

GOLDEN THREAD OR TATTERED FABRIC
BAIL AND THE PRESUMPTION OF INNOCENCE

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Justice Connolly was appointed a Judge in January 2003. He was Master of the Supreme Court of the Australian Capital Territory from 1996-2003, and had been a Member of the ACT Legislative Assembly from 1990-1996. He was Attorney-General from 1991-1995. He was educated at Adelaide University (BA, LLB (Hons)) and the Australian National University (LLM). In 2001 he undertook mediation training at Harvard Law School.

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1. As lawyers, we are all fans of Rumpole, and recall with fondness his constant refrain on the “Golden Thread” of the common law - the presumption of innocence, and the burden of proof. John Mortimer has Horace Rumpole express the sentiments far better than I can, but the more prosaic version of the concept is well expressed in the Judicial Commission of New South Wales Criminal Trial Bench book. This document, available to all via the internet¹ sets out a proposed standard form of direction which trial judges may give to jurors. It says, in part:

It is, and always has been, a fundamental part of our system of justice that persons tried in our courts are presumed to be not guilty of any offence charged or alleged against them until a jury of their fellow citizens has been satisfied that the Crown (which brings the charge) has proved its case beyond reasonable doubt. The accused is entitled to the benefit of any reasonable doubt which you may have at the end of your deliberations in respect of any of the essential matters which the Crown has to prove in order to establish its case.

2. This is entirely uncontroversial and would meet, one assumes, with near universal approval. Indeed, to put the matter the other way, as Lewis Carroll did in *Alice in Wonderland*, immediately demonstrates the importance of the “Golden Thread” to our criminal justice system and culture of liberty. The Queen of Hearts, you may recall, had her own views of a proper criminal justice system - “No No”, she said “First the sentence, then the verdict”.² As Parliaments around Australia increasingly intervene to reverse the presumption in favour of bail, or indeed to expressly provide that bail is not an option for certain offences, and as studies show an increasing tendency for increased rates of remand in custody - although, interestingly, not always coinciding with those jurisdictions that have the most restrictive bail laws, one might wonder whether the Queen of Hearts’ understanding of the criminal justice system is now

¹www.jc.nsw.gov.au

² Lewis Carroll, *Alice’s Adventures in Wonderland* (1865), chapter 12

more realistic. Certainly some media commentators would view such a system with favour, one may assume.

3. I would like to propose a short multiple choice test. Guess the author of this quote:

The English law ... has always insisted that guilt has to be proved, not innocence established.

4. Was the author of this quote -

- a) an obviously out of touch elitist judge,
- b) a criminal lawyer pandering to the concerns of the criminal classes,
- c) Australia's longest serving conservative Prime Minister?

5. The answer will be found at page 326 of Sir Robert Menzies' memoir, *Afternoon Light*.³ Indeed, in his memoir, Sir Robert Menzies also made the observation that, under the jury system, no doubt some guilty persons were acquitted, but:

Far better that this should be so than that innocent men should be convicted. So regarded, the criminal jury is an historic device for tempering the natural severities of the criminal code.

Such wisdom would now be regarded by many media commentators on "law and order" as dangerously soft-headed.

6. If we take as the starting point of Australian law, as derived from English law, the proposition that a person is innocent until proven guilty, surely it must follow that pre-trial deprivation of liberty must be regarded as an extraordinary remedy, and that any deprivation of liberty before a trial must be demonstrably justified. While we sometimes take something of an Anglo-Celtic world view of these things, we should remember that the proposition that pre-trial detention should be avoided is not a unique concept of the common law. *The International Covenant on Civil and Political Rights* provides in Article 9(3) that:

³ 1967, Cassell Australia, Melbourne.

It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

7. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* similarly provides that there is a general right to liberty, but permits:

*the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.*⁴

8. It follows that, as the legal assumption that bail is to be the norm, and pre-trial incarceration the exception is common across many legal systems, one would expect to see similarities in rates of remand, and this seems to be the case. A recent *Trends and Issues Paper* from the Australian Institute of Criminology notes that the proportion of prisoners held in remand in Australia in 2004 at 20.4 percent, was broadly similar to rates in England (16.9 percent), New Zealand (18.3 percent), the United States (20 percent), Canada (21.1 percent) and Germany (21.2 percent).⁵
9. I would like to address two questions today - firstly, the remarkable phenomenon of divergent rates of remand across parts of the federation, and the lack of relationship between remand rates and the state of the legislation in the relevant jurisdiction, and secondly the potential impact international human rights law may have on bail determinations. This is particularly relevant in the Australian Capital Territory, where the *Human Rights Act 2004* is already in force, and in Victoria, where the *Charter of Rights and Responsibilities Act 2006* will commence operation over the next two years.

⁴ Article 5(1)(c).

⁵ *Remand in Custody: Critical Factors and Key Issues*, R. Sarre, S King and D Balmford, Australian Institute of Criminology, May 2006 www.aic.gov.au

Variations in Statutory Regime and Remand Outcome

10. It has long been the position at common law that bail is primarily to be determined by the need to secure the prisoner's attendance at trial. In *R v Rose*⁶, Lord Russell CJ said that:

It cannot be too strongly impressed upon magistrates that bail is not intended to be punitive but merely to secure the attendance of the prisoner at the trial or to come for judgment.

11. Prior to the enactment of bail legislation throughout Australia, the source and authority for bail decisions was somewhat opaque⁷, although it has long been clear that superior courts of general jurisdiction had an inherent power to grant bail. In *R v Rochford; Ex parte Harvey*⁸, Fox J said of the position of the Supreme Court of the Australian Capital Territory, which by statute had the same criminal jurisdiction as the Supreme Court of New South Wales as at 1911, that:

The Supreme Court of New South Wales originally had the same jurisdiction in relation to bail as was possessed by the superior common law courts at Westminster. As to the jurisdiction of those courts, Stephen, History of the Criminal Law of England (1883) says:

*The power of the superior courts to bail in all cases whatever, even high treason, has no history. I do not know, indeed, that it has ever been disputed or modified. It exists in the present day precisely as it has always existed from the earliest times.*⁹

12. Where the law of bail has been codified by statute, the inherent power of the Supreme Court has, in many cases, been expressly abolished¹⁰, and it has been argued that this may have occurred even in jurisdictions where the codification of the law of bail does not expressly so claim.¹¹

⁶ (1898) 67 LJQB 289

⁷ Miles CJ, *Bail Legislation: Objectives and Achievements*, paper from D Challinger (ed) *Bail or Remand*, Australian Institute of Criminology Conference Proceedings No 6, 1991, www.aic.gov.au

⁸ (1967) 15 FLR 140

⁹ *Ibid* at 141

¹⁰ *Bail Act 1992* (ACT), s 57AA

¹¹ Miles, *op cit*, 35

13. In Australia, leading authorities, to largely the same effect, on the discretion to grant bail, have generally been taken to be *R v Light*¹² and *R v Watson*.¹³ In *Light*'s case Scholl J, referring to the position in "non capital cases" (there being at common law a presumption against bail in capital punishment cases) said¹⁴ that:

the first matter for consideration was the probability or otherwise of the accused appearing at the trial. In connection with that matter three subsidiary questions ... had always been regarded as of importance. First, the nature of the crime charged; secondly, the probability of a conviction or, as it is sometimes put, the strength of the prima facie case against the accused; and thirdly, the severity of the punishment that may be imposed ... In my opinion if there is any presumption in respect of bail it is this, that in a non-capital case the presumption will be in favour of the granting of bail.

14. The common law has largely been supplemented by legislation across Australia, which to a greater or lesser extent introduces statutory complexities as to whether there is an entitlement to bail, a presumption in favour of bail, no presumption either way, a presumption against bail, or a prohibition of bail, either absolutely or subject to special and exceptional circumstances. There is no uniformity across the jurisdictions, and it is not appropriate in this paper to outline all the different statutory schemes.¹⁵ What is most striking, it seems to me, is that there is little or no correlation between the strictness or severity of the statutory regime, and the tendency to grant bail or remand in custody.
15. Over recent years there has been a general increase in rates of remand per 100,000 head of population. In a paper to the 20th *International Conference of the International Society for the Reform of Criminal Law*, David Balmford noted that, across Australia, the rate had grown from 18.9 in 1998 to 32.6 in 2005 - an increase of 89 percent. Moreover, the rate varied widely across Australia, from a high of 45.8 in

¹² [1954] VLR 152

¹³ (1947) 64 WN (NSW) 100

¹⁴ *Ibid* at 155

¹⁵ They are concisely summarised in *The Laws of Australia* at 11.3.13 and following.

South Australia, to a low of 16.7 in Victoria. New South Wales, at 38.1, has just over double the rate of remand of Victoria.¹⁶

16. It is interesting that in the state with the highest level of remand prisoners, South Australia, the *Bail Act 1985* leaves a broad discretion to the courts, saying that bail should generally be granted unless the decision maker considers that bail should be refused in light of matters that broadly reflect the common law criteria.¹⁷ By contrast, Victoria, the state with the lowest level of remand prisoners, has a more prescriptive regime with a general presumption, but limitations that bail only be granted in exceptional circumstances for a broad range of offences, and a presumption against bail in respect of certain offences with an evidentiary burden on the accused.¹⁸ In New South Wales, as in the Australian Capital Territory, there is a somewhat complex scheme as presumptions shift and onus of proof varies depending on the type of offence, and whether or not the person was on bail at the time of the alleged new offence. It seems that, in those jurisdictions where the bail regime is prescriptive, there has been a tendency for rapid parliamentary intervention to increasingly add offences to the presumption against bail list.¹⁹ This is perhaps most strikingly seen in the rapid addition of “riot” to the list of restricted bail offences.²⁰ What is interesting is that, despite significant variation between a broad common law approach and a highly prescriptive approach, rates of remand do not necessarily follow the pattern, with the highest rates in the state with the least prescriptive and restrictive bail legislation.

¹⁶ D Balmford, S King and R Sarre, *The Custodial Remand Explosion* - identifying contributing factors and possible responses, paper to 20th *International Conference of the International Society for the Reform of the Criminal Law*, Brisbane, July 2006, see also Sarre, King and Balford, note [5] above.

¹⁷ *Bail Act 1985* (SA), s 10

¹⁸ *Bail Act 1977* (Vic), s 4

¹⁹ G Brignell, *Bail, An Examination of Contemporary Issues*, Judicial Commission of New South Wales, Sentencing Trends and Issues paper, November 2002, <http://www.jc.nsw.gov.au>

²⁰ See *Law Enforcement Legislation Amendment (Public Safety) Act* (NSW) 2005 assented to 15 December 2005.

Will a Statutory Bill of Rights impact on bail law and practice?

17. Although there have been debates for over 30 years as to whether or not Australia should adopt a Bill of Rights, and these debates continue, there have been recent reforms at the State and Territory level that have changed the focus from a national regime to a state based regime. The Australian Capital Territory leads the way, with the enactment of the *Human Rights Act 2004*. This is a statutory bill of rights, on the New Zealand and United Kingdom model, in that it declares that certain rights apply (broadly based on the International Covenant of Civil and Political Rights), and then declares that:

*In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.*²¹

18. The ACT Human Rights Office website contains a broad range of material relevant to the ACT Act.²²
19. This “interpretive model” of human rights protection stands in contrast to an entrenched regime such as the United States Constitution or Canadian Charter jurisprudence. However, experience in New Zealand under the *New Zealand Bill of Rights Act 1990* and in the United Kingdom, under the *Human Rights Act 1998*, may well be instructive. The Victorian Parliament has recently enacted the *Victorian Charter of Rights and Responsibilities Act 2006*.
20. There is an express provision in the ACT and Victorian laws relating to pre-trial detention, as there is in the UK Human Rights Act. The ACT provision is contained in s 18, *Right to Liberty and Security of Person*, and provides:

(5) Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, if necessary, for execution of judgment.

²¹ Human Rights Act 2004 (ACT), s 30

²² see www.hro.act.gov.au

21. The Victorian provision is found in s 21, *Right to Liberty and Security of Person*, and is in identical terms, save that it uses the phrase “must not be automatically detained in custody” rather than “must not be detained in custody as a general rule”. Both are clearly modelled on Article 9(3) of the *International Covenant on Civil and Political Rights*.
22. The impact of the *Human Rights Act* on the *ACT Bail Act* has not yet been subject to detailed argument and judicial consideration in our court, but in published papers members of the court and the Director of Public Prosecutions have all acknowledged that there will be an impact.²³
23. The *ACT Bail Act*, as I mentioned, is broadly based on the New South Wales model, in that it has certain categories of offences or offenders where there is a presumption against bail unless the accused can establish “special or exceptional circumstances”. There has been judicial consideration of what amounts to special or exceptional circumstances by the New South Wales Court of Appeal in *Chau v DPP*.²⁴ Normally, Australian courts will afford great respect to and would normally follow interstate intermediate court of appeal decisions on common form legislation.²⁵ However, it seems to me that, while prior to the enactment of the *Human Rights Act* an ACT judicial officer would be minded to follow the views of the NSW Court of Criminal Appeal on what is meant by ‘special or exceptional circumstances’ on an equivalent provision in the bail laws, the requirement to give to an ACT law the interpretation that best accords with a right conferred by the *Human Rights Act*, namely the right that a person should not generally be detained before trial, may require

²³ Higgins CJ, Australia’s First Bill of Rights – Testing Judicial Independence and the Human Rights Imperative, paper to National Press Club, March 2004, Connolly J, Practising Criminal Law under the Human Rights Act – No Rogues Charter, paper to Conference of Australian Prosecutors, July 2005, both papers available at www.courts.act.gov.au; R Refshauge SC, The Human Rights Act and the Criminal Law, paper at ANU/UNSW Conference Assessing the First Year of the ACT Human Rights Act, June 2005.

²⁴ (1995) 37 NSWLR 639

reconsideration of the meaning of the provision. The United Kingdom Court of Appeal in *R v Offen*²⁶ has held that the passage of the Human Rights Act 1998 made it necessary to reconsider a previously settled view of what amounted to “exceptional circumstances” to avoid life imprisonment for a second serious offence.

24. English bail laws have been substantially impacted by human rights laws due to the effect of the European Convention right to take claims of abuse to the European Commission on Human Rights in Strasburg. In *Caballero v UK*²⁷ the Commission held that certain provisions of the *Criminal Justice and Public Order Act* which denied certain persons bail with no judicial discretion were inconsistent with the United Kingdom’s obligations under the Convention. As a consequence, the laws were amended so that there is no longer a class of offence or offender in which bail is prohibited, but there are reversals of presumptions.
25. The English Law Commission was asked to examine the English law on bail and report on its compatibility with the Human Rights Act. The main focus was on section 25 of the *Criminal Justice and Public Order Act* which reads:

A person who in any proceedings has been charged with or convicted of an offence to which this section applies in circumstances to which it applies shall be granted bail in those proceedings only if the court, or as the case may be, the constable considering the grant of bail is satisfied that there are exceptional circumstances which justify it.

The Law Commission Report on Bail and the Human Rights Act 1998²⁸ did not recommend further amendments to the bail provisions of English law, but rather laid out guidelines to assist in the exercise of discretion when decisions are made in

²⁵ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485

²⁶ [2001] 2 All ER 154

²⁷ (2000) EHRR 643

²⁸ Law Comm No 269, June 2001 (www.lawcom.gov.uk)

relation to bail where there is a presumption against bail and a statutory requirement to make out “exceptional circumstances”. The Law Commission recommended that:

Section 25 should be construed as meaning that where the defendant would not, if released on bail, pose a real risk of committing a serious offence, this constitutes an “exceptional circumstance” so that bail may be granted. This construction would achieve Parliament’s purpose of ensuring that, when making bail decisions about defendants to whom section 25 applies, decision makers focus on the risk the defendant may pose to the public by re-offending.

There may be other “exceptional circumstances” which may permit bail to be granted.

Even if “exceptional circumstances” do exist, bail may, nonetheless, be withheld on a Convention compatible ground if this is deemed to be necessary in the individual case.²⁹

26. Although it is always difficult to comment at such a distance, it appears that the Law Commission Report is being taken into account in bail determinations. In *R (O) v Crown Court at Harrow*³⁰, Kennedy LJ and Hooper J both held that it was possible to read section 25 in a manner consistent with the *Human Rights Act*, and both expressly referred to the Law Commission Report.

27. Kennedy LJ acknowledged that the relevant provision of English law:

cannot be found to be compliant with article 5(3) if the words exceptional circumstances are too narrowly construed, or if the court sets too high a threshold at which it is prepared to declare itself satisfied that exceptional circumstances do exist.

28. His Honour made reference to the “helpful report” of the Law Commission, and held that the presumption against bail other than in exceptional circumstances provision:

establishes a norm. The norm is that those to whom it applies if granted bail are so likely to fail to surrender to custody, or offend, or interfere with witnesses or otherwise obstruct the course of justice that bail should not be granted. If in fact, taking into account all the circumstances relating to a particular alleged offence and offender he does not create an unacceptable risk of that kind he is an exception to

²⁹ Ibid at 65

³⁰ [2003] 1 WLR 2756

*the norm, and in accordance with his individual right to liberty he should be granted bail.*³¹

In effect on this view, there is no reversal of onus or presumption.

29. Hooper J held that s 25, if read to impose a burden on the accused, would be inconsistent with the Convention obligation, but that it:

*may properly be read down to impose an evidential burden on the defendant to point to or produce material which supports the existence of exceptional circumstances. A defendant who falls within section 25 is very unlikely to be granted bail and, unless he can point to exceptional circumstances, will almost certainly not be granted bail. None the less, in my view, the burden remains on the prosecution to satisfy the court that bail should not be granted.*³²

30. Leave to appeal in respect of this decision was granted by the House of Lords in December 2004³³ and the decision has recently been handed down, dismissing the appeal. In *O (FC) v Crown Court at Harrow*³⁴, delivered on 26 July 2006, the House of Lords generally endorsed the approach taken by Hooper J. In the majority judgment of Lord Brown, with whom Lords Nicholls and Hutton and Baroness Hale agreed, his Lordship noted the remarks of Hooper J and said:

*Like him I read the section as placing a burden on the section 25 defendant. He has to rebut a presumption and if he fails to do so is to be denied bail. True it is ... that in the vast majority of cases the court will reach a clear view one way or another whether the conditions for withholding bail specified by Schedule 1 to the Bail Act are satisfied. But just occasionally the court will be left unsure as to whether the defendant should be released on bail - the only situation in which the burden of proof assumes any relevance - and in my judgment bail would then have to be granted. That must be the default position. Section 25 should, in my judgment, be read down to make that plain.*³⁵

There is no criticism in any of the House of Lords' judgments of the express references below to the Law Commission report.

³¹ at 2771-2

³² at 2790

³³ [2004] 1 WLR 13

³⁴ [2006] UKHL 42

³⁵ at [35]

31. It is also worth mentioning the possible impact of the Human Rights Act on cases where bail has been properly denied, but there subsequently emerge unexpected delays before trial. In *Attorney General's Reference*³⁶, the House of Lords was asked to rule on whether criminal proceedings may be stayed on the basis of unreasonable delay contrary to the convention right to trial within a reasonable time. While holding that this could be an appropriate remedy, the House of Lords noted that the interest of the public in determining proceedings might justify other remedies, such as the release to bail of an offender who had previously been denied bail (per Lord Bingham at 1061). I note however that undue delay can, in appropriate circumstances, be a basis for a renewed bail application under existing Australian law regardless of the Human Rights Act.³⁷
32. It seems to me that, in those jurisdictions where statutory bail provisions have to be construed by reference to a statutory bill of rights, the English law, which makes extensive reference to European Convention jurisprudence, may provide guidance for practitioners and judges alike, and it may well be necessary to reconsider the meaning of existing statutory provisions that restrict bail to “special or exceptional circumstances”.

³⁶ (*No 2 of 2001*) [2004] 1 All ER 1049

³⁷ *Cain (No 1)* (2001) 121 A Crim R 365 per Sperling J at 367