

MYTH AND MUDDLE — AN EXAMINATION OF CONTRACTS FOR THE PERFORMANCE OF WORK

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I. INTRODUCTION

One of the most persistent problems in employment law has been the fundamental task of defining the employment contract. The major reason for the continual need to face this issue is that a number of important statutes make access to benefits (or liability for imposts) dependent on the existence of such a contract. In most cases, the status of 'employee' or 'employer' is a good working guide, because those we have come to see as possessing such status fall squarely within the group which the legislature intends to benefit (or to tax etc.). However, there is a constant procession to the courts of 'borderline' cases. These cases concern claims for benefits by people who appear to fall within the group of intended beneficiaries, except for the fact that they are not, as the law has defined it, 'employees', or claims for exemption from impost by persons who would appear to fall within the group of intended payers, except for the fact that they are not, as the law has defined it, 'employers'.

I have examined elsewhere¹ the various categories of such cases — Workers' Compensation claims, claims of entitlement to the protection of industrial awards, cases involving alleged liability to payroll tax etc. — and have suggested that often, if not almost always, the answer which the courts give to the question whether the claimant is or is not an employee or whether one of the parties is or is not an employer depends on why the question is being asked.² This point was also taken up in Harvey on *Industrial Relations*

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1 A.S. Merritt, " 'Control' v 'Economic Reality': Defining the Contract of Employment" (1982) 10 *Australian Business Law Review* 105.

2 *Id.*, 105-6 and 112-8.

*and Employment*³ and was referred to in a very realistic judgment by Di Fazio I.M.⁴

In the article referred to above, I attempted to produce a test for defining employment contracts which would cover persons whom the courts, in the cases of which I have just spoken, considered appropriate beneficiaries of the statutes concerned, so that we could say they were entitled to the benefits because they were, using my suggested test, 'employees', and thus within the statutory coverage. C.P. Mills took issue with my attempt, claiming that I was trying to put new wine into old bottles.⁵ Perhaps he was right. Looking back on my argument and his, I have come gradually to the conclusion that my 'fault' was to be too circumspect. By attempting to provide a definition for employment contracts, I was accepting their existence as a discrete category.

Further research and further thought have brought me to the conclusion that, as with the unicorn, there is no such beast as an 'employment contract'. I would argue that this follows from two factors, the second following logically from the first, but each capable of separate exposition: first, it is impossible to define the employment contract so as to differentiate it from 'independent' contracts for the performance of work; second, there are no differences in the rights and duties that will arise under contracts labelled as 'employment contracts' from those which will arise under contracts labelled as 'independent'. I believe, therefore, that there are not two distinct types of contract, but merely one broad type — contracts for the performance of work.

If this is so, then something must obviously be done to provide an alternative criterion of eligibility or liability in the statutes to which I referred above. In providing this alternative criterion, we have the opportunity to make the statutes serve their purposes more comprehensively, by replacing the 'employment' criterion with a more accurate identification of the groups which the community, through the legislature, intended to benefit or penalise.

This paper attempts to substantiate these claims and conclusions — to demonstrate the identity of contracts for the performance of work and to suggest alternative statutory criteria.

II. THE FAILURE OF SUPPOSED DEFINITIONS

If there is such a thing as an employment contract, it must be susceptible of definition. Thus, the first point in the process of 'de-employmentification' is the iconoclastic assertion that the employment contract is impossible of legal definition. The courts have, for many years, proceeded on the basis that

3 Harvey, *Industrial Relations and Employment* (1984 update) 4.

4 *M. Borg and Olympic Industries Ltd* (1984) 26 AILR 363.

5 C.P. Mills, "The Contract of Employment: Control is Economic Reality" (1982) 10 *Australian Business Law Review* 270, 277.

it can be defined, but — with all the very greatest respect that such a bold claim requires — they have been mistaken.

Obviously, an employment contract is a contract for the performance of work. But, we are told, not all contracts for the performance of work are employment contracts. There are, we are told, several distinct legal types of contract included within the broad description of 'contracts for the performance of work'. The most important or most common of those distinct types of contract are, we are told, employment contracts and 'independent' contracts, and law reports contain countless cases where the courts have purported to decide that the particular contract for the performance of work with which they dealt was an employment contract or, conversely, an independent contract.

We can, of course, see clear *factual* differences between many situations where contracts are assigned to these categories. We can recognise a difference between the situation where a person contracts to work as a process-worker in a factory or a clerk in an insurance office and the situation where a plumber, operating under the business-name of 'Joe Bloggs Plumbing Services', contracts to fix our leaking taps. But the difference we can see does not of itself make those contracts legally different entities. To do that, we would have to be able to produce a legal definition of employment contracts and of independent work contracts. The law claims that it has such definitions, that there are tests which, if applied, will identify particular contracts as belonging to one or other type. It is my contention that the law has no such definitions, that these tests do not identify particular types of contract.

A 'definition' of something, to be worthy of the name, must be both inclusive and exclusive, must state elements which will be present in *all* instances of that something, and which will not be present in other things. This can be done by putting together a group of criteria which will always be found together in a thing of that nature, and never found together in any other type of thing. Thus, we have not properly defined a cat if we say that a cat is an animal with four legs, fur and a tail. We have *described* a substantial number of cats by doing that, but we have not defined the concept 'cat'. First, the purported definition is not inclusive — it is not true of all cats. Manx cats have no tail; some breeds of cat have no fur. Second, the purported definition is not exclusive — lots of animals have four legs, fur and a tail, yet are not cats. The alleged definitions of employment contracts fail in the same way. They neither include all contracts which have been judicially accepted as employment contracts, nor do they exclude all contracts judicially proclaimed 'independent'.

These definitions have varied over the years, but all are unsatisfactory. The classic 'control' test argued that the deciding feature of an employment contract was that the employer could control the employee in the manner of performance of the work. It would follow, as a necessary corollary, if that feature were to be decisive, that a principal could *not* control the manner of a performance of work by an independent contractor. This is obviously not

true. There are many contracts accepted by the courts as being employment contracts where the employer does not and could not control the manner of performance.⁶ There are also many contracts recognised as independent contracts where the principal reserves and exercises a very large degree of control over manner of performance.⁷

This criticism was purportedly dealt with⁸ by the argument that what was decisive was not the actual exercise of control, but the *right* to exercise it — “lawful authority to command so far as there is scope for it. And there must always be some room for it . . . ”⁹ And, of course, the courts were not simply concerned with express reservations of control, but implied rights; that is, they allegedly focussed on those contracts where that right was, by the very nature of the contract, present even without the need to express it. These qualifications did not make the control test more useful, however, but less. As I wrote in 1982:

[t]he error in using ‘right to control’ [or ‘lawful authority to command’, in the High Court’s phrase] as a *definition* . . . is that this right is a consequence rather than a determinant of the very thing we are looking for. In so far as there is a type of control distinctive to a contract of employment, we can only establish that such a right of control exists by first establishing that the contract in which it is being sought is in fact a contract of employment. It is only by the most circular logic that we can say that we identify a contract which will give a right of control by seeing whether the contract gives a right of control.¹⁰

A further refinement of the control test was produced by saying that an employment contract is one where there is both a right to control *and* a requirement of personal service by the employee.¹¹ Again, this is factually untrue, definitionally inadequate and theoretically circular. There are employment contracts in which personal service is not required, and independent contracts where it is required. The addition of personal service to control does not turn a description into a definition. It is not inclusive, because it has been judicially treated as a non-essential feature of employment contracts, so that we cannot say that *all* employment contracts contain a right to control and an obligation of personal service. In the *Queensland Stations* case,¹² in *A.M.P. v. Chaplin*¹³ and in *M. Borg and Olympic Industries Ltd*,¹⁴ the absence of an obligation of personal service

6 Almost any case involving a professional employee would serve as an example. For an early instance, see *Cassidy v. Ministry of Health* [1951] 2 KB 343.

7 For example, *Queensland Stations Pty Ltd v. FCT* (1945) 70 CLR 539.

8 In *Zuijs v. Wirth Bros Pty Ltd* (1955) 93 CLR 561.

9 *Id.*, 571.

10 Note 1 *supra*, 111.

11 Note 5 *supra*, 270-2.

12 Note 7 *supra*.

13 (1978) ALJR 407.

14 Note 4 *supra*.

was noted as relevant, but was not decisive. In fact, in the last mentioned case, though Di Fazio I.M. commented that:

the element of personal service, i.e. the obligation to do the work personally, is an important determinant of the question in hand. Personal service has always been important in the contract of service . . .¹⁵

and admitted that:

[t]he complainant Borg was not, as I see the evidence, obliged personally to work for the company. It was of no importance to the company whether it was he or another who erected garages provided that the job was done and done to the company's minimum standards and specifications . . .¹⁶

he nevertheless concluded that:

[i]n the end a conclusion can only be reached by balancing all of the matters that I have mentioned. The balance in this case is very fine. Nevertheless in my mind it tilts unmistakably in favour of a contract of service . . .¹⁷

And in addition, the criterion is not exclusive. There are many independent contracts where personal service will be essential,¹⁸ so that we cannot say that *only* employment contracts exhibit this criterion. Finally, the control/personal service test is circular, because, if we are talking about an *implied* obligation of personal service as being decisive rather than an express one, we could not say such an obligation was or was not necessarily *implied* into a particular contract until we had *first* identified that contract as one of employment or as an independent contract.

Another variation of the definition of employment contracts was to argue that an employment contract is one where there is a right to control and an obligation of personal service *and* where the other terms of the contract are consistent with an employment contract.¹⁹ This 'inconsistency' test is clearly circular.

The only way in which it can be shown that a term of a contract is inconsistent with that contract being one of employment is to be able to state *first* what the essentials of an employment contract are.²⁰

How can we identify the presence of a contract of a particular type by arguing that its terms are inconsistent with an as-yet undefined type of contract in contradistinction to other contracts from which the unformulated inconsistency sets the undefined contract apart? What this version of the definition amounts to is to say that 'an employment contract is an employment contract'! Gertrude Stein was rightly deriding arid formalism when she said "a rose is a rose", but the law purports to impose obligations and to create rights depending on the definition of an employment contract,

¹⁵ *Id.*, 364.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ As, for example, if I engaged Clifton Pugh to paint my portrait. Clearly, I would not accept any delegation to another of the work involved in such contract.

¹⁹ *Readymixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497.

²⁰ Note 1 *supra*, 108.

and it cannot sensibly do that by simply asserting that an employment contract is an employment contract.

The final test or definition is the so-called 'integration test', which derives largely from the question posed by Denning L.J. in *Bank voor Handel en Scheepvaart N.V. v. Slatford* of "whether the person is part and parcel of the organisation"²¹ of the person for whom the work is done. This was reformulated by Cooke J. in *Market Investigations Ltd v. Minister of Social Security* into the more useful question: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?"²² His Honour concluded that the worker in question in that case was not a person in business on her own account:

Mrs Irving did not provide her own tools or risk her own capital, nor did her opportunity of profit depend in any significant degree on the way she managed her work.²³

The test is thus rather vague, but looks primarily to whether the worker has an opportunity, through management of his or her 'business', to make a *profit*, rather than simply to earn a fee or wage. The problem with this test is that it is looking at issues extraneous to the actual contract for the performance of work, and I would suggest that it cannot thereby define the nature of that contract. The definition must depend on the contract itself and its terms.

Thus, there is no proper definition which enables us to say that one contract for the performance of work *is* an employment contract, while another contract *is* an independent contract.²⁴ And if we cannot define an employment contract, we are unlikely to find any inherently different obligations or rights arising by necessary implication from the one or other 'type' of contract. Nor are we able to sensibly allocate benefits on the basis of one worker *being* an employee yet to deny them on the basis of another worker *being* an independent contractor.

III. THE TERMS OF CONTRACTS FOR THE PERFORMANCE OF WORK

If, as suggested, there is no definition which satisfactorily separates employment and independent contracts as essentially different entities, there is no reason why the rights and duties of the one type of contract need be

21 [1953] 1 QB 248, 295.

22 [1969] 2 WLR 1, 9.

23 *Id.*, 13.

24 It is worth noting that, while English courts are swinging away from the control test and favour an integration/economic reality criterion, Australian courts are less uniform in their approach. Some judges and Industrial Magistrates clearly favour economic reality, but the control test is still alive and well — see, for example, *Stevens v. Brodribb Sawmilling Co. Pty Ltd* (1986) 60 ALJR 194, and the reliance of the New South Wales Court of Appeal on control in, of all things, a case based on the *actio per quod servitium amisit*: *Baldi v. Fletcher Pty Ltd*; *Baldi and Fletcher Earthmoving Pty Ltd v. Rabmar Pty Ltd*, unreported, New South Wales Court of Appeal, 3 June 1988.

any different from the rights and duties of the other. And if we find that there are no necessary differences in the rights and duties appropriate to contracts which we have been schooled to call employment contracts and contracts we have been schooled to label independent, then it is pointless to continue to claim that the two types of contract exist independently. I argued earlier²⁵ that the two factors disproving the existence of employment contracts were capable of separate exposition, and therefore, in presenting the second separately, I do so on the basis that things called employment contracts and things called independent contracts do exist. I assume, for argument's sake, the existence of the two boxes. What are the contents?

The major significance, at common law, of the categorisation of work contracts has been in relation to the establishment of the terms to be implied into those contracts. Obviously, parties may provide expressly for whatever rights and obligations they wish, providing no illegality is involved. But it has been held²⁶ that, in the absence of express statement, certain rights and obligations will be implied into employment contracts, and it has been assumed that these terms would not be similarly implied in contracts for services. I would suggest that (even accepting the existence of separate legal categories of work contracts) differences in the content of implied terms will arise, if at all, only from the particular circumstances, and not from that legal categorisation. I propose to demonstrate this by examining the traditional implied terms of employment contracts one by one, starting with those imposing obligations on employers.²⁷

A. THE OBLIGATION TO PAY REMUNERATION

It is accepted without question that, providing that there is a contract — that is, that an intention to create legal relations is established, then a promise to pay remuneration — wages, salary, commission or whatever — will be implied into employment contracts, even if it has not been expressly stated. Such an implication is obviously valid. Since a contract requires consideration, once the existence of a contract has been acknowledged, the employer *must* have promised consideration and, if the promise is not express, obviously it is to be implied. The possibility that the implied consideration might be something other than the payment of remuneration might once have existed, but for at least one hundred years, the implication made would have been of consideration in the form of payment. And, of

²⁵ See p. 49 above.

²⁶ For example, see J. Macken, G.J. McCarry and C. Sappideen, *The Law of Employment* (2nd ed. 1984) 51-2; B.T. Brooks, *Contract of Employment* (3rd ed. 1986) 39-40.

²⁷ My discussion of circumstances in which terms will be implied may appear to conflate the two categories of, on the one hand, terms necessarily implied by operation of law (in the absence of their clear exclusion), and, on the other hand, terms implied because shown to be obviously intended in the circumstances — the arena of operation of the officious bystander. I would argue, however, that the former are a recognition that certain circumstances have, over a series of cases, inevitably produced the latter; and moreover, that those circumstances are not necessarily tied to a categorisation of the contract as one of employment, but will also be found, on appropriate occasions, in independent contracts.

course, acts such as the Truck Act 1900 (NSW)²⁸ require remuneration in currency or bearer cheque.

Surely it is equally obvious that, if an independent contract for the performance of work is acknowledged to have been entered into and yet there is no express provision for consideration in the form of remuneration, such a promise would be implied. It is the factual situations which will differ, not the legal result. It is legally possible for such a contract to involve consideration in some other form than the payment of monetary remuneration — in goods or services (just as it would be for an employment contract, were it not for the Truck Act and its equivalents). But in today's world, if the consideration is not expressed, then the implication would be of consideration in the form of monetary remuneration. Consideration of another sort would have to be express.

There remains the difficulty of determining *how much* remuneration is impliedly promised, if this term of the contract is not expressed. That question could be more easily answered in a recognised 'employment' situation, because the job will possibly be subject to an award or industrial agreement, so that the implication would be that the parties did not bother to express the remuneration because they intended that it should be the sum set by that award or agreement. The absence of such a measure in 'independent' agreements would not point to there being different rules as to the implication of a term concerning remuneration. Rather it would mean that the courts would be less likely to find the intention to create legal relations was established! Thus, it is easy enough to find an intention to contract even though the parties do not express one of the basic elements of a contract to perform work — remuneration — when there is a widespread and generally enforceable amount established for contracts to perform the work concerned which the parties can be readily assumed to have impliedly adopted; but more difficult when there is no such accepted sum in existence. To reiterate — factual situations differ; principles do not. It is legally possible for parties to intend to establish either an 'employment contract' or an 'independent' contract without expressly stating the remuneration. But, in practice today, this will not occur except where there is a governing award rate for the job already in existence. However, if we look *back* to situations where it was argued that, in the absence of expression of remuneration, the worker would be impliedly entitled to what the court, on evidence, accepted as the 'fair rate' or the 'going rate' for the job, we find that they frequently involved seasonal occupations or particular crafts such as fencing, clearing, shearing, reaping etc., where there would have been a strong argument, if the distinction had clearly existed at the time, that the worker was not an employee but an independent contractor.²⁹

²⁸ See also Wages Acts 1908-54 (Qld), s. 20; Truck Act 1899-1904 (WA), s. 5.

²⁹ This type of situation arose occasionally in relation to claims for unpaid wages under the New South Wales Masters and Servants legislation, examined in A.S. Merritt, "The Development and Application of Masters and Servants Legislation in New South Wales 1845-1930", unpublished Ph.D. thesis, Australian National University, 1981.

The last-mentioned point raises one of the pervading difficulties in an analysis of 'employment law'. The texts, and many judges, today speak as if the distinction between employment contracts and independent contracts is long-standing to the point of immutability.³⁰ In fact, the distinction is very recent — dating from about the last decade or two of the nineteenth century. Before that time, any such distinction was largely inchoate, or at least widely misunderstood. This lends support to my underlying premise that 'employment law' as a separate entity does not exist. As examples of the previous blurring of concepts now treated as distinct, I instance two cases. The first is *Harmer v. Cornelius*³¹ in 1858, the case which is taken as having established the employee's implied warranty of skill and implied promise to exercise skill. In explaining the implied warranty, Willes J. said "if an apothecary, a watchmaker or attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts".³² Yet apothecaries, watchmakers and attorneys would not have been employees but independent contractors, if there is a distinction between the two, and therefore they would have been 'engaged', not 'employed'. Thus, in using the terminology of employment, Willes J. confused the two categories if separate categories existed, or indicated that they did not exist. And in adopting his statement as governing 'employment contracts', later judges who do believe the two separate categories exist, have been confusing rules laid down in relation to one type of work situation with those applicable to another type.

The second case involves a more obscure but also more fundamental confusion. This is *Yewens v. Noakes*,³³ the *locus classicus* of the famous 'control test', by which employment contracts can supposedly be distinguished from independent contracts. Bramwell L.J. stated that "[a] servant is a person subject to the command of his master as to the manner in which he shall do his work".³⁴ Later commentators assumed that master-servant law and employment law are the same thing, that employee is merely a modern appellation for servant,³⁵ and that therefore an *employee* is subject to the command of the *employer* as to the manner of doing the work whereas, by corollary, an independent contractor is not so subject to the command of the principal. That is a very strange result to have flowed from Bramwell L.J.'s decision. For the question at issue in *Yewens v. Noakes* was whether Noakes was entitled to exemption from inhabited house duty. Exemption was allowed if a servant lived in the house for its protection.

30 For example, in *Performing Right Society Ltd v. Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762, 766 McCardie J. spoke of the distinction as having been discussed in "many cases", which he examined, as far back as *Milligan v. Wedge* in 1840 12 Ad. and E. 737, though he acknowledged that the decisions were "not always easy to follow".

31 (1858) 5 CB (NS) 236.

32 *Id.*, 246.

33 (1880) 6 QB 530.

34 *Id.*, 532-3.

35 For example, G. Fridman, *Modern Employment Law* (1963).

There was a caretaker in the premises for which Noakes was claiming exemption. Bramwell L.J. made his famous statement when discussing whether that caretaker, Kepell, was a servant (so that the exemption would apply) or an employee!

Thus, in the view of Bramwell L.J., 'employee' was not just another name for 'servant'. They were two different things, and by stressing that *servants* were subject to command as to the manner of working, he was indicating also that *employees* were not. And yet the case has been taken as authority for the proposition that employees are subject to such command. One of the problems we face, then, in attempting to establish the components of employment law which differentiate employment contracts from independent contracts is that we are relying on cases which used different concepts to examine different things. This does not mean, of course, that we can simply discount later cases which have taken up statements like those in *Harmer v. Cornelius* and *Yewens v. Noakes* as establishing principles of employment law; but it does mean that, in re-examining those principles, we should go to the essence of decisions, rather than simply to their reiteration of supposed maxims.

B. THE OBLIGATION TO PROVIDE WORK

There is, of course, no general obligation implied into 'employment' contracts whereby an employer should provide work for the employee to do, as well as pay the remuneration agreed. An obligation to provide work arises in three special sets of circumstances only. The first is where payment is to be by way of piece-rates or commission. In such cases, as *Devonald v. Rosser*³⁶ established, the employer must provide sufficient work to enable the employee to earn a "reasonable amount" of remuneration. In so holding, *Devonald v. Rosser* differed from earlier cases such as *Williamson v. Taylor*,³⁷ *Aspden v. Austin*³⁸ and *Rhodes v. Forwood*,³⁹ which had interpreted the contract as merely providing a chance to earn commissions if work should be given. Thus, the modern view, represented by *Devonald v. Rosser*, is simply an application to the particular circumstances of such types of payment of the obligation to pay remuneration. The result would therefore be the same whether the contract was one of 'employment' or 'for services'. If there is a clear obligation to pay remuneration, rather than simply an agreement, as in the three cases mentioned above, to pay if the work is given and performed, then that clear obligation will involve of necessity an implied obligation to give the work necessary for the earning of remuneration. It is not so much a separate implied term, as a necessary element of the agreement to pay which, as seen, is just as inevitable a part of 'independent' contracts as of 'employment' contracts. Again, it will be factual circumstances which

36 [1906] 2 KB 728, 740, 742-4.

37 (1843) 5 QB 175.

38 (1844) 5 QB 671.

39 (1876) 1 App. Cas. 256.

will differ, rather than legal principles. It is more likely that the admittedly unusual situation of an agreement whereby work may be given which, if so given, is paid for will arise in relation to what are regarded as independent contract situations. But it can *theoretically* arise in either — it depends on the actual contract. If it does arise out of an actual contract, the result will be the same whether the contract is one of service or for services. And if such agreement is not contained in the actual contract, then again the result will be the same, whatever the categorisation of the contract.

An obligation to provide work in a situation which is genuinely *in addition* to the obligation to provide remuneration will be found in situations so far restricted almost exclusively to the entertainment field, where doing the work involves publicity, which is regarded as part of the consideration.⁴⁰ Here also there would be no difference in result whether the contract was one of service or for services. If the contract is to give a part in a production which part involves publicity (and the resultant enhancement of reputation),⁴¹ then failure to give the part, even if the fee is paid, will result in a failure to provide the publicity. This will be just as true, and just as much a breach of contract, if the contract is an independent one as if it is a contract of service. In fact, engagements of performers fall more easily into the group of contracts regarded as 'independent' than into the group regarded as 'employment'. The cases dealing with this matter have not given very serious attention to the categorisation of the contracts concerned; nor was there any reason that they should have, since the question of categorisation is irrelevant to the issue.

The third of the sets of circumstances in which an obligation to provide work in addition to the obligation to pay remuneration will be found is characterised by the involvement in the position of 'privileges and powers'. These cases state that, where the contract is to appoint to an office, then to discontinue the appointment to that office, even without dispensing with the person's service, and without discontinuing payment of the agreed remuneration, is a breach of contract. Just as with the reputation and publicity cases, it is a mistake to treat these cases as establishing a principle, special to 'employment' contracts, that the employer must provide *work* as well as wages. What the employer must provide is the office which he or she expressly contracted to provide. Otherwise, there is an obvious breach of the contract — a breach which would be just as obvious if one could be appointed to an office under an independent contract, as normally understood, and the

40 *White v. Australian and New Zealand Theatres Ltd* (1943) 67 CLR 266; *Herbert Clayton and Jack Waller Ltd v. Oliver* [1930] AC 209.

41 There seems a different emphasis given in British and Australian courts to the extra element of consideration. British courts stress the opportunity to enhance one's reputation; Australian courts look more to the receipt of publicity. The difference is not major, however, for the value of the publicity would come from its enhancement of reputation. Underlying both emphases is the economic interest of the performer in gaining future engagements, an interest obviously dependent to a large extent on the performer's reputation, which is gained by publicity given to past performances.

holding of that office was discontinued. So again, the difference is factual rather than legal. In so far as there is such a thing as an independent contractor, legally separate from an employee, then it is *factually* improbable that an office-holder would be an independent contractor.

It is also *factually* unlikely that an office-holder would be an *employee*, in the sense that numerous cases⁴² have referred to as the 'ordinary' master-servant relationship. For office-holders, in the strict sense, are usually 'servants of the Crown', who are *not* employees.⁴³ However, cases dealing with this particular issue, the issue of the obligation to provide 'work' in the form of the office, where there is a contract appointing a worker, usually seen as an employee, to that office, have shown a rather fluid conceptualisation of what an 'office' is. In *Shindler v. Northern Raincoat Co.*,⁴⁴ involving a contract of employment of a person as director of a company, the position of director was regarded as an office. An even more obvious example of the fluid approach to 'office' is shown in *Collier v. Sunday Referee*,⁴⁵ which has been taken as holding the position of Chief Sub-Editor to be an office. In so far as the interpretation given to these cases properly represents the essence of the decisions, the courts would seem to have come to the point of treating any job with a title, or at least any important job with a title, as being an 'office'. That is clearly going too far. Perhaps the reason why *Shindler's* case seems less outrageous than *Collier's* case in this respect can be found if we identify, as a component of an 'office', the fact that the position involved is governed by rules drawn from branches of the law other than the law of employment. Thus, the position of director is governed by rules drawn from company law. The position of Chief Constable of the County of Brighton⁴⁶ is governed by principles drawn from administrative, and even parliamentary, law. The position of soldier⁴⁷ is governed by principles drawn from military law. But what principles other than the alleged principles of supposed 'employment law'⁴⁸ govern Chief Sub-Editors, so as to make that position different from 'Purchasing Officer', or 'Safety Officer', or even 'Parking Officer'? Whatever the explanations for the particular decision in these cases, there would seem to be no reason in *principle* why different terms as to the provision of work would be implied into employment contracts from those implied into contracts for services.

C. THE OBLIGATION TO TERMINATE THE CONTRACT LAWFULLY

The standard statement of the law as to the termination of employment contracts is that they are terminated by the effluxion of a stated term in the

42 For example, *Ridge v. Baldwin* [1964] AC 40, 65; *Malloch v. Aberdeen Corporation* [1971] 2 All ER 1278, 1294; *Mckay v. Oliver* (1967) 15 FLR 39, 55-6; *Hill v. C.A. Parsons Pty Ltd* [1971] 3 All ER 1345, 1349.

43 See *Reading v. Attorney-General* [1951] AC 507.

44 [1960] 1 WLR 1038.

45 [1940] 2 KB 647.

46 *Ridge v. Baldwin* [1964] AC 40.

47 Note 43 *supra*.

48 But at base — I would argue — simply contract law.

case of fixed term contracts or by the giving of proper notice in the case of contracts of indefinite duration, or by the acceptance by one party of a repudiatory breach by the other — that is, in the case of repudiatory breach by an employee, by summary dismissal for cause.⁴⁹ In relation to the third method, this is simply the application of a rule pertaining to all contracts of whatever kind — that, in the event of a repudiatory breach, the innocent party has an election to continue the contract or to accept the repudiation as putting an end to all further obligations under the contract.⁵⁰

Where a contract is for the performance of work for a fixed and certain period, then, on the expiration of that period, the contract, on its terms, comes to an end. Moreover, as a corollary, if a contract states that it is to continue for a set period, to attempt to terminate it before the expiration of that period is clearly a breach unless justified by the other party's repudiation. This will be the position whether the contract is allocated to the category of employment contracts or that of contracts for services. Whereas it is sometimes suggested that a fixed term might be an indicium of a contract for services rather than a contract of service, this is recognised as a fairly weak indicator (if indeed it is an indicator at all), and it has never been suggested that, where a contract is already identified as being one of employment, a term setting a fixed period for the contract's duration would be differently applied from such a term in a contract for services. It may be that such fixed periods are more *usually* found in contracts for services, but, if and when they appear in employment contracts, their effect will be the same.

Where a contract for the performance of work is expressed to be terminable by the giving of a particular amount of notice by either party, then that term for notice will have the same effect, whether the contract is one of 'employment' or one 'for services'. The governing factor is the parties' expression of intention. Where a contract of employment contains no term providing for expiration at the end of a set period and no term providing for the giving of notice, it is established that a term providing for 'reasonable notice' will be implied.⁵¹ If a contract for services mentions no fixed term and no notice period, how is it to be terminated? It may be that it is clear from the contract that it is for the performance of a particular task, so that — by necessary implication — the contract would expire on performance of the task and payment of the remuneration agreed. This is effectively the same situation as a fixed term contract, and it would thus be a breach to terminate the contract before completion of the task. (It is theoretically possible to

49 See, for example, M.R. Freedland, *The Contract of Employment* (1976), Chapters 5 and 6; Macken et al note 26 *supra*.

50 The so-called theory of automatic determination of employment has not received favour in Australia, and seems to have been finally laid to rest in Britain also — see e.g. *Gunton v. Richmond-upon-Thames London Borough Council* [1980] 3 WLR 714.

51 For example, *Richardson v. Koefod* [1969] 1 WLR 1812; *Thorpe v. South Australian National Football League* (1974) 10 SASR 17.

employ someone for the performance of a particular task, and there also the contract would terminate on completion of the task). But if a contract for services is not for the performance of a particular task, and is silent as to termination by notice, how is it to be terminated? The courts would have to imply a term whereby the contract was terminable on reasonable notice being given, in which case there would be no difference from an employment contract similarly silent as to duration.

As to what 'reasonable notice' means, there have been innumerable decisions in cases where employees have sued for wrongful dismissal on the grounds that the notice they were given was not enough to be 'reasonable', or where employees have put the unexceptionable argument that, since they were given *no* notice at all, there was clearly a breach of the implied term as to reasonable notice, leading to the need for the court to determine what reasonable notice would have been in order to assess damages. In all these cases, the courts have stressed that what 'reasonable notice' means depends on the circumstances of the particular case.⁵² Various factors, relating to the job and to the employee, have been stated to be relevant — responsibility, training required, salary, age, educational qualifications, length of service etc. The court weighs and balances such matters to determine what notice, given the particular mix of these factors, should have been given to the particular employee.⁵³

In the case of an independent contract into which a term of reasonable notice were to be implied, the same process of analysis would take place. It may be that some factors pointing to a longer period of notice are more likely to be found in 'employment' contracts and that some factors pointing to a shorter period of notice are more likely to be found in independent contracts; so that 'reasonable notice' might tend to be longer in one type of contract. But again, this is simply a question of the facts of the situation differing, rather than of different legal categories inevitably involving differing rights and obligations. Where the factors pointing to a longer period of notice outweigh any factors pointing to a shorter period, 'reasonable notice' will mean a longer period, however the contract in question is categorised.

D. THE OBLIGATION TO TAKE REASONABLE CARE FOR THE EMPLOYEE'S HEALTH AND SAFETY

It is quite clear that, today, this obligation can simply be presented as a particular example of the general duty as regards negligence. We all have a duty to take reasonable and practicable precautions to avoid foreseeable risks to the health and safety of another resulting from our actions. We have a duty to avoid negligently injuring our 'neighbours'. 'Employers' liability' for employees' safety is simply a shorthand recognition that the circumstances of

⁵² For example, *Thorpe, id.*, 36-7.

⁵³ Though, by process of analogy, something of an informal scale has developed — so many months for a manager, so many weeks for a shop assistant etc.

employment create a 'neighbour' relationship between employer and employee. Thus, it is not because A is the employee of B that B has an obligation to take care for A's safety, but because, being an employee, A is clearly B's neighbour. If the circumstances of an 'independent' contract are such that the contractor is the 'neighbour' of the principal, then the principal will owe the same duty of care. And it will be the factual circumstances of the relationship between a particular contractor and his/her principal which will determine whether that contractor is someone:

so closely and directly affected by [the principal's] act that [the principal] ought reasonably to have them in contemplation as being so affected when [the principal is] directing [his] mind to the acts or omissions which are called in question.⁵⁴

It is worth noting in this regard that the various Occupational Health and Safety Acts passed in Britain and Australia,⁵⁵ following the recommendations of the Robens Committee,⁵⁶ establish statutory performance standards based on the common law duties of care not only for employers, but also for principals as regards (inter alia) persons who have contracted with them to perform work.⁵⁷

Thus the law of tort will today impose the same *duty* of care on principals as on employers. The *standard* of care, the level of precautionary measures necessary to be taken in order to establish fulfilment of the duty, varies according to the particular circumstances. So, for example, in the case of an experienced employee, an employer can perhaps fulfil the duty by a simple warning where, in the case of an inexperienced employee, reiteration of warnings and supervision of compliance with them might be necessary in order to amount to reasonable care. The effect of the particular circumstances on the standard necessary for fulfilment of the obligation might mean that the standard of care will be generally lower in independent contract situations than in employment situations, but that is not a matter of legal categorisation.

This analysis has, however, so far only established that employers and principals are subject to the same duty in tort. The early development of employers' liability for employees' safety proceeded on the basis of an implied duty in the employment contract.⁵⁸ And whereas it will generally matter little whether a claim by an injured employee is framed in contract or in tort, the choice of the form of action *does* in certain situations have a bearing on the outcome;⁵⁹ and the courts have, in recognising that, upheld the injured plaintiff's right to choose the form of action appropriate to him or her. It is

⁵⁴ *Donoghue v. Stevenson* [1932] AC 562, 580.

⁵⁵ Health and Safety at Work etc. Act 1974 (UK); Occupational Health and Safety Act 1983 (NSW); Occupational Health and Safety Act 1985 (Vic.); Occupational Health, Safety and Welfare Act 1986 (SA); Occupational Health, Safety and Welfare Act 1987 (WA).

⁵⁶ Great Britain, Committee on Safety and Health at Work 1970-72, *Report*. Cmnd 5034.

⁵⁷ S. 6 (U.K.); S. 18 (NSW); S. 24 (Vic.); S. 24 (SA); S. 23 (WA).

⁵⁸ A.S. Brooks, *Guidebook to Australian Occupational Health and Safety Laws* (3rd ed. 1988) Chapter 1.

⁵⁹ *Id.*, 227-228.

therefore necessary to my argument (that the two types of contract for the performance of work have no relevant differences in rights and obligations) that I establish that principals also have an implied *contractual* obligation to take reasonable care for the safety of contractors. But could it be seriously argued that principals would *not* have a contractual duty to avoid exposing contractors to unnecessary risks arising from the principals' acts? Would the parties, if interrupted at the moment of contracting by an officious bystander, who asked "Surely you intend to include an obligation on the principal to take reasonable care?", answer any way other than (testily) "Of course". Certainly the contractor would answer that way. The principal might be tempted to say "No, that is not the intention". But such a self-serving temptation would be equally found if the officious bystander accosted an employer and employee at the point of contracting. And indeed, in the case of every implied term, one or other party would have such temptation, since every implied term imposes an obligation on one or other party. The officious bystander is a fiction, and equally fictional is the law's presumption that both parties would agree on the 'obvious' intention to incorporate the suggested term. What is really involved in this imaginary scenario is that the law has established certain obligations as being sufficiently essential to a contract, and of sufficient importance to one or other party, that that party would not have contracted unless that obligation were included, either with the 'purchased' agreement of the other party, or by the over-riding intention of the law itself. If the duty of care for an employee is of sufficient importance that an employee would not enter an employment contract from which such a term were absent, the same will be true of an independent contractor — he or she would not enter a contract for the performance of work unless the principal were thereby bound to take care, to the standard appropriate on the facts, not to jeopardise his or her health and safety. If such an obligation is present in both types of contract for the performance of work, there is no difference on this point, in terms of legal theory and effect, between the two types of contract.

E. THE EMPLOYEE'S OBLIGATION TO TERMINATE LAWFULLY

This is the mirror image of the employer's obligation discussed in (C). The same arguments put there that a similar obligation would attach to both principal and employer apply here with the same force. A contractor's obligation to terminate the contract lawfully — by giving proper notice, by completing the task or by serving to the end of a set period (or by acceptance of a repudiatory breach by the principal) — will arise as inevitably as will that of an employee.

F. THE EMPLOYEE'S OBLIGATION NOT TO DISCLOSE CONFIDENTIAL INFORMATION

It has been long established that an employee has an implied duty to protect the employer's confidential information, and that it is a breach of that duty to disclose that information to another or to use it for the employee's

own benefit.⁶⁰ And whereas earlier cases identified the information to which the duty applied by looking to the method of obtaining the information,⁶¹ or the motive with which it was obtained,⁶² the modern approach is to ask simply if the information is confidential. If so, it may not be disclosed as long as it remains outside the public domain, whether the employment still persists or has ended.⁶³ That approach creates difficulties, since it is not possible to separate cleanly information which is confidential from the employee's "stock of knowledge".⁶⁴ Such impossibility was recognised in *Printers and Finishers Ltd v. Hollaway*,⁶⁵ even though Cross J. restated the distinction between information readily separable from the employee's stock of knowledge and information not so separable.⁶⁶ Yet His Honour acknowledged that there could be information which could fairly be regarded as confidential which "his employees will inevitably carry away with them in their heads", and declined to enforce the employee's duty of confidentiality by injunction; since to do so would mean "an ex-employee is placed in an impossible position", and would "extend the general equitable doctrine to prevent breaking confidence beyond all reasonable bounds".⁶⁷ Instead, he suggested the employer should protect him- or herself "by exacting covenants from their employees restricting their field of activity after they have left their employment".⁶⁸ But given this approach, which looks to the *effect* of disclosure by asking whether it would be damaging to the employer's business rather than to whether the information was obtained by improper means or for improper motives, it is impossible to imagine that a duty not to disclose confidential information would not apply also to contracts for services.

It is ludicrous to suggest that an independent contractor might disclose confidential information, thus damaging the principal's business, but that an employee learning through his or her work the same information would be bound to keep the information confidential. Of course, in practice, the circumstances of most independent contracts might be such that contractors are unlikely to learn confidential information of the principal in the course of performing the work agreed. But if the circumstances of the working

60 See *Robb v. Green* [1895] 2 QB 315; *Kirchner v. Gruban* [1909] 1 Ch 413.

61 *Robb v. Green*, *ibid*; *Ormonoid Roofing and Asphalts Ltd v. Bitumenoids Ltd* (1930) 31 SR (NSW) 347.

62 *Wessex Dairies Ltd v. Smith* [1935] 2 KB 80.

63 *Thomas Marshall (Exports) Ltd v. Guinle* [1978] ICR 905.

64 *Ansell Rubber Co. Pty Ltd v. Allied Rubber Industries Pty Ltd* [1967] VR 37, 41 *per* Gowans J.

65 [1964] 3 All ER 731.

66 *Id.*, 735.

67 *Id.*, 736.

68 *Ibid*. Another attempt to cope with the difficulties of the modern approach which focusses on the confidentiality of the information in question can be seen in the Court of Appeal decision in *Faccenda Chicken Ltd v. Fowler* [1986] 1 All ER 617 (applied in New South Wales in *Riteway Express Pty Ltd v. Clayton* (1987) 10 NSWLR 238) which effectively divides confidential information into two categories, of which the most secret category may not be disclosed either during or after the employment, while the less secret may not be disclosed during the employment but may be disclosed — or used — once the employment relationship has ended.

arrangement are such that, given formal categorisation of the work relationship as a contract for services rather than a contract of service, the worker *does* learn such information in the course of performing the work, on what grounds could it be argued that no contractual duty to protect the confidence would apply. The principal in such a situation, if asked by the officious bystander whether a duty of confidentiality was intended, would be very testy indeed in inevitably answering "Of course!". Moreover, an equitable right in the principal to the protection of his or her confidence would exist and be enforceable quite independent of the contract for the performance of the work.⁶⁹ Surely then, such a right would be taken up by the implication of an equivalent obligation in the contract.

G. THE EMPLOYEE'S OBLIGATION NOT TO TAKE SECRET PROFITS

This obligation of an employee is said to arise as part of a fiduciary obligation.⁷⁰ That is not to say that the employment *relationship* is a fiduciary one, but simply that an employee owes certain fiduciary obligations to his or her employer. But it has long been clear that this does not apply only to employees. It is not *because* a person is *an employee* that an obligation not to take secret profits arises. It is rather that it is *because certain situations* give rise to a fiduciary obligation that an employee's obligation not to take secret profits is imposed. That the duty has a foundation outside the contract of employment was recognised as far back as 1888 in *Boston Deep Sea Fishing and Ice Co. v. Ansell*,⁷¹ where Bowen L.J. said:

[i]t is true . . . that the money which is sought to be recovered must be money had and received by the agent for the principal's use . . . the law implies a use, that is to say there is an implied contract, if you put it as a legal proposition — there is an equitable right, if you treat it as a matter of equity — as between principal and agent that the agent should pay it over, which renders the agent liable to be sued for money had and received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity.⁷²

Thus, the obligation was found to arise also in the case of a member of the armed services, in *Reading v. Attorney-General*,⁷³ whom Lord Normand described as "ow[ing] to the Crown a duty as fully fiduciary as the duty of a servant to his master or of an agent to his principal".⁷⁴

The obligation under discussion here is in reality a duo of obligations. In different fact situations, both or only one of the obligations may be breached. It is a breach of the fiduciary obligation to keep secret a profit received from a third person as a result of carrying out employment duties. The employee must disclose the profit to the employer and, if so required, deliver it over to the employer. This is so whether or not the profit was solicited by the

69 *Seager v. Copydex Ltd (No.1)* [1967] 2 All ER 1415.

70 Note 47 *supra*, 515-7.

71 (1888) 39 Ch D 339.

72 *Id.*, 367-8.

73 Note 47 *supra*.

74 *Id.*, 517.

employee, and whether or not its promise or receipt affected the employee's performance of his or her employment duties. This member of the duo of obligations arises by operation of law, quite distinct from the 'law of employment'. It arises because money or profit received in such circumstances becomes, by its receipt, impressed with a fiduciary obligation, which can be enforced by the person for whose benefit that obligation is imposed by an action for restitution. The fiduciary obligation arises by virtue of the receipt and attaches to the profit received. It is not because an employee is *already* bound by a fiduciary obligation that he or she holds such profit to the use of the employer. It is because receipt of the profit creates the fiduciary obligation. This was recognised by Lord Porter in *Reading v. Attorney-General*, when he stated:

[a]s to the assertion that there must be a fiduciary relationship, the existence of such a connexion is, in my opinion, not an additional necessity in order to substantiate the claim; but another ground for succeeding where a claim for money had and received would fail.⁷⁵

The principle here is thus the same principle explained and applied in *Sinclair v. Brougham*,⁷⁶ *Re Diplock*,⁷⁷ and in *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd*,⁷⁸ where Goulding J. said:

the fund to be traced need not . . . have been the subject of fiduciary obligations before it got into the wrong hands. It is enough that . . . the payment into the wrong hands itself gave rise to a fiduciary relationship.⁷⁹

This obligation to disclose and, if required, deliver up the profit would therefore apply not only to an employee but also to an independent contractor who received from a third person a 'secret' profit in relation to the work that the contractor was performing for his or her principal. It would be, in Lord Porter's words, the "position of authority" gained by the contractor from the work he or she had contracted to do which would "enable him [or her] to obtain the sum . . . received".⁸⁰ The contract of employment does not create the employee's obligation to disclose and deliver such profit, it merely creates the opportunity to be offered the profit. If an independent contract also creates such opportunity, the same fiduciary obligation to disclose and deliver will arise.

When the profit is solicited by an employee, or where offer and/or receipt of the profit affects the employee's performance of his or her work — leading the employee to give favour or preference to the third person in performance of the contract under circumstances where proper performance of the work would not have resulted in such favour or preference being given — then there will be a breach of the second obligation of the duo, the obligation (to be discussed later) to perform the contract work well. For example, where an

⁷⁵ *Id.*, 516.

⁷⁶ [1914] AC 398.

⁷⁷ [1948] 1 Ch 465.

⁷⁸ [1981] 1 Ch 105.

⁷⁹ *Id.*, 119.

⁸⁰ Note 43 *supra*, s. 16.

employee who, like Ansell in the *Boston Deep Sea Fishing and Ice Co.* case,⁸¹ had as part of his or her work to place a contract for the building of fishing boats for use in the employer's business, placed that contract with a particular boat builder, not because that builder would produce the most suitable boats for the best price, but because that builder had promised or paid the employee a bribe, then the employee would not have properly performed the work of placing the contract. This would be just as true if the person charged with placing such contract was an independent contractor. Surely there would be implied in that person's work contract an obligation to do the work of placing the contract properly, having regard to factors relevant to the principal's business, so that to place the contract because of the promise or receipt of a bribe would be a breach of that obligation to do the work properly. If, for example, a consultant is engaged to advise a business on the best computer system for that business to install, there is surely an implied obligation to give proper advice based on relevant factors. To advise a particular system, not because the consultant believes it to be the most suited to the principal's needs, but because the manufacturers have offered or paid the consultant a bribe would be a breach of the consultant's contract with the business. This would be so even without receipt of the bribe. To act in that way because a bribe was promised, or even in the hope of attracting a subsequent payment as reward would be just as much a breach of obligation. Thus, in relation to 'secret' profits, both the seeking of them and the receipt of them without disclosure will be breaches of a contract to perform work, whether the contract is categorised as an employment contract or as a contract for services.

H. THE EMPLOYEE'S OBLIGATION TO HOLD INVENTIONS ETC. ON TRUST FOR THE EMPLOYER

It was established in *Triplex Safety Glass Co. Ltd v. Scorah*⁸² that it is an implied term of all employment contracts that:

any invention or discovery made in the course of the employment of the employee in doing that which he is engaged and instructed to do during working hours, and using the materials of his employer, is the property of the employer, and not that of the employee, and that, having made such a discovery or invention, the employee becomes a trustee for the employer of that invention or discovery, as the case may be, and he is, therefore, as a trustee, bound to give the benefit of any such discovery or invention to his employer, at any rate during the employment.⁸³

That was admittedly only the decision of a single judge in the Chancery Division. However, it was approved by the Court of Appeal in *British Celanese Ltd v. Moncrieff*.⁸⁴

One argument underlying the implication of such a duty was set out by

⁸¹ Note 71 *supra*.

⁸² [1937] 4 All ER 693.

⁸³ *Id.*, 698-9.

⁸⁴ [1948] 2 All ER 44.

Roxburgh J. in *British Syphon Co. Ltd v. Homewood*,⁸⁵ though His Honour treated the question as independent of any previous authority, saying that he could not "find even an oblique discussion of this problem anywhere in the many authorities which the industry of counsel had disclosed".⁸⁶ His finding was, however, quite consistent with the principle as stated by Farwell J. (as he then was) in the *Triplex Safety Glass Co.* case. Describing the defendant as "employed to give the plaintiff technical advice in relation to the design or development of anything connected with any part of the plaintiff's business", Roxburgh J. said:

[w]ould it be consistent with good faith, as between master and servant, that he should in that position be entitled to make some invention in relation to a matter concerning a part of the plaintiff's business and either keep it from his employer, if and when asked about the problem or even sell it to a rival and say "Well, yes, I know the answer to your problem, but I have already sold it to your rival"? In my judgment, that cannot be consistent with a relationship of good faith between a master and a technical adviser . . . this invention . . . if made during a time during which the chief technician is standing by under the terms of his employment, must be held to be in equity the property of the employer.⁸⁷

This argument is, as I have suggested, consistent with the principle stated by Farwell J. It is in fact narrower in its application than the earlier statement, for Roxburgh J. ties it to the situation where the employee is actually employed, and 'standing by', to give advice as to how the employer's manufacturing process should be undertaken. In the statement of Farwell J., however, the relevant factors seem to be that the employee is using the employer's time and materials to make the invention, and has agreed by virtue of his or her contract to work during that time for the employer. Another way of addressing the question, and one which would catch even inventions made out of working hours, would be to suggest that any invention made relating to the employer's business is likely to involve in its thinking out and its formulation confidential information of the employer, and that, since that information cannot be used by the employee to his or her profit, neither can an invention which derives from that information. The situation which arose in the *British Syphon Co.* case could arguably have been treated in this way without recourse to any separate duty relating to inventions. If the employee's actions there did *not* involve use of any confidential information, so as not to be covered by the duty of confidentiality, I would suggest that it would have been better to base the implied duty to hold the invention for the employer on the principle propounded by Farwell J. in *Triplex Safety Glass*.

Adopting that foundation for the duty that looks to the use of the employer's time and materials, would such a duty be implied in the case of an independent contractor? This is more problematic than the other issues in relation to which the two alleged types of contract have been compared so far.

85 [1956] 2 All ER 897.

86 *Id.*, 898.

87 *Id.*, 898-9.

If a householder engages a plumber to fix a leaking tap, and in the course of performing that service, the plumber has a 'brainwave' and invents some improvement to the plumbing system, would it be possible to argue that the plumber held that invention in trust for the householder? If a company engages a consultant engineer to design and supervise construction of a bridge, is an invention by the engineer about an improved method for constructing bridges, devised while carrying out the consultancy, held on trust for the company? Certainly the plumber or consultant would deny to the officious bystander any intention that such a term was to be included in the contract. Probably the householder or the company would also answer that he, she or it had not considered that the plumber or consultant was so binding him- or herself. Perhaps this can be explained by the fact that, in those contracts, the work contracted for is fixing a particular leak or building a particular bridge, whereas an employed plumber or engineer is hired to work on whatever taps or bridges the employer may direct. These employees are hired to perform plumbing work, or engineering design work, and thus the invention made will be part of the thing they are hired to do, rather than simply relating to the subject matter of which the particular task they are hired to perform is a part. Thus, if an engineer was hired as consultant to a construction company to advise generally on projects the company might undertake, it could be said that the engineer had already contracted with respect to inventions made in the course of giving such advice to the company.

These musings lead to the argument that the principle as stated by Farwell J. in *Triplex Safety Glass*⁸⁸ is too wide, and that, even in relation to employees, the implied duty should be limited to inventions relating to the employer's business, or even to the feature of the employer's business on which the employee was put to work. Surely it would go too far to say that, if a clerk in the David Jones accounts department, during working hours and thus in the course of employment, invented a new type of lawnmower, the clerk should hold that invention in trust for David Jones, even if the time spent in making the invention had resulted in the clerk failing to complete the day's work of processing accounts etc. Arguably, this qualification is involved in Farwell J.'s statement, in that the phrase "made in the course of the employment of the employee in doing that which he is engaged and instructed to do so during working hours"⁸⁹ implies "made in the course of the employment of the employee *as a result of the employee's doing* that which he is engaged and instructed to do . . ." This would enable the position of the employee to be correlated to the position of plumbers and consultant engineers, with the determining factor being in all cases what the worker was actually engaged or employed to do.

⁸⁸ Note 82 *supra*, 698-9.

⁸⁹ *Ibid.*

I. THE EMPLOYEE'S OBLIGATION (IN APPROPRIATE CIRCUMSTANCES) TO DISCLOSE THE MISCONDUCT OF OTHER WORKERS

Cases on employee's duties have established that there is no general duty on an employee to disclose to the employer the misconduct of a fellow worker. Referring to the earlier decision of *Swain v. West (Butchers) Ltd*,⁹⁰ Stephenson L.J. said in *Sybron Corp v. Rochem Ltd*:

whether there is such a duty depends on the contract and on the terms of employment of the particular servant. He may be so placed in the hierarchy as to have a duty to report either the misconduct of his superior, as in *Swain's* case, or the misconduct of his inferiors, as in this case.⁹¹

In the *Sybron* case, Fox L.J. considered the employee was subject to the duty because he "was in a senior executive position in the group and there was existing a continuing fraud by the employees against the company, of which he was well aware".⁹²

The obligation to disclose in such cases is thus simply an aspect of the employee's duty to perform the work agreed, in circumstances where the work agreed involves such supervision and disclosure. It would therefore apply equally to an independent contractor, though the circumstances where such disclosure could form part of the work which the contractor agreed to perform would occur very rarely. One could however hypothesize as a possible example a person hired as a management consultant to advise on ways in which a company could improve its work arrangements and thus increase productivity. If that consultant became aware that part of the company's problem was that line managers were absenting themselves for long periods without authorisation, or that one of the reasons that productivity needed improvement was that there was a large amount of pilfering going on, disclosure of those matters would amount to a part of the giving of advice which the consultant had contracted to do.

J. THE EMPLOYEE'S OBLIGATION TO OBEY LAWFUL ORDERS

This obligation, which might perhaps be regarded as the most essential obligation of an 'employee', as traditionally defined, stems from the case of *Yewens v. Noakes*,⁹³ where Bramwell L.J. stated that a servant "is a person subject to the command of his master as to the manner in which he shall do his work".⁹⁴ I have pointed out already that Bramwell L.J. made this statement to distinguish servants from employees, but that later cases⁹⁵ have taken it to apply to employees, and to distinguish them from independent contractors, who can be told what to do but not how to do it (unless a power to give the latter type of direction is expressed in the contract).

90 [1936] 3 All ER 261.

91 [1983] 2 All ER 707, 717.

92 *Id.*, 719.

93 (1880) 6 QB 530.

94 *Id.*, 532-533.

95 For example, *Zuijjs v. Wirth Bros Pty Ltd* (1955) 93 CLR 561, 571 *per* Dixon C.J., Williams, Webb and Taylor JJ.

It is, of course, misleading to suggest that a principal or employer can tell a worker 'what to do'. It is the *contract* which determines what work can be given.⁹⁶ Neither employer nor principal can order the performance of work outside that contractually agreed. Thus, the duty to obey lawful orders and the supposed distinction between contracts of service and contracts for services boils down to this: that an employee can be ordered *how* to perform the work contractually agreed. Since the work itself is determined by the contract, 'lawful orders' will only encompass orders as to the manner of doing the work agreed in the contract. The 'manner of doing the work' can, depending on what the work is, cover hours and days of work, the place where the work is to be performed, the actual mode of performing the tasks involved in the work (for example, an order to shearers to shear the belly wool first rather than last),⁹⁷ dress whilst at work, deportment whilst at work etc.

The "Caftan case"⁹⁸ shows that an employer can dictate the employee's dress. This is so because how one dresses at work amounts to how (in part) one performs one's work. If this were taken to its logical extreme, it would mean that, if an employer ordered all employees to wear Mickey Mouse ears whilst at work, the employees would have an obligation to wear Mickey Mouse ears, of which refusal would constitute a breach. If an independent contractor cannot be directed as to the manner of doing the work, he or she would not be obliged to obey if the principal ordered him or her to wear Mickey Mouse ears whilst performing the work.

However, it could be argued that the duty to obey orders as to the manner of performing the work will only encompass orders relevant to the type of work and to the circumstances in which it is to be done. Could the employer in *Airfix Footwear Ltd v. Cope*⁹⁹ have required Mrs Cope to wear Mickey Mouse ears while working at home sticking heels onto shoes? Would Mrs Cope have been in breach of contract if she had not complied with such an order? Could Hart have been ordered by Telecom not just to wear a shirt and trousers rather than a caftan, but to wear a suit of particular material, style or colour? It would seem correct that David Jones could order all female shop assistants to wear a white blouse and black skirt to work, but could the Department of Motor Transport order all male clerks, even those not working in areas to which the public has access, to wear grey suits? The answer which common sense suggests is No!. The wearing by shop assistants of white blouse and black skirt has relevance to the needs of David Jones' business and the work performed — ensuring that the workers are respectably and unobtrusively attired, and achieving a uniformity which, arguably, contributes to the 'image' which the employer wishes to present within the stores. But the work of the Department of Motor Transport would surely not be

96 *Price v. Mouat* (1862) 11 CB (NS) 508.

97 See A.S. Merritt, "The Development and Application of Masters and Servants Legislation in New South Wales" note 29 *supra*, 329-30.

98 *Australian Telecommunications Commission v. Hart* (1982) 43 ALR 165.

99 [1978] ICR 1210.

affected if some clerks were in grey suits, some in blue suits and some in navy blazers! The result of this analysis, if correct, would be that an employee has a duty to obey only those orders which are lawful and have a relevance to the work, so as to be truly relating to the manner of performing it. (And thus, McDonalds might legitimately require employees to wear Mickey Mouse ears, but Airfix Footwear or the Caltex Oil Refinery might not legitimately give such an order).

The duty to obey orders is often stated as being a duty to obey "all lawful and reasonable orders",¹⁰⁰ yet many text-writers have pointed out that this statement is misleading,¹⁰¹ that the duty is to obey lawful orders, and that — providing the order is lawful — it matters not that it is unreasonable. *Turner v. Mason*¹⁰² has been seen as an example of this.¹⁰³ There, a domestic servant was held to be in breach of contract where she absented herself to visit her dying mother. The argument in the last paragraph reasserts the validity of the "and reasonable" part of the description of orders which an employee must obey. If the argument is correct, an employee is bound to obey *only* those orders which are *both lawful and reasonable*, in the sense of having a "reasonable" connection to the work. *Turner v. Mason* is not necessarily destructive of that argument since the order itself — Work tonight — was not unreasonable in the sense set out above. It was an order to perform part of the work agreed. The apparent "unreasonableness" lay in a refusal to give the servant time-off to visit her ailing parent, so that it was arguably unreasonable in the sense of being unkind or inhumane. Moreover, it was not so much an order as a refusal to countermand an order.

The argument which I am developing involves, then, the proposition that an employee can be directed as to the manner of doing the work provided the directions given are truly related to performance of the work. That proposition is not so much a rejection of previously established law as an analysis of what the previously established law really amounted to. It involves the presentation of hypothetical examples because the exact point has not been judicially examined. The courts have not yet been presented with cases where orders which were lawful but had no reasonable connection with the work were disobeyed. They have not been asked to decide whether refusing to wear Mickey Mouse ears is a breach of the duty of obedience. I am suggesting that, if they were asked to decide that question, their answer would be that it was not a breach, and that, in explaining their decision, they would inevitably have had to make the type of qualification which I have outlined — that the employee can only be directed as to the manner of performing the work where the direction is reasonably related to the work and its object.

100 As pointed out by Macken et al note 26 *supra*, 118-9.

101 *Ibid.* See also Freedland note 49 *supra*, O. 198.

102 (1845) 14 M. and W. 112, 153.

103 For example, G.J. McGarry, "The employee's Duty to Obey Unreasonable Orders" (1984) 58 ALJ 327, 328.

Once this proposition is accepted, does it leave any distinction on this issue between contracts of service and for services? Can an independent contractor be required to accept directions as to the manner of performance of the work agreed where those directions are reasonably related to the work? I would suggest that he or she would be so required, and that it is the particular circumstances of many independent contract situations which leave little scope for directions as to the manner of performance reasonably related to the work, so that in those situations the worker is seldom legally bound to accept directions as to manner of performance. Thus, it would not be because a worker is an independent contractor that he or she is not bound to obey directions as to the manner of performance, but simply that, because there will be little scope for reasonably related directions, an independent contractor is rarely in fact subject to directions as to the manner of performance.

The sorts of subordinate issues involved in manner of performance discussed above, such as dress, would be outside the scope of legitimate direction in most independent contracts because they would have no reasonable bearing on the work. However, in some independent contract situations, they would be relevant to the work, and in those cases the contractor would — I would argue — be bound to comply, just as an employee would be. To use a personal example, some years ago I was engaged under an 'independent' contract as legal adviser to a parliamentary inquiry. The work involved attending public hearings during which I was required to sit with the Committee. Had I attended the hearings dressed in dirty jeans, sweat shirt and with bare feet, surely I could have been directed to wear more formal attire — jeans and sweat shirt could have been argued to detract from the dignity of the Committee and thus of the Parliament, and therefore to interfere with the Committee's task of taking public evidence, a task which I had been engaged to assist. Thus, in both independent contracts and employment contracts, the person for whom the work is done would have a right to give directions on such subordinate aspects of the manner of performance of the work, providing they did reasonably have a bearing on the work and its purpose.

Few would argue that, in relation to more central aspects of 'manner of performance', such as the actual mode of performance of work tasks, an employer can give directions to an employee. But again, the scope of this right of direction needs to be examined to see if there will be any distinction between the rights of employer and principal and the corresponding obligations of employee and independent contractor.

Can a contract painter be told what size brush to use, or whether to stroke from left to right or top to bottom? I would argue that the painter, though an independent contractor, could be so directed *if* the job would not be 'right' unless done that way. But if, at the end of the job, one cannot tell whether the painter stroked from left to right or vice versa, if either mode of painting uses the same amount of paint and lasts as long, then the painter would not be obliged to accept such directions. If that is so, could an employed painter

be required to brush from left to right where, as outlined above, right to left gives exactly the same result as left to right? Arguably, he or she could not, unless the contract had expressly stated that the employee would accept any such directions (a term which would also bind an independent contractor). One could support such argument by saying that the employee has contracted to do the work of 'painting', and that 'painting' involves brushing paint onto a surface. Thus, the employee performs the work agreed just as much by brushing it on from right to left as by brushing it on from left to right. Therefore, even if the employer orders the employer to brush from left to right, if the employee brushes from right to left, he or she has done the work agreed, he or she has painted.

But if brushing from left to right gives a better result, then the direction is relevant and 'reasonable', and the employee would be bound to obey. So, arguably, would an independent contractor. If brushing from right to left gives a result of a generally acceptable standard, but brushing from left to right gives a superlative result — could an employer require an employee to brush the latter way? Our initial reaction would be to say "Yes", but the true answer is probably less straightforward. For example, if the normal method of painting is right to left, the employee has been trained that way, and it is difficult to adopt the other method after such training without extensive practice, then arguably there would need to be some express contractual provision that the employee would acquire the new skill before such an order could be enforced. Without that express provision, the employee's duty is to perform well the work of painting as normally understood. And an independent contractor's duty would be the same — to perform the work of painting to the generally accepted standard required of a person who holds him- or herself out as a painter.

K. THE EMPLOYEE'S OBLIGATION NOT TO MISCONDUCT HIM- OR HERSELF

It is frequently stated that an employee has an obligation of good conduct, or — stated negatively — an obligation not to misconduct himself or herself. Accepted examples of misconduct are habitual insolence, habitual lateness, drunkenness on the job etc. For the most part, an obligation not to act in such a way comes down to a question of whether the job is being properly done, that is — whether the worker is doing the work contracted. If he or she is not doing the work, it is a breach of contract, and it would be so whether the contract were one of service or for services. Obviously, drunkenness on the job is likely to affect the work done, whether the objective performance of the task *is* inferior, or because the worker creates a danger to his or her fellows, thus interfering with the overall work of the enterprise, or because the work involves contact with the public, who will reject the service being offered to them, through the worker, by the employer or principal, if the worker is noticeably affected by drink.

Where the contract is for the performance of a set number of hours of work, then habitual lateness means that the worker is not performing the

work agreed. If the contract is simply to produce a single end result by a certain time, or to produce so many of a particular item each day, then lateness is irrelevant. The setting of hours, unless part of the express terms, would then be outside the contract, and not a legitimate directive by either employer or principal.

Insolence is more problematic, for it cannot be seen to interfere with the work contracted, unless that work involves contact with the public, or unless the worker has contracted to be a generally acceptable companion, assistant etc. Is an insolent gardener, process worker or wharflabourer in breach of an employment contract (where the insolence does not consist of refusal of lawful orders)? Arguably not in the 1980s. Even in *Pepper v. Webb*,¹⁰⁴ the judges of the Court of Appeal concentrated on the refusal of a direct order to perform the work or the failure to garden properly when, told to plant fuchsias before leaving work since otherwise the plants would die, the gardener said: "I couldn't care less about your bloody greenhouse and your sodding garden". While cases from an earlier and more servile age, when judges were inevitably employers of domestic labour, held habitual insolence to be a breach, I would suggest that today a different result would obtain, and that both employees and independent contractors have the same duty — to do the job contracted for, which in some unusual situations might involve refraining from insolence.

L. THE EMPLOYEE'S OBLIGATION TO ACT IN THE EMPLOYER'S BEST INTERESTS

If this duty means all that it says, then it would surely give rise to a distinction between contracts of service and for services. But the question is what it in fact means, and to what extent it encompasses matters not already covered by the obligations so far discussed and to be discussed subsequently. To my knowledge, there are only two situations in which this obligation has been applied which are not covered by the other duties of an employee.

The first of these two situations where a breach was found which — not falling within the other duties — had to be founded on some additional obligation of acting in the employer's best interests related to activities of employees in their 'spare time', that is — in out-of-work hours. Cases which cover spare time activities are *Clouston v. Corry*,¹⁰⁵ where the employee was a salesman for a grain and seed merchant who was publicly drunk in the evening in one of the towns he was visiting to solicit orders for his employer; *Orr v. University of Tasmania*,¹⁰⁶ where a university professor allegedly had a sexual relationship with a female student; *Hivac v. Park Royal Scientific Instruments Ltd*,¹⁰⁷ where factory workers of a hearing aid valve manufacturer worked for a competitor in their spare time; and the example

104 [1969] 1 WLR 514.

105 [1906] AC 122.

106 [1956] Tas SR 155.

107 [1946] 1 Ch 169.

given by Lord Greene M.R. in the *Hivac* case¹⁰⁸ of a solicitor's clerk who worked on weekends for another solicitor in the same town.

In *Orr v. University of Tasmania* and in the hypothetical case of the solicitor's clerk, the point which the court saw as creating a breach of the employee's duty was that the spare time activity made it impossible or difficult for the employee to perform his contractual obligation — to perform the work agreed — owed to the first employer. The professor's alleged sexual relationship made it difficult for him to perform objectively the task of assessing the work of his students so as to give them grades properly representing their academic achievements. The solicitor's clerk's spare time work could involve him in acting for a party in a matter where his weektime employer undertook to represent the other party. In such a situation, he would be unable to carry out tasks relating to the weektime employer's solicitor-client relationship with the one party since his previous relationship with the other party created a disabling conflict of interest. If such situations could arise in independent contracts, then surely there would be a breach. If one contracts to do something, and then makes it impossible for oneself to do that thing, there is a breach whatever the type of contract. This can be so even in a contract of sale, as Lord Denning M.R. pointed out in *Secretary of State v. A.S.L.E.F.*,¹⁰⁹ where he used the example of a contract to sell the year's crop from an apple tree which the vendor cuts down before the crop is ready for picking.¹¹⁰

In *Clouston v. Corry*,¹¹¹ the argument for the employee's drunkenness being a breach was that, by getting publicly drunk, he caused a loss of reputation and therefore, possibly, of business to his employer. The Privy Council stated that, in assessing whether drunkenness was a breach of contract, one should contrast intoxication which "may be habitual and gross, and *directly interfere with the business of the employer* or with the ability of the servant to render due service" with "an isolated act committed under circumstances of festivity and in no way connected with or *affecting the employer's business*".¹¹² Drunkenness "directly interfer[ing] with" an employee's ability "to render due service" will be drunkenness on the job, and covered by the obligation to perform work properly. Drunkenness in spare time is a breach if it interferes with the employer's business (which can only be by its effect on reputation) and even then, it would seem from the Privy Council's statement, only if it is habitual and gross.

If the spare time activities of an independent contractor would also cause a loss of reputation and business to a principal, would the contractor therefore be in breach of contract? If not, it would seem that there is here a difference between the two categories of contract. There are unlikely to be

¹⁰⁸ *Id.*, 174-5.

¹⁰⁹ [1972] 2 All ER 949.

¹¹⁰ *Id.*, 967.

¹¹¹ Note 105 *supra*.

¹¹² *Id.*, 129.

many situations where a contractor's spare time activities would have any effect on the principal's business reputation, but that does not eliminate the distinction in terms of contractual theory. On balance, I believe that there is no difference between the two categories of contract on this matter — not because such activity would be a breach by an independent contractor as well as by an employee, but because it would be unlikely to be held by today's courts to be a breach by an employee. If an employer or principal wishes today to control out-of-hours conduct of employees or contractors, the employees or contractors must be shown to have expressly agreed that they will refrain at *all* times from conduct which the employer or principal regards as damaging.¹¹³

In the *Hivac* case,¹¹⁴ the facts were acknowledged to be very special, in that the statutory manpower restrictions and the state of the market were such that the employees' spare time work actually *created* competition for the employer, which could not otherwise have arisen. I would suggest that, even given these facts, the case was wrongly decided and that no breach of contract had been committed; but that, if the decision is accepted as correct on its facts, the case was a definite 'one-off', and creates no precedent in terms of employees' duties, and thus can lead to no distinction in theory between those duties and the duties of an independent contractor.

The second of the situations in which an obligation has been argued to exist which, not falling within the other obligations discussed, must be founded on an obligation to act in the employer's best interests, is that which arose in *Secretary of State v. A.S.L.E.F.*,¹¹⁵ and which has alternatively been described as a duty "to obey orders in a reasonable way".¹¹⁶ It was said in the *A.S.L.E.F.* case that it would be a breach of such duty to obey orders in such a way as would frustrate the employer's business.¹¹⁷ If such a duty exists, is there a corresponding duty on an independent contractor to obey orders in such a way as not to frustrate the business of the principal? There is a touch of unreality here — how is it possible that, by doing the work one has contracted to do one can frustrate the business of the person who has engaged one to do that work? The answer is, I believe, that it is *not* possible, and therefore neither the duty postulated in *A.S.L.E.F.*, nor a corresponding duty on independent contractors, can exist. The underlying point is to identify the work agreed — once that is properly done, 'unreasonable performance' of that work is not possible. Performance will either be 'proper' or not — in terms of the duties of obedience, good conduct and care and skill, but, if it is so 'proper', it cannot be unreasonable. The decision in *A.S.L.E.F.* must be seen as either muddled or wrong, or both.

113 See for example a trend to that view in *Thompson v. Catholic College, Wodonga* (1987) EOC 92-217.

114 Note 107 *supra*.

115 Note 109 *supra*.

116 *Id.*, 980 *per* Roskill L.J.

117 *Id.*, 966-967 *per* Lord Denning M.R. and 972 *per* Buckley L.J.

Firstly, the real problem which occurred in *A.S.L.E.F.* was not that the railwaymen had obeyed the orders in the 'Black Book' *unreasonably*, but that they had *obeyed* them — and to the letter. Put another way, it was not that they obeyed the orders in a way that was unreasonable in that it frustrated British Rail's business, but that they obeyed orders which were unreasonable in that the orders frustrated the business. Implicit then in the Court of Appeal's finding of breach is the proposition that, where, through misjudgment or failure to keep rule books up to date, an order given to an employee is in fact against the employer's business interest, and where the employee recognises this, he or she should *disobey*. That means that 'acting in the employer's best interests' requires the employee to disobey certain orders. Surely this is ludicrous! If the railwaymen had disobeyed the Black rule book, British Rail could have sacked them for disobedience. How then can it be a breach to obey those rules?

The example given by Lord Denning of an employee driving the employer to the station slowly so that the employer misses his or her train (when the employer had not stated, but the employee knew, that the object was to catch the train)¹¹⁸ is more of a problem, though it was an inappropriate example in the *A.S.L.E.F.* case since, as seen, it was not that the employees had obeyed the rules *in such a way* as to cause harm, but that they had obeyed them at all. Taking the example at face value, however, if the employer orders the employee to "drive me to the station", with no requirement as to the speed at which the employee should drive, or the time the employer wishes to arrive, can we not argue that there is no breach if the employee drives slowly and the employer misses the train, because getting the employer to that train was not *part of the job* the employee was given? If the employee did not know which train the employer wished to catch and drove slowly, would there be a breach if the employer thereby missed his or her intended train? (I am not dealing with the situation where meeting a particular train is a reasonable implication to be drawn from the order, but rather with the situation where the employer's object would not be available to the employee except by genuinely fortuitous and independent knowledge gained outside the circumstances of the job). If in that situation, an employer sees that one mode of performance will frustrate the object with which the job is given, he or she can direct the appropriate mode of performance for achievement of that object (since, in terms of the duty to obey orders as to the manner of performance, such direction is reasonably relevant to the work).¹¹⁹ If he or she does not bother to give such directions, surely any consequential loss is on his or her head.

And even if the employer does not know that one mode of performance is against his or her business interests, but his/her employee does know it, then surely the employee is not bound to adopt the mode of performance least convenient to him or her if the alternative method of performance still falls

118 *Id.*, 966 *per* Lord Denning M.R.

119 See pp 72-74 above.

within the scope of what the employer has ordered the employee to do. If the management of the business is the employer's prerogative (as countless cases in the arena of industrial legislation have asserted),¹²⁰ then responsibility for that management is also the employer's burden. If the contract entails that the employee bear some of that burden, then as a necessary corollary it should entail that the employee is also entitled to some of the attendant benefits. So long as the employee's remuneration is limited to a wage or salary, rather than an entitlement to share in the profits, his or her obligations will be limited to the performance of the work for which that wage or salary is the agreed consideration. The same reasoning would apply with equal force to an independent contractor — so long as the contract is not a joint enterprise but simply the performance of agreed work for an agreed fee, then a contractor told to do a task and not directed why or how it is to be done performs his or her duty by performing it according to any 'proper' mode, even if that mode thwarts the reason for which the principal wants the work done, and even if the contractor knows that will be the result.

This situation would be altered if it was a clear implication of the contract that the employer or principal relied on the employee or contractor to know and choose the mode of performance best suited to the object for which the employer or principal wishes the work done. In many employment contracts involving skilled or professional services, and in possibly most independent contracts, this will be the case. But in most such situations, the alternative modes of performance are 'proper' performance — not skilled performance. An employed surgeon, for example, is relied on by the employing hospital to adopt the proper mode of operating, in the sense of adopting that mode which will best maximise the patient's chance of recovery from both the operation itself and the ailment which dictated the operation. Arguably also, if there are several modes of operation which would have an equally satisfactory result in terms of patient recovery, the surgeon would be impliedly bound to adopt the one of those several modes which is least expensive for the hospital. But if one of those modes is more favourable to interests of the employer distinct from the interest of getting the job done as well as possible with the least attendant expense, there is no obligation on the worker to adopt that mode without direction as to the additional purpose. Thus, to use again the example of the driver, if there are several routes of the same length by which the driver can take the employer to the station in time to catch the train the employer has stated he or she wishes to catch, the driver has no obligation, in the absence of direction, to take the most scenic route, or — having seen the employer carrying letters — the route which goes past the post-box.

The *A.S.L.E.F.* case¹²¹ founded its argument in favour of a duty to obey in a reasonable manner on the concept of the commercial object of the

120 See discussion in B. Brooks, *Contract of Employment* (3rd ed. 1986) 316.

121 Note 109 *supra*.

contract.¹²² Implied in this, and in Lord Denning M.R.'s reliance on the example of the apple tree,¹²³ is what has been called¹²⁴ the "principle of co-operation". Freedland discussed the principle, as outlined by Stoljar,¹²⁵ and presented it as involving:

a general requirement of co-operation which could be stated in two parts: both as (1) a duty not to prevent or hinder the occurrence of an express condition precedent upon which the performance by the promisor depends, with the sanction that of the promisor does so prevent, he will fall under an immediate duty (usually of payment) as if no condition had ever qualified his promise; and (2) in appropriate circumstances a distinctly positive duty; that is, a duty to take all such necessary or additional steps in the performance of the contract as will either materially assist the other party or will generally contribute to the full realisation of the bargain, failure in this duty amounting to a breach of contract, which will make the non-co-operative liable in damages or will create a new defence for the benefit of the other.¹²⁶

Freedland goes on to argue that this principle of co-operation:

could be, and in the second *A.S.L.E.F.* case was, *convincingly* used to produce the conclusion that the deliberate non-co-operation involved a work-to-rule must be breach of contract. It is not in doubt that the employee in some senses agrees to serve the employer and *it is not difficult* to conclude that the employee cannot fulfil that obligation by pursuing the objective of disrupting the running of the employer's enterprise. [Emphasis added]¹²⁷

With respect to Freedland, whose analysis of the employment contract, though traditional, is generally academically impressive and lucid, I dispute that the principle in question 'convincingly' produces the conclusion that a work-to-rule campaign is a breach of contract, and I contend that it is 'difficult' to conclude that in itself the objective of disruption prevents the employee from fulfilling the obligation of 'in some sense' serving the employer. Such a principle is apposite enough in the situation of the apple tree. There the object of the contract is for the purchaser to get the apples and the owner of the tree to get the price. If the owner cuts down the tree, the object is thwarted. But, in the *A.S.L.E.F.* case, the 'commercial object' that was being thwarted was not that of the contract between the railwaymen and British Rail. It was the object of the contracts between British Rail and the passengers and persons consigning freight. The object of the employment contracts was the performance of various duties involved in running the trains in accordance with directions given via the 'Black Book', the very directions obedience to which was allegedly causing the disruption. I would suggest that it will not be factually possible for an employee to thwart the object of an employment contract by performing the work agreed in a mode required or not prohibited by the contract, that an employee can thwart the object of an employment contract only by refusing to perform the work or

122 *Id.*, 972.

123 *Id.*, 967.

124 Freedland, note 49 *supra*, 27-32.

125 S. Stoljar, "Prevention and Co-operation in the Law of Contract" (1953) 31 *Canadian Bar Review* 231.

126 Freedland, note 49 *supra*, 28.

127 *Id.*, 30.

by performing it contrary to directions or contrary to the generally accepted 'proper' method for reasonably skilled performance. It is not necessary to create duties to obey in a reasonable manner or principles of co-operation to provide sanctions for such conduct, for it is already covered by the duties to perform the work agreed with reasonable care and skill.

There is thus a distinction between the object of the contract and the motive which leads one or other party to enter into the contract — a distinction, we could say, between the object of the contract and the objective of contracting. The apple tree owner may contract to sell the crop because he or she does not wish to have to pick the crop before finding buyers. But that is not the object of the contract for the sale of the crop, it is the motive. The motive of a private hospital in employing a surgeon may be to create opportunities for the use of theatre equipment manufactured by a company in which the hospital's owners hold shares, but that is not the object of the surgeon's employment contract. Had there been (as was doubted by the High Court) a contract in *Dare v. Dietrich*,¹²⁸ the motive of Dare in employing or engaging Dietrich may have been to perform the charitable purpose of rehabilitating an ailing alcoholic, but that was not the object of the contract.

An employee and an independent contractor are both bound not to thwart the object of their contracts, for that object is the performance of the work they have agreed to do, and to thwart that means to fail to perform that work, or to fail to perform it adequately. They are not bound to perform that work so as to satisfy the motive which led the employer or principal to contract to have the work done, for that motive forms no part of what they have undertaken to do. If the employer or principal wishes to ensure the attainment of the motive, he or she must do so by including expressly such attainment as part of the employee's or contractor's obligations.

M. THE EMPLOYEE'S OBLIGATION TO WORK WITH REASONABLE SKILL AND CARE

The development of this obligation as an implied duty of employees proceeded by a three-stage process. Firstly, the courts propounded that entering into an employment contract involved an implied warranty by the employee that he or she possessed the skill requisite for the job.¹²⁹ Such an implication seems no more than a fair application of the officious bystander test. If an employer advertises "Wanted — a lion tamer", and a person presents him- or herself, saying "I'm here in answer to the advertisement" and goes through the process of agreeing to take the job there is an obvious implication that the person who takes the job is representing him- or herself to *be* a lion tamer, and thus to have whatever arcane skills a lion tamer might generally be supposed or expected to have. If the officious bystander interjected the impertinent question "Surely this means that you are warranting yourself to be a qualified lion tamer", would the aspirant have

¹²⁸ (1980) 30 ALR 407.

¹²⁹ *Harmer v. Cornelius* note 31 *supra*.

any available option but to answer "Of course"? Certainly the advertiser would answer "Yes, I regard that warranty as implied". Would the situation be any different if the position advertised and accepted involved an independent contract? I have pointed out already¹³⁰ that the examples given in *Harmer v. Cornelius*¹³¹ of public profession of an art are more appropriate to independent contracts than to employment contracts. If a person hangs out a shingle — "Solicitor" — and a client comes into the office with a case requiring the services of a solicitor, surely the client contracts, and would tell the officious bystander that he or she does so, on the basis that the person addressed is a qualified solicitor with the basic skills expected of a solicitor. The situation would be the same if the client advertised to have the job done. If a person puts it about that he or she wants the services of a plumber, and Joe Bloggs appears offering to do the job, surely Joe Bloggs thereby warrants that he has the appropriate training and skill. Could he deny such warranty if the contracting process was interrupted by the ubiquitous officious bystander. Obviously, the person with the leaking tap would answer that he or she took such warranty as necessarily implied.

The second stage in the development of the duty was to imply, as flowing from the warranty of possession of the appropriate skill, a promise to exercise that skill to a generally accepted standard.¹³² Here also, the implication is obvious. A person who solicits the performance of a job dependent on possession of a particular skill clearly does so on the expectation that such job will be done with the application of that skill. That is the whole point of seeking out, impliedly, a worker having that skill. Otherwise the persons with lions to be tamed would simply advertise "Wanted — idiots", and accept whatever purported lion taming the foolish applicants might provide. The purpose of seeking out a person warranting the skill of a lion tamer, crane driver or clerk is to have done a job which will not be done to the desired standard unless the successful appointee acts with the skill of a lion tamer, crane driver or clerk. And again, by accepting such job, the worker surely implies that he or she will perform the work involved, which means taming lions, driving cranes, or acting as a clerk, work which cannot be said to be 'performed' unless the appropriate skill is exercised. One cannot tame a lion unless one exercises, at least to a minimal extent, the appropriate skill of a lion tamer.

Here also, an independent contractor would surely be impliedly bound in a similar way. Taking a job as a plumber must surely imply that one will exercise the necessary skill to fix the leaking tap etc. Taking a brief as a barrister must surely mean one promises to exercise the rudimentary skills of presenting one's client's case. Is it possible to suggest that, where a contract is being concluded for the performance of work as a plumber or barrister, the contractor could answer other than "Yes" to the intrusive Greek chorus

¹³⁰ See pp 56-57 above.

¹³¹ Note 31 *supra*, 246.

¹³² *Lister v. Romford Ice and Cold Storage Co Ltd* [1957] AC 555.

"Surely you intend to promise to exercise the standards or basic skills of a plumber or barrister?"

The third stage in the development of the implied duty of skill and care follows less obviously. This stage postulates an implied promise to exercise care, as distinct from skill, so that the promise applies even to unskilled jobs. A sweeper thus impliedly promises to sweep with care. What is dubious about this extension of the duty is that the duty to exercise skill was made dependent on the promise that the employee possesses the skill. A person warranting that he or she was, and therefore possessed the skill of, a lion tamer was to be taken as thereby promising to exercise that skill in the engagement in question. In *Lister v. Romford Ice and Cold Storage Co. Ltd.*,¹³³ Viscount Simonds rather cavalierly extended such promise to one that implied care:

[n]or can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. No such distinction is made in the cited case. [*Harmer v. Cornelius*]: on the contrary, 'possess' and 'exercise' are there conjoined. Of what advantage to the employer is his servant's undertaking that he possesses skill unless he undertakes also to use it? I have spoken of using skill rather than using care, for 'skill' is the word used in the cited case, *but this embraces care. For even in so-called unskilled operations, an exercise of care is necessary to the proper performance of duty.*¹³⁴ [Emphasis added]

Thus, His Lordship involved even unskilled workers in a similar promise.

Yet, such a promise to take care, on the part of an unskilled worker, cannot be attached to any precedent implied warranty of the possession of a particular skill, simply because the job involved is one for which no skill is a recognisable prerequisite. On one analysis, that it not an insurmountable problem. Surely, as Viscount Simonds suggests, a person agreeing to sweep or perform such 'unskilled operations' must imply that he or she will at least sweep etc. with reasonable care. There is however a circular inconsistency here. First, if no skill is involved, a promise to sweep is performed by sweeping, and any sweeping will suffice. Thus, in such circumstances, the duty of care and skill has no scope not already part of the duty to perform the work agreed. Second, if there is any content to the duty to exercise care in such a job, it must mean that there are alternative modes of performance, alternative modes of sweeping — one that is acceptable as careful, and one that is not. And that must entail that sweeping is a job with 'standards', which is not too far from saying a job with *skills*. The duty to perform the work will be comprehensive of the employee's obligations except to the extent that the job in question involves skill, and Viscount Simonds' analysis would appear to result in the importation of skill into almost all, if not absolutely all, areas of work.

Where a person promises to perform 'unskilled' work under a contract for service rather than one of services, the implication of a duty to exercise

¹³³ *Ibid.*

¹³⁴ *Id.*, 573.

requisite care would surely be the same. As with so many of the situations hypothesised previously, the facts would dictate that there would be few examples of independent contracts where the contractor had *no* 'skills' and had therefore not promised to exercise such skills. Nevertheless, if an independent contract were to be entered into for the performance of work involving no established skills, the contractor would surely be taken to have impliedly promised to exercise, at the least, the requisite care necessary for the job, in so far as that could be said to involve any extension of the obvious duty to perform the work agreed.

N. OVERVIEW

The foregoing analysis has postulated that there will be no difference in the contractual obligations attaching to independent contractors (or principals) from those attaching to employees (or employers), in so far as those obligations are implied rather than express. As far as express obligations are concerned, parties to any contract, however categorised, can agree to whatever obligations they wish. The whole analysis is, however, as suggested earlier,¹³⁵ predicated on an unreality of theory, proceeding on the assumption for the sake of argument that it is good law that one can draw substantive distinctions between factually identical work situations simply on the assertion that one situation is an employment contract and the other is an independent contract. I have argued that there will be no difference in law in the obligations applying to particular matters in employment contracts from those applying in independent contracts. I would suggest that the obligations are the same because the contracts are the same, and the contracts are the same because the obligations are the same! They are contracts for the performance of work, and the traditional belief that there are two legal categories of such contracts becomes untenable when we consider, along with the identity of obligations, the wholly unsatisfactory nature of the supposed tests for the existence of a contract of employment.

Clearly, we can see obvious points of difference, in terms of *facts*, between work situations at the polar-opposite ends of the spectrum of the two alleged types of contract. There are obvious differences between the position of an 'employed' tealady or process worker on the one hand, and the position of an 'independent' or 'self-employed' architect, doctor, lawyer or builder on the other. The weakness in the legal categorisation becomes apparent when we confront the claim that one can distinguish the positions of an architect 'employed' by A.V. Jennings Homes and a 'self-employed' architect working as a consultant full-time for A.V. Jennings Homes, a person 'employed' by a legal firm as an industrial advocate and a person 'engaged' by that firm to do the *same* work on a 'consultancy basis', and so on.

¹³⁵ See p. 53 above.

IV. VICARIOUS LIABILITY

If it were to be accepted that no genuine difference exists between employment contracts and independent contracts in terms of the rights and duties implied as between the parties, and that no workable definitions of the two supposed categories of contract can be found, two problems would still remain. The first of these concerns the rights which allegedly arise for the benefit of third parties against employers through the doctrine of vicarious liability. The traditional — and traditionally inaccurate — expression of this doctrine is that employers are, whereas principals are not, liable in damages to those injured or suffering loss through the wrongful acts of those who perform work for them. A more exact analysis shows that, while employers are almost always vicariously liable for injury or loss caused by employees, principals are sometimes liable for injury or loss caused by independent contractors, and sometimes not.¹³⁶

If we argue that the dichotomy between the two types of contract does not exist, then some restatement of the vicarious liability doctrine becomes an obvious necessity. That restatement could be made by saying that vicarious liability *always* arises in situations of contracts for the performance of work, or that it *never* arises. Either of these solutions presents great problems. It is therefore necessary to find a middle ground — it sometimes arises and sometimes does not — and to determine *when* it arises, without relying on the employment/independent contract dichotomy.

The old law on vicarious liability for 'independent contractors' *could* be brought into line with the earlier arguments in this article by a process of distinguishing cases, finding ways to identify those where liability was denied¹³⁷ as turning on issues other than a supposed differentiation of work contracts. This would be a pleasant, mentally stimulating exercise, but ultimately pointless. The formative cases in the development of the vicarious liability doctrine with regard to independent contractors¹³⁸ date from a period when, as seen earlier, the courts were not absolutely clear or precise about work contracts. If the supposed distinction had not crystallised, then decisions that a person was or was not vicariously liable for a particular worker cannot found any hard-and-fast doctrine for or against liability.

Moreover, notions of the obligations and responsibilities of both 'employers' and 'principals' have changed so much,¹³⁹ that it is pointless to attempt to find rules to govern 1980s situations in pronouncements made in the 1840s or even 1880s. Notions as to the justification of the vicarious

136 P.S. Atiyah, *Vicarious Liability in the Law of Torts* (1967) Chapter 29.

137 *Quarman v. Burnett* (1840) 6 M and W 499, and cases following it, cited by Atiyah, note 136 *supra*, 327 n. 2.

138 See Atiyah, note 136 *supra*, Chapter 29, for discussion of these cases.

139 Witness the change in the obligations of an employer to take care for the safety of an employee, since *Priestley v. Fowler* (1837) 3 M and W 1.

liability doctrine itself have also changed,¹⁴⁰ and so have notions as to the very basis of tort liability.¹⁴¹ To seek to present rules appropriate to today as part of a seamless web of common law by ingenious interpretation and distinction is, ultimately, dishonest. We must recognise that the purposes to which legal doctrines are applied change with time even if, apparently, the doctrines remain the same, and that the guiding principle today is one of loss distribution.¹⁴² We must attempt to formulate rules on vicarious liability that achieve a distribution of loss most in keeping with prevailing standards.

In assaying such a formulation against the background of the law as it has so far developed, it is necessary also to recognise the residue of earlier notions of fault and punishment, and the residue of eighteenth century ideas of justice and equity.¹⁴³ Whatever the main jurisprudential justifications for vicarious liability, we have to acknowledge that there is at least a residue of 'qui facit per alium facit per se',¹⁴⁴ and of the notion that 'he who takes the benefit should bear the burden' in the general view which accepts vicarious liability of employers but not of principals. And, if we look closer into these inchoate impressions, they would seem — anomalously — to be based on some vestigial acceptance of the doctrine of surplus value.¹⁴⁵ How else can it be said that an employer should be liable for an employee's acts on the grounds of the employer taking the benefit, while leaving a principal free of liability because the benefits are equally shared. Yet that seems, at base, to be an unspoken part of the justification for the differing rules on liability.

Traditional lawyers would instinctively baulk at the suggestion that *all* persons for whom work is performed should be vicariously liable for harm caused by those performing the work. Inherent in that reaction is, I believe, an idea of enterprise liability — that, where work is done on behalf of an enterprise, it is that enterprise which should bear the costs. Supporting this idea is a further one, an assumption that 'business' is generally organised on the basis of employment, with employees working for the employer enterprise, and that independent contracts exist in a different private world where the enterprise is more likely that of the worker than of the person for whom the work is done. On this view, the employed steelworker works for the enterprise of BHP, but — in the situation of an independent contract with, for example, a plumber — the enterprise is that of the plumber and the work is done for a householder. This view may once have been legitimate, but is certainly no longer so. There has been a profound development in the structure of industry and commerce, and in the structuring of work within them. No longer is an 'employer's' enterprise confined to the environs within the shadow of its smokestack, and no longer are the work relations of that

140 See Atiyah, note 136 *supra*, Chapters 1 and 2.

141 See Morton J. Horwitz, *The Transformation of American Law 1780-1860* (1977), 81-4.

142 Note 136 *supra* particularly, 22-8.

143 Regarding which, with respect to contract law, see P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979), 200-3; and Horwitz, note 141 *supra*, 173-181.

144 See Atiyah, note 136 *supra*, 19-20.

145 Karl Marx, *Capital Vol. 1*, Parts Three to Five.

enterprise organised solely, or even perhaps predominantly, on the basis of so-called 'employment'. Thus we can no longer use a simple formula whereby:

Industry = employment relations = enterprise of employer

Private life = independent contracts = enterprise of contractor.

However, loss distribution arguments would, in simple terms, still support liability following the enterprise. Taken together, these changes and these prevailing attitudes create difficulties in reformulating rules for the incidence of vicarious liability.

In loss distribution terms, and retaining for the purposes of argument the notions of employment and independent contracts, it is sensible that an *employer* is vicariously liable, since the employer is better placed than the employee to bear the cost of a damages award. Where an employee causes harm (physical or economic) to a third party, he or she will seldom if ever have the personal resources to meet the award. The employer, having the deeper pocket, is better placed to pay. And the employer can spread such cost by passing it on in increased prices to the community at large. Insurance, of course, plays a part in this also, as do the tax laws. The employer can insure against such liability. The employer passes on the cost of insurance by claiming the premiums as a tax-deductible business expense. Employees could also theoretically insure against liability to third parties for negligence, but — as the tax laws stand at present — they could not claim the premiums as a deduction. Thus, the cost borne by the insurers in the event of a claim could be spread, but the cost of the premiums would be borne solely by the insured employees.

The result of this is that, though employees could insure, few do so on the grounds of cost. Therefore, few injured persons claim against employees rather than employers, increasing the employees' estimation that the slight chance of being sued is not worth the certain annual cost of the premium. And this situation is generally accepted, not only on the argument of cost-spreading, but also on the argument that the employer, who takes the benefit, should bear the initial burden of premium or damages award.

But let us postulate again the situation of a householder hiring a plumbing contractor to fix a leaking tap, and let us suppose that, in some way not falling within the purview of the householder's normal occupier's liability policy, the plumber performs the work negligently, with the result that a third party is injured or suffers loss. There is no way for the householder to spread the cost of paying damages to the third party, but the plumber could do so by insuring, and increasing prices for his or her services to cover the premium. Thus, in loss distribution terms, vicarious liability for the householder is not indicated. But, if we adopt this approach, the 'benefit' involved in the contract for the performance of the work of fixing the taps does not simply follow the attribution of liability, or vice versa, for both householder — who gets a mended tap, and plumber — who gets the fee, benefit from the contract. As I suggested earlier,¹⁴⁶ to identify this as a

¹⁴⁶ See p. 86 above.

situation of equal benefit, yet to identify employment as a situation where the major benefit lies with the employer would seem to involve some reliance on the theory of surplus value — which is an odd result for Anglo-Australian jurisprudence!

The differences between the two situations could possibly be presented in terms of 'control'. The householder has no knowledge of, or skill for, plumbing, and could therefore not control the manner in which the plumber did the work. Thus, any negligent performance of that work is clearly the responsibility of the plumber. But the same is equally true of employers in most situations,¹⁴⁷ and this attempted explanation would fail.

What then of the situation where an enterprise arranges for the performance of some necessary task by way of an independent contract? — where, for example, a developer hires a consultant architect? While, under current tax laws, both enterprise and consultant could claim the cost of an insurance premium as a deductible expense, the developer has probably the deepest pocket, and the broader circle of customers to whom the cost could be spread, so that it would seem on that argument the developer's enterprise should be vicariously liable for any harm negligently caused to third parties by the consultant. And, if this were not so, we could have the anomalous situation of an enterprise, with both 'employed' and 'consultant' architects working side by side, being vicariously liable for the acts of the employed but not for the acts of the consultants — a situation which would be messy for the enterprise, unfair on the workers, and (initially, at least) confusing for the injured third parties, uncertain of the contractual position of the immediate instigator of their injuries, and therefore of the identity of the appropriate defendant. But if we say that, in such a situation, the principal should be vicariously liable, how do we formulate the rule to avoid making householders liable for harm caused by negligent plumbers?

Another way of differentiation, which could perhaps be drawn from early cases, is to distinguish contracts where the essence is performing work from those where the essence is supply of a 'thing'. It is necessary to distinguish between contracts *for* the performance of work on the one hand, and contracts *as a subordinate consequence of which* work is performed on the other. To deny the separate existence of categories within contracts for the performance of work is not to say that all contracts which *indirectly* lead to work being performed are contracts for the performance of work. Thus, if one goes to a pastrycook and orders a cake, the essence of the contract is supply of the cake, though the contract involves the pastrycook 'working', that is — making the cake. When a person takes a bus to the City, that person contracts with the Urban Transit Authority for the temporary use of space in that bus during the drive to the person's destination. Indirectly that contract leads to the bus driver driving the person to the city. It is not a

147 Certainly in the vast majority of situations involving professional employees or employees with particular trade or craft qualifications.

contract whereby the driver contracts to perform that work of driving for the passenger. Where a person contracts with a livery stable for the hire of a carriage, which comes with driver,¹⁴⁸ the contract results in the driver driving the person, but it is not a contract between that person and either the stable or the driver *for* the performance of work.

If one *employs* a person, arguably it is the doing of the work involved rather than the end-result of that work which is the essence of that contract. If one employs a labourer, it is the *labouring* which is the essence. Such a view perhaps fits with very early notions of contracts of service. It can be seen, decried, by Dickens in *Hard Times*,¹⁴⁹ in the concept of workers as merely 'hands'. It is also apparent in the categorisation of certain workers in colonial Australia as 'generally usefults'. But even if the view could have been upheld then, it cannot really be supported now. Increasing levels of skill, and increasing fragmentation of tasks makes the distinction between the work and the end-product much more difficult. There are very few tasks today which can be clearly presented as a 'doing' rather than as a stage to an end-product. The discussion in *Price v. Grant Industries Pty Ltd*¹⁵⁰ makes that clear. Workers engaged in assembling pre-fabricated wardrobes were argued to be independent contractors producing the end-result of an *assembled* wardrobe!

[i]f the engagement was one creating the relationship of entrepreneur and independent contractor then at least it must be possible to identify the end result supporting each claim for payment in terms of end result rather than of work done. As to installation the end result could be identified in terms such as 'providing in a purchaser's chosen location an installed and stabilized wardrobe of specific model assembled out of pre-fabricated parts supplied by Grants'.¹⁵¹

And even in the nineteenth century, workers argued jealously for their skills and the differentiation of their tasks¹⁵² — few of them acknowledged that they were merely 'hands', merely units of labour power.

The resolution of these various anomalies still lies best, I believe, in the concept of the 'enterprise' or 'business'. Where work is performed by one person for another (be the persons natural or only legal), liability should follow the enterprise. Where the work performed is part of, or relates to, or is for the purposes of, the business or enterprise of the person engaging the worker, that person should be vicariously liable for any harm done the third parties through the fault of the worker. But where the work performed does not relate to the business of the person engaging the worker, yet is performed by the worker as part of the worker's business or trade, then the worker should be liable for any injury caused to a third party through his or her fault.

148 As in *Quarman v. Burnett* note 137 *supra*.

149 Charles Dickens, *Hard Times*, 102-3.

150 (1978) 21 ALR 388.

151 *Id.*, 398.

152 See A.S. Merritt, "The Development and Application of Masters and Servants Legislation in New South Wales" note 29 *supra*, 328-334 and 373-375.

V. STATUTORY BENEFITS AND LIABILITIES BASED ON 'EMPLOYMENT'

The final problem that flows from a merging of employment and independent contracts is that of finding alternative criteria to 'employment' for eligibility to various statutory benefits and for subsection to various statutory liabilities. A large number of welfare-oriented statutes base eligibility to the benefits involved on the applicant's being an 'employee'. For example, Workers' Compensation legislation defines a 'worker', the person to whom compensation will be payable, as an 'employee'. The benefits of Annual Holidays legislation and Long Service Leave Acts are available only to 'employees'. On the other hand, a number of statutes impose liability to payment of taxes, levies, premiums etc. on 'employers' — Workers' Compensation legislation, payroll tax legislation, fringe benefits tax legislation etc. The use of an employment contract as the criterion in such statutes makes sense at first glance. By and large, the sort of people we regard as 'employees' are the sort of people for whom the benefits provided by those statutes are designed. By and large, the sort of people we regard as 'employers' are the most appropriate target group for the payment of the taxes, levies etc., which the Parliaments wish to raise by the other statutes mentioned. However, on closer analysis, it can be seen that the use of employment as the criterion creates a number of difficulties. It can thwart the object of the legislation; it leads to constant litigation. There are several interlocking reasons why the employment criterion is unsatisfactory.

One of these reasons is that — even if we are prepared to accept the so-called definitions of employment contracts as really distinguishing a distinct category of work contracts — cases in which those definitions have been applied show that the group of workers thus identified as employees does not completely encompass the people who should, on the underlying philosophy of the statutes, be entitled to the benefits (or subject to the liabilities). The criterion of employment may perhaps catch most of those people, but not all.

The case of *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*¹⁵³ is a good example of this. The issue was whether Ready Mixed were obliged to make National Insurance contributions in respect of a certain Latimer, who had entered into a contract to deliver concrete for Ready Mixed as an 'owner-driver' (and, as a corollary, whether Latimer was entitled to National Insurance payments if injured). He would have been entitled *if* he was an employee, and Ready Mixed would have been liable to pay contributions in respect of him *if* he was an employee. The court held Latimer was not an employee. Yet, if we examine his circumstances, he was clearly the sort of person who needed the benefit of National Insurance.

Despite the view to the contrary of McKenna J., Latimer was expressly subject to extensive control by Ready Mixed to a degree suitable to

153 [1968] 2 QB 497.

satisfaction of the control test. Despite the fact that he was ostensibly a carrier, providing his own vehicle, that vehicle was 'his' only by virtue of a hire-purchase contract which he had been required to enter into with a company in the Ready Mixed group; and it was a term of the contract that Ready Mixed could acquire the vehicle on the expiration of the hire-purchase contract. It was also a term of the contract that Latimer could be required to assign to Ready Mixed his rights under the insurance policy on 'his' vehicle. He was paid a rate per cubic yard of cement carried per mile, he could carry only for Ready Mixed, and he was to carry however much they directed to whomever they directed him to carry it. There was thus no way that Latimer could manage his 'carrying business' so as to increase his profit — there was no 'profit' but simply the sum received for the cement carried less the required expenditure on hire-purchase payments, insurance, maintenance and petrol. There was no way in which, if Latimer had to take out a private accident and sickness insurance policy because National Insurance payments were not available, that policy could be other than a further charge upon the sum received for the cement carried. Latimer was therefore clearly a person in the position of those whom Worker's Compensation-type legislation is designed to benefit; yet he was not eligible to that benefit because, the court said — applying the tests discussed earlier,¹⁵⁴ his contract with Ready Mixed was not an employment contract but an independent contract of carriage.

Another reason why the criterion of employment is unsatisfactory as a determinant of eligibility to benefit or liability to impose is that the definitions discussed earlier are seldom genuinely applied. Though courts purport to ask 'what sort of a contract is this?' before deciding that, it being of a particular type, a party is or is not entitled to a benefit or subject to a liability, they usually proceed by a different, unstated route to decision. They look first at — for example — the person seeking Workers' Compensation benefits, and ask 'is this person in the position of those for whom Workers' Compensation benefits are designed? *Should* this person be eligible to Workers' Compensation benefits?' If the answer is 'yes', then they will find ways to argue that the contract under which the applicant for benefits works fits the tests for an employment contract.¹⁵⁵ This procedure gives a better result, but it is not really legitimate if there actually is such a thing as a definable employment contract. It is simply a way round the problem mentioned above that the employment criterion does not completely cover the group of intended beneficiaries. Where the courts adopt the more legitimate approach, as on occasions they do, the decision may be 'unjust', as in Latimer's case.

If the question of whether the person 'should' have the statutory benefit is the real determinant, as I have suggested it is in most cases, it would be much better to go straight to the needs issue, without the necessity to find or

¹⁵⁴ See pp 50-52 above.

¹⁵⁵ See p. 48 and notes 2-4 above.

purport to find an employment contract, altering the statutes by eliminating the reference to employment as the criterion for eligibility, and substituting instead an accurate definition or description of the persons intended to receive the benefit. (The same applies equally to statutes imposing a liability). The matters creating a need for particular benefits will not be constant in all the statutes. Different matters will be relevant to the need for Workers' Compensation benefits from those relevant to the need for Long Service leave. It does not matter that each of the statutes in question may therefore have a different eligibility clause, providing that, in each, the clause accurately identifies the factors creating need for the benefit provided by that statute. It would thus be necessary to examine separately each of the statutes using the criterion of employment to identify the real basis for eligibility (or liability). I intend to concentrate on two such areas of statutory benefit and liability to illustrate this approach — Workers' Compensation, and trade union and arbitration legislation.

A. WORKERS' COMPENSATION LEGISLATION

The philosophy behind statutory Workers' Compensation schemes proceeds on the basis that, because the community will suffer if an ill or injured worker receives no income during the period of absence from work, it is in the community's interest that the worker be provided with income during that period, and that therefore — ultimately — the community should bear the cost of the provision of that income. Thus, the loss, the cost of providing benefits during incapacity for work, should be placed directly on the person or persons best situated to spread that cost to the community. Under the New South Wales system of Workers' Compensation, as an example, the cost is borne directly by the employer who is required to take out a Workers' Compensation policy and pay the premiums for that policy. The employer can spread this cost by passing it on to the community in the form of increased prices for his or her goods or services. The cost of the actual weekly benefits paid to incapacitated workers is borne directly by the insurance company, in the form of payment of claims made under the policy. The insurance company can pass that cost to the community by increasing premiums on the whole range of insurance policies it enters into. In the Victorian, South Australian and British systems, the employer bears the cost directly by paying a levy to the statutorily-established funds, and passes that cost on to the community in increased prices. The cost of the weekly payments to incapacitated workers is borne directly by the government — by the statutory fund. The government passes that loss on to the community, because any amount by which payments made to workers are in excess of the levies paid by employers is made up out of Consolidated Revenue, and thus out of the taxes which the community pays.

Where an incapacitated worker receives payments to replace income during the period he or she is unable to earn as a result of an accident or sickness insurance policy which he or she has taken out *him-* or *herself*, he or she *may* be able to pass the cost of that policy — the annual premium — to the

community. The cost would be partly passed on if the worker were able to deduct the amount of the premium from his or her gross income as an allowable tax deduction. It will be totally passed on if the worker can increase the fee or wage or charge for his or her services to recoup the expense of the premium. But if the premium is not deductible, and/or the worker does not have sufficient bargaining power to set his or her own fees or remuneration, then the worker will have to bear the whole cost of the premium, or take the risk of working without insurance, in which latter case, if the worker becomes ill or is injured, he or she will have no income during the period of incapacity for work, unless that worker has access to payments under the statutory Workers' Compensation schemes.

The ability to deduct premiums and to pass on their cost in higher charges is an aspect of the matter looked at in discussing the integration test for the existence of an employment contract (in its converse formulation) — whether the worker is in business so as to achieve and increase 'profit'. Does the job give the worker a 'chance of profit' rather than simply a fee or wage which the worker cannot increase by more efficient operation? A chance of profit does not arise merely because the worker can earn more by working longer hours or working faster (in a piece-rate pay situation) or by taking a second job (in a time-rate pay situation). It means that, given the pay for the job is \$x, the worker can so organise him- or herself as to be able to retain, as profit, a greater amount of \$x after deduction of the expenses of earning \$x. A worker in that position can write off, by passing on to the community, the cost of a personal insurance policy.

Thus, the identifying feature of eligibility to Workers' Compensation benefits would be whether or not one's job provides a 'chance of profit', whether or not the job is such that a worker can pass on the cost of a personal insurance policy. If the job does not provide such 'chance of profit', then the worker should be entitled to Workers' Compensation benefits. If the job does provide a chance of profit, the worker should be left to arrange personal insurance.

Logically, the underlying philosophy of Workers' Compensation schemes would require a further refinement of the criterion for eligibility just set out. I argued that the starting point is that the community suffers when workers receive no income during periods of incapacity for work. Where workers have no money, they can make no contribution to the economy through purchase of goods and services, and no contribution to public services through payment of tax; their families may be deprived of education or health care, and the community has an interest in the education and health of all of its members; the worker and his or her family may become a further burden on an over-stretched welfare system; the worker's family may even turn to crime, which involves a burden on the police, justice and prison systems. But if an incapacitated worker, though not receiving income from the job, has adequate resources to meet his/her family's needs during the period of incapacity, then those disadvantages will not eventuate. Workers who, even though they cannot spread the cost of personal insurance, can well afford to pay for it,

or workers whose salaries or fees have been so high that they have substantial savings, or workers of independent means through inheritance, or interest on property or securities, will not be the occasion of cost or loss to the community if they are unable to earn income through work during incapacity.

Thus, I would argue that the philosophy of the Workers' Compensation schemes does not involve the provision of benefits to workers who, though their jobs involve no chance of profit, receive income while working sufficient to pay for personal insurance, or have independent means sufficient to be able to support their families without any threat to living standards. But it also follows from the philosophy of the legislation that those who are entitled to benefit are not only those who cannot afford and cannot pass on the cost of personal insurance, but also those who, though *theoretically* able to pass on that cost, cannot afford to incur it — those who would *actually* have to bear the cost of that insurance because their businesses are so marginally profitable that the cost of that insurance would reduce their level of 'profit' to unacceptably low standards, causing real disadvantages to them or their families. However, the philosophy of the legislature, quite apart from the philosophy of the Workers' Compensation legislation itself, could well be antipathetic to the introduction of what amounts to a means test, in relation to the suggested exclusion from benefit of persons whose salaries or independent sources of income would, on the above analysis, enable them to meet the cost of personal insurance or the expenses of periods of incapacity without job income.

The objection to the above argument whereby 'chance of profit' is substituted for 'employment' as the criterion for eligibility to receive Workers' Compensation benefits is that it perpetuates in another, and largely untried, form the old dichotomy, reintroducing employment and independent contracts in another guise, and — arguably — putting 'new wine into old bottles'.¹⁵⁶ And we would not have completely eliminated the old problem, for even persons who, because they could afford to insure, were not eligible for Workers' Compensation under such a formula, might nevertheless fail to insure, and find themselves incapacitated for lengthy periods with no income, with the resultant detriment to the economy and the community.

There is a way around these criticisms and difficulties, which is much simpler — theoretically at least. We could dismantle the present Workers' Compensation structure and set up a national Workers' Compensation fund to which all persons injured or contracting disease whilst at, or because of, work could apply. The fund would be financed by a levy on assessable income, from which there would be exemption in the case of incomes below a certain level — in the manner of the old Medibank levy. Thus we could ensure that all who could have *afforded* personal insurance under the old system would be paying for 'insurance' under the new, and that all who could not have afforded personal insurance, and who therefore needed Workers'

¹⁵⁶ Note 5 *supra*.

Compensation, would still be entitled to it without any direct personal contribution.

The problem with this is a constitutional one. It necessitates use of the income tax system which is basically a Commonwealth function. Yet Workers' Compensation has traditionally been regarded as within the arena of State legislative power. However, there are many heads of Commonwealth legislative power from which jurisdiction for such a system could be derived. For example, there is the taxation power in section 51(ii), the insurance power in section 51(xiv), and the social services power in section 51(xxiiiA). Arguably also, the external affairs power in section 51(xxix), acting upon the ILO conventions, could be used.¹⁵⁷ And if none of these powers sufficed, we *could* amend the Constitution to make Workers' Compensation expressly a matter of Commonwealth power. Of course, to say we *could* do these things may seem naive in terms of practical politics. But the point I am making is not thereby destroyed. There are any numbers of ways to provide income replacement to incapacitated workers. Workers' Compensation based on employment as a criterion of eligibility is not part of the law of nature. It is merely one way to achieve a particular result. And since it is based on a meaningless concept, capricious in its effects, it is not a satisfactory way. Other ways can be found. All will have their difficulties. The essential point is to recognise that, whatever method is chosen, ultimately the community pays.

B. LEGISLATION PROVIDING FOR REGISTRATION OF TRADE UNIONS AND FOR ENTITLEMENT TO THE BENEFIT OF INDUSTRIAL AWARDS

The body of legislation of most immediate and wide-ranging importance to workers, apart possibly from Workers' Compensation legislation, is that dealing with trade unions and industrial arbitration. This legislation involves both federal and state law. In so far as it involves federal law, it might have been argued that there are constitutional barriers to the type of re-alignment I have been recommending, but such barriers as may have originally been thought to exist have now been broken through, both by High Court reinterpretation of the industrial head of power¹⁵⁸ and by High Court recognition of alternative and less internally limited sources of federal power over industrial matters.¹⁵⁹

The structure of the legislation, as it relates to the point in issue here — the use of the concept of employment as a criterion of eligibility to benefit and liability to obligation — is that there is provision for the registration and

157 Using the approach adopted in *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 and *Commonwealth v. Tasmania* (1983) 158 CLR 1.

158 Flowing from the landmark decision of *R. v. Coldham; ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

159 As for example, the trade and commerce power — s. 51(i), the corporations power — s. 51(xx), the external affairs power — s. 51(xxix), as to which last, see note 151 *supra*.

control of trade unions, and — perhaps as a corollary to the imposition of additional limitations on unions' access to industrial action — provision for the creation and enforcement of industrial awards setting the rights and obligations of particular employers and particular groups of employees. Such awards import minimum terms into the contracts which employers bound by them enter into with employees in the groups covered. At a number of points throughout the legislative framework, the criterion of employment is used, so that the whole system is basically available only to regulate the conditions of persons whose work arrangements are conducted through the medium of an employment contract as purportedly defined.¹⁶⁰

In summary,¹⁶¹ the state Trade Union Acts provide for the registration of trade unions. The concept of trade unions within these Acts is defined, in terms taken from the British Trade Union Act of 1871,¹⁶² as being:

combination, whether temporary or permanent, for regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers or for imposing restrictive conditions on the conduct of any trade or business
...¹⁶³

and a registrable trade union under the Acts is one having at least seven members.

The state industrial relations or industrial arbitration Act¹⁶⁴ then provides for the recognition or registration, within that particular state's arbitration system, of trade unions registered under the relevant Trade Union Act. Both the Trade Union Acts and the industrial relations/industrial arbitration Acts impose requirements in relation to the rules of registered unions, and the industrial relations/industrial arbitration Acts also regulate union membership, union elections, and the industrial activities of the registered unions. The industrial relations/industrial arbitration Acts provide for the hearing by the relevant Commission of disputes on 'industrial matters' (defined as being "matters pertaining to the relationship of employer and employee")¹⁶⁵ referred to the Commission by employers, employer associations or employee associations (i.e. registered trade unions), and for the handing down of awards binding on the parties in dispute. The federal system is similar, providing for the registration (inter alia) of associations of employees as 'organisations' under the Conciliation and Arbitration Act 1904, for the regulation of those 'organisations' and their activities, and for the

¹⁶⁰ This remains generally and 'basically' true, despite certain exceptions where independent contractors are deemed employees, for example under s. 88E of the Industrial Arbitration Act 1940 (NSW); and where independent contractors are permitted to become members of registered trade unions, as with owner-drivers of trucks etc. and the Transport Workers' Union in New South Wales.

¹⁶¹ This summary presents an overall picture. Details vary from jurisdiction to jurisdiction.

¹⁶² 34 & 35 Vic., c. 31, 23.

¹⁶³ eg: Trade Union Act 1881 (NSW) s. 31.

¹⁶⁴ Industrial Arbitration Act 1940 (NSW); Industrial Relations Act 1979 (Vic.); Industrial Conciliation and Arbitration Act 1961-1983 (Qld); Industrial Conciliation and Arbitration Act 1972 (SA); Industrial Relations Act 1979 (WA); Industrial Relations Act 1984 (Tas.).

¹⁶⁵ S. 5(1), (NSW); s. 3(1), (Vic); s. 5, (Qld); s. 6(1), (SA); s. 7(1), (WA); s. 3(1), (Tas.).

participation of those organisations as parties principal in the hearing of disputes on industrial matters and their determination by awards.¹⁶⁶

Thus, the system is basically closed to workers who perform work under independent contracts and are not 'employees' as purportedly defined by application of the various tests previously discussed.¹⁶⁷ Basically, only employees may be members of trade unions within the system, and basically the awards establishing minimum wages and conditions or work may only deal with such matters in relation to employees.

The reasons (if any) why trade unions should be designedly limited to combinations of workers who are 'employees' would have to be sought in the industrial history of the last hundred-plus years, and particularly in the industrial history of the second half of the nineteenth century. I suspect, however, that there was no *intention* to so limit them. During the nineteenth century, when the principles of 'employment law' were being developed, the courts did not always make clear distinctions between employment contracts and independent contracts, and were not always precise in the terminology they used.¹⁶⁸ 'Employer' was used then, as in ordinary speech it is frequently used today, to denote the person for whom another worked, without necessarily delineating the precise nature of the work contract involved. And 'employment' was often used then, as now, to denote the process of being occupied in a particular work situation. I suspect therefore that when the 1871 Trade Union Act, on which our Acts are based, defined a trade union as a combination "for regulating the relations between workmen and employers . . .",¹⁶⁹ the intention was simply to refer to regulating the relations between workmen and those for whom they worked.

In fact, if we examine the origins of such combinations, we find them in the guilds of artificers — workmen who, in so far as such distinction has any real substance, were more likely to be independent contractors than employees. The idea behind the combinations was that those in a weaker position as regards bargaining for the remuneration and conditions of their labour should band together so as to derive from the strength that is in unity a more equal position from which to negotiate that remuneration and those conditions. Yet independent contractors can be in an unequal bargaining position also. And one of the main factors leading to the development of 'compulsory arbitration' in Australia was that period of industrial unrest known as 'the great strikes of the nineties', and one of the major protagonists in that struggle was the Australian Shearers' Union (later the Australian Workers' Union). But in the nineties, most shearers were more likely to have been independent contractors than 'true' employees.

Thus, I can see little historical justification for confining the benefits and

166 *Burwood Cinema Ltd v. Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528.

167 See pp 50-52 above.

168 See pp 55-57 and p. 85 above.

169 Note 162 *supra*.

obligations of trade union and arbitration legislation to employees 'proper'. Nor can I see any compelling reason in the industrial relations scene today to perpetuate that limitation. The Trade Union Acts recognise the legality of combinations of workmen banding together to protect and improve wages and conditions of work. Such collective action may however involve considerable disruption to the economy and to the community at large. The industrial relations/industrial arbitration Acts attempt to minimise that disruption by providing a framework for the legal presentation and solution of industrial disputes. Disputation about work conditions and rewards by 'independent' contractors can cause disruption also.¹⁷⁰ Thus, it is in the community's interest to bring such disputation within the purview of the arbitration system. And not only would the community benefit from such a move, enhancing as it would the achievement of the aims of the legislation. Some at least of those groups within the community most immediately concerned would benefit also.

Trade union interests would not be prejudiced by opening their ranks to independent contractors, nor would their interests be prejudiced by giving independent contractors access to the benefits of awards. In fact, such a move would be to the unions' advantage, for, as long as 'independent contractors' are not subject to awards, as long as their principals are not bound to pay them award wages for work the equivalent of work which employees might do, and as long as those independent contractors do not and cannot band together in trade unions to negotiate higher rewards, then there exists a fragmented pool of labour which can be used to break down award wages and conditions. It is that very possibility, inimical to the whole thrust of the arbitration system, which has led to the incorporation of Section 88F in the New South Wales Industrial Arbitration Act, empowering the Industrial Commission to set aside or vary a contract for the performance of work which (inter alia):

(d) provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work; or

(e) was designed to or does avoid the provisions of an award . . .

and it is that very *reality* which has led trade unions to apply to the Commission under Section 88F for the variation of contracts with so-called

¹⁷⁰ I realise that the High Court has held, in *R. v. Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313, that the 'industrial matters', which can, by virtue of the Conciliation and Arbitration Act 1904 (Cth) give rise to an "industrial dispute" within the jurisdiction of the Commonwealth arbitral tribunals, must be "matters or things affecting or relating to work done or to be done" "pursuant to contracts of service". I would point out that this is an interpretation of the Conciliation and Arbitration Act, not of the Constitution; and I would still raise the question: Why should the system set up under the power given in Section 51(xxxv) be limited to these matters. If we are to take the "common sense" approach to the meaning of "industrial disputes" adopted in the *Australian Social Welfare Union* case (note 158 *supra*), then surely we would treat the phrase as including disputes such as the recent truck-drivers' blockade. And if such disputes can be brought within the constitutional power, why should we legislate in the Conciliation and Arbitration Act to exclude them from arbitration. Finally, I would respectfully reject any suggestion that the phrase "industrial matters" cannot include matters arising out of the work contracts of so-called "independent contractors".

independent contractors, as did the Federated Miscellaneous Workers' Union in the *Wilson's Car Park* case.¹⁷¹

Independent contractors have nothing to lose from access to trade unions and to the arbitration system, though those for whom they work may have fostered in them the idea of freedom to work as they choose, freedom to 'be their own boss'.¹⁷² But this is the illusory freedom of contracting for remuneration from a position of weakness, and working without any of the statutory benefits of Workers' Compensation, paid leave, and award-enforced safety conditions; the illusory freedom of undertaking the expense of finding one's own tools of trade, paying one's own sickness insurance and so forth. In short, it is the illusory freedom to choose a disadvantageous work situation and to say — 'No one tells me what to do' — no one, that is, except the person for whom I work, the bank or finance company from which I am forced to borrow, and the creditors to whom I cannot help but become indebted. It is Latimer's freedom, and Latimer's freedom was a chimera.

The persons who may derive a short-term benefit from the tying of the trade union/arbitration legislation to the idea of 'employment' are *employers*. It enables them to bargain with a worker on an individual basis, without the interposition of a combination giving strength to the worker. It enables them to say to an individual worker, who needs work in order to live — 'Well, that's the pay, if you want the job'. It enables them to avoid paying the wages and giving the conditions which employees, banded together into unions, can gain as a result of awards negotiated by their unions as parties principal — awards in which the tribunals decide, on the basis (*inter alia*) of justice and of what the industry can pay, what those wages and conditions ought in decency to be. The fact that employers see this as a benefit is witnessed by the number of instances that come before the courts and tribunals of employers attempting to restructure the work contracts of those who work for them into a shape which will avoid the definition of 'employment contract'.¹⁷³ Often the courts and tribunals recognise these attempts as shams.¹⁷⁴ Sometimes — as with Latimer¹⁷⁵ the attempt is successful.

So far, I have examined this issue from the standpoint of employees and their unions, independent contractors and employers. What of the community? How would the community suffer if plumbers, doctors or solicitors could band together in trade unions to negotiate fair conditions within the arbitration system? The answer is that it would not suffer at all. Many such groups already operate as what are, to all intents and purposes, trade unions. What trade union is more effective than the A.M.A. or the Law

171 (1981) 38 ALR 431.

172 The illusory content of this "freedom" in relation to long-distance truck owner-drivers was graphically demonstrated in the list of grievances of the drivers responsible for the 'blockade' at Goulburn in July 1988.

173 As, for example, in the *Wilson's Car Park* case note 171 *supra*.

174 See *Wilson's Car Park* case *ibid*, and *Ferguson v. John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213.

175 Note 19 *supra*.

Society? The only real difference between the Metal Workers (for example) and the A.M.A. is that the former *is* subject to the requirements of industrial legislation as to its rules, the conduct of its internal affairs and the parameters of its industrial action, and that the latter is not. Apart from that, the A.M.A. — or the Law Society, or any number of other 'professional' bodies — operate just as would any trade union finding itself outside the arbitration system. The A.M.A. and the Law Society and all the other groups use their industrial muscle to negotiate favourable conditions for their members. They do so by — to coin a phrase! — 'holding the community to ransom' until they obtain the conditions they wish.

Plumbers, pest exterminators etc. do the same thing, though less obviously. They agree amongst themselves on a scale of prices below which they will not work, and if we do not accept those prices, we must accept leaking taps, bug-ridden houses etc. Admittedly, other types of tribunals may enter the picture. There are scheduled fees for doctors, a scale of costs for lawyers, and various agreed scales in other industries. These limitations achieve somewhat the same effect as do the awards of industrial tribunals. And just as doctors can charge above scheduled fees if we are prepared to pay, and solicitors can charge above the scale, unless we take the risk of requiring our bill to be taxed, so unions can negotiate over-award payments if they have the muscle and conditions are right. Where is the difference?

Moreover, in talking of doctors, lawyers and even plumbers, I am talking of very powerful groups rendering more or less essential services. How will the community suffer if, for example, owner-drivers of trucks or independent car park attendants are brought into the union/arbitration system? In any of the industries where work is divided between employees and so-called independent contractors performing almost identical services, the independent contractors, the Latimers, are, as I have shown, at a real disadvantage. While prices in those industries might rise if employers could not force off many workers into independent contracts at lesser pay and without statutory benefits, the social cost to the community resulting from employers having to accept increased obligations would be less than the social cost of leaving those workers unprotected.

The various other statutes using employment as a criterion can be subjected to the same type of analysis and rethinking. I do not propose to multiply examples here, but merely to reiterate that the use of the employment criterion is not inevitable, not necessary, and not even satisfactory. What I hope has been demonstrated is that the attainment by workers of adequate security in their jobs — security from the effects of ill-health, security to obtain an adequate wage etc. — involves inevitably a cost to the community. The question is as to the best way to arrange for the community to bear that cost — and basically the choice is between bearing it by paying increased costs for goods and services now, or bearing it by paying increased taxes later. Whatever method we adopt for the allocation of these costs, we should dispense with the use of 'employment' as a criterion of eligibility for benefit.

For these purposes, it is an inadequate, irrelevant, and ultimately meaningless concept.

VI. CONCLUSION

We thus have in the contract of employment a concept which cannot be defined, which has no distinguishing marks in terms of rights and obligations to differentiate it from other contracts for the performance of work, and which has no indispensable part to play in the allocation of statutory benefits or liabilities. Of what conceivable use, then, is this creature, less graspable than a taniwha, less definable than a platypus, and far less functional than an antimacassar! I suggest the time has come to consign it to the realm of fable, and to concentrate on things which *do* exist and *do* have utility — like contracts for the performance of work.