OBSCENITY AND INDECENCY

Interpretation of the Obscene and Indecent Publications Act 1901-1955 (N.S.W.)

In *Crowe* v. *Graham and Others*[1] the respondent G together with three others (R. D and M) had been convicted by a Stipendiary Magistrate of an offence under section 16(d) of the New South Wales Obscene and Indecent Publications Act 1901-1955 and all four were fined $20 each. From this conviction the four applied for rules nisi for statutory writs of prohibition directed to the magistrate and to the informant calling upon them to show cause why they should not be restrained from enforcing the fines. The rules nisi were granted and on their return before the New South Wales Court of Appeal were made absolute by a majority (Jacobs and Holmes JJ.A., Wallace P. dissenting)[2]. From this decision the informant appealed, by special leave, to the High Court[3] which reversed the decision of the New South Wales court and ordered that the rule nisi be discharged.

The prosecutions arose out of the publication in Sydney of the second issue of each of two magazines—one called *Censor* and the other *Obscenity* Both works purported to lampoon the irrationality of existing Australian censorship procedures by reproducing, in part, extracts from allegedly obscene works whose importation into Australia had been prohibited under the Customs Act. *Censor* No. 2 contained risque jokes, photographs of female nudes and selections from the novel *Fanny Hill*[4]. *Obscenity* No. 2 comprised extracts from the novel *Juliette* by the Marquis de Sade which described a cannabalistic dinner served by naked girls, an article on "The Four Letter Word", a review of various books banned in Australia and selections from the *Kama Sutra* and Boccaccio's *Decameron*. The evidence disclosed that G was the editor, publisher and distributor of *Censor* No. 2 and R was a street vendor who sold and delivered a copy of the publication to a police officer. Similarly D was the editor, publisher and distributor of *Obscenity* No. 2 while M was again a newspaper vendor who sold a copy to a policeman.

The relevant part of section 16 of the New South Wales Obscene and Indecent Publications Act 1901-1955, under which each of the respondents was convicted, states:

> "Whosoever . . . (d) affixes to or inscribes on any house building wall hoarding gate fence pillar board tree or any other thing whatsoever so as to be visible to a person being in or passing along any street public highway or footpath or affixes to or inscribes on any public urinal or delivers or attempts to deliver or exhibits to any person or throws down the area of any house or into the garden or curtilage

1. (1968) 41 A.L.J.R. 402 (Barwick C.J., McTiernan, Kitto, Windeyer and Owen JJ.).
2. (1967) 85 W.N. (Pt. 1) (N.S.W.) 438.
3. (1968) 41 A.L.J.R. 402.
4. There was some evidence that these collections had themselves been censored by the publishers of the magazines: see (1967) 85 W.N. (Pt. 1) (N.S.W.) 438, 454.

> of any house or exhibits to public view in the window of any house or shop or otherwise publishes any indecent or obscene picture or printed or written matter . . . shall be liable . . . to a penalty . . . "

Each respondent was convicted of having published indecent printed matter. Two grounds were argued in the New South Wales Court of Appeal in support of the rule nisi: firstly that there had been no publication of the magazines with the terms of section 16(d) and, secondly, that they were not indecent. The Court of Appeal held that there was no evidence of publication in respect of either of the magazines and that only one—*Obscenity* No. 2—was properly found to contain indecent matter. Thus as the case stood in the High Court the only question for determination in respect of *Obscenity* No. 2 was whether it had been published. In relation to *Censor* No. 2 both publication and indecency were in issue.

The prototype of section 16(d) is to be found in section 3 of the English Indecent Advertisements Act 1899[5] which rendered persons liable for punishment who engaged in any of a variety of proscribed acts with respect to the dissemination of obscene or indecent matter. The English provision was incorporated into the New South Wales legislation in 1900[6] but was modified by the addition of the expression "or otherwise publishes" which appears towards the end of the subsection. This modified version became in the following year section 16(d) of the consolidating Obscene and Indecent Publications Act but, apart from a brief discussion in *Potter* v. *Smith*[7], its meaning had not been the subject of extended judicial consideration until the present case.

In relation to the issue of publication the core problem for the court was whether section 16(d) extended to cover cases in which indecent or obscene matter was disseminated to others in a consensual transaction such as delivery in the course of a sale. The respondents contended that the subsection should be confined in its operation to cases in which indecent matter was thrust upon or exposed to the view of members of the public against their will or at least without their consent and that in each of the cases under appeal the evidence established that the persons to whom delivery was made had agreed to accept the allegedly indecent publication. In its original English setting the precursor of section 16(d) omitted the words "or otherwise publishes" and in that form it was apparent that those who drafted the provision perceived the dissemination of obscenity simply as a public nuisance annoying persons unwillingly subjected to it; the enactment created a number of particular offences having as their common genus the protection of the community from uninvited confrontation by obscene or indecent material. Unfortunately the respondents' argument was undermined by the existence in the subsection of the phrase "or otherwise publishes" for its effect, in the opinion of the High Court, was "not to enlarge an existing genus by adding new things of like kind [but] to demonstrate a different and wider

5. 52 and 53 Vic. c. 18.
6. Indecent Publications Act 1900, s.1(3).
7. (1902) 2 S.R. (N.S.W.) 220.

genus to which the prohibited acts all belong, namely publishing"[8]. Windeyer J. explained:

> "I consider it plain that if section 16(d) be read according to the ordinary rules of grammatical construction the earlier words state particular manners or ways in which obscene and indecent material can be published . . . The ordinary meaning of 'publish' is simply to make public: *Boucicault* v. *Chatterton*[9]. A printed work is published when it is issued to the public. Delivering an indecent picture or print to one person would not necessarily be a publishing of it: but if that person was a member of the public, someone whose only connexion with the accused was that he was the purchaser or recipient of the article from him a publishing of it could be inferred"[10].

Kitto J. also denied that the element of unexpectedness or absence of willingness to receive the publication was meant to be understood as essential to the offence of "otherwise publishing". Instead he formulated a wider test which stated that the subsection would be satisfied whenever a person parted with indecent or obscene matter in circumstances evidencing an intention to cause it to be disseminated to others[11]. Owen J. was likewise unwilling to accept the argument that the subsection was limited to cases in which unsought offensive matter was foisted onto the public and he saw no reason why section 16(d) should not cover a case in which delivery was made with the assent of the recipient whether in the course of a sale or otherwise. He pointed out that an argument similar to that of the respondents had been put to the Full Court in *Potter* v. *Smith*[12] in relation to a comparable section but with equally fruitless results. McTiernan J. delivered no judgment in the case beyond stating that he would allow the appeals and that he agreed in general with the reasons of Wallace J. the dissentient in the hearing before the New South Wales Court of Appeal. However Wallace J., the President of the Court, had also taken the view that section 16(d) need not be read down or restricted so as to be confined to the case of the offender who handed to or thrust upon an unwilling or unsuspecting person indecent material or attempted to do so[13].

Accordingly, the majority of the High Court held that each of the four respondents had "published" the material alleged to be indecent. However, the Chief Justice, Sir Garfield Barwick, dissented as to the convictions of R and M the actual vendors of the magazines. In His Honour's judgment the phrase "otherwise publishes" in section 16(d) should not have been read as encompassing a sale of indecent matter and similarly, the word "delivery" in section 16(d) should not have been interpreted to include a delivery in pursuance or as part of a sale of such matter. But the Chief Justice made it clear that although he would exclude sales of indecent matter from the

8. (1968) 41 A.L.J.R. 402, 407.
9. (1876) 5 Ch.D. 267, 281.
10. (1968) 41 A.L.J.R. 402, 407.
11. *Id.*, at 406.
12. (1902) 2 S.R. (N.S.W.) 220, 222.
13. (1967) 85 W.N. (Pt. 1) (N.S.W.) 438, 442.

purview of section 16(d) he would not be willing to extend the limitation to all cases in which indecent publications were voluntarily received by another:

> " . . . I would not be prepared to exclude from the operation of so much of section 16(d) as refers to delivery or attempted delivery of indecent matter as a consensual delivery, in the sense that the recipient either sought or willingly accepted the delivery. There is probably a wide field of acts which in their circumstances would satisfy so much of the subsection. It is sufficient for present purposes that delivery as part of or upon sale, in my opinion, would not"[14].

While critics of existing legal controls on obscenity and indecency will applaud any judicial interpretation of the legislation which returns to the view that the dissemination of obscene and indecent publications is no more than a public nuisance and that therefore consensual dealings in such publications should not be the subject of legislative prohibitions, it must be submitted, with respect, that the Chief Justice's attempt to exclude sales from section 16(d) was ill-founded and properly rejected by his brethren. Both the Chief Justice and the judges who were in the majority in the New South Wales Court of Appeal took as their ground the fact that although it was expressly declared to be an offence under para. (a) of section 16[15] to sell or have in one's possession apparently for the purpose of sale an obscene publication, the sale or possession for sale of indecent publications was not expressly made an offence under para. (d). Jacobs and Holmes JJ.A. observed:

> "If the legislature had so intended it could have simply added the words 'or indecent' in para. (a) of section 16. This it has not done and we are asked to infer that it intended to achieve the same result by the use of the words 'delivers' and 'publishes' in para. (d). We do not think that the legislature intended to do so indirectly something which so easily could have been done directly in the section"[16].

But, whatever force there might have been in his reasoning if section 16 had been drafted originally as a whole, it is rendered nugatory when account is taken of the multiplicity of sources of section 16, and, in particular, the late arrival of para. (d). Para. (a) was derived from section 2 of the Obscene Publications Prevention Act 1880 (N.S.W.) which was primarily concerned with the suppression of the trade in obscene books and articles by providing for their seizure and destruction. The word "indecent" did not appear in the Act at all. Para. (d) was derived from section 1(3) of the Indecent Publications Act 1900 (N.S.W.) and there is no evidence that this later Act was intended merely to build upon the earlier legislation or to provide only for

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14. (1968) 41 A.L.J.R 402, 405.
15. S.16 reads "Whosoever—
    (a) prints photographs lithographs draws makes sells or has in his possession apparently for the purpose of sale publishes distributes or exhibits any obscene publication or assists in so doing . . .
    shall be liable . . . to a penalty . . ."
16. (1967) 85 W.N. (Pt. 1) (N.S.W.) 438, 448. See also *per* Barwick C.J. (1968) 41 A.L.J.R. 402 at 405.

cases not previously covered. According to the Commissioner for the Consolidation of the Statute Law, the 1900 Act dealt with the same subject matter but "in different language and entirely different manner"[17]. It is therefore a mistake to infer that because, in 1901, the two different provisions were carried into the one consolidating Act, they were meant to be mutually exclusive. Each part of section 16 should be read as it stands, as a self-contained provision, and section 16(d) should not be confined by a comparison of it with section 16(a)[18].

The conflict of opinion both as to the purpose of para. (d) and the interpretation of section 16 as a whole highlights the lack in Australia of carefully considered legislative policies in relation to the control of offensive publications. *Crowe* v. *Graham* illustrates that the *ad hoc* amalgamation of various pieces of anti-obscenity legislation, each often seeking to achieve different purposes, may create a mosaic of statutory prohibitions which are quite arbitrary and unpredictable in their operation and which reveal no unified pattern or rationale.

Of far greater significance in *Crowe* v. *Graham* was the court's discussion of the nature of obscenity and indecency. Although it has been held that the word "indecent" is not a legal term of art[19], the judges have explained that in its popular or ordinary use it refers to conduct offending against recognized standards of proprietary and delicacy and has a wider import than the term "obscene"[20].

In the Court of Appeal the majority (Jacobs and Holmes JJ.A.) referred approvingly to the distinction between obscenity and indecency drawn by Lord Sands in the Scottish case of *M'Gowan* v. *Langmuir*[21]:

> "I do not think that the two words 'indecent' and 'obscene' are synonymous. The one may shade into the other, but there is a difference of meaning . . . The matter might perhaps be roughly expressed thus in the ascending scale: positive—immodest; comparative—indecent; superlative—obscene"[22].

This passage had also been approved by the Court of Criminal Appeal in *R.* v. *Stanley*[23] when Lord Parker accepted this hierarchy of epithets, at the same time pointing out that it followed logically that while an indecent article was not necessarily obscene, an obscene article must always be indecent. Jacobs and Holmes JJ.A. proceeded to add the comment that "in the concept of indecency there is lacking that element of lasciviousness and prurience which seems to us to be an essential element of the concept of

17. (1967) 85 W.N. (Pt. 1) (N.S.W.) 438 445.
18. (1968) 41 A.L.J.R. 402 at 406 *per* Kitto J., *per* Windeyer J. and 413 *per* Owen J.
19. *Purves* v. *Inglis* (1915) 34 N.Z.L.R. 1051, 1053; *R.* v. *Towe* [1953] V.L.R. 381, 382.
20. *Norley* v. *Malthouse* [1924] S.A.S.R. 268, 269-270.
21. [1931] S.C. (J.) 10.
22. *Id.*, at 13.
23. [1965] 2 Q.B. 327, 333.

obscenity"[24]. However, in the High Court, Windeyer J., in a relatively lengthy judgment, pointed out that under the Obscene and Indecent Publications Act the phrase "obscene and indecent" did not denote different things except insofar as by statutory definition the common law understanding of the terms had been extended and this was not of significance in the present case. Thus a charge of publishing matter which was "indecent or obscene" would not be bad for duplicity. Morever a court in convicting an offender under section 16(d) would be free to describe a particular publication as either indecent or, if it chose to condemn it more vigorously, as obscene[25]. Since in two States of Australia the operative word in what is obviously anti-obscenity legislation is indecent, and the legislation of most other States use the terms indecent and obscene interchangably it is submitted that His Honour is entirely correct in treating these two words as describing the one offence.

The magistrate had held that the word indecent described that which would offend the ordinary modesty of the average man, and this definition was accepted by the majority in the New South Wales Court of Appeal subject to the proviso that the modesty referred to was sexual modesty[26]. In the High Court, this formulation was accepted by Barwick C.J.[27] and Kitto J.[28] but Windeyer and Owen JJ.[29] refused to express an opinion on the limitation as to sexual matters, each saying that it was not necessary to decide the point since the publications complained of did in fact relate to matters of sex. In the result, however, all judges were in agreement that *Censor* No. 2 was an indecent publication and that the prosecutor's appeal should be allowed. Judges have usually been in the forefront of those who bewail the fact that the concepts of indecency and obscenity are ambulatory so that the subject matter condemned as obscene or indecent varies not only from society to society but within a given society from time to time. But with the development of the separate crimes of blasphemous and seditious libel to deal with offensiveness in the religious and political spheres of life, it would be fair to say that for the last hundred years the common law offence of publishing an obscene libel and its numerous statutory outgrowths has been regarded, both in legal and popular judgments, as being confined to sexual and scatalogical matters. Sado-masochistic writings would still fall within the categories of obscene or indecent since the incidents of flagellation and torture described are inevitably found in an erotic context. For instance the whipping or cruelty takes place during, or as a preliminary, to sexual activity[30]. It is therefore unfortunate that Windeyer and Owen JJ. felt themselves unable to join their brother judges in bestowing the High Court imprimatur on this limitation. If the concepts of obscenity and indecency are not so confined, the results are

24. (1967) 85 W.N. (Pt. 1) (N.S.W.) 438, 449.
25. (1968) 41 A.L.J.R. 402, 408.
26. (1967) 85 W.N. (Pt. 1) (N.S.W.) 438, 451.
27. (1968) 41 A.L.J.R. 402 at 403.
28. *Id.*, at 407.
29. *Id.*, at 410 and 414 respectively.
30. See for instance the description of the sado-masochistic publication in *Burke* v. *Kingsley Books* (1955) 142 N.Y.S. 2d 735 at 742-743.

likely to be unpredictable in the extreme as witnessed by the decision in *John Calder (Publications) Ltd.* v. *Powell*[31] in which a book advocating drug addiction was declared to be obscene.

In delivering his judgment, Barwick C.J. emphasised the importance of considering the circumstances of dissemination in determining the indecency or otherwise of the publication in question:

> "In resolving such a question the manner and occasion of placing the matter before others as well as the significance of the matter itself must be considered and might in some circumstances be critical in resolving the question. Here, for example, sexual matters were referred to in the issues of the magazine in a way which might pass muster in a tap room or smoke concert but which, displayed in print to the reader of the magazine, could, in my opinion, be held to offend the modesty of the ordinary man"[32].

This emphasis on the circumstances in which the allegedly obscene or indecent matter is disseminated is essential for a proper legal understanding of these concepts. Too often obscenity and indecency is discussed as if there were some objective and tangible reality corresponding to these labels. It is true that in the general social judgment some words and the graphic representation of certain intimate acts are so highly taboo that they are considered obscene or indecent no matter in what context they appear, but this idea of inherent obscenity or indecency has no place in the law except for occasional statutory oddities[33]. In law, the obscenity or indecency of a publication depends always in the last analysis, on the actual or presumed effect it has on the audience to whom it is or is likely to be disseminated and this will depend, of course, on the circumstances in which it has been published[34]. Windeyer J. was making substantially the same point when he said:

> "It is, I think, a mistake to regard cases under s. 16 of the Act as depending on two entirely separate questions: one, was the matter in question obscene or indecent? the other, was it published? The offences described in the section consist in the publication, in one way or another, of obscene or indecent matter. But whether or not matter published answers that description can depend upon the manner and circumstances of its publication. In relation to obscenity that is shown by s. 3(3)[35]. In relation to indecency . . . it arises from the very

31. [1965] 2 W.L.R. 138.

32. (1968) 41 A.L.J.R. 402, 403.

33. E.g., legislation derived from s.5 of the English Indecent Advertisements Act 1889 (52 and 53 Vict., c. 18) which provided that any advertisement which related to "syphilis, gonorrhoea, nervous debility, or other complaint or infirmity arising from or relating to sexual intercourse" was deemed to be of an indecent nature.

34. *U.S.* v. *31 Photographs* (1957) 156 F. Supp. 350; *R.* v. *Clayton and Halsey* [1962] 3 W.L.R. 815.

35. "In determining for the purpose of this Act whether any publication or advertisement is obscene the court shall have regard to—
(a) the nature of the publication or advertisement; and
(b) the persons, classes of persons and age groups to or amongst whom the publication or advertisement was or was intended or likely to be published, distributed, sold, exhibited, given or delivered, and

> nature of indecent conduct as understood by the common law. It is an act in its setting and circumstances which constitutes the offence. To publish or exhibit a particular picture or print might amount to a publication of indecent matter in one set of circumstances although in other circumstances this would not be so. When it is said that a print or picture is indecent because it is 'an affront to modesty' what is meant is that it is of such a character that its publication in the way alleged is an affront to modesty"[36].

In a modern scientifically oriented society such as ours it would seem not only logical, but essential that before a person is subjected to the sanctions of the criminal law as a purveyer of obscenity or indecency the alleged pernicious effect of the publication (either offence to the modesty of the average man or the corruption of his morals) be in some way demonstrated as part of the prosecution case. But the answer which Windeyer gives in the High Court is that no such demonstration is required. His Honour points out that though the much quoted *Hicklin* test of obscenity—"whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such moral influences, and into whose hands a publication of this sort may fall"—has had a great vogue and forms the basis of many of the statutory definitions of obscenity in Australia, it and its implications have largely been ignored:

> "Courts have not in fact asked first whether the tendency of a publication is to deprave and corrupt. They have asked simply whether it transgresses the bounds of decency and is properly called obscene. If so its evil tendency and intent is taken to be apparent"[37].

Far from disapproving of this state of affairs, or suggesting that the law might return to more rational foundations, His Honour proceeds:

> "It is not to the point for a court, having to decide whether or not some matter is obscene, to ask, with or without psychiatric learning, whether or not obscene publications can lead from unchaste thoughts to evil actions . . . Writings are obscene by reason of what they describe, express or bring to mind, and the way and the words by which they do it. *It is assumed incontrovertibly by the common law that obscene writings do deprave and corrupt morals by causing dirty-mindedness, by creating and pandering to a taste for the obscene*"[38].

Even if one accepts the validity of this assumption (and there is not a jot of scientific evidence to support it) one is still left with the original problem of classifying the work as obscene or otherwise. The answer given is to look at the book or picture itself:

(c) the tendency of the publication or advertisement to deprave, corrupt or injure the morals of any such persons, class of persons or age group

to the intent that a publication or advertisement shall be held to be obscene when it tends or is likely in any manner to deprave, corrupt or injure the morals of any such persons or the persons in any such class or age group, notwithstanding that persons in other classes or age groups may not be similarly affected."

36. (1968) 41 A.L.J.R. 402, 410.

37. *Id.*, at 409.

38. *Ibid* (my emphasis).

> "Does the publication, by reason of the extent to which and the manner in which it deals with sexual matters, transgress the generally accepted bounds of decency? That is a question of fact to be decided by the tribunal of fact. It is to be answered by reading the publication. Common sense and a sense of decency must supply the answer. Only within very narrow limits is evidence beyond the publication itself necessary or admissible. Evidence of what has been published in other books or writings is not admissible"[39].

This is far removed from the proposition that the law of obscenity is concerned with the punishment of those who disseminate sexual and scatalogical writings to an audience who are susceptible to offence or moral harm. If Windeyer J. is correct, the courts are entitled to assume harm to the audience if the tribunal of fact[40] considers that the writing in question transgresses the standards of current morality. This step is not only logically unwarranted but constitutes an unjustifiable deterrent to non-conformity. It will be seen to be particularly unjustifiable when it is recognised that the standards against which the accused's conduct is to be assessed are to be determined subjectively by the judge:

> "No one would question that, however obscenity and indecency be understood as grounds for the condemnation of a publication, the question is to be related to contemporary standards, community standards. But of that the appointed tribunal of fact must be the judge. Evidence is neither needed nor permitted. Contemporary standards are those currently accepted by the Australian community . . . And community standards are those which ordinary decent-minded people accept"[41].

When translated into operational terms the test of obscenity or indecency as interpreted by the High Court would appear to be little more than, "Does the publication shock the judge?" If it does it will be interpreted as being in conflict with contemporary community standards and the casual link between the publication and the harm feared will be assumed.

It is not to the point here to argue the merits or demerits of anti-obscenity legislation in Australia. Given the existence of the basic common law and legislative framework, the question is whether it is to operate in the courts at a rational objective level or whether the judges are to act subjectively and intuitively. In *Crowe* v. *Graham* the approach of the High Court is hardly objective. If, despite all the talk of depravity and corruption, the real rationale of anti-obscenity laws is, as Windeyer J. contends, the avoidance of offence to the public's sense of decency, it may be aruged persuasively that it is not unreasonable for the court to assume that a publication will cause the average man offence if it clearly transgresses general community standards of sexual expression. But this still requires the court to exercise

39. *Id.*, at 410.

40. In Australia the tribunal of fact in an obscentity prosecution is invariably the judge or magistrate except in the rare case of a prosecution for obscene libel as in *R.* v. *Close* [1948] V.L.R. 445.

41. (1968) 41 A.L.J.R. 402, 411-12.

considerable care in determining what in fact are the community standards and one cannot be satisfied either with Windeyer J.'s statement that "evidence is neither needed nor permitted", or with Owen J.'s reference to the existence of "a general instinctive sense" of what is decent and what is indecent"[42]. The defect in this line of approach is that it assumes that there is a common set of contemporary community standards and that the courts have judicial notice of them. The validity of both assumptions is questionable.

Firstly, there may be real doubt as to whether there is a common set of community standards in relation to what are the tolerable limits of written sexual expression. The Kinsey studies on sexual behavious in the United States have gone a long way towards showing that there is a marked discrepancy between the stated moral values of the community and the actual practices of its citizens. Moreover the studies provide evidence of significant differences in the standards of sexual behaviour from one educational level to another. Even in Australia there are known differences in the norms of social behaviour—the drinking habits of the populace of Darwin do not correspond with those in Hobart, and drinking to the extent acceptable in the Northern Territory may well be regarded as worthy of condemnation by the "average" citizen of Tasmania. So it may well be with indecency and obscenity. Certainly since the courts are invariably interpreting State legislation they should look to State rather than national community standards. The latest census figures show that almost 53% of Australia's population are under 30 years of age and have thus been reared during a period which is acknowledged on all sides to be one marked by increased permissiveness and liberalization in sexual expression. The "generation gap" is much discussed, and it is highly probable that there has been a polarization of community attitudes towards sex; those born before the second world war subscribing to the traditional Christian ethic and those of the post-war generation holding much more radical views and being prepared to tolerate far more erotic realism in writing and the graphic arts. As Howard Zelling has recently commented[43] there is a great gulf between the older generation which is governed by ascertainable and objective moral standards and the "permissive generation" for whom the ultimate obscenities are war, injustice, poverty, racial exploitation and corruption in political and economic spheres. It is submitted, therefore, that in this social setting it is a retrograde step for the court to restrict itself to evidence of community standards culled only from "commonsense" or the "general instinctive sense of what is decent".

Secondly, there is the danger that a judge, in expressing his view of what community standards are, will present instead his own notion of what they should be. Thus, in his judgment in the New South Wales Court of Appeal, Wallace J. (with whom McTiernan J. in the High Court later expressed concurrence) said:

> " . . . a modern magistrate or judge, to whom the task of determining indecency is still entrusted by the legislature, must do his best according to his own understanding and experience of everyday affairs and

42. *Id.*, at 413. The quotation is taken from the judgment of Fullagar J. in *R.* v. *Close* [1948] V.L.R. 445 at 465.

43. *Australian Book Review,* June 1968, 141.

> also, I think, according to his own beliefs in what are or should be the current standards of decency in public conduct to arrive at an objective decision. I do not think we should be reconciled to the acceptance of all modern trends with a shrug of the shoulders, when called upon to perform the entrusted duty"[44].

Unless the courts believe that standards of public decency cannot be scientifically investigated or that sociologists or other social scientists are unable to provide useful insights into prevailing attitudes towards sexual expression, they should not deny themselves the possibility of being enlightened. The courts should not fear that they will be overwhelmed by a phalanx of experts for there already exists a built-in control, namely the requirement that the court must be satisfied that a person seeking the right to express an opinion as an expert be suitably qualified. Nor should the judges be unduly anxious lest their adjudicative functions be usurped by the experts for the court is always entitled to reject such evidence as unconvincing and may then apply its own standards as representing and reflecting the standards of the wider community. In this latter situation, however, it would be preferable that the tribunal consist of a judge and jury rather than a single judge or magistrate. Again it must always be remembered that as in all criminal prosecutions (except where a statute evidences a contrary intention) the accused is entitled to the benefit of any reasonable doubt[45].

Support for the argument that the High Court need not tie itself to an intuitive approach to indecency and obscenity is to be found in the earlier case of *Transport Publication Co. Pty. Ltd.* v. *Literature Board of Review*[46] in which the court conceded that where allegedly obscene matter was disseminated to special classes of actual or potential readers e.g. delinquents, adolescents or university students which might form the basis of special study and knowledge it was proper that the members of the court be informed of the actual or probable reactions of the members of that class to the publication in question. In *Crowe* v. *Graham*, however, Windeyer J. looked to Shakespeare[47]. But Shakespeare is no substitute for science and unless our judges are more willing to heed Lord Dunedin's *dictum* that courts of law are bound to follow, as far as they can, the discoveries of science and the results of experience[48] the law will continue to be ridiculed for battling against speculative evils.

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44. (1967) 85 W.N. (Pt. 1) (N.S.W.) 438 at 441. Contrast the attitude of Jacobs and Holmes JJ.A. at 452.
45. *Id.*, at 451; (1968) 41 A.L.J.R. 402, 412.
46. (1956) 99 C.L.R. 111, 119, 123, 126-127.
47. (1968) 41 A.L.J.R. 402, 408.
48. *H. M. Advocate* v. *Brown* [1907] S.C. (J). 67, 77.

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