[1974] S.C.R. 239) might yet provide a ready means of sidestepping *CAL No. 14* when the point arises. Hopefully, this course will not be taken.

Unfortunately, *CAL No. 14* leaves one significant issue open, namely whether there is similarly an absence of any general duty of care on licensees *vis-à-vis* non-customers injured by their intoxicated customers. Whilst the Supreme Court of Canada has recognised a licensee's "general duty of care to persons who can be expected to use the highways" (*Stewart* v. *Pettie* (1994) 121 D.L.R. (4th) 222), *CAL No. 14* might make such a conclusion less likely in Australia and England.

CHRISTOPHER HARE

LEGISLATE IN HASTE, REPENT AT LEISURE

AN unhappy practice of our present Government is to reform the law in demagogic dialogue with the tabloids. In response to Monday's "scandal" comes Tuesday's ministerial "pledge", and on Wednesday this is followed by an instant Bill, rushed through Parliament with inadequate debate. That legislation made like this is often unsatisfactory should need no demonstration. If it does, however, *Adorian* v. *Metropolitan Police Commissioner* [2009] EWCA Civ 18, [2009] 1 W.L.R. 1859 provides it.

When the Norfolk farmer Tony Martin was jailed for shooting down two fleeing burglars, killing one and injuring the other, he was canonised by sections of the popular press, which thought that he deserved not prison but a medal. When later it emerged that the surviving burglar, on his own release from gaol, planned to sue the farmer for damages, tabloid fury was redoubled – not abating even when the burglar decided, on reflection, to drop his claim. Responding to pressure from the Conservatives – responding in their turn to pressure from the media – the Government promptly added to their current by-now-annual Bill to "rebalance" criminal justice a new clause designed to make law-suits of this type more difficult.

In due (or undue!) course, this became law as section 329 of the Criminal Justice Act 2003. In 455 words of convoluted legislative prose, this provides that where a claimant brings an action for trespass to the person, and "the claimant has been convicted of an imprisonable offence … committed on the same occasion as that on which the act is alleged to have been done", his action shall not proceed without judicial leave. It then provides that leave shall be given only in one or other of two situations: first, where there is evidence suggesting that the

https://doi.org/10.1017/S0008197310000085 Published online by Cambridge University Press

defendant did not believe his act of injuring the claimant was necessary to stop the crime or catch the criminal; or alternatively, where there is evidence suggesting that "the defendant's act was grossly disproportionate". And finally, it provides that if the claim proceeds, the defendant wins if it is shown at trial that, when he acted, he believed honestly – if unreasonably – that what he did was necessary; unless his act was "grossly disproportionate".

Though intended to protect householders, section 329 applies no less to the police. And it is the police, it seems, and not the disciples of "St. Tony", who are now using it. It has been regularly invoked by the police to defeat claims by convicted persons who allege that, in the early stages of proceedings that led to their conviction, truncheon-happy constables illegally detained them, strip-searched them, or beat them up to make them show respect. A case of this type was *Adorian* v. *Metropolitan Police Commissioner*. And it is in Sedley L.J.'s judgment in that case that this disquieting development is revealed.

In August 2004 Adorian was arrested for disorderly behaviour and then charged with obstructing the police, an offence for which he ultimately received a conditional discharge. From the police station where he was taken on arrest he was hastily removed to hospital, where he was found to be suffering from multiple fractures to his leg and hip: injuries the orthopaedic surgeon called "appalling". He complained about mistreatment to the Independent Police Complaints Authority: in whose bureaucracy, three years later, his complaint was still enmired. So on the eve of the third anniversary of the incident, on which his claim became time-barred, he instituted a civil claim against the Metropolitan Police. In answer, the Commissioner pleaded section 329. First, he said, there was here "no evidence" that the force used by his officers arresting Adorian was "grossly disproportionate". Secondly, and more fundamentally, he said that even if there was, the requirement for prior leave was mandatory, not directory, and so its absence could not be cured by the court giving retrospective leave. In such a situation, proceedings started without leave are simply null and void. In law, all this meant that Adorian had failed to institute proceedings within the limitation period, and his claim was now time-barred.

These arguments the Court of Appeal resoundingly rejected. Of grossly disproportionate force, they said, there was ample evidence before them in the papers in the case: such evidence could be circumstantial, and need not be direct. And dealing with the second and more crucial point, they held, after a long and careful examination of the case-law on similar provisions, that section 329 is merely directory. Hence where (as here) a claimant has failed to get leave ahead of issuing a claim, a court can grant it retrospectively.

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In reaching this conclusion, the Court of Appeal was mainly motivated by the inconvenience and injustice that, in its view, would result from interpreting the leave requirement in section 329 as imposing a total bar. But in construing it narrowly, the Court was also influenced by the fact that, as an unintended consequence of the way the provision has been drafted, its main beneficiaries are not householders but the police. As Sedley L.J. put it:

> In place of the principle painstakingly established in the course of two centuries and more, and fundamental to the civil rights enjoyed by the people of this country – that an arrest must be objectively justified and that no more force may be used in effecting it than is reasonably necessary – the section gives immunity from civil suits, not confined to those involving personal injury, to constables who make arrests on entirely unreasonable grounds, and accords them impunity for all but grossly unreasonable force in doing so.

Since 1965 there has existed in this country the Law Commission; a body which, unlike headline-hungry politicians, thinks calmly about thorny legal issues, and consults with those who understand them, before formulating a response. It was to the Law Commission that the Government should have referred the problem to which it produced section 329, like a rabbit from a hat, as an instant answer. And it is to the Law Commission that the Government now should refer the mess it has, all too predictably, created.

J.R. SPENCER

BANK CHARGES IN THE SUPREME COURT

BANKS make substantial amounts of money from charging customers for becoming, or attempting to become, overdrawn on their current accounts without prior authorisation. The Office of Fair Trading ("OFT"), concerned that such charges may be unfair, agreed with the leading banks that it should be determined by the courts whether standard terms imposing these insufficient funds charges fall within the scope of, which provides an exception to the assessment of fairness Regulation 6 of the Unfair Terms in Consumer Contract Regulations 1999. Andrew Smith J. ([2008] EWHC 975 (Comm), [2008] 2 All E.R. (Comm) 625; noted [2008] C.L.J. 466) and the Court of Appeal ([2009] EWCA Civ 116, [2009] 2 W.L.R. 1286) found that they did not. The Supreme Court, unanimously, disagreed: *Office of Fair Trading* v. *Abbey National plc. and others* [2009] UKSC 6, [2009] 3 W.L.R. 1215.

https://doi.org/10.1017/S0008197310000085 Published online by Cambridge University Press