LIABILITY FOR NEGLIGENTLY CAUSED ECONOMIC LOSS: A RESTATEMENT

M DAVIES*

During 1968 and 1969,the State Planning Authority of New South Wales (hereafter "the Authority") prepared a plan for the redevelopment of Woolloomooloo. The Sydney City Council (hereafter "the Council") adopted the finished plan on 11th August 1969. An exhibition giving details of the plan was held in the vestibule of the Sydney Town Hall. Brochures containing a written account of the redevelopment proposals, plans for development control and so on were available at the exhibition. One of the people attending this exhibition during its four week run was a Mr Baker, who took away copies of the brochures. Mr Baker was a property developer. He decided that there was money to be made in the proposed redevelopment, and so he arranged for various companies under his control to buy property in Woolloomooloo.

Unfortunately for Mr Baker and his companies, it soon became clear to the Council that the Authority's proposals were unworkable. It seems that the Authority's estimates of possible workforce density would have required a public transport system more akin to that of Fritz Lang's Metropolis than that provided by Sydney's U.T.A. The Council abandoned the plan in late 1972, leaving Wooloomooloo to decay in peace as it always had, with the exception that large portions of it were now owned by Mr Baker's companies.

These development companies suffered considerable financial losses as a result of the abandonment of the scheme for a brave new Woolloomooloo, and they sought redress from the Sydney City Council and the New South Wales Minister who had succeeded to the liabilities of the Authority. The companies succeeded at first instance, and the defendants appealed. This appeal to the New South Wales Court of Appeal thus bears the unwieldy name of *Minister Administering the Environmental Planning and Assessment Act 1979* v *San Sebastian Pty. Ltd. and others*.[1] In other words, inevitably, the *San Sebastian case*.

The plaintiff companies alleged negligence with respect to three different

* Lecturer, Law School University of Western Australia

1 [1983] 2 N S W L R 268 ("San Sebastian")

matters: first, in the preparation of the report; second, in its publication; and third, in a failure by the Council to warn developers of its intention to abandon the scheme.

Although ostensibly innocuous, this approach has radical implications. Usually, a claim with respect to "negligent publication" *contains* a complaint with respect to "negligent preparation". The substance of the complaint in *Hedley Byrne* v *Heller*[2] was that the credit report was poorly researched, not that it was badly typed or still in draft form. If *Hedley Byrne* principles apply only to the publication and not to the preparation of statements, then their application is drastically reduced. They would apply only to those situations where the defendant was negligent in "publishing" a statement at all, such as an off-the-cuff response to a serious request for advice. In those situations where it was quite proper for the defendant to "publish" a statement of some kind, the only complaint would be as to the quality of the "acts" of preparation. As this would be a complaint that negligent "acts" had produced economic loss (such being the loss in almost all cases of this kind), the question of duty of care would fall to be determined by the principles contained in *Caltex Oil Pty. Ltd.* v *The Dredge "Willemstad"*.[3] In other words, *Hedley Byrne* would apply to unprepared statements, and *Caltex* to badly-prepared statements (assuming the only loss to be economic). This in turn would mean that the standard "professional negligence" suit against advisors such as lawyers, accountants, bankers, etc. would fall under *Caltex* rather than *Hedley Byrne*, as the usual complaint in such suits is not that advice was given when it should not have been, but of the quality of advice received on request. This would be innovation indeed.[4]

Although this innovation apparently appealed to Ash J. at first instance in the Supreme Court of New South Wales, as he found for the plaintiffs, it received short shrift from the Court of Appeal of New South Wales. As Glass J.A. put it:

> Since loss could only ensue following publication of the study and reliance upon it, the plaintiffs perforce are remitted to a Hedley Byrne claim, if they can establish it, based upon that chain of events and can claim nothing for the preceding act of preparation, whether it was carelessly performed or not.[5]

2 [1964] A C 465

3 Caltex Oil Pty Ltd v The Dredge "Willemstad" (1976) 136 C L R 529

4 It is interesting to speculate as to the reasons why counsel for the *plaintiffs* should have taken such an approach, as it would mean that the more restrictive Caltex test would be applied to the question of whether the defendants owed a duty with respect to the preparation of the report
Such an approach would work to the benefit of defendants in "negligent preparation" cases, and so would considerably reduce the premiums paid for professional indemnity insurance by such people as accountants, bankers, *lawyers*

5 San Sebastian at 302

This restates the position as it had hitherto been understood, namely that *Hedley Byrne* governs *all* negligently made statements whether the negligence complained of be in the preparation or the actual publication of the offending statements. Hutley J.A. gave similar reasons for rejecting the plaintiff's "negligent preparation" claim.[6] (Mahoney J.A. took an entirely different approach to all three of the plaintiffs' claims; his judgment will be dealt with later.)

Although Hutley and Glass JJ.A. rejected the proposition that *Caltex* principles were applicable because the "acts" in question, even if negligent, had not caused the economic loss suffered, they both went on to consider whether the defendants would have owed to a duty the plaintiffs if *Caltex* principles had been applicable. The *San Sebastian* case is thus one of the few reported cases where appeal courts have considered the *Caltex* case.[7] Much has been made of the difficulty of identifying the *ratio* of *Caltex*; the judges set themselves this task in the *San Sebastian* case by considering whether the Authority owed the plaintiff companies a duty of care with respect to the alleged negligent "act" of preparation.

Hutley J.A. selected passages from Gibbs, Stephen and Mason JJ. in *Caltex* before concluding that under any of the tests suggested by those three judges, no duty would be owed by the defendants to the plaintiffs in this case. This seems to be a fairly standard response to the difficulties of *Caltex* — "whatever it says, it doesn't apply here". Glass J.A., on the other hand, was a little more adventurous. He too confined himself to the judgments of Gibbs, Stephen and Mason JJ., but he attempted to synthesise the opinions of those three judges into a single test for the existence of a duty of care with respect to negligent acts causing economic loss. He said:

> But from the reasoning of the three judges quoted a concurrence of view can, I believe, be discerned as to the kind of relationship which gave rise to the duty of care binding the defendants.
>
> A defendant will incur a duty to take care that his actions do not cause financial loss to the plaintiff when he had knowledge or means of knowledge that the plaintiff as an individual person and not as an undifferentiated member of a class will probably suffer financial loss as a consequence of his careless conduct. For want of a better term this may be called a special relationship although its elements are different from those which constitute the special relationship between plaintiff and defendant without which no duty to be careful in the giving of information and/or advice is raised. But what is

6 Id at 278

7 Others are Millar v Candy (1981) 38 A L R 299, Mitsui OSK v The Ship "Mineral Transporter" [1983] 2 N S W L R 564 and Johns Period Furniture Pty Ltd v Commonwealth Savings Bank (1980) 24 S A S R 224

> conspicuous is that both special relationships are defined in a way which gives them a more circumscribed operation than the proximity relationship.[8]

This constitutes a restatement of the *Caltex* position in both senses of the word. Firstly, it provides an alternative, condensed way of expressing the essence of the judgments of Gibbs, Stephen and Mason JJ. in *Caltex*. Secondly, it re-establishes the primacy in Australia of the *Caltex* decision in the field of negligent acts producing economic loss. Doubt had been cast on that primacy by recent developments in England, and in particular the House of Lords decision in *Junior Books* v *Veitchi*.[9] A number of recent English cases seem to have suggested that a *Donoghue* v *Stevenson*-type test for the existence of a duty of care is appropriate even where the loss suffered by the plaintiffs is purely "economic". Armed with his synthesis of the *Caltex* judgments, Glass J.A. considers[10] these English cases, namely *Ministry of Housing and Local Government* v *Sharp*[11] *Ross* v *Caunters*,[12] *Dutton* v *Bognor Regis U.D.C.*[13] and *Junior Books* before rejecting them in favour of the *Caltex* approach:

> The conclusion to which this discussion brings me is that the relevant law for Australian purposes is to be found in *Caltex* and *Shaddock* and in English authorities which are not inconsistent with those decisions.[14]

With respect to the alternative approach taken in *Junior Books*, Glass J.A. had this to say:

> If I may say so with respect, a potent source of confusion is created by excluding a *Donoghue* relationship while simultaneously founding a duty of care to prevent economic loss upon a relationship described in terms virtually indistinguishable from it[15]

This damning criticism seems valid. Nothing in the nature of economic loss nor its easy transmissibility has changed so as to reduce the fear of indeterminate liability that has always accompanied the use of a *Donoghue* test in this area and thus there is nothing to suggest that a *Donoghue* —

8 San Sebastian at 297
9 [1982] 3 W L R 477
10 San Sebastian at 298-300
11 [1970] 2 Q B 223
12 [1980] Ch 297
13 [1972] 1 Q B 373
14 San Sebastian at 300
15 Id at 300

type test has suddenly become appropriate. Indeed it is arguable that the House of Lords itself has resiled from its *Junior Books* position in the case of *Tate and Lyle Food and Distribution Ltd.* v *Greater London Council.*[16] However, whatever *Junior Books* does or does not say, the *San Sebastian* case is a timely reminder that the Australian position is different from the English, more readily comprehensible, and more consistent with the traditional policy with respect to economic loss.

The difference noted by Glass J.A. between the *Caltex* "special relationship and the *Hedley Byrne* "special relationship" is emphasised by the fact that he held that on the facts of the case before him, the defendants owed no duty to the plaintiffs under *Caltex*, but they *did* owe a duty under *Hedley Byrne*. Both Glass and Hutley JJ.A. found that no *Caltex* duty existed on the facts before them because the defendants did not know that *the specific companies owned by Mr Baker* would suffer economic loss if they failed to take care in the preparation of the report. However, Glass J.A. considered that even in these circumstances the defendants *did* owe a duty to the plaintiffs under *Hedley Byrne*.

With respect to the "negligent publication" claim proper, both Glass J.A. and Hutley J.A. relied on an obiter dictum of Barwick C.J. in the High Court of Australia in *Mutual Life* v *Evatt*[17] to the effect that a duty to take care in the making of a statement can be owed to an unidentified member of an identifiable class if the defendant knew or ought to have known that members of that class would be relying on the statement, notwithstanding that he or she did not know the actual identity of the members of that class. In the *San Sebastian* case the Council and the Authority knew that the identifiable class of property-developers-interested-in-the-redevelopment-of-Woolloomooloo would rely on the contents of the brochures available at the exhibition. Thus, by application of the Barwick dictum, a duty was owed to all members of that class even if personally unidentified — in other words, to Mr Baker's companies, including the eponymous San Sebastian Pty. Ltd. This was the view taken by both Glass and Hutley JJ.A. (although the latter decided that the prima facie duty that arose as a result of this reasoning was excluded for policy reasons.) This endorsement of the Barwick dictum from *Evatt* confirms it as an extension of the range of plaintiffs to whom a *Hedley Byrne*-type duty is owed. Here again, the Court of Appeal of New South Wales preferred Australian authority to other Commonwealth authorities[18] that have attempted to widen the range of plaintiffs by importation of notions of reasonable foreseeability from *Donoghue*, a

16 [1983] 2 W L R 649

17 (1968) 122 C L R 556 at 570

18 Such as Gordon v Moen [1971] N Z L R 526, Haig v Bamford (1976) 72 D L R (3d) 68, Scott Group Ltd v Macfarlane [1978] 1 N Z L R 553 (esp per Woodhouse J)

process to which, as we have already seen, this Court was averse.

On the issue of the effect of policy on this prima facie duty of care, Hutley J.A. and Glass J.A. disagreed. Hutley J.A. felt that the recommendations of a planning authority should not give rise to a legal duty of care not to cause economic loss because such recommendations inevitably and properly involve suggestions that certain parties should suffer losses in order to facilitate the scheme in question. Glass J.A., on the other hand, felt that there were no policy considerations based upon social interest which would override the fact that ratepayers had relied upon the documents to their detriment.

The *Hedley Byrne* — type duty owed by the defendants to the plaintiffs in this case was, of course, a duty to take care in the making of any statements upon which the plaintiffs would reasonably rely. Despite the fact that the plaintiffs had clearly relied on the contents of the brochures, Glass and Hutley JJ.A. nevertheless held that there was in fact no breach of duty in this case, as the documents in question contained no "statements" at all. (This view was, then, part of the *ratio* of Glass J.A.'s decision as he had concluded that a duty was owed; it was *obiter* on the part of Hutley J.A., who had already concluded that there was no duty to take care anyway. Mahoney J.A. also agreed on this point, as we shall see shortly.) There were no statements made because the brochures merely contained *opinions* as to what Woolloomooloo should look like *with no accompanying statements of feasibility*. If the brochures had contained statements that the scheme in question was feasible, then there would have been a breach of duty. However, to believe in and to rely upon mere expressions of opinion, as the plaintiff companies did here, was to do so at their own risk.

With respect to planning schemes at least, then, the presumption seems to be the reverse of that which applies to "ordinary" advice: in *Hedley Byrne* it was said that negligently given advice would give rise to liability unless there was an express statement that it was to be relied on at the plaintiff's own risk (i.e. a disclaimer of responsibility); the *San Sebastian* case says that planning reports can be negligently prepared, wild, speculative or even fanciful and they will not give rise to liability unless they include an express statement that they *can* be relied upon as feasible possibilities. The *San Sebastian* case thus suggests an alternative to the professional advisor's usual disclaimer of responsibility. Such advisors could emulate the deliberate detachment of the classic Freudian psychoanalyst, merely offering delphic "opinions" while reiterating that it is for the client to make the actual decisions. However, it seems unlikely that such sophistry would appeal to the courts; if a "professional adviser" were to say to a client, "In my opinion you should do such and such, but of course I am not

suggesting that you should do so", this is a "statement" of advice in all but appearance, and liability should and probably would attach to substance rather than appearance. Professional advisors would be well advised to treat the *San Sebastian* view as an exception and to continue using their disclaimers of responsibility.

The third head of the plaintiffs' claim was that the Council had been negligent in failing to warn developers of their intention to abandon the plan. This, of course, involved a decision by the Court as to whether the Council owed any duty to anyone to warn of their changed intentions. It is somewhat startling that a claim so fundamentally without merit should ever have been made. The plaintiffs were claiming that the Council should have given them notice that they were wasting their money in Woolloomooloo. Why should they require this information? Presumably so that they could cut their losses by offloading the properties in question onto hapless third parties to whom no duty to warn was owed by the Council. It is perhaps not surprising that the Court of Appeal rejected this claim. There was some question on the facts as to whether the Council and the Authority had become aware of the identity of the particular companies in question by 1972 and the time of the abandonment of the plan. However, the Court was unanimous in concluding that even if the relationship between plaintiffs and defendants was sufficiently close by then as to give rise to a prima facie duty, that duty was excluded by policy considerations of overriding social interest. As Hutley J.A. put it:

> It would put an intolerable burden on a policy maker if he had to deal fairly (whatever that may mean) with every vested interest if he alters his plan . . .[19]

Little mention has been made so far of the third member of the Court of Appeal, Mahoney J.A. His judgment is, to say the least, a little unfocussed. He points out on a number of occasions that losses *other* than "pure" economic loss involve an infringement of a recognised pre-existing right, whereas "pure" economic loss has no such basis. With respect, this analysis is questionable. If I am run over by a car as I cross the road, in what sense has a *pre-existing* right of mine been interfered with? It is not at all clear that I have any right to bodily integrity that exists independently of the protection afforded by the law of negligence. Such "rights" as I do have arise because of the driver's breach of his or her obligation not to run me down, which arises from the law of negligence itself. I have a right to recover if struck, but only in a very artificial sense can it be said that I have a legal right not to be struck.

19 San Sebastian at 289.

Mahoney J.A. refers to rights and obligations "in the Hohfeldian sense",[20] namely the sense in which a right is the correlative of a duty, and vice-versa. Yet in this sense I also have a "right" not to suffer economic loss if someone owes me a duty not to cause such loss, simply *because* I am owed that duty. The same reasoning applies with equal force to both material physical damage and pure economic loss, yet Mahoney J.A. insists that it applies to the former and not the latter. The law characterises negligence in terms of duty with respect to both physical injury and pure economic loss; this, and this alone is the source of any "rights" in the law of negligence.

Mahoney J.A. bases his analysis of the question of duty of care on this shaky theoretical foundation. He justifies the distinction between the "proximity" test for duty and the more restrictive tests in *Hedley Byrne* and *Caltex* on these grounds of "pre-existing right". With respect, the usual analysis in terms of the preclusion of indeterminate liability seems preferable. Mahoney J.A. melds the various heads of claim into a single long analysis of the duty of care question which also places significant emphasis on the fact that the Authority was exercising a statutory power in producing the report. However, the only conclusion at which Mahoney J.A. does arrive is that *if* there can be recovery for "pure" economic loss, and *if* the fact that this was an exercise of a statutory power is conclusive, then still in these circumstances the defendants owed the plaintiffs no duty of care.[21] With respect to the question of breach, it does seem clear that as far as the "negligent publication" claim goes, Mahoney J.A. concurs with his fellows that the absence of any "feasibility claim" meant that the documents contained no statements and so could give rise to no *Hedley Byrne* type liability.

Another interesting aspect of the *San Sebastian* judgments is the use of policy considerations in determining the question of duty of care. Although at first sight the approach seems familiar, it is, in fact, novel. The standard approach of first establishing the existence of a duty relationship, then considering whether there are any policy reasons for denying that duty stems from the famous dictum of Lord Wilberforce in *Anns* v *Merton L.B.C.*[22] However, the first of the two steps recommended by Lord Wilberforce is the establishment of a relationship of proximity using *Donoghue* v *Stevenson*; it is the *Donoghue* test that Lord Wilberforce recommends be tempered by the consideration of policy. Very often the primary policy consideration that arises at the second stage of the "*Anns* two-step"[23] is the fear of indeterminate liability, or, in other words, the

20 Id at 328 referring to the work of W N Hohfeld and in particular his book *Fundamental Legal Conceptions* (1923)

21 Id at 333

22 [1978] A C 728 at 751-2

23 For this neologism, of which I am very fond, I am indebted to Craig Burton

"floodgates" argument. Recent examples of this standard approach to the question of duty of care can be found in the decisions of the House of Lords in *McLoughlin* v *O'Brien*[24] and the High Court of Australia in *Jaensch* v *Coffey*.[25] In both of these "nervous shock" cases, the court first established the existence of a *Donoghue* "neighbour" relationship between plaintiff and defendant, and then considered (and in both cases, rejected) the proposition that to find a duty in such circumstances and in relation to such an injury would be to open the floodgates to a torrent of complaints of psychological disturbance. However, both the *Caltex* and the *Hedley Byrne* duty tests have "built-in" safeguards against this fear of indeterminate liability, in that each test is more restrictive in its scope than *Donoghue*. Indeed, it seems clear that the tests for duty of care in those cases were explicitly formulated in order to avoid the breadth of liability that would occur if the *Donoghue* "proximity relationship" were to be used as the test for the existence of a duty. However, the Court of Appeal in the *San Sebastian* case takes the "*Anns* two-step" duty/policy approach *with these restrictive duty tests as the first step*. As Glass J.A. put it:

> There is no reason to suppose that the two stage inquiry described in *Anns* does not equally apply to a prima facie duty of care to avoid economic harm generated by a *Caltex* or *Hedley Byrne* relationship.[26]

With policy issues of indeterminate liability already settled in the first step, the Court is thus free to concentrate on other policy issues of "overriding social interest" in the second step, such as the desirability of the freedom of planning authorities from restraint and the responsibilities of Councils to their ratepayers. As Glass J.A. says, there is no reason to suppose that the "*Anns* two-step" should only apply where the first step is the finding of a *Donoghue* relationship, and, indeed, this novel approach offers great opportunities for taming the "unruly horse" of policy by reining it in to the specific issues relevant to the case.

The plaintiff companies have appealed to the High Court of Australia. This appeal thus provides the High Court with the opportunity of reviewing the whole field of the law relating to economic loss, both that caused by "negligent words" and that caused by "negligent acts". The decision of the Court of Appeal of New South Wales in the *San Sebastian* case, and the lucid judgment of Glass J.A. in particular, provide a clear statement of the law as it currently stands:

> The three generative principles of a duty of care . . . operate in three mutually exclusive areas marked out by the legal concepts of physical

24 [1983] 1 A C 410
25 (1983) 54 ALR 417
26 San Sebastian, at 301

> damage due to carelessness in statement or action, economic loss due to careless statement and economic loss due to careless conduct[27]"

It is to be hoped that the High Court take this opportunity to reconsider the mutual exclusivity of these areas. By this it is not suggested that the High Court follow the House of Lords into the *Junior Books* quagmire of introducing notions of foreseeability from the "physical damage" area into that of economic loss — indeed, it seems desirable that these two areas remain firmly separated. However, there seems to be no cogent reason why the test for duty of care with respect to negligent acts producing economic loss should continue to be more restrictive than that with respect to negligent misstatements producing economic loss. It would seem that if there is to be any difference between the two tests at all, the "negligent misstatement" test should be more restrictive than the "negligent act" one because of the traditional fear that "words travel fast and far afield".[28] Yet, a more coherent approach to the whole issue of economic loss would be the formulation of a single test embracing both words and acts. Economic loss caused by a negligent act is equally as volatile as that caused by a negligent misstatement. Words can undeniably be "passed on without being expended",[29] but so can economic losses, however caused — indeed, the very nature of an exchange economy means that any economic loss will always be "passed on" through the economy.[30] There is no question that the defendant who sets off the chain reaction should not be liable to every person who suffers loss as a link in that chain, whether the chain be the repetition of a statement or the economy's absorption of a loss. What does seem questionable is that an arbitrary distinction be made between the two different ways of producing such chain reactions when the issue of fundamental importance — the fear of indeterminate liability — is the same in both cases.

27 Id at 300 per Glass J A

28 Lord Pearce in Hedley Byrne v Heller [1964] A C 465 at 534

29 Id at 534

30 See Bishop, 'Negligent Misstatement through Economists Eyes' (1980) 96 *L Q R* 360

BOOK REVIEW

Peter Hain, *Political Trials in Britain from the Past to the Present Day* (London, Allen Lane, 1984) (Penguin, 1985) $7.95.

Marx did not suggest that religion was only, or even mainly, an opiate. Now that legality has succeeded to many of religion's erstwhile functions — and on many sides of the *status quo* — Marxist and radical scholars are having to come to terms with *its* complexity. They have at last appreciated that if the apparatuses of legality, from the public service and the police to the myriad court officials and legal professions, can be characterised from one point of view as means of social control, that is not all that can or needs to be said.

Peter Hain, focusing on the trial, and with examples from recent events in Britain — essentially England — argues that legality is suffused with politics. He begins by examining institutions, like the magistracy, the police, the jury and judiciary, and moves, I think confusingly, on to themes like racism, trade unionism, and official secrecy. Presumably the reason is that all these topics have been extremely controversial over the last two decades, and Hain is concerned to write a book that he hopes will have a public effect within that controversy, rather than to produce an academic treatise.

It is always a problem: agonizing over causes and the need for a theoretical framework asserts itself to justify a particular mode of explanation or selection of events for discussion. Somewhere along the way the general reader is lost or loses patience. To describe effects exclusively, however, may be to remain accessible to the veriest News Limited reader, but to sacrifice explanatory power. Only moral indignation, blame and the ascription of bad faith are the critical weapons in such discourse —

and they are too open to political opportunism to be constructive.

There is a deeper dilemma for Hain as there is for many others, writing in the *genre*. If it is the case that the apparatuses of legality proclaim one set of values, but frequently operate according to another, one might be outraged at the discovery, but there is a limit to how much can be achieved by allegations of hypocrisy. Too much should not be expected of demonstrations of bias and double standards. Many revealing juxtapositions are piquant sauces for the socialist gourment, but that is all.

Lawyers are either perfectly aware of the profound shortcomings of the legal system, but continue, like Rumpole of the Bailey, to do with it what they can, or else they use the capacity for self-deception afforded by legal training to remain blithely unaware. Working class people generally have few illusions about either political or legal institutions. Only impeccably middle class radicals are genuinely shocked at the disjunction between the rhetoric and the reality of the rule of law. Hain's book may well find itself trapped in a Habitat bookshelf.

His description of the legal system is, I think, broadly accurate. One should resist the occasional suggestion — much more powerfully present in E.P. Thompson's civil libertarian polemics — that things are much worse now than in the past. There was never a time, at least in England, when the common law resembled Professor Atiyah's rosy vision of it. It never reflected a broad class-transcendant consensus because there has never been such a thing. Thus the particular ways in which the legal process can be said to be 'political' are contemporary manifestations of what has always been the case.

The police, for example, have certainly freed themselves from procedural accountability and their senior officers align themselves vociferously with politically conservative values. Hain aptly points to their monitoring of — usually left-of-center — organisations of which they disapprove, and the capacity which new technology and prosecutorial discretion gives them to exercise control, to infilltrate, and to harass. Increased police powers, justified by reference to panics about terrorism and organised crime, enhance police capacity for surveillance still further, without having any visible impact on the clear-up rate of known crimes. As Hain says, the huge majority of detainees under the draconian Prevention of Terrirism Act were not charged with anything, let alone terrorist offences.

Of course, the police should be accountable to democratically elected bodies in a thorough-going way, but it would be misleading to imagine that they were ever subject to other than wealthy and influential citizens through the Watch Committee system. Again, police surveillance and their use on behalf of employers in dispute with employees are not new,

but have their origins with the beginning of civilian policing, and the need to supervise urban ghettos whose inhabitants had escaped the earlier system of control about which E.P. Thompson writes in *Whigs and Hunters*.

Judicial preferences, Hain argues, should be seen less as personal idiosyncracy, and more in terms of the effects of imposing one set of political values rather than another. E.P. Thompson's outburst in *Writing By Candlelight* (at 217) is wonderful, but less analytically useful:

> There is a small point of literary craftsmanship ... I find .. in .. 1979 that it is impossible to bring the two words "probity" and "judge" into conjunction in any context of public rights without committing irony .. I leave the point to literary critics to explain.

The point is, as Thompson himself demonstrated so brilliantly, that judges are upholders of the established order. It does not make them wicked men, or deprive them of impartiality on a good many issues; but, as Lord Justice Scrutton remarked in the thirties they are men of their class who find it hard to comprehend people with totally different backgrounds and assumptions. As Lord Atkin protested from the bench in the forties, judges are also very conservative and pro-establishment members of their class. Directing other parts of the institutions of the state are men of similar background. They and the judges will not always agree, but when the interests of the state or the *status quo* are urged the independence of legal personnel from the personnel of the state is not something the rest of us can put infinite trust in. So, illegality resides at the heart of the legal system, condoned not by hyprocritical judges, but by judges who seek to sustain the existing state of affairs. They admit illegally obtained prosecution evidence, permit illegal tampering with jury-selection and seem endlessly compliant to the needs of the state where security is mentioned.

Again, though, we either know all this, and acknowledge that it contradicts the rhetoric of the legal system, or we ignore it and rationalise. If we acknowledge it, outrage or reiteration will not assist in solving the problem. Underlying causes do have to be sought with, inevitably, recourse to one or another social theory.

The difficulty with Hain's account is that he stops at the point of demonstrating that the legal system is one in which political values are imposed. His resolution of the problem is that litigants in trials involving clashes of political values should "go political" and make the clash overt, and central to the trial rather than hidden by legal etiquette, and vulnerable to legal technicality.

1 AA 217

"Going political", however, is precisely what the British trade union movement did over the conservative *Industrial Relations Act* of 1971, which they correctly saw as a challenge to the labor movement. The consequences of their temporary defeat of authority are at one level highly televisual. They have not been reform or compromise, but commando-style policing and cavalry charges like those of the redcoats Peel's bobbies were meant to replace.

To "go political" with any hope of success requires a quantity of support, as Hain concedes, that may be attainable nationally in the case of celebrated defendants, but is infinitely more problematic at the local level. More people would be required than middle class radicals, and whilst the working class may have few illusions about the legal system they still accept it as one of life's inevitabilities. To challenge it would represent an enormous leap in the dark. If there were any serious likelihood of a substantial part of the population's mounting such a challenge, the general political situation would already be one of crisis and potential revolution and counter-revolution.

There is an undoubted need — especially in Australia — for accounts of the legal system which escape the smug and parochial character of legal textbooks without at the same time being dismissive. Proper assessment of current controversies about law and lawyers must be located within some social-theoretical framework, and indeed provides an excellent opportunity for persuading lawyers to contribute more sympathetically to debates within social theory. An English book might show the way, although an Australian book would be better — but this one, I think, does not.

Ian Duncanson
La Trobe University