Some Observations on Robertson v Balmain New Ferry Co

***Address by J W Shaw QC, MLC, NSW Attorney-General to the Macquarie University Law Society on 17 May 1995 on the occasion of a dinner held to commemorate the ninetieth anniversary of the attempted ferry ride of* Robertson v New Balmain Ferry Co Ltd.**

It was a crisp winter's evening some 90 years ago - Monday June 5th 1905 to be precise - at about 7.45 pm when Archibald Nugent Robertson, Barrister-at-Law, strolled to the wharf of the Balmain New Ferry Company at the foot of Erskine Street, Sydney for the purpose of proceeding to Balmain. With him on that fateful night was a companion, one Mercy Murray, Bachelor of Arts and teacher of singing and elocution. In one of life's tragic twists, what should have been a joyous celebration of the Monarch's official birthday with Miss Murray and her parents became instead a nightmare, making legal history.

As was the custom in those bygone, politically incorrect days, good Archibald paid a penny each for himself and Miss Murray and both passed through the turnstiles. Sadly, the 7.45 ferry had already left but the ever resourceful Archie had a plan. Rather than wait 20 minutes for another Balmain Ferry they could instead proceed to the adjacent wharf to catch an earlier Leichhardt Ferry. Nothing could have seemed more reasonable and Miss Murray readily agreed.

However, they reckoned without the company men - William Anderson and Sydney Thomas Penson - who had their instructions. No-one was to enter or leave the wharf without payment of a penny. When Archie attempted to exit through the turnstile without paying the additional penny the officious Anderson pushed him back and Penson threw his arms round him. No reasoned argument or even threat of legal action could budge them. A crowd gathered and, according to the *Sydney Morning Herald*, Archie and Mercy "were subject to considerable annoyance, some members of the crowd satirically inquiring why he did not pay his fare".

Ever gallant, Archie ransomed Miss Murray by payment of another penny and she repaid his gallantry by returning with a Constable Frazer. But alas, Frazer proved unequal to the opportunity which fate had assigned to him and he did nothing to release the captive, advising only that Archie should pay the additional penny. This, of course, was unthinkable and Archie remained imprisoned until a momentary lapse in concentration by his gaolers allowed him to make good his escape.

October 12, 1922, p.14.

Barrister A. Nugent Robertson, who died at Mona Vale (N.S.W.) the other day, aged 66, had little legal practice, but got occasional jobs as Crown Prosecutor on country circuits. For 31 years he had been the legal visitor at mental hospitals, in the metropolitan area, and he did a good deal of journalistic work and wrote some novels. A few years ago he got into legal holts with the Balmain Ferry Co. Robertson had been seeing a friend off on the ferry, and had paid his entry penny at the turnstile, but, when he wished to come out again, the attendant demanded the exit penny. This Robertson refused, and was "detained." In the action he got £100 damages, but the Ferry Co. went to the Full Court, where the verdict was set aside, and the costs came to more than the penny exit fee.

These are the sorry facts upon which Archie mounted an action for assault and false imprisonment in the Banco Court before the NSW Chief Justice, Sir Frederick Darley and a jury of four.[1] Archie had a win first up, the good Chief Justice never doubting the justice of his cause and refusing an application for non suit.

The company then asked for a new trial but this request was rejected by the Full Court.[2] The company's case for a new trial was based on three grounds. The first involved a denial that Messrs Anderson and Penson had acted within the scope of their authority as servants of the company. So much for the company's loyalty to its staff! All three judges of the Full Court rejected the argument and it disappeared from the scene. The second and third grounds contended that the Chief Justice had erred in directing the jury that the company had no right to demand payment of a penny from Archie for passing through the turnstile and should instead have directed the jury that if they came to the conclusion that the company had done what was reasonable to give persons going on the wharf notice of the terms on which they were admitted to the wharf, the jury was entitled to find that Archie was bound by the notice. There was, in fact, a notice to the effect that a fare of one penny must be paid on entering or leaving the wharf whether or not the passenger had travelled by the ferry but we don't know whether Archie or Mercy saw it and the Higher Courts thought the notice was irrelevant.

None of the Full Court judges seems to have doubted that Archie had been assaulted and falsely imprisoned. Even Cohen J (dissenting), who favoured a new trial, would have done so for the assessment of damages only. Had the company done all that it could have been reasonably asked to do in order to give notice of the terms on which the public could enter and leave the wharf, Archie should be held bound by the notice but the notice would not have justified the acts of the company. Notice was relevant only for the assessment of damages.

Owen J adopted similar reasoning but found there was insufficient evidence to justify the jury in holding that Archie had notice; Pring J adopted a strong line against the company holding that, even if Archie had known of the notice, his rights were equally infringed. Notice could not afford any extenuation of the wrong committed by the company.

1. NSW Supreme Court 1-2 December 1905, unreported. See the *Sydney Morning Herald* 1 December 1905, p 10; 2 December 1905, p 11.
2. *Robertson v Balmain New Ferry Company* (1906) 6 SR (NSW) 195.

Enter the High Court and Archie's fortunes began a slide from which they were never to recover. By a 3-0 decision[3], the High Court ordered a verdict for the company, even though it had only asked for a new trial.

Chief Justice Griffith denied there had been imprisonment because Archie "was free to leave the premises by water". As to the alleged assault, his Honour found that Archie had been on the wharf a number of times; was aware of the terms on which he had obtained admittance; and it followed that he had agreed to be bound by them. There was no evidence that anything done by the company was not authorised by the agreement to which Archie was a party.

O'Connor J, who delivered the leading judgment and with whom the Chief Justice and Barton J agreed, seems also to have decided the matter by reference to contractual rights and obligations. A person may enter into a contract which necessarily involves the surrender of a portion of the person's liberty for a certain period and, if the act complained of is nothing more than a restraint in accordance with that surrender, the person cannot complain. Nor can the person, without the assent of the other party, by electing to put an end to the contract, become entitled at once, unconditionally and irrespective of the other party's rights, to regain the person's liberty as if the person had never surrendered it.

In Archie's case, Justice O'Connor said he had entered on to private property of his own free will and with the knowledge that the only exit on the land side was through a turnstile, operated as part of the company's system of collecting fares. The penny payment was a lawful condition of exit and Archie only had himself to blame if he refused to pay.

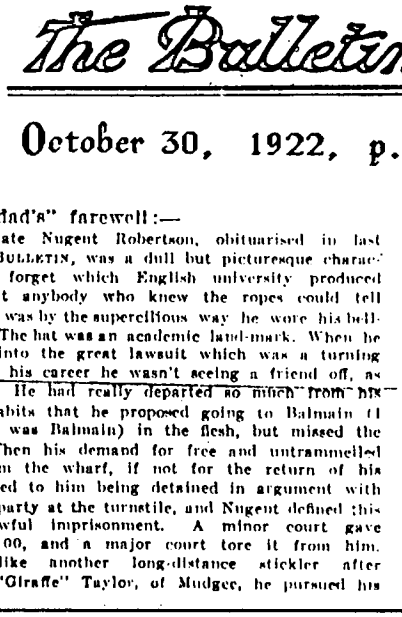
The colonial barrister got even shorter shrift from the Privy Council[4]. Archie, their lordships said, was merely called upon to leave the wharf in the way in which he contracted to leave it. The payment of a penny was a fair condition and if Archie did not choose to comply with it, the company was not bound to let him through. He could proceed on the journey he had contracted for. Our hero was dismissed with the hurtful judicial jibe that their lordships regarded Archie's conduct as thoroughly unreasonable.

We are not told if Archie won Mercy (that is, Miss Murray) but he clearly didn't win justice.

Let's look first at the issue of whether or not Archie was, in fact, imprisoned. Although the other judges seemed to have assumed imprisonment had taken place, Chief Justice Griffith thought not. Archie "was free to leave the premises by water". That argument, if you will excuse an obvious pun, does not seem to hold much water. What if Archie couldn't swim? What of those denizens of the deep, which at any time could have been lurking near the wharf eager to tear to shreds the foolhardy or the desperate? Surely Archie should not have been required to risk life and limb when a much safer and practicable alternative was available.

Probably his Honour's remarks should be interpreted as a reference to the likely eventual arrival of the Balmain Ferry. Several commentators have sought to latch on to this escape route. Amos[5] suggests that it would seem to have been possible for Archie to have left the wharf after some delay and that if this had not been possible, the decision would have been different. Glanville Williams, in his analysis of the case[6], said that "the contractual path of escape was never closed to him. He was not deprived of his liberty".

But, surely, the arrival of the Balmain Ferry would not have prevented imprisonment - only brought it to an end. Imprisonment on the wharf for 20 minutes may not have ranked Archie in the annals of history alongside the likes of Captain Dreyfus but imprisonment for 20 minutes is no less imprisonment. The length of imprisonment is, no doubt, a relevant factor to be taken into account in assessing damage but not, other than in extreme examples, in determining whether or not imprisonment has taken place.



The Bulletin.

October 30, 1922, p.14.

"Bildad's" farewell:—

The late Nugent Robertson, obituarised in last week's BULLETIN, was a dull but picturesque character. I forget which English university produced him, but anybody who knew the ropes could tell which it was by the supercilious way he wore his bell-topper. The hat was an academic land-mark. When he drifted into the great lawsuit which was a turning point in his career he wasn't seeing a friend off, as alleged. He had really departed so much from his usual habits that he proposed going to Balmain (I think it was Balmain) in the flesh, but missed the boat. Then his demand for free and untrammelled exit from the wharf, if not for the return of his penny, led to him being detained in argument with the old party at the turnstile, and Nugent defined this as unlawful imprisonment. A minor court gave him £100, and a major court tore it from him. Then, like another long-distance stickler after trifles, "Giraffe" Taylor, of Mudgee, he pursued his case to the Privy Council, and so moved that body out of its wonted calm that it told him that it experienced an unholy joy in deciding against him, he having been "thoroughly unreasonable." After that the litigant rushed into print till editors grew weary. He was one of the "Prudent Federation" candidates for the Federal Convention. These people, of the good old Geebung brand, were so prudent that they wanted to limit the Federal power to the establishment of a uniform dog-tax or something like that. I fancy there were five of them, and they were left in a very solid block at the foot of the poll. For the rest the deceased barrister was an amiable but rather mirthless companion. Whether he ever finished his interrupted penny journey across the harbor I know not.

3. *The Balmain New Ferry Company Limited v Robertson* (1906) 4 CLR 379.
4. *Archibald Nugent Robinson v Balmain New Ferry Company Limited* [1910] AC 295.
5. M S Amos, "A Note on Contractual Restraint of Liberty" (1928) 44 LQR 464.
6. G Williams, "Two Cases on False Imprisonment" in Holland and Schwarzenberger (eds), Law Justice and Equity (1967) pp 47-55.

As to the notion of contractual surrender of freedom put forward by Justice O'Connor in the High Court, it seems to me that Archie was entitled to demand his freedom, even if this constituted a breach of contract. He may well have been liable for the demanded penny in damages for that breach but that is another issue. Consent to imprisonment must be able to be withdrawn and, once withdrawn, liberty should be restored as soon as reasonably practicable. Several references to trains not being required to make unscheduled stops in order to let down disgruntled passengers and planes not being required to land in order to allow off flight attendants who have terminated their employment mid flight have been put forward to justify Archie's continued imprisonment[7]. So too, in Herd's case[8], the House of Lords held that a miner who refused to work was held to have no right to be brought to the surface until completion of his shift. But, in the end, Archie asked no more of the company than its forbearance as he made his escape. No positive act by the company was required and no inconvenience to it would have resulted. Indeed, it required a positive act of restraint by the company to detain Archie and deprive him of his freedom.

It is, of course, true that Archie could have purchased his freedom by payment of the penny. But the impecuniosity of the NSW Bar is a well known fact of which any court should take judicial notice. Having purchased Mercy Murray's freedom with (perhaps) his last penny, should Archie have been left to languish on the wharf - penniless - merely because payment of a further penny was a reasonable price to pay for his freedom? Was the Privy Council attempting to sanction a 20th century colonial debtors' prison? Perhaps the Erskine Street wharf was to replace the infamous hulks. A creditor cannot imprison a debtor to compel him to pay a debt. An earlier decision (of 1838) was correct: in *Sunbolf v Alford*[9], it was held that an innkeeper could not imprison a guest until the bill was paid.

No, Archie was, in my view, dealt with unjustly. A man of principle, although perhaps obsessive, was sacrificed on the alter of the sanctity of contract. Whilst there are those, including some academics of Macquarie University, who may yearn for those bygone days and who decry common law and legislative reforms in contract law as revolutionary and damaging assaults on will based contracts[10], I stand with Archie. Basic rights should be considered and balanced against the black letter law of contract. We do well tonight to recognise his place in legal history and to accord due honour to a martyr to the cause of liberty! ❑

7. See Keng Feng Tan, "A Misconceived Issue in the Tort of False Imprisonment", (1981) 44 MLR 166.
8. *Herd v Weardale Steel, Coal and Coke Co Ltd* [1915] AC 67.
9. (1838) 150 ER 1135; discussed by Glanville Williams op cit.
10. John Gava, "Assault on contract law a threat to freedom", *The Australian* 19 April, 1995.

Courtrooms and Television

The O J Simpson trial, long before it has finished, provides an important precedent. It demonstrates that allowing television cameras into courtrooms is a ghastly mistake.

Nobody outside the court watches the whole case. Even the most complete of the coverage is edited and interrupted by commercials, newsflashes and sports results.

This coverage is watched as an alternative to the midday soaps by those at home, and in gymnasiums all over the United States to offset the boredom of tread machines, stationary bicycles and weight circuit training machines in workout-length bites.

The news programs focus on the gruesome bits and such fascinating items as the prosecutor, Marcia Clark, being dressed down by Judge Ito for wearing, in court, the lapel badge of the Victims Support Group, an injured silver angel (I am not joking).

Another high spot focused on by the media was evidence as to the tone and loudness of the victim's dog's bark, which laid the ground for evidence about the mood of the dog by the person who heard it.

The *LA Times* published a cartoon of the dog "on the stand", as they say, being asked, "And what was your state of mind when you barked?".

My next favourite was after the defence mounted an attack on the forensic skills of the police at the scene, widely, nay ubiquitously, reported.

The Commissioner of Police went on television to urge the "public" to show solidarity with the LAPD by wearing blue ribbons in their lapels!

A stand-up comic on TV told how he had been watching the trial, very closely, "AND there is one man in that court who looks very guilty to me", he said, "and that man is Judge Ito!".

Every piece of evidence is commented on by alleged experts, predictions of prosecution and defence tactics are made by trial lawyers desperate for a piece of the publicity, and on and on.

How this trial can fail to miscarry in this circus is hard to see.

In a survey of criminal lawyers (of the most doubtful validity), 84% said that O J would be acquitted if not at trial then on appeal, because of the impossibility of a fair, unbiased and rational trial.

We must not let this awful phenomenon infect us across the Pacific as so many social diseases have. ❑

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