this part of Tanner’s medical expenses it did not matter whether Cherrywood was a hospital or not.

Section 6(1)(d)

Section 6(1)(d) was the contentious part. In s 6(1)(d) the definition of “medical expenses” referred to “maintenance as a patient at a hospital”. The issue was whether the appellant’s charges for maintenance at Cherrywood Village fell within para (d). If it did, she received the cost of maintenance as part of her medical expense under her award of workers compensation. For these payments to fall within para (d) it was necessary that Cherrywood Village was a hospital. This was the issue in the case. Was Cherrywood Village “a hospital within the meaning of that word” in the Workmen’s Compensation Ordinance 1951? (Tanner at 36).

Ambiguity

Here the ambiguity was the meaning of “hospital”. There are a number of possible meanings discussed below but the specific point was whether the term “hospital” covered an institution such as Cherrywood Village which provided “maintenance” to a resident (Tanner at 36). It was the appellant’s case that providing “maintenance” was enough, so that Cherrywood Village was a hospital. By contrast, the respondent argued that it was not enough, so that Cherrywood Village was not a hospital.

The term “hospital”, as Rainbow J pertinently and reassuringly pointed out, is not “a term of art” but “a descriptive term” (Kiprovich v Kriketos (1954) 28 WCR (NSW) 108 at 114, cited in Tanner at 39). Thus, there is no cut and dried definition. Moreover, what may or may not be a hospital can vary from time to time and from country to country (Tanner at 39 where His Honour points out that a definition in the Oxford English Dictionary prepared in England about 80 years ago must be used with care in determining the meaning of the word used by an Australian draftsman only 20 or so years ago). It can also vary according to circumstances because the meaning of “hospital” has arisen in a number of different contexts, eg interpretation of a gift in a will (Re Padbury (1908) 7 CLR 680, cited in Tanner at 39; Re Alfred Ford [1945] 1 All ER 288, cited in Tanner at 39; Public Trustee v Hospitals Commissioner of NSW (1939) 56 WN (NSW) 198, cited in Tanner at 40) and permissible use of a building under local government legislation (Salmar Holdings v Hornsby Shire Council [1971] 1 NSWLR 192, cited in Tanner at 39-40). These are grounds for treating judicial statements in cases as dicta (Tanner at 39), as is the fact that a case is interpreting “hospital” in legislation which uses “different statutory definitions” to the ones encountered in this case (Tanner at 41). Although this point is of general relevance, His Honour was referring specifically to Minister of Health v Royal Midland Counties Home for Incurables [1954] Ch 530). Here the context is welfare legislation making provision to compensate injured workers, so the definition needs to be fashioned according to the policy behind the legislation (Tanner at 38, 39, 41-42).
Reasons

Whether an institution was a hospital depended on the criterion which was used. In his judgment Blackburn J considered three major criteria. All of these related to what was provided to the person by the institution in question. These criteria were:

1. Cure. Providing treatment to cure the person, as an inpatient and possibly also as an outpatient.
2. Palliative care. Providing treatment to alleviate the person’s pain.
3. Maintenance. Providing care or treatment to stop the person’s condition from deteriorating. This could include care or treatment to maintain or enhance the quality of life.

The most obvious question with each of these criteria is whether they are relevant. If they are, there is a further question as to their status. Are they sufficient, are they necessary, or are they merely a factor which can be used to give weight to an argument that an institution is a hospital?

Outline of Reasons

Before discussing reasons I will outline them.

Cure

There were arguments for this criterion from secondary sources and cases:


Palliative Care

This criterion was supported by one case, Minister of Health v Royal Midland Counties Home for Incurables [1954] Ch 530 at 541, cited in Tanner at 40-41.

Maintenance

Three sources supported this criterion:

2. Cases. Kiprovich v Kriketos said that a hospital is a place “where the sick, aged and infirm are looked after” (1954) 28 WCR (NSW) 108 at 114, cited in Tanner at 39. There is also support for this notion from Minister of Health v Royal Midland Counties Home for Incurables [1954] Ch 530 at 541, cited in Tanner at 40-41, which said, as paraphrased by Blackburn J, that treatment in a hospital could include “the nursing of the incurably ill to make them more comfortable”.

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(3) Policy. The policy of the enabling legislation requires it (Tanner at 38, 39, 41-42). Its purpose was “to provide compensation for workmen for loss suffered by reason of injuries sustained in the course of their employment (Tanner at 41).

Cure
This criterion involves providing the patient with what is variously called “therapy”, “curative treatment” or “therapeutic” treatment (Tanner at 32, 38, 39). Essentially, this is treatment to cure the person. In the obvious case this treatment will be “medical or surgical treatment” (Re Padbury (1908) 7 CLR 680 at 686, cited in Tanner at 39).

The Oxford English Dictionary supports this criterion because it defines “hospital” to include a place for the care of those who require “medical treatment” (Tanner at 38). This notion of a hospital as a place “to which a person resorts with the intention of being treated for a curable malady or injury”, His Honour said, is the primary meaning of “hospital” “in everyday speech in Australia at present” (Tanner at 38).

There are also cases which take this approach, although with varying emphasis, holding or intimating that the “primary sense” (Tanner at 38), of hospital is a place which provides curative treatment (Re Padbury (1908) 7 CLR 680 at 686, cited in Tanner at 39; Re Alfred Ford [1945] 1 All ER 288, cited in Tanner at 39; Kiprovich v Kriketos (1954) 28 WCR (NSW) 108 at 114, cited in Tanner at 39; Salmar Holdings v Hornsby Shire Council [1971] 1 NSWLR 192 at 199, 206, cited in Tanner at 39-40; Ormskirk Union v chorlton Union [1903] 2 KB 498, cited in Tanner at 39; Public Trustee v Hospitals Commissioner of NSW (1939) 56 WN (NSW) 198 at 199, cited in Tanner at 40; Minister of Health v Royal Midland Counties Home for Incurables [1954] Ch 530, cited in Tanner at 40-41). This is the primary sense of “hospital” because not only is curative treatment a relevant criterion, but it is a major criterion. Some of these cases intimate that it may even be a sufficient condition for an institution to be a hospital. In other words, if all the institution does is cure patients it is a hospital. One case goes further and says that curing patients is the “essential [ie exclusive] characteristic” of a hospital (Public Trustee v Hospitals Commissioner of NSW (1939) 56 WN (NSW) 198 at 199, cited in Tanner at 40). Hence, if an institution does not provide this care it is not a hospital.

One of these cases also imposes a qualification on this criterion. To be a hospital it is not enough just to provide treatment to patients. Patients must also be residents of the institution, ie in-patients; hence if treatment is provided only to out-patients, it is not a hospital (Re Alfred Ford [1945] 1 All ER 288, cited in Tanner at 39).

Palliative Care
This criterion is that the institution provides “palliative” care (Tanner at 38). This was alluded to (Tanner at 38) but not taken up in His Honour’s reasoning. There is, however, some judicial support for this definition (according to Minister of Health v Royal Midland Counties Home for Incurables [1954] Ch 530 at 541, cited in Tanner at 40-41). The treatment in a hospital could include, in the words of Blackburn J in Tanner at 41, “the nursing of the incurably ill to make them more comfortable”).
**Maintenance**

This criterion is that the institution provides care “to prevent the deterioration of [the person’s] condition” (Tanner at 38). Logically this is also treatment, although in the case Blackburn J emphatically distinguished them, saying that “care without therapy is not treatment” (Tanner at 38). In the present case this was the crucial criterion because the care provided to the appellant at Cherrywood Village was precisely this (Tanner at 38).

Blackburn J decided that this criterion was not only relevant but was sufficient. His reasons were as follows:

1. The *Oxford English Dictionary* supports this criterion. It defines hospital to mean, with emphasis added, as “an institution or establishment for the care of the sick or wounded, or of those who require medical treatment” (Tanner at 38).

2. Although the cases which he has considered generally do not support this point of view they can be discounted for two reasons. First, the relevant statements are merely obiter dicta (Tanner at 39). Second, most of them actually hold that the “primary sense” or meaning of a hospital is a place that treats the sick and injured, but they do not preclude some other meaning “for the purpose of the construction of a statute” (Tanner at 39, and the idea is echoed at 41).

3. There is some judicial support for His Honour’s finding anyway. Kiprovich v Kriketos said that a hospital is a place “where the sick, aged and infirm are looked after” ([1954] 28 WCR (NSW) 108 at 114, cited in Tanner at 39. There is also support for this notion from *Minister of Health v Royal Midland Counties Home for Incurables* [1954] Ch 530 at 541, cited in Tanner at 40-41, which said, as paraphrased by Blackburn J, that treatment in a hospital could include “the nursing of the incurably ill to make them more comfortable”.

4. The policy of the statute requires it (Tanner at 38, 39, 41-42). Put simply, the purpose of the legislation is “to provide compensation for workmen for loss suffered by reason of injures sustained in the course of their employment” (Tanner at 41). The cost of the appellant’s stay at Cherrywood Village was such a loss (Tanner at 41-42). To exclude it would be “artificial and irrational” (Tanner at 42).

**Statutory Argument**

It is necessary to mention an alternative approach argued in the case. It is not entirely clear from the judgment what this approach was but the substance of it seemed to be an argument based on the definition of medical treatment in s 6(1). The upshot of this definition, said the argument, was that an institution merely providing nursing attendance was not a hospital. It also had to provide treatment and maintenance. This argument was quickly dismissed (Tanner at 37-38).

**Decision**

His Honour held that an institution could be a “hospital” if it provided care to maintain life or the quality of life. This meant that Cherrywood Village was a hospital. Therefore, “the cost incurred by the appellant for maintenance at Cherrywood Village is ‘the cost of medical treatment’ within the meaning of s 11(1)” of the *Workmen’s Compensation Ordinance 1951* (Tanner at 42). Consequently Tanner’s appeal was allowed (at 42).
MURRAY v MINISTRY OF DEFENCE

Introduction

This is an analysis of Murray v Ministry of Defence [1988] 1 WLR 692 (“Murray”), a case decided by the House of Lords.

In the original judgment the pages are divided into eight sections identified by upper case letters from “A” to “H”. These letters are used in the analysis here.

Lord Griffiths delivered the only substantive judgment. The other four Law Lords – Lord Keith of Kinkel (at 694G), Lord Templeman (at 694H), Lord Oliver of Aylmerton (at 704D) and Lord Jauncey of Tullichettle (at 704E) – delivered short judgments which simply expressed agreement with Lord Griffiths.

This judgment is not well set out and part of the analysis and reasoning is incomplete. To handle this I have filled in the gaps as best I could and rearranged material to make the analysis clearer.

Facts

The summary of the facts in the headnote refers to a Corporal D (Murray at 692E). Later, however, in the report of the case in the judgment of Lord Griffiths Corporal D is identified as Corporal Davies (at 695F).

These are the facts:

1. On 22 July 1982 Corporal Davies was told at an army briefing that the plaintiff, Margaret Murray, was suspected of involvement with the IRA and of committing offences.
2. Corporal Davies was instructed to go to Murray’s house with armed soldiers, arrest her and bring her back to the army screening centre.
3. At 7.00 am Corporal Davies and the soldiers arrived at Murray’s house.
4. Murray, who was not fully dressed, answered the door.
5. Corporal Davies and three armed soldiers entered the house.
6. Corporal Davies asked Murray to get dressed and accompanied her upstairs and stayed with her while she dressed.
7. At 7.30 am, after Murray had dressed and come downstairs, Corporal Davies said to Murray: “As a member of Her Majesty’s forces I arrest you” (at 692G, 696D).
8. Corporal D, Murray and the soldiers then left the house and drove to the army screening centre at Springfield.
9. At the centre various procedures took place. These included attempts to question the plaintiff by a person who was not Corporal Davies, the soldier who had arrested Murray.
10. The plaintiff was released at 9.45 am.
Murray sued the Ministry of Defence on a variety of accounts including trespass to the person and false imprisonment (Murray at 694D-E). Her claim was heard at first instance by Murray J and was dismissed (at 694E, 695A). She then appealed to the Court of Appeal in Northern Ireland. It allowed her appeal to the extent of “awarding her £250 damages for trespass to her person” (at 694E, 695A) but otherwise dismissed her appeal, including her appeal in relation to false imprisonment (at 694E, 695A). She now appeals to the House of Lords by leave of the Court of Appeal (at 694C-D, 695A).

Applicable Law

Introduction
In this case the plaintiff was suing the defendant for the tort of false imprisonment. Hence, the main law which is applicable consists of the principles of the law of false imprisonment. These, however, include law from other sources. (1) Section 14 of the Northern Ireland (Emergency Provisions) Act 1978 confers on members of Her Majesty’s forces a power to arrest and detain a suspect. This is relevant as a statutory defence to false imprisonment. (2) Section 14 uses the terms “arrest”. This incorporates the common law principles which define an arrest. Common law confers on government officials a power to question a person. (3) Finally, the power to arrest, detain and question a suspect is a discretionary power. Hence, it is subject to, and thus incorporates, the standard principles of administrative law which determine how a discretionary power can be exercised.

False Imprisonment
Murray sued the Ministry of Defence for false imprisonment relating to two incidents:

(1) Her arrest and detention at her house from 7.00 am to 7.30 am (Murray at 692H-693A).
(2) Her detention at the Springfield Road Centre.

Offensive Elements
In brief form the offensive elements of false imprisonment are:

(1) The plaintiff is confined.
(2) The plaintiff is confined because the defendant causes the confinement of the plaintiff.
(3) The plaintiff must know of the imprisonment. This element, however, is contentious and it was in issue in this case. The defendant argued that it was an element of false imprisonment and the plaintiff argued that it wasn’t.

Defensive Elements
It is a defence to false imprisonment that the defendant had lawful authority to imprison the plaintiff. Lawful authority to confine can take such form as arrest, judicial remand in custody, imprisonment as sentence for a crime, and custody for reasons of mental health or quarantine. Lawful authority is a defence to false
imprisonment only to the extent of the authority. If an official exceeds their authority, or does not exercise their authority legally, they lose the defence.

Authority to imprison or to confine a person can come from any of three sources:
(1) The prerogative.
(2) Common law.
(3) Statute. In this case the defence of lawful imprisonment rested on s 14 of the Northern Ireland (Emergency Provisions) Act 1978 (Murray at 695C). For the purposes of this case s 14 performed two functions – it conferred on members of Her Majesty’s forces power to arrest and detain a suspect, and it implicitly preserved the common law power to question a suspect.

Section 14
For the purposes of this case, the relevant power of arrest and detention was conferred by s 14 of the Northern Ireland (Emergency Provisions) Act 1978 (Murray at 695C). Section 14 provides a defence to the tort of false imprisonment by making legal an imprisonment by arrest or detention which would otherwise be tortious. Section 14 says:

14 (1) A member of Her Majesty’s forces on duty may arrest without warrant, and detain for not more than four hours, a person whom he suspects of committing, having committed or being about to commit any offence.

(2) A person effecting an arrest under this section complies with any rule of law requiring him to state the ground of arrest if he states that he is effecting the arrest as a member of Her Majesty’s forces.

Elements
There are three requirements for this power of arrest to be exercised on a person:
(1) There is a member of Her Majesty’s forces.
(2) The member of Her Majesty’s forces is on duty.
(3) The member of Her Majesty’s forces suspects a person of any of the following:
   (a) Committing an offence.
   (b) Having committed an offence.
   (c) Being about to commit an offence.

Consequences
When these circumstances apply, s 14 confers power on the member of Her Majesty’s forces to do two things:
(1) To arrest the person without warrant. Note, for the benefit of later discussion, that if the action taken against the person is not an “arrest” this power has not been properly exercised.

(2) Then to detain the person for up to four hours. Note, for the benefit of later discussion, that this provision confers two discretions:
   (a) To detain the person.
   (b) To determine the period during which they are detained up to a permissible maximum of four hours.
Power to Arrest

Power to arrest a suspect is conferred by s 14 of the *Northern Ireland (Emergency Provisions) Act 1978*. Our concern is with the meaning of the term “arrest” in s 14. The point here is simple: if the defendant imprisons the plaintiff but the imprisonment does not constitute an “arrest”, they have not exercised the power conferred by s 14(1). Hence the defendant cannot use s 14(1) as a defence of lawful authority to the tort of false imprisonment.

In the absence of an intention in the statute this refers to the common law meaning of “arrest”. According to cases cited by Lord Griffiths (*Hussein v Chong Fook Kam* [1970] AC 942 at 947, cited in *Murray* at 699B; *Spicer v Holt* [1977] AC 987 at 1000, cited in *Murray* at 699C; *Mohammed-Holgate v Duke* [1984] AC 437 at 441, cited in *Murray* at 699D), it seems (because the judgment is very unclear on this) that common law required three elements to be satisfied for an apprehension of a person to be a legal arrest:

1. The person is deprived of liberty.
2. The arrester notifies the person that they have been arrested.
3. The arrester notifies the person of the reason that they have been arrested.

If these requirements are not observed, the arrest is not legal (*Christie v Leachinsky* [1947] AC 573, cited in *Murray* at 699F-G).

**Deprivation of Liberty**

The first requirement for an arrest is that the person is “deprived of liberty” to go where they please (*Spicer v Holt* [1977] AC 437, cited in *Murray* at 699C). The arresting officer can do this in either of two ways:

1. One way involves force. The arrester takes the “person into his custody” (*Mohammed-Holgate v Duke* [1984] AC 437 at 441, cited in *Murray* at 699D). To do this the arrester “uses force to restrain” (*Hussein v Chong Fook Kam* [1970] AC 942 at 947, 692B) the person and so prevents them “from moving anywhere beyond the arrester’s control” (*Mohammed-Holgate v Duke* at 441, cited in *Murray* at 699D).
2. The other way is the threat of force. By “words or conduct [the arrester] makes it clear that he will, if necessary use force to prevent the individual from going where he may want to go” (*Hussein v Chong Fook Kam* at 947, cited in *Murray* at 692B).

**Notification of Arrest**

A second requirement of an arrest is that the person arrested knows that they are being arrested. Knowledge “of the fact of restraint by the suspect is an essential element of an arrest” (*Murray* at 698A). Hence the arresting officer must “state” in specific terms that “he is arresting the person” (*Hussein v Chong Fook Kam* [1970] AC 942 at 947, 692B).

The person arrested must, it seems (*Murray* at 699G), be notified of their arrest within either of two time frames:

1. In “ordinary circumstances” they should be notified at the time of the arrest (*Murray* at 699G).
2. In other, ie exceptional, circumstances they should be notified “within a reasonable time of the arrest” (*Murray* at 699G, citing *Christie v Leachinsky*).
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[1947] AC 573). This, however, is subject to a qualification. If a suspect “for
any reason refuses to accept the fact of restraint” after the arrest but before
they have been told that they are under arrest, they must be informed
“forthwith” that they are “under arrest” (Murray at 701A).

Notification of Reasons for Arrest
A third requirement for an arrest is that the person arrested is informed of
the reason why they have been arrested. When “a person’s liberty is being
restrained he is entitled to know the reason” (Murray at 699G). If this
requirement is not observed the arrest is not legal (Christie v Leachinsky

For the purposes of this case, notification of the reasons or grounds for arrest
can be done in either of two ways:

(1) In the absence of special statutory provisions, the arrester actually informs
the person arrested of the grounds for their arrest.

(2) There is an alternative means of notification provided by s 14(2) of the
[is] effecting an arrest” under s 14(1). Section 14(2) provides that this person
will be taken to comply with any rule of law requiring him to state the
ground of arrest if he states that he is effecting the arrest as a member of Her
Majesty’s forces.

This notification must be done within either of two time frames:

(1) In “ordinary circumstances” this should be done at the time of the arrest
(Murray at 699F).

(2) In other circumstances it should be done “within a reasonable time of the

Power to Detain
Section 14(1) authorises a member of Her Majesty’s forces on duty to arrest a
suspect. Having arrested a suspect, s 14 confers power to “detain [the person] for
not more than four hours”. This provision confers two discretions on the
defendant:

(1) They were authorised to detain the plaintiff.

(2) The were authorised to determine the length of the period of detention up to
a maximum length of four hours.

Power to Question
Common law confers on officials (indeed on everybody) a power to question a
suspect. This power, it must be stressed, is simply a power to ask questions. It is
not a power to compel a person to answer the questions, nor a power to appre-
hend and detain a person for the purpose of asking the questions. Such powers
must come from some other source.

Administrative Law
There are some general principles of administrative law which dictate how a
power must be exercised if it is to be exercised legally. If it is not exercised legally
it can be subject to judicial review by a court. Hence these principles of adminis-
trative law are in effect part of all discretionary powers and determine their limits.

These principles are not very fully stated in the judgment (Murray at 703E-F). The
court merely alludes to them as it applies them and, unfortunately, does so in
a way which does not clearly indicate which principles they are invoking and
why. I will state the principle here, and in subsequent discussion state my best
guess as to what the court was doing.

Now for the principles. A discretion has to be exercised legally and properly.
Three basic propositions summarise this law. First, the official must act within
the designated limits of the power. For example, a power to detain a person with
disease X is not a power to detain a person with disease Y. Second, the power
must be properly exercised, ie the decision is made for proper purposes and is
directed by relevant considerations. Third, to be safe, an official should comply
with all procedures attached to the exercise of the power. Failure to comply with a
procedure may make the exercise of the power invalid.

Issues

Because the court was not clear in spelling out the relevant law it was also not
clear in stating the issues. Consequently, to some extent my statement of issues
here is based on guesswork or inference. On this bases, the issues were as follows:

(1) Offensive elements of false imprisonment – knowledge of imprisonment. Is
knowledge of false imprisonment an element of the tort?

(2) Defensive elements of false imprisonment – legality of arrest. Was there an
arrest? This was an issue because the defendant argued that she had not been
properly notified of the fact of her arrest nor the grounds of the arrest.

(3) Defensive elements of false imprisonment – legality of detention. Implicitly
the court accepted that the purpose of the power of detention was to exercise
the power to question the suspect. Hence, an acceptable purpose for deter-
mining the period of detention was the need to ask the person questions.
There were, however, three issues that all involved the scope of the power to
detain the suspect for the purpose of questioning them:

(a) Whether the purpose of questioning was just to decide whether to hand
the suspect over to the police.

(b) Whether s 14 implicitly provided that the power to question a detained
person could be exercised only by the person who arrested them.

(c) Whether s 14 implicitly limited the power to put questions to a detained
suspect to a power to ask only reasonable questions.

Issue 1: Knowledge of False Imprisonment

Ambiguity

The question is whether “it is an essential element of the tort of false
imprisonment that the victim should be aware of the fact of denial of liberty”
(Murray at 701B-C). Imprisonment without a person’s knowledge can happen in
any of a number of ways (Murray at 701H-702A, see WL Prosser “False Imprison-
ment: Consciousness of Confinement” (1955) 55 Columbia Law Review 847 at 849,
which is cited in Murray at 702F-702H). For example, a person can be imprisoned and not know of it because he is “asleep” (Murray at 701H-702A), he is in “a state of drunkenness” (at 701H-702A), he is “unconscious” (at 701H-702A), he is “a lunatic” (at 701H-702A), or he is a child of tender years (Prosser “False Imprisonment: Consciousness of Confinement” at 849, which is cited in Murray at 702F-702H), to indicate just some of the possibilities.

One view is that knowledge of the imprisonment is an essential element of the tort, and the alternative view is simply that it is not. There is, however, another dimension of the ambiguity. It is found in the American Restatement of 1965. This required that the person confined is, with emphasis added, “conscious of the confinement or is harmed by it” (Restatement of the Law, Second, Torts 2d, (1965) section 35, p 52, cited in Murray at 703A). This variation on the ambiguity and the options which it presents were not, however, canvassed in this case, so we will not consider them further.

**Reasons**

The defendant alleged that the plaintiff did not know that she was confined during the period from 7.00 am to 7.30 am. The Court of Appeal agreed with this, finding that in the half-hour period from 7.00 am to 7.30 am Murray “did not appreciate that she would not have been free to leave the house” (Murray at 697H). This was potentially a defence because, on one view, knowledge is an element of false imprisonment. Thus, if the plaintiff did not know that she was imprisoned she had no case in false imprisonment.

Lord Griffiths disagreed with the finding of the Court of Appeal and found as a fact (by inference) that Murray did in fact know that she was restrained in the period from 7.00 am to 7.30 pm. As His Lordship said: “The plaintiff was in fact under restraint in her house from the moment she was identified. Corporal Davies stayed with her throughout the time it took her to dress and prepare to leave, and the plaintiff must have realised that she was under restraint and was not free to leave the house” (Murray at 698F-G). Later in the judgment he affirmed this view saying: “[O]n the facts of this case I am sure that the plaintiff was aware of the restraint on her liberty from 7.00 am” (at 701B).

Given this finding of fact it was not necessary for His Lordship to deal with the question as to whether knowledge is an element of false imprisonment. Nevertheless he did, even though his finding on this is obiter.

**Outline of Reasons**

Reasons used in this case involved principle, policy, precedent and secondary sources:

1. **Principle**: Liberty is inherently precious. Mere deprivation of it, therefore, without the plaintiff’s knowledge, should still be actionable.

2. **Policy**: A plaintiff can still suffer harm by a false imprisonment if they were ignorant of their imprisonment. Hence knowledge of the imprisonment should not be a requirement for the tort.

3. **Precedent**: Three cases of judgments supported the view that knowledge was an essential element in false imprisonment – Herring v Boyle (1834) 1 CM&R 377, the judgment of Duke LJ in Meering v Grahame-White Aviation (1919) 122 LT 44 (referred to in Murray at 698B), and the Court of Appeal in Northern Ireland in their consideration of Murray v Minister of Defence (at 698A). One
judgment took the opposite view, the judgment of Atkin LJ in Meering v Grahame-White Aviation.

(4) Secondary sources. Some secondary sources argued that knowledge was not necessary. Examples are Smith and Hogan Criminal Law (5th ed (1983) pp 385-386), Street on Torts (7th ed (1984) pp 25-26), Winfield and Jolowicz on Tort (12th ed (1984) pp 59-60), AL Goodhart’s article “Restatement of the Law of Torts” ((1935) 83 University of Pennsylvania Law Review 411 at 418) and the Restatement (the Restatement of Torts as it was in 1955, cited in Murray at 702F, provided in section 42 that “there is no liability for intentionally confining another unless the person physically restrained knows of the confinement”). Other writers favoured the opposite view. One example is Prosser in “False Imprisonment: Consciousness of Confinement” (1955) 55 Columbia Law Review 847 at 849, cited in Murray at 702E-H. Another is the Restatement of the Law, Second, Torts 2d, (1965) section 35, p 52, cited in Murray at 703A. It said that false imprisonment requires that the person confined “is conscious of the confinement or is harmed by it”.

Principle

The argument in principle was about liberty. Liberty is inherently precious. Consequently, the law “attaches supreme importance to the liberty of the individual” (Murray at 703B). Therefore, “a wrongful interference with that liberty” should “remain actionable even without proof of special damage” (at 703B).

Policy

There was a policy reason for the view that knowledge of the false imprisonment was not necessary, namely that a plaintiff could still suffer harm even though ignorant of the imprisonment (Murray at 702E-H). Despite this ignorance at the time, once the plaintiff knew of it they might still “properly complain” about the imprisonment because of suffering this harm (Meering v Grahame-White Aviation (1919) 122 LT 44 at 53-54, cited in Murray at 702A).

Here are some examples of the harm:

(1) Captors outside the room where the person is imprisoned “may be boasting to [other] persons that he is imprisoned”, thus exposing the captive to ridicule (Meering v Grahame-White Aviation at 53-54, cited in Murray at 702B).

(2) A child, two days old, is locked in a bank vault for two days and in consequence “suffers from hunger and thirst, and his health is seriously impaired” (WL Prosser “False Imprisonment: Consciousness of Confinement” (1955) 55 Columbia Law Review 847 at 849, cited in Murray at 702F-H).

(3) A wealthy lunatic is abducted and held for ransom for a week. During this time he “undergoes mental suffering affecting his health” (Prosser “False Imprisonment: Consciousness of Confinement” at 849, cited in Murray at 702F-H).

(4) A child of two is kidnapped, confined and suffers because it is “deprived of the care of its mother” (Prosser “False Imprisonment: Consciousness of Confinement” at 849, cited in Murray at 702F-H).
Three precedents supported the contention that knowledge was an element in false imprisonment:

(1) One was *Herring v Boyle* (1834) 1 CM&R 377. This was relied on in the Court of Appeal in its decision (*Murray* at 698B-C). Lord Griffiths, however, thought that *Herring v Boyle* was wrong on the facts (*Murray* at 701E-F) saying: “I suppose it is possible that there are schoolboys who prefer to stay at school rather than go home for the holidays but it is not an inference that I would draw, and I cannot believe that on the same facts the case would be similarly decided today”. The case itself appears to be a script from *Ripping Yarns*. This weakened the status of the decision because the statement of law was not necessary for the decision and therefore was not ratio. Indeed, so unimpressed was Lord Griffiths by *Herring* that he described it as an “extraordinary decision” (*Murray* at 701C).

(2) The second was the judgment of Duke LJ in *Meering v Grahame-White Aviation* (1919) 122 LT 44 (*Murray* at 698B).

(3) The third was the Court of Appeal in Northern Ireland in this case. It found that “knowledge of the fact of restraint” is “an essential element of an arrest”, and logically therefore, it would seem, of false imprisonment (*Murray* at 698A).

Against this was the judgment of Atkin LJ in *Meering v Grahame-White Aviation* holding that knowledge was not an essential element of false imprisonment. But, according to the Court of Appeal, this judgment could be disregarded for several reasons. First, it is only dictum (*Murray* at 698D). Second, it is of a court of only equal (and not superior) authority to that in *Herring* (*Murray* at 698C). Third, the decision in *Herring* was not cited to the court in *Meering* (*Murray* at 698C). Fourth, there has been a substantial amount of academic criticism of Atkin LJ’s judgment (*Murray* at 698C-D).

Lord Griffiths, by contrast, found *Meering* to be good law. Having cited the crucial part of the judgment of Atkin LJ (*Murray* at 701H-702E), His Lordship then says simply: “I agree with this passage” (at 702E). Reasons for this agreement are the policy reasons which are given above.

**Secondary Sources**

A number of secondary sources, cited in the Court of Appeal (*Murray* at 698C-D), expressed the view that knowledge was necessary for false imprisonment. These are as follows: (1) Smith and Hogan *Criminal Law* (5th ed (1983) pp 385-386). (2) *Street on Torts* (7th ed (1984) pp 25-26). (3) *Winfield and Jolowicz on Tort* (12th ed (1984) pp 59-60). (4) AL Goodhart’s article “Restatement of the Law of Torts” (1935) 83 University of Pennsylvania Law Review 411 at 418. (5) The *Restatement* (the *Restatement of Torts* as it was in 1955, cited in *Murray* at 702F) provided in section 42 that “there is no liability for intentionally confining another unless the person physically restrained knows of the confinement”. But later, in *Restatement of the Law, Second, Torts* 2d, (1965) section 35, p 52, cited in *Murray* at 703A, the position had changed. It now said that false imprisonment requires that the person confined “is conscious of the confinement or is harmed by it”). Other writers favoured Atkin LJ’s view, an example being Prosser in “False Imprisonment: Consciousness of Confinement” (1955) 55 Columbia Law Review 847 at 849, cited in *Murray* at 702E-H.
Decision

Lord Griffiths came to an emphatic conclusion that knowledge is not an essential element of false imprisonment, ie it is not necessary for the plaintiff to establish that he or she knew of the false imprisonment (Murray at 701B-C). He said: “I cannot agree with the Court of Appeal that it is an essential element of the tort of false imprisonment that the victim should be aware of the fact of denial of liberty” (at 701B-C). In holding in this way he overruled the Court of Appeal.

Knowledge of the imprisonment may, though, still have some consequences. According to Atkin LJ in Meering v Grahame-White Aviation (1919) 122 LT 44, where the plaintiff is ignorant of the imprisonment “the damages might be diminished” (at 53-54, cited in Murray at 702A). Lord Griffiths indicated in his judgment that he agreed with this (Murray at 702E).

Issue 2: Legality of Arrest

Issue

The plaintiff alleged that she was subjected to false imprisonment from 7.00 am to 7.30 am. The defendant tried to justify the imprisonment by claiming that they had power to “arrest” the defendant under s 14(1) of the Northern Ireland (Emergency Provisions) Act 1978. In counter to this the plaintiff argued that she had not been arrested at 7.00 am because what Corporal Davies did at 7.00 am did not amount to an arrest. (It needs to be said that the judgment is not entirely clear on this point. What is stated here seems to be what the court meant.) Thus the issue became whether the plaintiff’s arrest was a legal arrest protected by s 14 or an illegal false imprisonment.

To consider this was the case, we start with the salient facts:

(1) Corporal Davies had arrested Murray at 7.00 am. She said nothing then as to either the fact that Murray was being arrested or the reasons for the arrest.

(2) Corporal Davies went upstairs with the plaintiff and stayed with her whilst she was dressing. The plaintiff claimed that at this time she asked “if she was being arrested, and received no answer” (Murray at 696B).

(3) Later, at 7.30 am, after Murray had dressed and come downstairs, Corporal Davies said to Murray: “As a member of Her Majesty’s forces I arrest you”. (Murray at 692G, 696D).

These issues depended on the meaning of “arrest” as used in s 14. While this is a statutory provision it uses, and thus draws on, the common law meaning of “arrest”. If an imprisonment is not an arrest, the defence provided by 14 is not available. There were arguments that two of the requirements for a legal arrest had not been complied with:

First, there was the requirement, when arresting a person, to notify them that they have been arrested. The plaintiff was not notified that she had been arrested when she was first apprehended at 7.00 am; she was told of her arrest later at 7.30 am. The plaintiff argued that she should have been told “that she was under arrest as soon as her identity was established when she opened the door at 7 am” (Murray at 697E). Hence she was “unlawfully imprisoned for half an hour” (at 697E) from 7.00 am to 7.30 am.
Against this the defendant argued that this late notification was justified because two requirements were satisfied:

1. The arrest was made in circumstances which were not “ordinary” (Murray at 699G) but rather they were exceptional.

2. By notifying the plaintiff at 7.30 am that she was arrested, they were notifying her within “reasonable time” (Murray at 699G, citing Christie v Leachinsky [1947] AC 573).

Second, there was the requirement, when arresting a person, to notify them of the reasons for their arrest. The judgment is not clear on whether the plaintiff raised this point or whether the court discussed it of its own initiative.

For an arrest under s 14(1) this requirement can be satisfied either by observing the common law requirements or by complying with s 14(2). To understand the issue look again at the salient facts. The plaintiff, Murray, was apprehended at her house at 7.00 am. At 7.30 am after Murray had dressed and come downstairs, Corporal Davies said to Murray: “As a member of Her Majesty’s forces I arrest you” (Murray at 692G, 696D).

We will take these requirements for arrest one at time. Before doing this it is necessary to point out that this part of the judgment is unclear. One of the major reasons for this is that the two questions, notification of arrest and reasons for arrest, are discussed together (for a major illustration, see Murray at 699F-700A). Another is that this question gets confused with the question as to whether the plaintiff’s knowledge that they are imprisoned is a requirement of false imprisonment (Murray at 698G-699A).

**Ambiguity**

*Notification of Arrest*

In this case the ambiguity involved two words of degree:

1. One was “exceptional” as distinct from “ordinary” – the defendant argued that the arrest of the plaintiff took place in exceptional circumstances while the plaintiff alleged that they were ordinary.

2. The other was “reasonable” with the plaintiff and defendant disagreeing whether notification of arrest at 7.30 am was within reasonable time given that the arrest took place at 7.00 am.

*Notification of Reasons for Arrest*

There was no ambiguity here. Why this is the case will become apparent when we look at the reasoning.

**Reasoning: Notification of Arrest**

There were two questions here – were the circumstances exceptional, and was the time reasonable. Because both of these terms are concepts of degree the reasoning is not sharp.

**Exceptional Circumstances**

According to Lord Griffiths the circumstances were exceptional. The soldiers were faced with the “difficult and potentially dangerous task of carrying out a house
arrest of a person suspected of an offence in connection with the IRA” (Murray at 700G-H). So much is this the case that there was a special “drill [for] the Army [to] follow” (at 700A) to ensure “that the arrest should be peaceable” (at 700C) in order to protect both the arresters and the “occupants of the house” against harm (at 700F).

**Reasonable Time**

If the circumstances were exceptional, was the delay from 7.00 am to 7.30 am (in telling the plaintiff that she was arrested) unreasonable? Lord Griffiths held that it was not. Given these exceptional circumstances, it was “reasonable to speak the words of arrest” as the plaintiff and the soldiers were about to leave her house at 7.30 am (Murray at 701A, and see also at 700F-G).

**Reasoning: Notification of Reasons for Arrest**

To start with the salient facts, the plaintiff, Murray, was apprehended at her house at 7.00 am. At 7.30 am after Murray had dressed and come downstairs, Corporal Davies said to Murray: “As a member of Her Majesty’s forces I arrest you”. (Murray at 692G, 696D).

On the face of it, Corporal Davies did not comply with the common law requirement. This failure, however, is justified by s 14(2) of the Northern Ireland (Emergency Provisions) Act 1978 which modifies this common law requirement for the purposes of arrest under s 14. Section 14(2) provides that a person effecting an arrest under s 14 complies with any rule of law requiring him to state the ground of arrest if he states that he is effecting the arrest as a member of Her Majesty’s forces. Hence, by these statutory means, this requirement for the arrest to be legal was satisfied (Murray at 699H).

**Decision: Notification of Arrest**

Both of the questions were decided in favour of the defendant. First, Lord Griffiths held that the circumstances of the arrest were exceptional (Murray at 700A-H). Second, the delay from 7.00 am to 7.30 am (in telling the plaintiff that she was arrested) was not unreasonable (at 701A, and see also at 700F-G).

**Decision: Notification of Reasons for Arrest**

This question was decided in favour of the defendant. There was no failure to give details of the reasons for the arrest. It was true that Corporal Davies merely said to the plaintiff: “As a member of Her Majesty’s forces I arrest you” (Murray at 692G, 696D). However, this satisfied the requirement to tell the plaintiff the reasons for her arrest because of a provision in s 14(2) of the Northern Ireland (Emergency Provisions) Act 1978. This modifies this common law requirement for the purposes of an arrest under s 14. Hence the requirement to notify the suspect of the reasons for their arrest was satisfied (Murray at 699H).

**Issue 3. Legality of Detention**

**Issue**

This point concerned the power of the defendant under s 14(1) of the Northern Ireland (Emergency Provisions) Act 1978 to “detain” the plaintiff and to detain them
for a period of “not more than four hours”. This authorised the defendant to do two things:

1. To detain a suspect.
2. To determine the length of the period of detention up to a maximum length of four hours.

These decisions had to be made on proper grounds, ie according to the principles of administrative law which regulate the exercise of discretionary powers (Murray at 703E-F).

It was clear that there was power to detain Murray, given that the court decided that she has been properly arrested under s 14. What was the issue was the purpose of the detention which inevitably determined the period of the detention. To start, the court explicitly accepted that the purpose of the power of detention was to exercise the power to question the suspect “to confirm or allay the suspicion on which he was arrested” (Murray at 703B-C). Hence the “period of detention” should “not exceed” the time “that was reasonably required to make a decision whether to release the suspect or to hand her over to the police”.

There were, however, two issues that both involved the purpose of the power to detain the suspect for questioning:

1. Whether s 14 implicitly provided that the power to question a detained person could be exercised only by the person who arrested them.
2. Whether s 14 implicitly limited the power to put questions to a detained suspect to a power to ask only reasonable questions. Questions had to be relevant and proper to justify detention.

Ambiguity

Identity of Questioner

One part of the plaintiff’s argument was that s 14 contained an implicit requirement that the only person who could question the detained person was the person who had arrested them. Hence the ambiguity was whether there was such an implied limitation on s 14.

Asking Improper Questions

Here the issue was whether the plaintiff was properly detained if given that, as she alleged, she had been asked unreasonable questions. Hence the ambiguity was two fold. (1) Is the need to ask unreasonable questions a ground for exercising the discretion to detain the plaintiff? (2) If so, what is the definition of “unreasonable”?

Reasons

Identity of Questioner

Reasons put for and against the contention by the plaintiff that s 14 contained an implied limitation were not stated in the judgment. There is, however, an obvious argument based on the wording of s 14 (and I suspect that this was the basis of the plaintiff’s argument).

Section 14 confers power on a “member of Her Majesty’s forces on duty”. They are authorised to “arrest [a suspect] without warrant, and detain [them] for
not more than four hours”. In addition, common law confers a power on officials to question a suspect. Now the court accepted that a purpose (perhaps the main purpose or even the sole purpose) of the arrest and detention was to exercise this power of questioning. Thus there are three powers here – to arrest, to detain and to question a suspect. If read literally, 14 confers the power to arrest on a person who is a “member of Her Majesty’s forces”. It confers the power to detain on this same person. Since the power to detain is for the purpose of exercising the power to ask questions, then the power to ask questions should also be exercised by the person who has power to detain, namely, the “member of Her Majesty’s forces” who arrested the suspect.

This argument is reinforced by another part of the wording of s 14. It conferred a power of arrest on a member of Her Majesty’s forces who “suspects” a person of past, current or future criminal activity. Hence the arresting member is the most appropriate person to question the suspect.

There were two arguments against this, which the court accepted. While s 14 conferred a power of arrest on a member of Her Majesty’s forces who “suspects” a person of past, current or future criminal activity, the member who actually made the arrest could found their suspicions merely on information received from other persons. Consequently, they were not the most appropriate person to question the suspect. Indeed, this was exactly the position of Corporal Davies (Murray at 703C-D).

Furthermore, questioning by a “skilled interrogator”, as was the case here, had a major advantage (Murray at 703D). It was far more likely to get to the truth of the matter.

**Asking Improper Questions**

There were two questions to consider here:

1. Is the need to ask unreasonable questions a ground for exercising the discretion to detain the plaintiff? There is no reasoning reported on the question, although, at least for the sake of the case, Lord Griffiths accepted that the discretion could not be exercised on the basis of the need to ask the plaintiff unreasonable questions. We comment that the truth of this is self evident. This, however, raises a question as to how one determines when a question is unreasonable.

2. What is the definition of unreasonable? One argument is that a reasonable question would be a question which was “obviously directed towards the offence of which the plaintiff was suspected” (Murray at 703H). Another argument is that the notion of a reasonable question is wider than this. A reasonable question may be indirect, because it “would be to ignore all experience of interview technique to limit questioning a suspect to two or three questions directly related to the suspected offence” (Murray at 704A). An example would be questions, which “although routine, may in fact tend to dispel or establish suspicion” (Murray at 704A).

**Decision**

Lord Griffiths was satisfied “that there [was] no substance in this final ground of complaint” (Murray at 704C-D).
Identity of Questioner

One part of the plaintiff’s argument was that s 14 contained an implied qualification that the only person who could question the detained person was the person who had arrested them. Lord Griffiths held that there was no such limitation on the operation of s 14. He said: “I can see nothing in the wording of the section which forbids anyone save the arrester to ask any questions of the suspect whilst they are in custody” (Murray at 703C. Reasons for this are give at 703C-E).

Asking Improper Questions

In considering the issue as to whether the plaintiff was unduly detained by being asked unreasonable questions Lord Griffiths did the following.

First, implicitly he accepted, at least for the purposes of the case, that a person could not be detained for the purpose of asking unreasonable questions. Instead the proper purpose of detention was to make a decision “whether to release the suspect or to hand her over to the police” (Murray at 703E-F).

Second, adopting the reasoning above, His Lordship found on the facts that the questions were not unreasonable, indorsing as he did so two prior findings of fact:

(1) The Court of Appeal said that it was in no doubt that “the interviewer did attempt to pursue the subject of the suspicion which had been the occasion of [the plaintiff’s] arrest but was unable to make any headway” (Murray at 704B-C).

(2) The trial judge “expressed himself as satisfied that the plaintiff ‘was not asked unnecessary or unreasonable questions’” (Murray at 704B).

Overall Decision

Lord Griffiths found that none of these grounds of appeal was made out. Consequently, he dismissed the appeal (Murray at 704D). The other four Law Lords, Lord Keith of Kinkel (at 694G), Lord Templeman (at 694H), Lord Oliver of Aylmerton (at 704D) and Lord Jauncey of Tullichettle (at 704E), delivered short judgments which simply expressed agreement with Lord Griffiths.
HALLIDAY v NEVILL

Introduction

Halliday v Nevill (1984) 155 CLR 1 (“Halliday”) is a decision of the High Court of Australia. There was a joint majority judgment by four of the justices, Gibbs CJ, Mason, Wilson and Deane JJ. There was a separate minority and dissenting judgment by Brennan J.

Facts

The facts occurred in Melbourne in the State of Victoria. In January 1982 Halliday, who was a disqualified driver, drove a car out of the driveway of 375 Liberty Parade (an inappropriately named street given that the majority judgment paraded very little attachment to liberty). These premises belonged to someone who was known to Halliday. Halliday was seen by Constables Nevill and Brida. They approached. Halliday thereupon drove the car back into the driveway. The constables walked down the open driveway and arrested Halliday who was standing in the driveway beside the car. When Halliday was being escorted down the driveway he broke away from them, ran across Liberty Parade and entered his mother’s house, where he lived, at 370 Liberty Parade. He was pursued there by the constables, they caught him, there was a scuffle and he was finally overcome.

Proceedings

Halliday was charged with several offences:

(1) There was one charge of escaping from legal custody. This related to Halliday breaking free from the police in the driveway of 375 Liberty Parade.
(2) There were two charges of obstructing police in the execution of their duty. These related to what happened at 370 Liberty Parade.
(3) There were two charges of assault of the police. These also related to what happened at 370 Liberty Parade.

Halliday was acquitted by the stipendiary magistrate who heard the charges “on the ground that the arrest in the driveway of No 375 was unlawful because the arresting officers were trespassers at the time of the arrest” (Halliday at 2). The case then went to the Supreme Court where the prosecution sought review on a question of law under s 88 of the Magistrate’s Courts Act 1971 (Vic). Brooking J granted the review (Nevill v Halliday [1983] 2 VR 553). Halliday then appealed to the High Court “by special leave” (Halliday at 2).

Applicable Law

Halliday’s defence to the charges was founded on an allegation that the officers who arrested Halliday were trespassing by entering the driveway of 375 Liberty Parade...
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Parade. The significance of this is explained below, but the immediate point is that
the case concerns the tort of trespass to land.

Trespass to land has the following elements:

(1) There is a piece of land.
(2) The land is in the possession of the plaintiff.
(3) The defendant interferes with the land by entering it, damaging it, or
remaining on it once he has been asked to leave by the occupier.
(4) There is no permission. Permission is alternatively described as “leave” or
“licence” (Robson v Hallett [1967] 2 QB 939 at 954 per Diplock LJ, cited in
Halliday at 11). Permission may be expressed or implied. Permission can be
given by the person in actual possession of the land (Halliday at 11, citing
Mount Bischoff Tin Mining Co R v Mount Bischoff Extended Tin Mining Co NL
(1913) 15 CLR 549 at 562), or by a person who is entitled to possession (Robson
v Hallett at 954 per Diplock LJ, cited in Halliday at 11).
(5) There is no justification at common law.
(6) There is no authority conferred by statute or common law. Authority under
statute may be expressed or implied. This authority confers on the person an
“independent right to proceed on the land” (Robson v Hallett at 954 per Diplock LJ, cited in Halliday at 11). By this is meant that it is independent of
the rights of the occupier in relation to the land. Therefore the occupier has
no power to revoke this authority, in contrast to permission which they can
revoke. This case did not raise the question of common law or statutory
authority. Nevertheless, Brennan J discussed both statutory and common law
authority. This discussion is summarised in the Appendix to this analysis of
the judgment.

Issues

Outline

Halliday was appealing against his conviction on the charges. The issue in broad
terms was whether the police officers were trespassing when they arrested
Halliday, because if they were trespassing, a vital element of the charges was
missing. To understand how this is the case it is necessary to consider a principle
that underlies executive powers - they can be used only legally and not illegally.
Hence in this case Halliday argued that the police were “acting unlawfully”
(Halliday at 3 per Merkel QC in argument, citing Morris v Beardmore [1981] AC 446
at 458; Mackay v Abrahams [1916] VLR 681, Davis v Lisle [1936] 2 KB 434; Halliday at
10) because they were trespassing when they entered the drive at 375 Liberty
Parade.

This had consequences for all of the charges against Halliday. If he could
show that the officers who made the arrest were trespassing, then all of the
charges against him would collapse. This is the reasoning:

(1) Obstructing police in the execution of their duty. Police are not acting in
the execution of their duty when they are trespassing, at least when the trespass
is “more than trivial” (Halliday at 10, 11 per Brennan J, citing Morris v
Beardmore at 458-459, Davis v Lisle, McArdle v Wallace (1964) 108 Sol J 483, DJ
Lanham “Arrest, Detention and Compulsion” The Criminal Law Review
(1974) p 288), because the police officer “is acting unlawfully” (Halliday at 3 per Merkel QC in argument, citing Morris v Beardmore at 458, Mackay v Abrahams, Davis v Lisle; Halliday at 10). He is, therefore, acting “outside the course of his duty” (Halliday at 10 per Brennan J, citing Great Central Railway Co v Bates [1921] 3 KB 578 at 581-582). Therefore, Halliday would not be obstructing police in the execution of their duty if they were trespassing.

(2) Assault. If “a purported arrest is made in circumstances where the power is not intended to be exercised, the arrest is invalid”, even though the arrest itself falls within and is otherwise justified by a common law or statutory power (Halliday at 18). Powers are not intended to be exercised by illegal means. Consequently, an arrest made by a police officer who is trespassing is both ineffectual and illegal. (In the words of Brennan J in Halliday at 18: “The arrest is not struck with invalidity because the person arrested is not liable to arrest under ss 458 and 459 [of the Crimes Act 1958 (Vic)] but because the power conferred by those sections can be exercised only if it is otherwise lawful to act in execution of the power. If a police officer could validly arrest by entering a place which he has no power to enter and which he is given no permission to enter, the statutory limitation on the power of entry would be nugatory and the protection of individual privacy which Parliament intended would be denied in practice.) Since there is no lawful arrest, there is no lawful custody and the attempted arrest constitutes an assault and false imprisonment. Hence the person seized in the “arrest” may use reasonable and lawful force to resist the illegal arrest. Halliday argued, therefore, that he would not be guilty of assault because he was resisting an illegal trespass to his person (assault and false imprisonment) and used only reasonable force to resist the illegal arrest.

(3) Escape from lawful custody. Since the arrest was illegal, there would not be any lawful custody from which to escape.

Thus, the whole case against Halliday depended on whether the police officers had trespassed. Let us, therefore, consider the facts as they relate to trespass. Clearly the officers had satisfied the positive requirements of trespass. They had entered land in the possession of another person. Hence the question as to whether they were trespassing in this case came down to whether they could rely on any of the defences – common law justification, common law authority, statutory authority and permission. We will consider these in turn.

Common Law Justification
At common law an entry onto which would otherwise be a trespass may be justified in various circumstances. There was, however, no common law justification on which the police could rely in this case.

Common Law Authority
Common law authority to enter the premises is a defence to trespass. This is discussed in the Appendix.

Statutory Authority
There may be statutory authority to enter premises to do something, eg as is pertinent here, to make an arrest. Statutory authority may be expressly conferred
by the statute, or it may be conferred by implication. This is discussed in the Appendix.

**Permission**

There is no trespass if the defendant enters land with the permission of the owner. Permission is alternatively described as a “leave” or a “licence” (Robson v Hallett [1967] 2 QB 939 at 954 per Diplock LJ, cited in Halliday at 11; Halliday at 6-7). Permission is of two kinds – expressed or implied.

**Express Permission**

Permission may be expressed. A person does not trespass if they enter land with the expressed permission of the owner. There was, however, no express permission given here.

**Implied Permission**

Permission may be implied, or “tacit” (Halliday at 7) as it is alternatively described. There are two versions of implied permission, a narrow view and a wide view. Indeed, this was the issue in the case – whether the wide or narrow view was correct. It was also, therefore, the basis of the disagreement between the majority of four justices and the minority of Brennan J. For this reason we will treat the wide and narrow views separately.

Since there is a narrow view and a wide view of the extent of the implied power of a person to enter land, in a practical sense there are three possible versions of the scope of implied permission to enter premises:

1. **Persons**
   - The narrow version.
2. **Scope**
   - The wide version.
3. A version that is different to both of these. This was not argued in the case so we will not dwell on it any further.

**Narrow Version**

On this version the power of entry based on implied permission has several elements. First, there are the persons on whom it is conferred. Second, there is its scope, ie the things which it allows a person to do. Third, there is a qualification on the right. It must involve neither interference to the occupier’s possession nor injury to the occupier, his or her guests or his, her or their property. Fourth, the power must not have been precluded or revoked. Fifth, the test for whether implied permission has been conferred is objective not subjective.

1. **Persons**
   - This licence to enter premises is conferred on “any member of the public” (Halliday at 7). Thus, it extends to “a variety of persons” (at 8 by the majority; Brennan J expresses similar sentiments at 19), including a “police officer” (at 8 by the majority; Brennan J expresses similar sentiments at 19). It does not, however, confer any special rights on police officers over and above those which are conferred on a citizen.

2. **Scope**
   - This implied licence allows the person to do either of two sets of things.
     - The first has several parts. It allows the entrant to do the following:
(1) To “come through the gate” (Robinson v Hallett [1967] 2 QB 939 at 951 per Lord Parker CJ, cited in Halliday by Brennan J at 19).

(2) To go upon “the means of access” (Halliday at 7, and see also at 8) to the house, ie the “path, driveway or both” (at 7, and see also at 8) leading to “the entrance of the dwelling” (at 7, and see also at 8). Thus, where there is an implied licence, “the path or driveway is “held out by the occupier as the bridge between the public thoroughfare and his or her private dwelling’ (at 7).

(3) To go “up the steps” (Robinson v Hallett at 951 per Lord Parker CJ, cited in Halliday at 19 by Brennan J).

(4) To “knock on the door of the house” (Robinson v Hallett at 951 per Lord Parker CJ, cited in Halliday by Brennan J at 19), ie the “entrance” (Halliday at 7, 8). This door should be the “front or nearest door” (Brunner v Williams (1975) 73 LGR 266 at 272, cited in Halliday at 19).

(5) To do either of two things:
   (a) Communicate with the occupier (Halliday at 7) in order to “ask whether he may be given permission for whatever he wishes to do” (Brunner v Williams at 272 per Lord Widgery CJ, cited in Halliday at 19 by Brennan J), or make “lawful communication with “any person in the house” (Halliday at 7).
   (b) Make a “delivery to any person in the house” (Halliday at 7).

(6) To do these things only if they involve “genuine” (Brunner v Williams at 272, cited in Halliday at 19 by Brennan J) and “legitimate” (Halliday at 7-8 and at 19, citing Robinson v Hallett at 951, per Lord Parker CJ) business.

The second also has several parts. It allows the entrant to do the following:

(1) To “come through the gate” (Robinson v Hallett at 951 per Lord Parker CJ, cited in Halliday by Brennan J at 19).

(2) To go upon parts of the land. These are not specified, but are not confined to going on “the open driveway or path” (Halliday at 7), or going to “the entrance of the house” (at 7).

(3) To do these things for a justifiable purpose. This is not defined but from the examples it has the tenor of some emergency or necessity. Examples referred to in the judgment are where a defendant enters the plaintiff’s land in one of the following circumstances:
   (a) Without wanting to do so, ie “unintentionally” (Halliday at 7, citing Robson v Hallett at 950 per Lord Parker CJ).
   (b) To avoid an obstruction such as a vehicle parked across the footpath” (Halliday at 7, citing Robson v Hallett at 950 per Lord Parker CJ).
   (c) To “recover some item of his or her property which has fallen or blown upon it” (Halliday at 7, citing Robson v Hallett at 950 per Lord Parker CJ).
   (d) To “lead away an errant child” (Halliday at 7, citing Robson v Hallett at 950 per Lord Parker CJ).

3. Qualification

There is a qualification on the implied licence. The business or purpose of the entrant must involve “genuine” (Brunner v Williams (1975) 73 LGR 266 at 272, cited in Halliday at 19 by Brennan J) and “legitimate” (Halliday at 7-8, and at 19, citing Robinson v Hallett [1967] 2 QB 939 at 951 per Lord Parker CJ) business. In
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particular, it must not “in itself” involve “interference with the occupier’s possession nor injury to the occupier; his or her guests; or his, her or their property” (Halliday at 7-8).

4. Licence Not Precluded or Revoked

A licence, whether expressed or implied, is derived from the occupier. Hence they can revoke it (Halliday at 7, 11) or preclude it (at 7, 8, 11) by taking “appropriate steps” (at 8). Consequently, as is obvious, there is no implied permission once it has been precluded or revoked (Halliday at 7, Edwards v Railway Executive [1952] AC 737 at 74). Let us consider these in turn:

(1) An occupier can preclude a licence by “by express or implied refusal” (Halliday at 7). This distinction between express and implied is illustrated by the following examples, while conceding that it may not always be strict:

(a) An example of express refusal is a “notice or other indication that entry by visitors generally, or particularly designated visitors, is forbidden or unauthorised” (Halliday at 7). In an example given by Brennan J, a prominent notice says simply: “Keep Out” (at 19).

(b) An example of implied refusal is where access onto the land is blocked or sufficiently impeded. One example is obstructing the “path or driveway” leading to the entrance of a dwelling (Halliday at 7). Another example is locking the “entrance gate” (at 7).

(2) Once an occupier has given permission they can revoke or withdraw it “at any time” (Halliday at 7, 11). In principle any sufficiently clear expression of an intention to revoke the licence, and communication of this intention to the entrant, should be sufficient. To illustrate, in some cases (Snook v Mannion [1982] RTR 321, Gilham v Breidenbach [1982] RTR 328, cited in Halliday at 19) “injunctions to depart” given to police were not sufficient, because they were both “vulgar and vigorous” and thus construed “as mere abuse falling short of an express withdrawal of a licence to be on premises” (Halliday at 19). If permission is revoked where the person is already on the property and the person still remains there, they are a trespasser (Halliday at 7, 10, 11).

5. Objective Test

In determining whether an occupier has given a licence, or whether an occupier has precluded or revoked a licence, it is not relevant that the occupier “subjectively” had “not intended to give it” (Halliday at 7, citing Robson v Hallett [1967] 2 QB 939 at 950-952, 953-954; Lipman v Clendinnen (1932) 46 CLR 550 at 556-557; Lambert v Roberts (1980) 72 Cr App R 223 at 230). It is, therefore a matter of inference, and the point is that the inference is generally made when the stipulated conditions (described above) apply. Thus, the test is objective.

Comment

Before leaving this discussion of the narrow view of implied permission there is something useful to note. In describing the wider version of permission the court did not go into anything like the detail that there is here for the narrow version. Therefore, some of the components of the narrow version, which are not inextricably part of defining its scope in a narrow way, could apply to the wider view as well.

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According to the wider view of implied permission, a police officer had “had an implied or tacit licence” from the occupier (Halliday at 8) to enter land under the following conditions:

(1) The police officer was acting “in the ordinary course of his duty” (at 8).

(2) They came only onto an “open driveway” (at 8).

(3) They came “for the purpose of questioning or arresting a person whom [they] had observed committing an offence on a public street in the immediate vicinity of that driveway” (at 8). (In other words, it is the right of hot pursuit.)

(4) This person could be either “a trespasser or a lawful visitor” upon the land (at 8).

This licence can be precluded (or revoked one also presumes) by the occupier “taking appropriate steps” (Halliday at 8). Logically, these would be the steps described above to preclude the narrow version of the licence.

Comment

In describing these defences we have distinguished between statutory authority, common law authority and permission. In principle this distinction is firm, but it can start to blur in either of two cases. First, a statute can confer authority expressly as well as impliedly and, second, permission may be expressed as well as implied. In both of these cases the argument for implied authority or permission will take on notions of common sense and public policy. For this reason, an alternative support for these defences could be common law authority, and it is easy to become confused between them. This confusion actually comes out in two places in the case:

(1) In the judgment of the majority when they give examples of authority when speaking of permission (Halliday at 7-8).

(2) In the judgment of Brennan J when he reviews cases which discuss a power of entry to make an arrest (at 18-20).

Another reason for the confusion is procedural. Under s 88 of the *Magistrate’s Courts Act 1971* (Vic), this appeal was confined to arguing any “question of law” which arose, but not a question of fact (Halliday at 18-20). Whether an occupier has given permission for a person to enter their land is, according to the High Court, “essentially a question of fact” (at 6). Now if this was where the matter stayed, there could be no appeal. There is, however, a qualification. There are “circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or revoked” (Halliday at 6, citing Edwards v Railway Executive [1952] AC 737 at 744). These circumstances, where a court finds as a matter of law that a licence has been implicitly conferred, can easily be confused with the situation where there is common law justification to enter the land.
Narrow Version of Permission

Issue
The issue was whether the action of the police in entering the private premises was justified. On the wide view it was; on the narrow view it was not.

Ambiguity
The issue was whether the wide or narrow version of implied permission was a correct view of the law. With the narrow version (and also the wide version) there is scope for further ambiguity, namely, whether the version used in the case is correct. This, however, was not raised so there is no need to pursue it.

Reasons
There is no need to outline reasons here because they can be stated shortly. Arguments justifying the existence of implied permission were based on policy and precedent.

Policy
There was a simple policy reason for implied permission. Authorising entry of premises for good cause is an “incident of living in society” (Halliday at 19).

Precedent
There are cases such as Robson v Hallett [1967] 2 QB 939 at 951 per Lord Parker CJ (cited in Halliday at 19) and Brunner v Williams (1975) 73 LG R 266 at 272 per Lord Widgery CJ (cited in Halliday at 19) supporting an implied permission to enter premises.

Principle
There was also an argument based on principle which justified the narrow version against the wide version. The right to private property should be respected, and therefore should have minimum interference (Halliday at 9).

Decision
Brennan J explicitly indorsed the narrow view of implied permission (Halliday at 19). It seems that the other four judges, constituting the majority, accepted it because they did not attack it in any way. This narrow right of entry was not, however, sufficient to authorise police officers to enter premises to exercise a power of arrest (Halliday at 20).

Wide Version of Permission

Issue
All judges held, explicitly or implicitly, that there was an implied licence or permission in the terms which we have called the narrow view. What is now in issue is whether the licence is wider than this. Does it justify a police officer entering premises to effect an arrest? Does it extend to a member of the police
force who wants to come on to premises to question or arrest a person whom he
has seen committing an offence? (Halliday at 6, 8).

**Ambiguity**
The issue was whether there was implied permission in the wider form. This was
crucial to Halliday’s case. Hence, for the purposes of this case the ambiguity was
whether the scope of implied permission to enter premises was determined by the
wide view or the narrow view. This determined whether or not the police officers
had implied permission from the occupier to enter the premises to make an arrest
- the wide view allowed them to do so and the narrow view did not. Logically
there can be argument about the scope of the wide view but this argument was
not raised here.

**Reasons**
There were potentially three types of arguments involved in support of the wide
view:

1. **Principle.** It is an important part of the general liberty of the subject that
wrongdoers be brought to justice.
2. **Policy.** Considerations of “public policy” (Halliday at 8) which accord with
“common sense” allow the wide version (at 8). Indeed if the law was
otherwise it would be “an ass” (Halliday at 7, citing Robson v Hallett [1967] 2
QB 939 at 950 per Lord Parker CJ).
3. **Precedent.**
   a. There was no precedent cited directly favouring the wide view. In
      reaching their decision, however, the majority referred to some
      precedents which gave general support to the idea of an implied licence,
      without supporting the wide view of it taken by the majority (Robson v
      Hallett at 951, cited in Halliday at 7; Lipman v Clendinnen (1932) 46 CLR
      550 at 556-557, cited in Halliday at 7; Lambert v Roberts (1980) 72 Cr App R
      223 at 230, cited in Halliday at 7).
   b. There were cases against it (Halliday at 18-19). Examples are Great Central
      Railway v Bates [1921] 3 KB 578 at 582 per Atkin LJ (cited in Halliday at
      18), Robson v Hallett at 951 per Lord Parker CJ (cited in Halliday at 19)
      and Brunner v Williams (1975) 73 LG R 266 at 272 per Lord Widgery CJ
      (cited in Halliday at 19).

**Principle**
This case was a conflict of principle, a conflict between a principle in favour of
private property and a principle in favour of protection of liberty by bringing
wrongdoers to justice. Hence the case was defining the limits of these principles.
While the four justices in the majority did not acknowledge the conflict, Brennan J
did. He enunciated it in the opening words of his judgment: “This case is about
privacy in the home, the garden and the yard. It is about the lawfulness of police
entering on private premises without asking for permission. It is a contest
between public authority and the security of private dwellings” (Halliday at 9).
(Brennan J, however, also refers to the principles “that secure the privacy of
individuals in their own homes, gardens and yards” (at 20) as mere “privileges”
(at 20). To do this detracts from the notion that they are inviolable rights.)
While this conflict of principles was otherwise not acknowledged, it underlies various statements of the justices. On the one hand are statements which promote the needs for privacy and the right of private property:

(1) Common law “has long protected the privacy of the home” (Halliday at 11), so that everyone’s house “is as to him as his castle and fortress” (Semayne’s Case (1604) 5 Co Rep 91a at 91b, 77 ER 194 at 195, cited in Halliday at 11). This is part of the “general protection which the common law accords to persons in possession of private property” (Halliday at 17).

(2) Common law principles protecting property “are of ancient origin but of enduring importance” (Halliday at 10). They provide that “every invasion of private property, be it ever so minute” is a trespass (Entick v Carrington (1765) 19 St Tr 1029 at 1066, cited in Halliday at 10. Brennan J points out, at 10 also, that this statement was approved by Lord Scarman in Morris v Beardmore [1981] AC 446 at 464). This principle “applies alike to officers of government and to private persons” (Halliday at 10).

(3) Common law has long valued “the privacy of an Englishman’s dwelling house” (Great Central Railway Co v Bates [1921] 3 KB 578 at 581-582, cited in Halliday at 10), and continues to value and protect “the privacy of individuals in their own homes, gardens and yards” (Halliday at 20).

On the other hand the liberty of all of us is diminished by crime. Hence there are also statements about the problem if police could not arrest a criminal in a person’s driveway:

(1) The occupier’s path or driveway becomes a “haven for minor miscreants” (Halliday at 8).

(2) Offenders could “find an Alsatia in their home or in the homes of their friends” (Halliday at 11).

One way or another the court has to resolve this conflict. It can find for privacy and private property or it can find for “law enforcement” (Halliday at 20 per Brennan J). In fact, the majority favoured law enforcement.

Policy
This implied licence, according to the majority, is justified and reinforced “by considerations of public policy” (Halliday at 8). It accords with “common sense”, (at 8) because if the law were otherwise it would be “an ass” (Halliday at 7, citing Robson v Hallett [1967] 2 QB 939 at 950 per Lord Parker CJ). This is illustrated by the fact that most “reasonable householders” (Halliday at 18) would “not as a rule object” to police entering their land if “the matter was done bona fide and no nuisance was caused” (Great Central Railway Co v Bates [1921] 3 KB 578 at 582 per Atkin LJ, cited in Halliday at 18). Indeed, most of us would regard a police constable coming to our front door for a legitimate purpose as “laudable” (Halliday at 18).

There were also some policy arguments against the wide view:

(1) If it is conceded that police do have power to enter land on police business, there is great difficulty in defining, and thus in confining, the power. If you allow a licence, where does it stop? Does it permit the police to enter to “install a traffic radar device on the driveway” or to “carry out surveillance of neighbouring premises from there”? (Halliday at 20).
(2) There is an argument specific to the situation in Victoria where the legislature had specifically conferred a power on police to enter private land on police business by enacting s 459A of the Crimes Act 1958 in 1981. By doing this the legislature had “carefully defined the rights of the police to enter” (Halliday at 20). Therefore, “it is not for the courts to alter the balance between individual privacy and the power of public officials” (at 20) by “creating” an implied permission for police to enter private premises.

Precedent

There was no precedent cited directly favouring the wide view. In reaching their decision, however, the majority referred to some precedents which gave general support to the idea of an implied licence, without supporting the wide view of it taken by the majority (Robson v Hallett [1967] 2 QB 939 at 951, cited in Halliday at 7; Lipman v Clendinnen (1932) 46 CLR 550 at 556-557, cited in Halliday at 7; Lambert v Roberts (1980) 72 Cr App R 223 at 230, cited in Halliday at 7).

There were cases against it. For example, in Great Central Railway v Bates, for example, Atkin LJ was emphatic that there was no implied licence for a police officer to enter premises, even with the best of intentions ([1921] 3 KB 578 at 582 per Atkin LJ, cited in Halliday at 18). Other cases such as Robson v Hallett at 951 per Lord Parker CJ (cited in Halliday at 19) and Brunner v Williams (1975) 73 LGR 266 at 272 per Lord Widgery CJ (cited in Halliday at 19) also clearly took a similar line (Halliday at 18-19).

Decision

Majority

In their joint judgment, the majority, Gibbs CJ, Mason, Wilson and Deane JJ, held that the police officers were not trespassing because they had the implied permission of the owner or occupier of the house. This was a case where “the King is a party” so that “the public interest in the prosecution of criminals prevailed over private possessory interests in land” (Halliday at 16 per Brennan J). Hence Halliday was guilty of the offences and the appeal was dismissed.

Minority

In his dissenting judgment Brennan J held that there was no such implied permission. Although there was an implied licence to enter land, it was not wide enough to justify the entry by the police officers (Halliday at 20). As His Honour put it, there is “no general licence implied by law permitting police officers on police business to enter on private property” for police business (Halliday at 18, citing Great Central Railway Co v Bates [1921] 3 KB 578 at 582). Nor is there any specific licence which justifies the present case (Halliday at 18-20).

Overall Decision

By a majority of 4-1 the court held that the police officer who arrested Nevill “had an implied licence from the occupier of the premises to be upon the driveway” (Halliday at 6). Consequently, the appeal was dismissed with costs (at 9, 20) and the convictions of the appellant confirmed. Brennan J, in dissent, would have
allowed the appeal, and in consequence “set aside” the “convictions of the appellant” (at 20).

Appendix

This appendix considers the discussion by Brennan J of both common law and statutory authority.

Common Law Authority

There is no trespass if a person enters land with common law authority. Authority to enter land is distinguished from permission by its lack of “revocability” (Halliday at 19-20). Permission can be revoked and the person then either cannot enter the land or, if they are on it, must leave immediately. Authority, by contrast, does not depend on grant from the owner, but on grant from the law as “an independent right to proceed on the land” (Robson v Hallett [1967] 2 QB 939 at 954 per Diplock LJ, cited in Halliday at 11).

Only Brennan J considered the question of common law authority. According to Brennan J, at common law there is authority to enter private land to exercise the common law power of arrest without warrant. His honour described the common law power to arrest in these terms: “[A] constable is entitled to enter on private property to effect an arrest within the limits of his common law power to arrest without warrant, although he would be a trespasser if he entered or remained on the property for any other purpose” (Halliday at 12). We need to consider this further.

Power of Arrest

The common law power of a police constable to arrest without warrant applies in two cases. These depend on the distinction between felonies and misdemeanours, a distinction which has now been abolished in Victoria (Halliday at 13 per Brennan J. His Honour did not say when it was abolished, nor by what means).


Second, there is power to “arrest a person guilty or suspected of misdemeanours”, but only “where an actual breach of the peace by an affray or by personal violence occurs and the offender is arrested while committing the misdemeanour or immediately after its commission” (Halliday at 12 per Brennan J, citing JF Stephen A History of the Criminal Law of England (1883) Vol 1, p 193, Hale’s Pleas of the Crown (1800) Vol 2, p 85). On this basis it was held that “a constable could not lawfully arrest an offender who, having assaulted the constable an hour earlier, retires to his house and closes and fastens his door” (Halliday at 12 per Brennan J, citing R v Marsden (1868) LR 1 CCR 131).

Power of Entry

There is a common law power to enter premises to arrest a suspect (Semayne’s Case (1604) 5 Co Rep 91a at 91b, 77 ER 194 at 195, Burdett v Abbot (1811) 14 East 1 at 162, 104 ER 501 at 563, Harvey v Harvey (1884) 26 Ch D 644, Southam v Smout [1964] 1 QB 308 at 320, cited in Halliday at 12 by Brennan J). A “constable is entitled to enter
on private property to effect an arrest within the limits of his common law power to arrest without warrant, although he would be a trespasser if he entered or remained on the property for any other purpose” (Halliday at 12). This power has several requirements:

1. The power vests in the King. It applies, therefore, as the cases and texts describe it, where “the King is party” (Semayne’s Case (1604) 5 Co Rep 91a at 91b, 77 ER 194 at 195, cited in Halliday at 12 by Brennan J, Halliday at 12). Hence a police officer who is a constable exercises this power by virtue of their office under the Crown. It can be conceived either as a common law power or as a delegated prerogative power.

2. The power can be exercised only in furtherance of the common law power of arrest without warrant. It is a power to enter property “to effect an arrest within the limits of his common law power to arrest without warrant” (Halliday at 12).

3. The power extends to both “private” and “public” property (Halliday at 11). It can be exercised, therefore, in the person’s home, in the home of others (Semayne’s Case (1604) 5 Co Rep 91a at 91b, 77 ER 194 at 198, Foster’s Crown Law, 3rd ed, (1809) p 320, s 21, cited in Halliday at 12 by Brennan J) (eg the home of “friends” (Halliday at 11, 16, citing at 16 Eccles v Bourque (1974) 50 DLR (3d) 753 at 756-757 and in a “church” (Halliday at 11, 16, citing at 16 Eccles v Bourque (1974) 50 DLR (3d) 753 at 756-757).

4. It extends to all persons, eg to a “fugitive” (Halliday at 16 per Brennan J, citing Eccles v Bourque at 756-757) and even to clergy (Chitty’s Criminal Law 2nd ed (1826) Vol 1, p 15, cited in Halliday at 11 by Brennan J).

The power has two aspects:

1. If “the doors” are “open” the person effecting the arrest just enters (Semayne’s Case (1604) 5 Co Rep 91a at 91b, 77 ER 194 at 195, cited in Halliday at 12 by Brennan J).

2. If they “otherwise cannot enter” (Semayne’s Case at 91b, 195, cited in Halliday at 12 by Brennan J) the person effecting the arrest “may break the party’s house” (Semayne’s Case at 91b, 195, cited in Halliday at 12 by Brennan J), ie they may “break down the outer doors” of the house (Halliday at 12), and presumably inner doors also if necessary. Before the person does this, though, he must do two things. He must “signify the cause of his coming” (Semayne’s Case at 91b, 195, cited in Halliday at 12 by Brennan J). He must also “make request to open the doors” (Semayne’s Case at 91b, 195, cited in Halliday at 12 by Brennan J), for which the customary form is the demand: “Open in the name of the King” (Southam v Smout [1964] 1 QB 308 at 320 per Lord Denning MR, cited in Halliday at 12 by Brennan J, where His Honour notes that “the privilege of keeping the outer doors shut against process was confined to execution at the suit of private individuals” but not the King).

**Abolition of Common Law Authority**

Section 457 of the Crimes Act 1958 (Vic) abolished this common law power to enter property and to arrest a person. The common law powers were replaced by provisions in ss 458 and 459 of the Crimes Act 1958.
Relevance
Since the common law authority to enter premises had been abolished it had no direct relevance to the case. It has, however, indirect relevance. In his analysis of implied statutory authority Brennan J argued that this common law power of entry implicitly adhered, for a time, to two statutory provisions which replaced this common law power of arrest.

Statutory Authority

Introduction
There is no trespass by a defendant if the defendant enters land pursuant to statutory authority to do so. Statutory authority to enter land may be expressly conferred by a statute or it may be conferred by implication.

Express Authority
Section 459A of the Crimes Act 1958 confers a statutory power to enter and search premises for the purpose of making an arrest. Section 459A, however, did not apply to the arrest at 375 Liberty Parade (Halliday at 14 per Brennan J). Hence there was no further discussion.

Implied Authority
Section 458(1) of the Crimes Act 1958 confers a statutory power to arrest. It was the power used by the police officers. It contains no express power to enter premises to make the arrest. However, there is the possibility that it confers an implied power to enter. Brennan J was the only judge to consider this.

Ambiguity
For our purposes s 458(1) of the Crimes Act 1958 has two possible interpretations. On one interpretation there is no express power to enter premises to make an arrest and there is also no implied power. According to the other interpretation, while there is no express power to enter premises to make an arrest, there is an implied power.

Reasons
There are arguments for and against the notion that ss 458 and 459 carry with them an implied power to enter premises.

For our purposes s 458(1) of the Crimes Act 1958 has two possible interpretations. On one interpretation there is no express power to enter premises to make an arrest and there is also no implied power. According to the other interpretation, while there is no express power to enter premises to make an arrest, there is an implied power.
specimen breath when required to do so (Halliday at 14, citing Clowser v Chaplin [1981] 1 WLR 837 at 841-842).

There are several arguments in favour of the view that there is an implied power of entry arising from ss 458 and 459. While ss 458 and 459 did not confer an express power to enter on and search private property for the purpose of arresting an offender or suspected offender, there were three reasons to argue that they did so by implication:

1. Sections 458 and 459 were the direct successor to a common law power to arrest which did confer a right of entry. Therefore ss 458 and 459 should be construed as conferring, by implication, a similar right (Halliday at 16-17). The point is that the “powers conferred by ss 458 and 459 were not novel statutory powers” (Halliday 17). Hence, the position would be otherwise if they were novel statutory powers (Morris v Beardmore [1981] AC 446 at 454-455, cited in Halliday at 14, 17; Clowser v Chaplin [1981] 1 WLR 837 at 841-842, cited in Halliday at 14-15; Colet v The Queen (1981) 119 DLR (3d) 521, cited in Halliday at 17).

2. This notion that the common law power to enter stands behind the power of arrest when it is put in statute is supported by cases from several jurisdictions (Eccles v Bourque (1974) 50 DLR (3d) 753 at 756-757, Dinan v Breerton [1960] SASR 101, Kennedy v Pagura [1977] 2 NSWLR 810, McDowell v Newchurch (1981) 9 NTR 15, cited in Halliday at 16).

3. In this case “the King is a party” so that “the public interest in the prosecution of criminals prevails over private possessory interests in land” (Halliday at 16 per Brennan J). For example, if a policeman suspects “there is something wrong” (Great Central Railway Co v Bates [1921] 3 KB 578 at 581-582 per Atkin LJ, cited in Halliday at 10-11) and needs to investigate it, they can do so.

Decision

According to Brennan J, the position with ss 458 and 459 involved two stages:

1. When they were initially enacted in 1972 there was, for the reasons given above, an implied power to enter premises to make an arrest (They were inserted by the Crimes (Powers of Arrest) Act 1972 (Vic), cited in Halliday at 13). This implied common law power was operative from 1972 when ss 458 and 459 were enacted until 1981 when parliament inserted s 459A into the Crimes Act.

2. This implied common law power finished in 1981 when parliament inserted s 459A into the Crimes Act. Section 459A provided statutory authorisation to enter and search premises for the purpose of making an arrest. According to Brennan J, s 459A was “a code of the power of entry and search for the purpose of effecting an arrest under ss 458 or 459” (Halliday at 17. Reasons given to show that it was a code were the existence of a number of provisions which defined the scope of the power and procedures for its exercise in specific terms; see Halliday at 17). As a code it stated the law fully and comprehensively. (It was now similar to the Criminal Law Act 1967 (UK) which was, according to Donaldson LJ in Swales v Cox [1981] 1 QB 849 at 854, cited Halliday at 15, “intending to provide a comprehensive code on the rights of a constable to enter a place” for the purposes of making an arrest. Where parliament has failed to make specific provision for a power to invade liberty,
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According to Lord Keith of Kinkel in Clowser v Chaplin [1981] 1 WLR 837 at 841-842, cited in Halliday at 15, “the omission of [a] specific power is deliberate” because parliament did not intend to confer the power. Therefore, it precluded and abolished the common law powers which up until that time had attached by implication to ss 458 and 459 (Halliday at 17 per Brennan J). This conclusion is bolstered by a common law presumption that, when parliament creates a novel statutory power, “it does not intend thereby to authorise the commission of a trespass to facilitate its exercise” (Halliday at 17 per Brennan J, citing Morris v Beardmore [1981] AC 446, Colet v The Queen (1981) 119 DLR (3d) 521. See also Transport Ministry v Payn [1977] 2 NZLR 50, Allen v Napier City Council [1978] 1 NZLR 273). There are, however, cases where courts have taken another view and construed conferment of a specific statutory power such as a power of arrest, to confer by implication an ancillary power, such as a power to enter premises, in aid of the main power (Eccles v Bourque (1974) 50 DLR (3d) 753, although there are limits to this power stated at 756-757, cited in Halliday at 16; Dinan v Brereton [1960] SASR 101, cited in Halliday at 16; Kennedy v Pagura [1977] 2 NSWLR 810, cited in Halliday at 16; McDowell v Newchurch (1981) 9 NTR 15, cited in Halliday at 16; Snook v Mannion [1982] RTR 321, cited in Halliday at 19; Gilham v Breidenbach [1982] RTR 328, cited in Halliday at 19). Brennan J was not swayed by these cases.

Relevance
Since ss 458 and 459 no longer conferred an implied power to enter land for the purpose of making an arrest they were not relevant to Halliday’s case. Specifically, they could not be relied on by the constables as authority to enter the premises at 375 Liberty Parade.