Australian Criminal Law Journal

Developments From A Judicial Perspective

Published by Australian Law Publishers Pty Ltd (A.C.N. 010 615 933)
254 Hawken Dr, St Lucia 4067 Ph: (07) 870-9111 Fax: (07) 870-0222
Editor: Russell G. H. Mathews (BCom *Q'ld*) Price By Subscription

Issue 95/4/1 **ISSN: 1321-6562** **April, 1995**

Editorial

The article regarding the Common Law Right of Entry is a definitive work on a little understood, but vitally important concept. The idea of quiet enjoyment of ones home or property is fundamental to the English system of law. This article shows that a mans' home *is* his castle with very limited exceptions.

It would appear from my experience, that police and judges are confused and do not understand this basic concept. They seem to be of the view that a police officer can enter anywhere to, say, arrest a person without warrant, provided he first announces his intention to break if they do not open the door. When a police officer incorrectly enters a home, (and so many police would be guilty of this crime) and when one realises that the Rule of Law has been abrogated in Australia (this has been progressive over the past 14 years) then it is readily understandable that few, if any, of these police are prosecuted.

Criminal Law and Justice in Australia is in a parlous state. The bureaucracy is out of control. This bureaucracy includes the police and the prosecution arms of

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THE PRESENT DAY RELEVANCE OF COMMON LAW RIGHTS OF ENTRY

by Warren Bester (BCom LLB Q'ld) and Russell G. H. Mathews (BCom Q'ld)

Common law right of entry - implied licence to enter land - execution of process - arrest without warrant - right to enter to search for fugitives - requirements before force can be used to enter - requirements for statutory abrogation of right of owner to exclude trespassers

The power of strangers and, in particular, police officers, to enter private property without the permission of its occupants was always a very limited one at common law. It offended the fundamental principle, first laid down in *Semayne's Case* [1], that every person's house is his or her castle and fortress.

This article is concerned with the situations in which police officers and citizens can enter private property without the express consent of its occupants. It focuses on common law rights of entry but

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reference will also be made to rights to enter conferred by statute and to execute process.

The General Rule

A logical starting point is the judgement of Lord Camden L.C. J. in *Entick v Carrington*[2]:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.

In *Halliday v Nevill*[3], Brennan J said:

> The principle applies to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorised or excused by law.

What common law rights of entry are really concerned with then, are the exceptions , other than statutory or by way of execution of process, to the right of an occupant of property to bring an action in trespass against persons who enter his property without his consent.

What is consent? - Implied licence

Licence to enter land can be express or implied. Obviously, the majority of lawful entries onto land fall within the implied licence situation.

In *Robson v Hallet*[4], Lord Parker CJ said:

> The occupier of any dwelling-house gives implied licence to any member of the public coming on his lawful business to come through the gate, up the steps, and knock on the door of the house.

In *Halliday v Nevill*[5], a police officer pursuing a disqualified driver entered the open driveway in which he had taken refuge to arrest him. The officer did not seek the permission of the owner of the property before entering.

A majority of the high court held that there was an implied licence in favour of any member of the public to go upon the path or driveway to the entrance of a dwelling providing all the following conditions were met:

1. the path or driveway leading to the entrance is left unobstructed and with entrance gate unlocked.
2. there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden.
3. the entry is for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier or his or her property.
4. the implied licence has not at any time been revoked by express or implied refusal or withdrawal of it.

The judges held that, providing the above conditions were met, the implied licence included in its scope a member of the police force who goes onto the driveway in the ordinary course of his or her duty for the purpose of questioning or arresting a trespassor or a lawful visitor upon it.

The licence, of course, can be withdrawn by giving notice of its withdrawal. A person who enters or remains on property after its withdrawal is a trespasser.

Common Law Exceptions to the General Rule

In *Swales v Cox* [6], Donaldson LJ said that police officers and citizens had a common law right to enter, and if necessary, break doors in the following four cases:

1. by a constable or a citizen in order to prevent murder.
2. by a constable or a citizen if a felony had in fact been committed and the felon had been followed to a house.
3. by a constable or a citizen if a felony was about to be committed, and would be committed, unless prevented; and
4. by a constable following an offender running away from an affray.

He added that, even in those four cases, it was an essential precondition to any breaking doors to enter that there should have been a demand and a refusal to allow entry before the doors could be broken, and this applied to all other cases including those authorised by statute and warrant except in "exigent" circumstances.

Definition of "Felony"

The question of what constitutes felony is obviously of substantial importance to the practical application of the second and third exceptions.

A problem is that all of the relevant judgements seem to take for granted that what constitutes a felony is well settled. It is submitted that this is an erroneous assumption, given firstly, that the categorisation of any offence as a felony is anachronistic, and secondly, that different jurisdictions, including different states within Australia, classify offences differently.

At common law, felonies were crimes punishable by forfeiture of property to the Crown, a denial of the right to inherit or pass on property, and the death penalty. [7] Such crimes included murder, manslaughter, robbery, theft, burglary and rape.

The Australian legal dictionary, from which the above definition was drawn, goes on to say that the term is used today to refer generally to "serious" crimes such as murder and armed robbery.

Whatever the evolved meaning of the term "felony" has become, it is arguable that only those offences which justified unauthorised entry at common law should justify unauthorised entry today. This is because the courts have shown a general reluctance to diminish the rights of the owner of premises to exclude unauthorised entrants. A difficulty here will be the rapid increase in the number and type of offences that have and are being created. There is a definite need for judges to carefully define the type of offences which justify the unauthorised entry by police and citizens under the common law exceptions. A failure to do this will result in uncertainty for the police and most likely, an increase in illegal invasions of home-owners' privacy and security.

A closer look at exception 4 - Requirement of "continued pursuit"

It is important to note that the fourth exception does not authorise police to enter premises just because they know an offender who has run from an affray is inside. There must be some continuity between the assault or other offence, the following of the offender by the police, and the entry onto the premises.

In *The Queen v Marsden* [8], the accused assaulted a police officer in the street outside his house. The police officer went to the police station for assistance had returned an hour later with three other constables. When the accused refused to

allow them entry, they forced open the front outer door and entered the house.

It was held that the facts of the case didn't constitute a continued pursuit. The lapse of an hour meant that the entry into the house by the constables was not a continuation of the previous transaction. Thus, the apprehension was unlawful.

Distinguishing execution of process

It is critical to draw a distinction between the limited common law rights of entry and powers to enter under a warrant or to execute process.

These latter powers are referred to as the third resolution in *Semayne's Case* [9] :

> In all cases where the king is party, the sheriff may break the house, either to arrest or do other execution of the king's process, if he cannot otherwise enter. But he ought first to signify the cause of his coming, and make request to open the doors.

The case of *Plenty v Dillon* [10] reaffirmed as law, and clarified the parameters of, the third resolution.

The plaintiff sued the respondent police officers for trespass on his land. They had entered it for the purpose of serving a summons on his daughter pursuant to the *Juvenile Courts Act 1971 (S.A.)*. Section 27 of a related act, the *Justices Act 1921-75 (S.A.)*, provided that:

> Any summons or notice required or authorised by this Act to be served upon any person by - (a) delivering the same to him personally; or (b) leaving the same for him at his last or most usual place of abode...

In the circumstances of the case, the plaintiff had expressly revoked any implied consent given to any police constable to enter his land in order to serve the summons. Thus the issue for determination by the high court was whether a police officer who is charged with the duty of serving a summons is authorised, without the consent or implied licence of the owner of land, to go upon the land in order to serve the summons.

The judges held that serving the summons was not an "execution of the king's process". They noted the distinction drawn in previous cases between execution of the king's process and the execution of other process. Gaudron J and Mc Hugh J said [11] :

> The reference to execution of process in the third resolution in Semayne's Case is a reference to the seizure of the body or goods of the defendant and not to the service of process.

They explained that in the case of an execution against the body of a person, or an arrest, the object is to ensure the defendant will meet his obligation to answer the charge. In the case of an execution against goods, the object is to satisfy a judgement already given. But the object of serving a summons is fundamentally different. Its object is merely to fulfill the rules of natural justice - that is, to notify the defendant of the charge and to give him or her the opportunity to defend the charge.

Thus, at common law, the police officers were not authorised to enter the land where their implied licence had been revoked, to serve a summons. By doing so, they committed trespass and the plaintiff was entitled to damages ("substantial" damages, according to Gaudron J and Mc Hugh J) even though he had suffered no loss as a result of the trespass.

All judges also held that section 27 of the *Justices Act* did not authorise the entry

onto private premises in order to effect service of the summons.

They acknowledged a presumption, enunciated in *Morris v Beardmore* [12] by Lord Diplock, that:

> In the absence of express provision to the contrary, Parliament did not intend to authorise tortious conduct.

Gaudron J and Mc Hugh J said:

> If service of a summons could only be effected by entry on premises without the permission of the occupier, it would follow by necessary implication that Parliament intended to authorise what would otherwise be a trespass to property. But a summons can be served on a person without entering the property where he or she happens to be at the time of proposed service. Of course, inability to enter private property for the purpose of serving a summons may result in considerable inconvenience to a constable wishing to serve the defendant. But inconvenience in carrying out an object authorised by legislation is not a ground for eroding fundamental common law rights.

The effect of statutes which confer a power of arrest without warrant

Statutes which confer a power of arrest without warrant are different in nature to those, like the *Justices Act* referred to above, which merely prescribe the manner of service of a summons and which confer no power on a person to do a thing that a person is not free to do at common law.

However, it should not be presumed that statutes which confer a power of arrest without warrant carry a right to enter on private property additional to the common law rights of entry.

In *Clowser v Chaplin* [13], Lord Keith of Kinkel said:

> It may confidently be stated as a matter of general principle that the mere conferment by statute of a power to arrest without warrant in given circumstances does not carry with it any power to enter private premises without the permission of the occupier, forcibly or otherwise.

And later [14]:

> The proper inference, in my opinion, is that where Parliament considers it appropriate that a power of arrest without warrant should be reinforced by a power to enter private premises, it is in the habit of saying so specifically, and that the omission of any such specific power is deliberate. It would rarely, if ever, be possible to conclude that the power had been conferred by implication.

Right to enter premises to search for a fugitive

Eccles v Bourque [15] is a Canadian case in which it was held that where a person is duly authorised to make an arrest, either by virtue of warrant or under the terms of a statute, he or she becomes authorised under the common law to commit a trespass if necessary to make the arrest, including a trespass on the premises other than the fugitive, where:

a. there are reasonable and probable grounds prior to entry to believe the fugitive is on the premises and,

b. proper announcement is made prior to entry, including notice of presence, authority and purpose, and a request to enter.

It was acknowledged that in "exigent " circumstances, the requirement for notice may be dispensed with. However, this was limited to circumstances where dispensing with notice would save someone within the premises from death or injury or to prevent destruction of evidence or in hot pursuit.

Conclusions

Recent cases like *Plenty v Dillon* [16] indicate that the courts are still anxious to protect the privacy and security of householders in the face of police arguments concerning the need to efficaciously carry out their duty.

Gaudron and McHugh JJ recognised that (and this was 1991):

> If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official. [17]

but they were just two of the justices. We are yet to be convinced that the Abrogation of the Rule of Law has in any way been redressed.

If parliament wishes to authorise the invasion of those rights, it must do so expressly. The common law rights to enter remain limited and they should not, and probably will not, be extended by the courts.

Reference notes

(1) 77 ER 194
(2) (1765) 19 St. Tr. 1029
(3) (1984) 155 CLR 1, 10
(4) [1967] 2 QB 939, 951
(5) (1984) 155 CLR 1
(6) [1981] 1 QB 849, 853
(7) Stephen Marantelli, Celea Tipotin; *Australian Legal Dictionary*; Rigby
(8) (1868) 1 LR 131
(9) 77 ER 194, 195
(10) (1991) 171 CLR 635
(11) ib id 650
(12) [1981] AC 446
(13) (1981) 1 WLR 837, 841
(14) ib id 842
(15) (1974) 50 DLR (3d) 753
(16) (1991) 171 CLR 635
(17) ib id 655

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Government; ie the various DPPs.. This is aided by the system of Legal Aid which, as practiced in Australia, is fundamentally flawed. Legal Aid Commissions are branches of the Crown, of the administrative arm of Government. This is the same arm of government which is prosecuting but with a different hat. Conceptually this is untenable. It inevitably leads to the corruption, of which so many people in our community are aware.

Future editions will contain an analysis of Legal Aid as practiced in Australia and contrasted with the situation of *pro bono* as practised in the United States. We will also consider aspects of the interrelationship between the Law enforcement agencies and other sections of the public sector such that they will not prosecute or even investigate wrong doing by public officials.

We will also consider whether, and in what circumstances, the ordinary citizen can initiate legal action against the law enforcement agencies in Australia to require them to enforce the Criminal Law.

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