

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 Consent to imprisonment must be able to be withdrawn and, once withdrawn, liberty should be restored as soon as reasonably practicable.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 imprisonment⁷. 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 *Sunbol 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 altar 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 contracts¹⁰, 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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