Hallstrom's Case[49] seem more like a pious hope than a statement of the law.

> For myself however, I am not prepared to concede that the distinction between an expenditure on account of revenue and an outgoing of a capital nature is so indefinite and uncertain as to remove the matter from the operation of reason and place it exclusively within that of chance or that it must be placed in the category of an unformulated question of fact.

T. J. HIGGINS

PARKER v. THE COMMONWEALTH OF AUSTRALIA[1]

Commonwealth—Liability in tort—Negligent act of member of defence forces in peacetime—Injury on high seas—Judiciary Act 1903-1960 *(Cth), ss.* 79, 80—*Wrongs Act* 1958 *(Vic.), section* 18.

This action arose out of the tragic collision between two ships of the Royal Australian Navy, H.M.A.S. Melbourne and H.M.A.S. Voyager. The plaintiff, the widow of a person who lost his life as a result of the collision, brought an action against the Commonwealth in the Admiralty jurisdiction of the High Court on the basis that her husband's death was caused by the negligence of the officers and crew of the two ships and of other servants of the Commonwealth. The Commonwealth admitted the allegations of negligence. The action was heard in Melbourne before Windeyer J.

On a preliminary point Windeyer J. held that, since the repeal, in 1939, of section 30 (b) of the Judiciary Act, 1903-1960 (Cth) the sole source of the Admiralty jurisdiction of the High Court had been the Colonial Courts of the Admiralty Act, 1890 (Imp.). As the plaintiff's rights were perhaps less in an action in the Admiralty jurisdiction than they would be in an ordinary action in the original jurisdiction of the Court, His Honour considered the case as if it were an ordinary action at law.[2] Thus the difficult questions concerning the extent of the Admiralty jurisdiction of the High Court were avoided.

The liability of the Commonwealth in tort depends upon the provisions of the Constitution and sections 56 and 64 of the Judiciary Act 1903-1960 (Cth). His Honour mentioned the vexing question whether the ' vicarious ' liability of a master for the tortious acts of his servant arises because the master is answerable for his servant's torts, or because

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[49] (1946) 72 C.L.R. 634, 646.

[1] (1965) 112 C.L.R. 295; (1965) 38 A.L.J.R. 444. High Court of Australia; Windeyer J.

[2] See *Huddart Parker Ltd v. The ' Mill Hill '* (1950) 81 C.L.R. 502, 508.

the acts of his servant are imputed to him so as to make himself liable in tort, but expressed no opinion either way.[3] However he concluded

> ' But, however the principle of liability should be expressed, I think that the Commonwealth is only liable for the acts or omissions of a servant, if the servant would himself be liable '.[4]

It is clear, since the decision in *Shaw Savill and Albion Co. Ltd. v. The Commonwealth*,[5] that no-one, civilian or member of the armed forces, can bring an action for negligence based upon anything done in the course of actual operations of war. It is also clear that civilians may bring an action against members of the armed forces or the Commonwealth for injuries caused by negligent acts done in the course of peacetime duties. His Honour had no difficulty in reaching the conclusion that the deceased was in the Voyager in a purely civil capacity and could have, had he lived, brought an action for negligence.

However, Windeyer J. considered that servicemen could not bring an action against fellow servicemen in respect of acts done in the course of duty even in peacetime. He based this aspect of his decision on a line of cases from *Sutton v. Johnstone*[6] to *Heddon v. Evans*[7]. This immunity from suit, according to His Honour, applied equally in such varied situations as military operations falling just short of war and collisions on the highway. It followed from his earlier comments that, as servicemen were immune from suit, so also was the Commonwealth. His Honour recognised that there may be some grounds on policy considerations for allowing immunity to Crown servants while subjecting the Crown to liability, but held that this was not the law.

This considered statement of opinion by His Honour, though he admitted it to be *dictum*, was couched in terms which showed that he would not regret this view influencing subsequent litigation. As such litigation is pending it is therefore important to consider critically his interpretation of the authorites upon which he relied. Examination of these cases shows that they shed no light on the question whether a member of the armed forces may bring an action against a fellow member for injuries caused by negligent acts in the course of peacetime duties.

The first decision was *Sutton v. Johnstone*[8]. A captain of a ship who had been imprisoned for certain offences brought an action against his commander for false imprisonment. The Court of Exchequer Chamber held in favour of the defendant on the ground that the imprisonment had not been unlawful. However, the court was of the opinion that

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[3] However, it is interesting to note the reference to the *dictum* of Lord Pearce in *I.C.I. v. Shatwell* [1965] A.C. 656, 685; [1964] 3 W.L.R. 329, 349 as Lord Pearce obviously favours the former as shown by his approval, in that case, of *dicta* to that effect in *Stavely Iron and Chemical Co. Ltd v. Jones* [1956] A.C. 627 and of the judgment of Fullagar J. in *Darling Island Stevedoring and Lighterage Co. Ltd. v. Long* (1957) 97 C.L.R. 36.

[4] (1965) 112 C.L.R. 295, 301; (1965) 38 A.L.J.R. 444, 446.

[5] (1940) 66 C.L.R. 344.

[6] (1785) 1 T.R. 493.

[7] (1919) 35 T.L.R. 642.

[8] (1785) 1 T.R. 493.

such an action would not lie because, under the military code, the commander had a discretionary disciplinary power and any abuse of this power could only be corrected by a military tribunal.[9]

A case which has been the subject of considerable controversy is *Dawkins v. Lord Paulet*[10]. In that case, an army officer brought an action for libel against a superior officer on the grounds of malicious statements made in a report to the Adjutant-General. Mellor and Lush JJ. decided that the defendant was under a duty to make the report to the Adjutant-General and no action would lie at law for the performance of duties with which the officer had been charged. Another ground for the decision was that the Articles of War provided a mode of redress for every officer who may think himself wronged by his commanding officer and because of this an appeal to the civil courts was precluded.[11]

However, Cockburn C.J., in a strong dissenting judgment, disagreed with the proposition that such an action would not lie. His Honour argued that on the ground of public policy the action should lie. His Honour stated

> 'I cannot but believe that to a force depending on voluntary augmentation it will be far more beneficial that its subordinate members shall know that, against intentional oppression and manifest wrong leading to consequences disastrous to professional interests or character, redress may be found at the civil tribunals of the country'.[12]

In *Dawkins v. Lord Rokeby*[13] the Court of Exchequer Chamber held that statements made to a military tribunal were privileged and no action would lie because of them. The judgment of the Court was given by Kelly C.B. who said in the course of his judgment

> 'a case involving questions of military discipline and military duty alone are cognisable only by a military tribunal, and not by a court of law'.[14]

This decision was affirmed by the House of Lords[15] in *Fraser v. Balfour*,[16] Lord Finlay, with whom the other Lords agreed, said

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[9] This decision was affirmed by the House of Lords at (1787) 1 Bro. P.C. 76 but no reasons were given. During argument in *Warden v. Bailey* (1811) 4 Taunt. 67, 75 Lawrence J. said 'I have heard from good private information that the reasons assigned by Lord Mansfield for reversing the judgment of the Court of Exchequer were not adopted by the House of Lords, though the judgment of the Chief Justices was affirmed.'

[10] (1869) L.R. 5 Q.B. 94.

[11] The Article referred to was couched in terms almost identical with those of s. 42 of the Army Act, 1881 (Imp.).

[12] (1869) L.R. 5. Q.B. 94, 109. This decision has been subjected to severe criticism. Bower in his work *The Law of Actionable Damage* (2nd ed.) 87 n. (j) says that the decision of the majority (Mellor and Lush JJ.) is undoubtedly wrong and the dissentient judgment of Cockburn C.J. right. See also the decisions of Starke and Evatt JJ. in *Gibbons v. Duffell* (1932) 47 C.L.R. 520.

[13] (1873), L.R. 8 Q.B. 255.

[14] *Ibid.* 271.

[15] (1875) L.R. 7 H.L. 744.

[16] (1918) 87 L.J.K.B. 1116.

> ' the decision proceeded solely on the privilege of witnesses and did not affirm the other and wider proposition laid down in the Exchequer Chamber that such questions are not cognisable in a Court of Law '.[17]

The above cases, and others less important for present purposes, were reviewed by McCardie J. in *Heddon v. Evans*[18] in which a soldier sued his commanding officer for slander, false imprisonment and malicious prosecution. His Honour concluded that the authorities showed that, if the act causing injury to person or liberty is in the course of military discipline and is within the authority conferred on the person exercising the disciplinary power, no action will lie. He said

> ' Where, indeed, the actual rights he [a soldier] sought to assert were given not by the common law, but only by military law, then it might well be that in military law alone could he seek his remedy. . . . If however the rights which he sought to assert were fundamental common law rights such as immunity of person or liberty, save in so far as taken away by military law, then the common law might be asserted in the ordinary Courts '.[19]

On the question of policy His Honour agreed with the words of Cockburn C.J. in *Dawkins v. Lord Paulet*.[20]

However the conflict in the above cases may be resolved it appears clear that the cases turn on the particular provisions of military law and on how far the civil courts will interfere with matters of military discipline. On the question of negligence the cases are wholly silent. Although some of the propositions in these cases are expressed in wide terms, the facts of these cases are so far removed from those of the present one that the cases provide no authority for the proposition of Windeyer J.

It is submitted, however, that His Honour's proposition may not be correct. The common law appears to be silent on the question whether a member of the armed forces may bring an action in negligence against a fellow member. Thus it may be assumed that the common law does not differentiate between civilians and servicemen in this matter. In fact, what little authority there is suggests that the common law would allow such an action. In *Weaver v. Ward*[21] a soldier succeeded in an action in trespass against a fellow soldier because of an injury arising from the negligent discharge of the defendant's musket during a skirmish.

However that may be, it is submitted, that the common law provides no solution to the present question. A standing army is unknown to the common law. It is a creation of the legislature. Thus the special privileges and liabilities of servicemen can only be determined by looking to legislative enactment dealing with the matter.

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[17] *Ibid.* 1119.

[18] (1919) 35 T.L.R. 642.

[19] *Ibid.* 643.

[20] (1869) L.R. 5 Q.B. 94, 109.

[21] (1616) Hob. 134; See also *Stanley v. Powell* [1891] 1 Q.B. 86, 89.

It has always been assumed that members of the armed forces, although subject to military law, are not thereby divested of the civil rights and duties of citizens.[22] Thus if a member of the forces cannot sue a fellow member for negligence this right must have been removed expressly or impliedly, by legislation. This right has been removed in England[23] but there is no corresponding enactment in Australia. Consequently the right to bring such an action in Australia may exist.[24]

On the grounds of social policy, it is difficult also to agree with His Honour's proposition. No action may be maintained for acts done in the course of war but it is difficult to see why the dependants of a serviceman killed on the highway or at sea by the negligent acts of other servicemen should be denied redress. In such a situation the punishment, under military law, of the offender does nothing to aid an injured serviceman or his family.

Throughout his judgment Windeyer J. had in mind the possibility of future actions, brought by servicemen or their dependants, arising from the collision of the two ships. Even if the Commonwealth is not liable for the injuries of the servicemen arising from the collision it is possible that the Commonwealth may admit liability as it sought to do in *Parker's* case and merely litigate the question of damages. Windeyer J. was well aware of this possibility and not desiring the Court to be used as an assessor of damages where no cause of action exists he examined the admission of liability by the Commonwealth critically. He said

> 'To speak of an admission of liability can be misleading. A defendant may admit any allegation of fact. But a defendant cannot, by admitting that facts alleged entitle the plaintiff to have damages require the Court to assess and award damages unless those facts could in law have that consequence. The Court can only assess damages when it appears, from facts admitted or proved, that there was a legal wrong entitling the plaintiff to damages according to some measure recognised by law'.[25]

The High Court rules (O. 26, r. 18) enable the Court to strike out a pleading on the grounds that it does not disclose a reasonable cause of action[26] but a pleading will not be struck out if it is merely demurrable or where a serious question of law would arise.[27] It is clear from a

[22] *Burdett v. Abbot* (1812) 4 Taunt. 401 H.L. at 450; Halsbury's Laws of England (3rd ed., 1961) xxxiii, 849.

[23] Crown Proceedings Act, 1947 (Eng.) s. 10.

[24] If it is argued that the Defence legislation impliedly removes the right to bring such an action by setting out all the rights and duties of servicemen, s. 117A of the Defence Act 1903-1965 (Cth) would have had the effect of defeating the plaintiff in the present case as, by virtue of that section, the deceased was subject to the Act.

'117A. A person, not being a member of the Defence Force, who accompanies any part of the Military Forces, whether within or beyond Australia, shall be subject to this Act as if he were a member of the Military Forces. . .'

[25] (1965) 112 C.L.R. 295, 299; (1965) 38 A.L.J.R. 444, 445.

[26] O. 26 r. 18 provides—'(1.) The Court or a Justice may order a pleading to be struck out on the ground that it does not disclose a reasonable cause of action or answer.'

[27] Halsbury's Laws of England (3rd ed. 1961) xxx, 38.

comment made during argument[28] that His Honour had in mind another rule (O. 35. r. 2) which permits the Court or a Justice to direct that a question of law be raised for the opinion of the Court.[29] It remains to be determined whether this rule would provide a means of preventing the parties from restricting the issues to the assessment of damages where the existence of a cause of action was doubtful.

The next issue to be decided was the law under which the plaintiff derived a right of action for the death of her husband. The negligent acts and resulting death occurred at sea and both ships were Commonwealth ships. Thus the law to be applied was Commonwealth law. However at common law the doctrine of common employment and the lack of a cause of action on the death of a person would deny the plaintiff a remedy. These doctrines have been abolished by statute in all States but there is no Commonwealth legislation on either matter. Thus the plaintiff had a remedy only if sections 79 and 80 of the Judiciary Act 1903-1960 (Cth)[30] adopt State law for the purposes of the action. His Honour held that these sections did have this effect and as the action was heard in Melbourne, the law to be applied was the law of Victoria contained in the Wrongs Act 1958 (Vic.). However, His Honour stressed that both parties were in agreement with this conclusion and he stated that he would not necessarily be bound by this conclusion if the issue arose in another case.[31]

His Honour said the conclusion could be reached in two ways. As the action was heard in Victoria, the Commonwealth was subject to the laws of Victoria, including the rules of private international law there.[32] Then, because of the decision in *Davidson v. Hill*,[33] the conditions necessary to give the plaintiff a right of action existed according to the doctrine of *Phillips v. Eyre*;[34] the law of Victoria being by adoption the *lex fori*.

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[28] (1965) 112 C.L.R. 295, 296.

[29] O.35 r. 2 provides—' (1.) If it appears to the Court or a Justice that there is, in a proceeding, a question of law which it would be convenient to have decided before any evidence is given or any question or issue is determined, the Court or Justice may make an order accordingly and may direct that question of law to be raised for the opinion of the Court or of the Full Court, either by special case or in such other manner as the Court or Justice deems expedient '.

[30] These sections provide as follows:—

' 79. The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding in all Courts exercising federal jurisdiction in that State in all cases to which they are applicable.

80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their judisdiction in civil and criminal matters.'

[31] (1965) 112 C.L.R. 295, 297.

[32] *Musgrave v. The Commonwealth* (1937) 57 C.L.R. 514.

[33] [1901] 2 K.B. 606.

[34] (1870) L.R. 6 Q.B. 1.

This reasoning is suspect becaue it is doubtful whether *Davidson v. Hill*[35] has any application to the case under consideration. The doctrine of *Phillips v. Eyre*[36] requires that the act complained of must have been not justifiable by the law of the place where it was done. Since the decision in *Koop v. Bebb*[37] it appears that an Australian court would interpret this requirement as meaning that the act complained of must have been such as to give rise to a civil liability by the law of the place where it was done.[38]

In *Davidson v. Hill*[39] a collision occurred between a British and Norwegian ship due to the negligence of the former. As a result of the collision a Norwegian seaman lost his life and his widow brought an action against the owners of the British ship in England. The court held that as the tort was committed on a British ship the *lex loci* was English. The English law applied was the Fatal Accidents Act, 1846 (Eng.) which gave rise to civil liability for the death of the seaman. In *Parker's* case the *lex loci* was the applicable Commonwealth law which does not give rise to civil liability for death caused by negligence. Thus it appears that the doctrine of *Phillips v. Eyre*,[40] as interpreted by the High Court in *Koop v. Bebb*,[41] does not give a right of action in this situation.

The other approach is that sections 79 and 80 of the Judiciary Act 1903-1960 (Cth) adopt the common law of England, as modified by the Constitution and by the statute law in force in the State in which the jurisdiction is being exercised, as the law which regulates the right of the parties. Due to the doubt about the scope of these sections[42] no view about the validity of this approach can be expressed with any confidence but there may be difficulties, on constitutional grounds, in giving these sections a wide interpretation.[43]

On the assessment of damages a question arose whether or not it was necessary to take into account a pension to which the plaintiff became entitled by virtue of the Superannuation Act 1922-1959 (Cth). The deceased had been a contributor and in the calculation of his prospective income his superannuation contributions had been deducted. Section

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[35] [1901] 2 K.B. 606.

[36] (1870) L.R. 6 Q.B. 1.

[37] (1951) 84 C.L.R. 629.

[38] *Ibid.* 643 per Dixon, Williams, Fullagar and Kitto JJ.—' It seems clear that the last word has not been said on the subject, and it may be the true view that an act done in another country should be held to be an actionable wrong in Victoria if, first, it was of such a character that it would have been actionable if it had been committed in Victoria, and, secondly, it was such as to give rise to a civil liability by the law of the place where it was done '. But cf. *Machado v. Fontes* [1897] 2 Q.B. 231.

[39] [1901] 2 K.B. 606.

[40] (1870) L.R. 6 Q.B. 1.

[41] (1951) 84 C.L.R. 629.

[42] See *Musgrave v. The Commonwealth* (1937) 57 C.L.R. 514; *The Queen v. Oregan*; *Ex Parte Oregan* (1957) 97 C.L.R. 323; *Deputy Commissioner of Taxation v. Brown* (1958) 100 C.L.R. 32.

[43] Phillips, ' Choice of Law in Federal Jurisdiction ' (1961), 3 *Melbourne University Law Review* 170, 348.

18 of the Wrongs Act 1958 (Vic.) provides 'there shall not be taken into account [in diminution of damages] any sum paid or payable on the death of the deceased under any contract of assurance or insurance . . . ', and the question was whether the pension came within that description.

Counsel for the plaintiff merely relied on the decision of Sholl J. in *Tinka v. Lenan*[44] in which it was held that a pension under a superannuation scheme fell within the section, but Windeyer J. decided not to follow that decision. Sholl J. had followed, with some doubts, the decision in *Butler v. McLachlan*[45] but he was not aware that that decision had been overruled by the Full Supreme Court of South Australia in *Public Trustee v. Wilson.*[46] For that reason Wanstall J., of the Supreme Court of Queensland, in *Cockburn v. Brock*[47] refused to follow *Tinka v. Lenan.*[48] Thus the prevailing judicial opinion in Australia did not favour the decision in *Tinka v. Lenan,*[49] and it was not surprising that Windeyer J. refused to follow it. He referred to contrary English decisions and decided that the pension was not a sum 'payable under a contract of assurance or insurance '.[50]

J. A. CRAWFORD

HAZELTINE RESEARCH INC. v. ZENITH RADIO CORPORATION[1]

Constitutional Law—Evidence—Production of Documents—Crown Privilege —Power of the court to inspect documents.

A question of privileged Crown documents arose before the Supreme Court of the Australian Capital Territory in somewhat unusual circumstances. A dispute concerning restrictive trade practices in the United States led to an examination before the Registrar of the A.C.T. Supreme Court under the provisions of the Imperial Foreign Tribunals Evidence Act.[2] Under this Act, a Judge may on application order the examination upon oath of a witness and the production of documents where the Judge is satisfied that a foreign court desires to obtain the testimony of that witness. In the present case the Assistant Secretary of the Imports Branch of the Department of Trade and Industry was subpoenaed to

[44] [1956] V.L.R. 580.
[45] [1936] S.A.S.R. 152.
[46] [1955] S.A.S.R. 117.
[47] [1959] Qd.R. 254.
[48] [1956] V.L.R. 580.
[49] *Ibid.*
[50] The cases are reviewed by Hocker, ' Lord Campbell's Act—A Comment ' (1961-1964), 4 *University of Queensland Law Journal*, 451.

[1] Unreported. Supreme Court of Australian Capital Territory; Smithers J.
[2] 19 & 20 Vic. C.113.