

THE LAW REFORM COMMISSION
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REPORT ON MINORS' CONTRACTS

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CHAPTER 1 INTRODUCTION

In December, 1975, pursuant to the provisions of section 4, subsection (2)(c) of the Law Reform Commission Act 1975, the Attorney General requested the Law Reform Commission to initiate an examination of, and research in, "the law relating to the age of majority" and if thought fit to formulate proposals for the reform of the law and submit these proposals to him.

We duly commenced the investigation into the law relating to the age of majority. As the research progressed it became clear to us that we could not limit ourselves to the simple question of whether or not an alteration should be made in the law as to the age of majority: other related questions would of necessity require examination. One of these related questions is concerned with whether the law relating to the contractual capacity of a minor should be changed.

In due course the Commission published a Working Paper entitled "The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects".¹ In the Working Paper we recommended² a reduction in the age of majority to 18, or to the date of marriage, if below that age; and we dealt with the consequences of the reduction in the age of majority. The Working Paper also gave a brief outline³ of the law relating to the contractual and other obligations of a minor. The only change in the existing law of contract

¹ Working Paper No. 2, December 1977.

² Id., paras 2.38, 2.45.

³ Id., paras 3.6-3-25.

that we recommended⁴ in the Working Paper was that a minor should acquire full contractual capacity on reaching full age at the proposed age of majority (i.e. 18 or on marriage if below 18) rather than at 21 years. In our Report on the Age of Majority, the Age for Marriage and Some Connected Subjects,⁵ published in 1983, we made recommendations to the same effect.

These recommendations were given effect by section 2(1) of the Age of Majority Act 1985, which came into operation on 1 March 1985. We are of the opinion that the entire law regarding the contractual capacity of a minor should be revised and modernised having regard to modern social and economic developments.

The present Report sets out⁶ the main features relating to the contractual capacity of a minor. It briefly describes the legal position elsewhere and considers the legislation and proposals for legislation on the subject in certain other jurisdictions.⁷ Finally, in this Report, we analyse⁸ the deficiencies in the present law and make recommendations for its reform.

⁴ Id., para. 3.26.

⁵ LRC 5-1983.

⁶ Infra, Ch. 2.

⁷ Id., Ch. 3.

⁸ Id., Ch. 4.

CHAPTER 2 THE LAW IN IRELAND RELATING TO MINORS' CONTRACTS

The basic principle of the present law¹ is that a minor must be protected against his immaturity in his dealings with other persons.² At the same time the policy of the law is to mitigate some of the hardships that might be imposed on persons dealing with a minor, so as to encourage them to enter into contracts that are for the minor's benefit.

The contracts of a minor may be dealt with under the following three headings:-

- (1) contracts that are binding on the minor;
- (2) contracts that are deemed void by the Infants Relief Act 1874;
- (3) contracts that are binding on a minor unless and until he repudiates them.

(1) Contracts that are Binding on a Minor

Where a minor enters into a contract with another person, whereby that person sells or supplies him with a necessary or necessities, the contract will bind the minor. The courts have considered it in the minor's interest (as well as that of the other party) that he should be able to enter

¹ See generally Clark, 167-176, Cheshire & Fifoot, 379-398, Chitty, vol. 1, paras. 532-592, Payne, The Contractual Liability of Infants, 5 Western L. Rev. 136 (1966). Comparative analyses include Hartwig, Infants' Contracts in English Law: With Commonwealth and European Comparisons, 15 I.C.L.Q. 780 (1966), Kindred, Basic Problem of Minors' Contractual Capacity: Reform in England, France, Ethiopia and the United States of America, in Festschrift Rheinstein, vol. 2, p. 523.

² Cf. Lloyd v Sullivan, unreported, High Ct., McWilliam, J., 6 March 1981 (1981-395Sp.) at p. 3.

into binding contracts for necessities.³ The law relating to the sale of necessary goods is governed by section 2 of the Sale of Goods Act 1893, and the law relating to the supply of other necessities is governed by the common law. In substance, however, the concept of what a necessary means is the same whether the statute or the common law applies. By way of extension of the concept of necessities, certain contracts of service will bind a minor if they are for his benefit.

Section 2 of the Sale of Goods Act 1893 provides that where necessities are sold and delivered to a minor he must pay a reasonable price for them. Necessaries in this section are defined as meaning "goods suitable to the condition in life of [a minor] and to his actual requirements at the time of the sale and delivery".

The burden of showing not only that the goods were suitable to the condition in life of the minor but also that they were suitable to his actual requirements at the time of the sale and delivery, rests upon the supplier of the goods.⁴ Thus, where a minor has already been sufficiently supplied with the goods in question, even though this fact is not known to the supplier,⁵ the contract will

³ In Zouch ex dimiss., Abott & Hallet v Parsons, 3 Burr. 1794, at 1801, 97 E.R. 1103, at 1106-1107 (1765), Lord Mansfield said:

".... miserable must the condition of minors be; excluded from the society of the world; deprived of necessities, education, employment, and many advantages; if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act."

⁴ Nash v Inman, [1908] 2 K.B. 1, noted by Anon., Evidence in Actions Against Infants, 52 Sol. J. 577 (1908).

⁵ Barnes v Toye, 13 Q.B.D. 410 (1884), Johnstone v Marks, 19 Q.B.D. 50 (1887), Lyett v Lampmann, 53 O.L.R. 149 (1922).

not bind him.⁶

Whether or not goods or services are necessities is determined in two stages. First, the court must determine, as a matter of law, whether the particular goods or services are capable of being necessities: that is, "whether there are any grounds on which they might be said to be needed to maintain the minor in his status or condition".⁷ Secondly, assuming that the goods or services are capable of being necessities, the plaintiff must prove that, as a matter of fact, they are necessities in his or her particular circumstances.⁸ This two-stage process has lost much of

⁶ Nash v Inman, *supra*, fn. 4. In a commentary on Nash v Inman, in 24 L. Q. Rev. 236, at 237 (1908), it is stated:

"The judgments do not point out how the seller is to satisfy himself as to the amount and quality of like goods already in the buyer's possession, still less how he is to prove such facts in a court of justice except by the help of cross-examination. Practically the result would seem to be that prudent tradesmen will deal with infants only for cash, which, for anything we know, may be desirable."

⁷ English Law Commission's Working Paper No. 81, Minors' Contracts, para. 2.4 (1982). See also Chapple v Cooper, 13 M. & W. 252, at 258, 153 E.R. 105, at 107 (*per* Alderson, B., 1844). Cf. Ryder v Wombwell, L.R. 4 Ex. 32 (1868) (pair of jewelled solitaires and an antique goblet incapable of being necessities, even for minor with large unearned income). See also Skrine v Gordon, I.R. 9 C.L. 479, at 482 (Com. Pleas, *per* Lawson, J. 1875).

⁸ See the English Law Commission's Working Paper No. 81, Minors' Contracts, para. 2.4 (1982). See also Skrine v Gordon, *supra*. Cf. Navin, The Contracts of Minors Viewed from the Perspective of Fair Exchange, 50 N. Carolina L. Rev. 517, at 526 (1972):

"Since all the circumstances surrounding the status of a minor are considered - his station in life, the nature of the subject matter, and so forth - it is conceivable that almost anything could be a necessary, given the appropriate status of the infant."

its former significance in the absence of trial by jury in contract cases.⁹

What constitutes necessities will depend largely on the individual circumstances and requirements of the minor¹⁰ but the following general categories include the principal types of case:

(i) Food and Drink

Since the early development of the law of contract, the courts have held that food and drink may be necessities in certain circumstances.¹¹ But equally clearly there can be occasion where beverages may not constitute necessities.¹²

(ii) Clothing

The courts have frequently held that clothing may be a necessary,¹³ but it is of course clear that certain items of

⁹ Cf. Payne, The Contractual Liability of Infants, 5 Western L. Rev. 136, at 138, fn. 8 (1966).

¹⁰ Moreover, "it must be remembered that the usages of society change and [that] articles which were necessities may no longer be held to be so and vice versa": Chitty, vol. 1, 302, para. 543.

¹¹ Pickering v Gunning, Palm. 528, 82 E.R. 96 (1928), Tuberville v Whitehouse, 12 Price 692, 147 E.R. 848 (1823), Rearsby and Cuffer's Case Co. Litt. 172A, Whittingham v Hill, Cro. Jac. 494, 79 E.R. 421, at 422 (1618).

¹² E.g. Wharton v Mackenzies, Cripps v Hills, 5 Q.B.606, 114 E.R.1378 (1844), Brooker v Scott, 11 M.& W.67, 152 E.R. 718 (1843), Brooke v Gally, 2 Atk. 34, 26 E.R.427 (1743).

¹³ Mackerelle v Bachelor, Gouldsb. 168, 75 E.R. 1070 (1601), Maddosc v Miller, 1 M. & S. 738, 105 E.R. 275 (1813), Ive v Chester, Cro. Jac. 560, 79 E.R. 480 (1620) (action failed on pleading point, however), Rainsford v Penwick, Carth. 215, 124 E.R. 924 (1670), Rearsby and Cuffer's Case, *supra*, fn. 11, Vere v Delavall, Jo. W. 146, 82 E.R. 778 (1626), Coates v Wilson, 5 Esp. 152, 170 E.R. 769 (1804). Whittingham v Hall, *supra*, fn. 11. In the United States, in Jordan v Coffield, 70 N.C. 110 (1874), a bridal gown for a young girl was declared to be a necessary.

apparel may not be necessities.¹⁴

(iii) Board and Lodging

The provision of board and lodging may constitute a necessary in certain cases.¹⁵

(iv) Transport

It was held¹⁶ in 1898 that a racing bicycle used "occasionally" for transportation rather than in races may nonetheless be a necessary. In two Irish decisions, Skrine v Gordon¹⁷ and In re Mead,¹⁸ the purchase of a hunter

¹⁴ Cf. Nash v Inman, *supra*, fn. 4, Ryder v Wombwell, L.R. 4 Ex. 32 (1869).

¹⁵ Duncomb v Tickridge, Aleyn 94, 82 E.R. 933 (1648), Rearsby and Cuffer's Case, *supra*, fn. 11. See also Lowe v Griffith, 1 Scott 458, at 460 (1835), cited by Halsbury's Law of England (3rd ed., vol. 21) at p. 143, fn. 2. In British Columbia, in Soon v Watson, 33 D.L.R. (2d) 428 (B.C. Sup. Ct., 1962), the purchase by an infant married couple of a house was held to be a contract for a necessary, but it has been observed that "it is quite likely that a similar purchase by an unmarried infant would be unenforceable on the grounds that it would not be a necessary to the same extent": Percy, The Present Law of Infants' Contracts, 53 Can. Bar Rev. 1, at 2 (1975). Cf. the Alabama decision of Ragan v Williams, 127 So. 190 (1930) and contrast Lawrence v Baxter, 267 N.W. 742 (Mich., 1936) and Merrick v Stephens, 337 S.W. 2d 713 (Mo., 1960). See also Freeman v Bridges, 49 N.C. 1 (1856). The fact that a person under the age of 18 now ceases to be a minor on marrying (Age of Majority Act 1985, section 2(1)) should be noted in this context.

¹⁶ Clyde Cycle Co. v Hargreaves, 78 L.T. 296 (1898).

¹⁷ I.R. 9 C.L. 479 (1875).

¹⁸ [1916] 2 I.R. 285 (K. B. Div.).

was held not to bind the minor,¹⁹ although in In re Mead²⁰ Sir Ignatius O'Brien, L.C., made it clear that he was not "laying down that under no circumstances could a hunter be a necessary". In O'Neill v Read,²¹ the purchase of a horse by a minor who claimed that his health was delicate and that he required "horse exercise"²² was held by the jury to constitute a necessary.

Motor vehicles have caused more difficulty for the Courts. In Fawcett v Smethurst,²³ 1914, Mr Justice Atkin held that a contract made by a comfortably-off 20-year-old youth for the hire of a car at taxi-cab rates to drive a journey of six miles was binding on him as a necessary. In the United States the majority of jurisdictions still hold that a car

¹⁹ In Skrine v Gordon, I.R. 9 C.L. at 483, Lawson, J., stated:

"Of course we all know that hunting is a good sport and a manly exercise, but still that only shows it is a sport, and luxuries or amusement are quite distinct from necessities."

In Wharton v Mackenzie, 5 Q.B. 606 at 612, 114 E.R. 1378 at 1380 (1844), Coleridge, J., stated:

Suppose a son of the richest man in the kingdom to have been supplied with diamonds and racehorses, the Judge ought to tell the jury that such articles cannot possibly be necessities." (Emphasis added.)

²⁰ [1916] 2 I.R. at 194. See also, to similar effect, Harrison v Fane, 1 Man & G. 550, at 553, 133 E.R. 450, at 452 (per Tindal, C.J., 1840).

²¹ 7 Ir. L. Rep. 434 (C.P., 1845). See also Hart v Prater, 1 Jur. 623, 49 Eng. Rep. 746 (K.B., 1837), Barber v Vincent, Freem. K. B. 531, 89 E.R. 397 (1680). Cf. Clowes v Brook, 2 Str. 1101, 93 E.R. 1058 (1739) where, though the plaintiff farrier's claim for work done on an infant's horse failed on technical pleading grounds, it would appear clearly to have been accepted by the Court that a horse could be a necessary in certain cases.

²² 7 Ir. L. Rep., at 434.

²³ 84 L.J.K.B. 473 (1914).

is not a necessary for a minor save in cases of clear business necessities.²⁴

One commentator in the United States, writing in 1952, speculated that:

"Perhaps, the reluctance to classify an automobile as a necessary (and thus give the adult some recovery) is a reflection of the widespread feeling that automobile merchandising may not represent an exchange that is foursquare, particularly when one of the parties to the transaction is a young and inexperienced customer."²⁵

Canadian courts have, until relatively recently, "uniformly refused to regard a car as a necessary",²⁶ but in the British Columbia decision of First Charter Financial Corp. Ltd. v Musclow²⁷ in 1974, Mr Justice Craig, while holding on the facts that the evidence did not establish that the car sold to the infant was necessary, stated:

"It seems to me that in present day circumstances, many goods which at one time clearly would be unnecessary, must now clearly be a 'necessary'. The ownership of

²⁴ Mitchell v Campbell & Fetter Bank, 195 N.E. 2d 489 (Ind. App. Ct., 1964); Cf. Valencia v White, 134 Ariz. 139, 654 P. 2d 287 (1982), Gillis v Whitley's Discount Auto Sales, Inc., 319 S.E. 2d 661 (N.C.App., 1984) (Point not pleaded). In Some decisions cars have been held to be necessities: see e.g. Daubert v Mosley, 487 P. 2d 353, 56 A.L.R. 3d 1328 (Okla. Sup. Ct. 1971) and compare Bryant annotation, 56 A.L.R. 3d 1335 (1974).

²⁵ Navin, The Contracts of Minors Viewed from the Perspective of Fair Exchange, 50 North Carolina L. Rev. 517, at 524 (1952). Cf. McGuire. Note, 6 Hastings L.R. 112 at 114-115 (1954).

²⁶ Percy, supra, fn. 15, at 3, citing Coull v Kolbuc, 78 W.W.R. 76, at 78 (Alta D.C., 1968) Fannon v Dobranski, 73 W.W.R. 371 (Alta D.C., 1970) and Noble's Ltd. v Bellefleur, 37 D.L.R. (2d) 519 (N.B.C.A., 1963). See also Pyett v Lampman, [1923] 2 D.L.R. 249, (Ont. S. C. App. Div.).

²⁷ 49 D.L.R. (3d) 138 (B.C. Sup. Ct., Craig, J., 1974).

a motor vehicle is a clear illustration of this proposition. At one time the ownership of a motor vehicle was a luxury even for a small group of people. Today in [Canada], ownership of a motor vehicle is a commonplace thing and many young people from 16 years and up not only drive motor vehicles regularly, but own a motor vehicle."²⁸

In Australia the trend of decisions appears to be towards recognising that a car may be a necessary for a minor, depending on the circumstances of the minor and the purpose for which the car is obtained.²⁹

Train journeys have been held to constitute necessities in a number of cases.³⁰ While it would appear likely that the purchase of an air ticket could in some cases³¹ be held to be a necessary, at all events for long distances, an English decision³² has held that flying lessons for a law student did not constitute a necessary.

(v) Medical Aid

The provision of medical aid may constitute a necessary³³

²⁸ Id., at 142-143.

²⁹ Cf. Mercantile Credit Ltd. v Spinks, [1968] Q.W.N. 32 (car held to be a necessary to enable minor to earn living as a salesman); Re Mundy, [1963] A.L.R. 264 (car bought on hire-purchase by minor for his own private purposes and occasionally for transport to his place of employment nearly ten miles away; car held not a necessary).

³⁰ Brennan v G.N.R., 68 I.L.T.R. 145 (1935), Keays v G.S.R., [1941] I.R. 543, Flower v London & North Western Ry., [1894] 2 Q.B. 65. Cf. infra, pp. 15-19.

³¹ As, for example, where an Irish 17-year-old buys a ticket to fly to London for an interview for a job or for university selection.

³² Hamilton v Bennett, 95 J.P.N. 136 (1930).

³³ Dale v Copping, 1 Bulst. 39, 80 E.R. 743 (1610) (cure of falling sickness), Huggins v Wiseman, Carth. 110, 90 E.R. 699 (1690) (cure of a distemper).

provided that the assistance is not of frivolous or merely cosmetic nature. Thus, where, for example, a dentist fills a minor's teeth without the prior knowledge of the minor's parent³⁴ or contrary to parental instructions,³⁵ the court will not normally hold that this intervention constitutes necessary services.

(vi) Legal Aid

The provision of legal aid for the purposes of litigation or for non-litigious matters such as the preparation of a marriage settlement may constitute a necessary.³⁶

(vii) Funeral Expenses

Under the law formerly, it appeared³⁷ that a minor widow or widower would be bound in respect of a contract for the

³⁴ Cf. McCalhum v Hallen, [1916] E.D.L. 74 (S. Afr.). In Chapple v Cooper, 13 M. & W. 252, at 248, 153 E.R. 105, at 107 (1844), Alderson, B., stated that the medicines given to a minor "will depend on the illness with which he is affected, and the extent of his probable means when of age."

³⁵ Cf. McCalhum v Hallen, *supra*, fn. 34.

³⁶ Helps v Clayton, 17 C.B.N.S. 553, 144 E.R. 222 (1864), where Willes, J., stated (at pp. 571 and 229 respectively) that "[i]t would be a perversion of the law for the protection of infants, to hold that under these circumstances an infant could not contract for the preparation of such a settlement". See also Prince v Haworth, 20 T.L.R. 313 (P.D.A.Div., Gorell Barnes, J., 1904), subsequent proceedings, [1905] 2 K.B. 768 (K.B. Div., Lawrence, J.). The fact that a person under the age of 18 now ceases to be a minor on marrying (Age of Majority Act 1985, section 2(1)) should be noted in this context.

³⁷ Chapple v Cooper, 13 M. & W. 252, 153 E.R. 105 (1844). The fact that a person under the age of 18 now ceases to be a minor on marrying (Age of Majority Act 1985, section 2(1)) should be noted in this context.

burial of his or her deceased spouse or children. A minor would not appear, however, to be liable for funeral expenses incurred for the benefit of a parent or brother or sister.³⁸

Loans for Necessaries

At common law, a loan of money to a minor to pay for necessities was not recoverable.³⁹ But where a minor had borrowed money for this purpose and had actually paid the money for the necessary the lender could stand in the place of the person who had supplied the necessary and sue for the money lent.⁴⁰ This rule has "most probably survived"⁴¹ the

³⁸ In Chapple v Cooper, *supra*, fn. 37, at 260 and 108, respectively, Alderson, B., stated that "[i]t may be observed, that as the ground of our decision arises out of the previous contract of marriage, it will not follow from it that an infant child, or more distant relation, would be responsible upon a contract for the burial of his parent or relative."

³⁹ Earle v Peale, 1 Salk. 386, 91 E.R. 336 (1711) (where Parker, C.J., stated (at pp. 387 and 336 respectively) that the money "may be borrowed for necessities, but laid out and spent at a tavern"). See also Probart v Knouth, 2 Esp. 472n; 172 E.R. 423 (1783), Darby v Boucher, 1 Salk. 279, 91 E.R. 244 (1694), Ellis v Ellis, 3 Salk. 197, 91 E.R. 774 (1698).

⁴⁰ Cf. Marlow v Pitfield, 1 P. Wms. 558, 24 E.R. 516 (1719).

⁴¹ Anson, 218. Decisions in accordance with the common law approach decided after the passage of the 1874 Act include Lewis v Alleyne, 4 T.L.R. (C.A., 1888) and Martin v Gale, 4 Ch. D. 428 (Sir G. Jessel, M.R., 1876). As Trietel points out, however, these are not strong authorities, the 1874 Act not having even been cited in either decision: The Infants Relief Act 1874, 73 L.Q.R. 194, at 198 (1957). Cf. Atiyah, The Infants Relief Act 1874 - A Reply, 74 L.Q.R. 97, at 99 (1958), who argues that the fact that the Act was not cited was probably because counsel and court alike thought it to be irrelevant. Trietel later resiled from this position (see G. Treitel, The Law of Contract, 349, fn. 39 (1962)) as a result of a more detailed analysis of the legislative history of the Bill which ultimately led to the 1874 Act; he stated, however, (*id.*) that Atiyah's grounds for criticising his former position "did not convince" him.

prohibition relating to loans to minors in section 1 of the Infants Relief Act 1874. However, any security given in respect of a loan is unenforceable even though the money was required for necessities, and an account stated is void in spite of the fact that some of the items in the account are necessities.⁴² A bill of exchange or promissory note is void as against both the minor and any third person even though given in payment of necessities.⁴³

The Basis of Minors' Liability for Necessary Goods

The question whether a minor's liability for necessary goods is to be determined by reference to a contractual or a quasi-contractual restitutionary principle has not yet been resolved. The issue is of practical significance because if the minor's liability is based on contract he will be liable on a executory contract for necessities, whereas if it is based on quasi-contract⁴⁴ he will be liable only on supply of the necessary goods. In Nash v Inman,⁴⁵ Fletcher Moulton, L.J. suggested that the obligation rested on quasi-contract, but in the same case Buckley, L.J. based⁴⁶ the minor's liability on contract.

⁴² Williams v Moor, 11 M. & W. 256, 152 E.R. 798 (1848).

⁴³ Re Soltykoff, ex p. Margrett, [1891] 1 Q.B. 413 (C.A.), where Lopes, L.J., stated (at p. 416):

"[E]ven if the proceedings were between the original parties to the bills, the answer to the claim would be, that an infant cannot render himself liable upon a bill of exchange or a promissory note. This is no hardship upon a person who supplies necessities to an infant, for he is entitled to sue the infant upon the original contract."

⁴⁴ Cf. In re Rhodes. Rhodes v Rhodes, 44 Ch. D. 94, at 107 (C.A., per Lindley, L.J., 1890); and see Miles, "An Infant's Liability for Necessaries", 43 L. Q. Rev. 389, at 391 (1927).

⁴⁵ [1908] 2 K.B. 1, at 8 (C.A.). See also Guardian of Pontypridd Union v Drews, [1927] 1 K.B. 214, at 220 (C.A., per Scrutton, L.J.), Rex v Rash, 53 O.L.R. 245, at 256 (per Rose, J., (1923)), Trainer v Trumbull, 141 Mass. 527, at 530, 6 N.E. 761, at 762 (C. Allen, J.).

⁴⁶ [1908] 2 K.B., at 12.

In respect of necessary services, the English case of Roberts v Gray⁴⁷ in 1913 held that a contract by a minor of a broadly educational nature could be enforced against him although it was still to a large extent executory. Hamilton, L.J. was:

"unable to appreciate why a contract which is in itself binding, because it is a contract for necessities not qualified by unreasonable terms, can cease to be binding merely because executory If the contract is binding at all, it must be binding for all such remedies as are appropriate to the breach of it."⁴⁸

Although some commentators⁴⁹ have tentatively tried to do so, it is difficult to reconcile these differing approaches.⁵⁰

Other Contracts Beneficial to a Minor, including Contracts for Education, Apprenticeship Contracts, and Contracts of Service

Certain contracts which, taken as a whole, are for the minor's benefit, are treated as though they were contracts for necessities, and will bind the minor. These include

⁴⁷ [1913] 1 K.B. 530.

⁴⁸ [1913] 1 K.B., at 530. See, however, Walter v Everard, [1891] 2 Q.B. 369, at 374 (per Lord Esher).

⁴⁹ Including Cheshire & Fifoot, 382-383; see also Miles, "The Infant's Liability for Necessaries", 43 L.Q.Rev. 389 (1927); cf. Payne's criticism: The Contractual Liability of Infants, 5 Western L.Rev.136, at 142 (1966).

⁵⁰ Cf. McCamus, Restitution of Benefits Conferred Under Minor's Contracts, 28 U. New Brunswick L. J. 89, at 98 (1978).

contracts of apprenticeship,⁵¹ education,⁵² and service,⁵³ and contracts in analogous areas.⁵⁴

The Irish courts have gone some distance further than their counterparts in other jurisdictions in their treatment of this subject. In Keays v Great Southern Railways Co.,⁵⁵ in 1940, the plaintiff was a twelve-year-old schoolgirl who held a "school season ticket" from the defendant railway company, which transported her to and from school. The ticket was issued at a significantly reduced rate, and contained special conditions absolving the company from all liability for injuries carried by their negligence. The plaintiff was injured in a railway accident, allegedly caused by the defendant company's negligence. The company relied inter alia on the conditions contained in the contract.

Hanna, J. refused the application for a direction made by counsel for the defendant at the conclusion of the plaintiff's case. He said:

"An infant prima facie cannot make a contract, but an infant has certain rights in law, and a contract made by an infant is not in itself a void contract; it is only a voidable contract. That means that it is open to the infant at any time to repudiate the contract.

⁵¹ E.g. Meakin v Morris, 12 A.B.D. 352 (1884), De Francesco v Barnum, 45 Ch. D. 430 (1890) (noted by Pollock, in 6 L. Q. Rev. 240 (1890)).

⁵² Roberts v Gray, [1913] 1 K.B. 520, Mackinlay v Bathurst, 36 T.L.R. 31 (C.A., 1919).

⁵³ Clements v London & N.W. Ry., [1894] 2 Q.B. 482, (C.A.), Flower v London & N.W. Ry., [1894] 2 Q.B. 65 (C.A.).

⁵⁴ Doyle v White City Stadium Ltd., [1935] 1 K.B. 110 (C.A., 1934), noted by C.A. W[right], 13 Can. Bar Rev. 319 (1935); Chaplin v Leslie Frewen (Publishers) Ltd., [1966] Ch. 71 (C.A. 1965) (noted by Mummery in 82 L. Q. Rev. 471 (1966)) (contract to write autobiography with assistance of "ghost writers"); Denmark Productions Ltd. v Boscobel Productions Ltd., 111 S.J. 715, rev'd on other grds., [1969] 1 Q.B. 699 (management of pop group).

⁵⁵ [1941] I.R. 534 (High Ct., Hanna, J., with jury, 1940).

In determining whether the contract is for the benefit of the infant, the Court must consider the contract as a whole. It is not sufficient that the infant get some benefit from the contract. The Court has to take into consideration the obligations or limitations imposed by the company on the [natural] and legal rights of the infant."⁵⁶

Hanna, J. considered it to be "manifestly absurd"⁵⁷ to think that a school child, even of twelve years of age and even of the intelligence of the plaintiff, should be expected to be aware of the contractual limitation on her rights:

"it is a contract made with the child, and while it is a valid contract, and capable of being acted upon while in operation, it is the law that the child is entitled to repudiate it and to have determined by the Court whether a contract of this kind is for her benefit or not."⁵⁸

Hanna, J. was of opinion that the contract in question was "very unfair to the infant because it deprives her of practically every common law right that she has against the railway company in respect of negligence"⁵⁹ For that reason he considered that the contract was not for her benefit and that the plaintiff's case based on negligence should proceed.

It is apparent that the passages quoted from the decision lend themselves to a very broad interpretation since they would appear capable of applying to all contracts made by minors. Elsewhere in the judgment, however, Hanna, J.

⁵⁶ Id., at 536.

⁵⁷ Id., at 537.

⁵⁸ Id.

⁵⁹ Id.

speaks in more qualified terms,⁶⁰ and his reliance on an English precedent⁶¹ clearly in point would suggest that his broader statements should perhaps be read in this more orthodox context. It could scarcely be contested strongly that a contract for transport to and from school is sufficiently related to, and analogous with, a contract for education for it to fall within the category.

A decision more difficult to rationalise in these limited conventional terms is Harnedy v National Greyhound Racing Co. Ltd.,⁶² three years later, where the plaintiff was a nine-year-old girl who entered her greyhound for a racing trial and auction sale to be conducted by the defendants. During the trial the greyhound was injured, and the plaintiff sued the defendants alleging negligence in the conduct of the trial. The defendants relied on broadly drafted exemption clauses.

Geoghegan, J., in the High Court, affirming the Circuit Court decision in favour of the plaintiff, considered that, as a result of the comprehensive exclusion from liability:

"the possible disadvantages from a legal standpoint flowing from the express terms of the contract oblige me to disregard them as against this plaintiff, and to treat the special contract (taken as a whole), as one substantially to the detriment of the plaintiff. I must regard the sale as having been held on an open contract of employment affording no protection to the defendants against their common law liability for negligence."⁶³

⁶⁰ Cf. id., at 536, where Hanna, J. stated that the decision of Flower v London & North Western Ry. Co., [1894] 2 Q.B. 65 (C.A.) was:

"a clear enunciation by eminent Judges that, in considering a contract of this kind made with an infant, the Court has to peruse and consider the entire contract to decide whether it is for the benefit of the infant." (Emphasis added.)

⁶¹ Flower v London & North Western Ry. Co., [1894] 2 Q.B. 65 (C.A.).

⁶² [1944] I.R. 160 (High Ct., Geoghegan, J., 1943).

⁶³ Id., at 164.

In arriving at this conclusion, Geoghegan, J. stated that he had "followed"⁶⁴ the decision of Keays v Great Southern Railways Co.⁶⁵ and Flower v London & North Western Railway Co.⁶⁶

It is difficult to see how those decisions could have assisted the Court in Harnedy v National Greyhound Racing Co. Ltd.,⁶⁷ where the contract does not appear to have had any connection, whether by way of analogy or otherwise, with contracts for the education or employment of children or contacts for personal services.

It is clear that trading contracts do not bind a minor.⁶⁸ The distinction between trading contracts and contracts for apprenticeship and education and analogous contracts may often be difficult to draw. Treitel has commented that:

"An infant haulage contractor is a trader, but probably an infant racing driver would not be. An infant house painter would probably be regarded as a trader; but not an infant portrait painter."⁶⁹

⁶⁴ Id.

⁶⁵ [1941] I.R. 534 (High Ct., Hanna, J., with jury, 1940).

⁶⁶ [1894] 2 Q.B. 65 (C.A.).

⁶⁷ [1944] I.R. 160 (High Ct., Geoghegan, J., 1943).

⁶⁸ Cowern v Nield, [1912] 2 K.B. 419 (K. B. Div.) (discussed by Anon., The Liability of an Infant on his Contracts, 46 I.L.T. & S.J. 211 (1912)); Ex Parte Jones. In re Jones, 18 Ch. D. 109 (C.A., 1881), Mercantile Union Guarantee Corporation v Ball, [1937] 2 K.B. 498, (C.A.) Jenkins v Way, 14 N.S.R. 394 (1881). The contract may, however, be enforced by the minor at his option: Bruce v Warwick, 6 Taunt. 118, 128 E.R. 978 (1815). In Tuberville v Whitehouse, 1 C. & P. 94, 171 E.R. 116 (1823) it was held that where goods are supplied to a minor for trading purposes, the supplier may recover payment for such of the goods as are consumed as necessaries by the minor's family.

⁶⁹ Treitel, 374.

There is no general principle that, if a contract is for the minor's benefit, it will bind him. For an apprenticeship, service or other contract specified above, to be binding on the minor, it is necessary that, taking all aspects into account, it should be for his benefit.

In De Francesco v Barnum,⁷⁰ Fry, L.J., stated:

"It is not because you can lay your hand on a particular stipulation which you may say is against the infant's benefit, that therefore the whole contract, is not for the benefit of the infant. The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial."

(2) Contracts Valid Unless Repudiated

Where a minor enters into a contract involving the acquisition of an interest in property of a permanent nature, with continuing obligations attached to it, he may repudiate⁷¹ it at his option either before⁷² or within a reasonable time after attaining his majority.⁷³ There is judicial authority recognising five types of contract falling within this general category. Whether or not this list is exclusive is not clear:⁷⁴ what does seem plain, however, is that there is no general principle to the effect

⁷⁰ 45 Ch. D. 430, at 439 (1890).

⁷¹ Repudiation must be in toto; the minor may not affirm provisions that are beneficial to him while repudiating those that are not: Henderson v Minneapolis Steel & Machinery Co., [1930] 3 W.W.R. 613, [1931] 1 D.L.R. 570.

⁷² Chitty, vol. 1, 308, para. 557.

⁷³ Id.

⁷⁴ Cf. id., 308-309, para. 557.

that any contract conferring an interest in a subject-matter of a permanent nature is valid until repudiated.⁷⁵

The five types of contract are as follows:

(i) Contracts for the Lease or Purchase of Lands

Where a contract made by a minor involves the acquisition of an interest in property of a permanent nature with continuing obligations attached to it, the minor may, at his option, avoid the contract either before or within a reasonable time after he attains majority.⁷⁶ Until he avoids the contract, he is bound by the obligations under it.

(ii) Contracts to Subscribe for the Purchase of Shares

Similarly, a contract by a minor to purchase shares will bind him until he repudiates it during minority or within a reasonable time thereafter.⁷⁷

(iii) Marriage Settlements

A marriage settlement, or an agreement for a marriage settlement, may be avoided by a minor during minority or

⁷⁵ Cf. id., 309, para. 557, and the English Law Commission's Working Paper No. 8, Minors' Contracts, para. 2.12 (1982).

⁷⁶ Cf. Paget v Paget, 11 L. R. Ir. 26 (C.A., 1882).

⁷⁷ Dublin and Wicklow Ry. v Black, 8 Exch. 181, 155 E.R. 1310 (1852), North Western Ry. v M'Michael, 5 Exch. 114, 155 E.R. 49 (1850), Cork & Bandon Ry. Co. v Cazenove, 10 Q.B. 935, 116 E.R. 355 (1847), Newry & Enniskillen Ry. Co. v Coombe, 3 Exch. 565, 154 E.R. 970 (1849), Birkenhead Lancashire Ry. Co. v Pilcher, 5 Exch. 121, 155 E.R. 53 (1850).

within a reasonable time thereafter.⁷⁸ The minor must either accept or reject the settlement in its entirety.⁷⁹

(iv) Partnership Agreements

An infant partner is not liable to creditors of the partnership for partnership debts contracted during his infancy,⁸⁰ although he may not prevent their discharge out of the partnership assets.⁸¹ During minority or within a reasonable time of reaching full age, he may repudiate the partnership contract altogether⁸² but if he fails to do so he will be liable for all debts contracted since he came of age on account of having held himself out as a continuing partner.⁸³

(v) Insurance Contracts

There is Irish authority for including insurance contracts, involving an obligation to pay premiums periodically, within the category of positive voidable contracts. In Stapleton

⁷⁸ Burnaby v Equitable Reversionary Interest Society, 28 Ch. D. 416 (1855), Cooper v Cooper, 13 App. Cas. 88 (1888), Duncan v Dixon, 44 Ch. D. 211 (1890), Edwards v Carter, [1893] A.C. 360. The fact that a person under the age of 18 now ceases to be a minor on marrying (Age of Majority Act 1985, section 2(1)) should be noted in this context.

⁷⁹ Codington v Codington, L.R. 7 H.L. 854 (1875), Hamilton v Hamilton, [1892] 1 Ch. 396.

⁸⁰ Lovell and Christmas v Beauchamp, [1894] A.C. 607, at 611.

⁸¹ Id.

⁸² Goode v Harrison, 5 B. & Ald. 147, 106 E.R. 1147 (1821).

⁸³ Goode v Harrison, *supra*. The minor may also expressly adopt the contract on reaching full age: cf. Milliken v Milliken, 8 Ir. Eq. Rep. 16 (Blackburne, M.R., 1845), In the Matter of the Estate of Tottenham; Ex Parte Ingram & Harrison, 17 L. R. Ir. 174 (Monroe, J., 1886).

v Prudential Assurance Co. Ltd.,⁸⁴ in 1928 the High Court held that a contract for life insurance made by a minor was "a continuing contract, and the [minor] if she wished to repudiate it on attaining full age was bound to do so within a reasonable time."⁸⁵

The length of time after reaching full age during which a person may avoid a contract that he made during his minority will depend on the circumstances of each case. A minor may not plead ignorance of his right to repudiate as an excuse for failing to exercise that right within a reasonable time.⁸⁶ On repudiation by a minor, the following rules apply:

- (a) he need not perform obligations that have not yet accrued;
- (b) he must meet obligations that have already accrued;⁸⁷
- (c) he can recover nothing that he has paid under the contract unless there has been a total failure of consideration.⁸⁸

⁸⁴ 62 I.L.T.R. 56 (High Ct., 1929).

⁸⁵ Id., at 56 (per Sullivan, P.).

⁸⁶ Carnell v Harrison, [1916] 1 Ch. 328. See also Edwards v Carter, supra, fn.78, In re Alexandra Park Co., L.R. 6 Eq. 512 (1868).

⁸⁷ Blake v Concannon, I.R. 4 C.L. 323 (1870). The text book writers are not in agreement on this point. In favour of the principle espoused in Blake v Concannon, are Chitty, vol. 1, 312, and Anson, 190. Opposed to that principle and favouring the view that the minors' repudiation of the contract retrospectively relieves him of liability for accrued obligations is Cheshire & Fifoot, 387.

⁸⁸ Stapleton v Prudential Assurance Co. Ltd., 62 I.L.T.R. 56, at 56 (High Ct., per Sullivan, P., 1928), Cork & Bandon Ry. v Casenove, supra, fn. 77; cf. North Western Ry. v M'Michael, supra, fn. 77, Newry and Enniskillen Ry. v Coombe, supra, fn. 77, Ex Parte Jones. In re Jones, 18 Ch. D. 109, at 108 (per Jessel, M.R., 1881).

(3) Contracts "Absolutely Void" Under the Infants Relief Act 1874

Section 1 of the Infants Relief Act 1874⁸⁹ provides that:

"All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which the infant may, by an existing or future statute, or by the rule of common law or equity, enter, except such as now by law are voidable."

The effect of this section is not totally clear but a few points may be noted. It applies to only the contracts specified in it, namely -

- (i) contracts for the repayment of money lent or to be lent to a minor;
- (ii) contracts for goods supplied or to be supplied to a minor;⁹⁰
- (iii) all accounts stated with minors.⁹¹

⁸⁹ 37 & 38 Vict., c. 62.

⁹⁰ The expression "goods supplied" extends to goods that are exchanged: Pearce v Brain, [1929] 2 Q.B. 310 (Q.B.Div.).

⁹¹ Cheshire & Fifoot, 391 (footnotes omitted) state:

"An account stated is an admission by A. that a certain sum is due from him to B. Such an admission was at one time regarded as raising an implied promise to pay the amount stated, but it was always the rule at common law that an infant could not thereby bind himself, even though the items of account consisted of necessities. In the modern law, however, an account stated is only prima facie evidence of a debt which may be rebutted by contrary evidence, and therefore its inclusion in the contracts declared by the Act to be void is almost superfluous."

The section does not affect the law as to contracts for necessities or contracts of apprenticeship, service and education mentioned above. Nor does it apply to cases where money is lent or goods supplied by the minor or accounts are stated by him with others.

As a leading commentator noted, "[i]t has long been recognised that this section does not mean what it says".⁹² What it does mean, however, is not so clear. The expression "absolutely void"⁹³ has given rise to varying interpretations in different contexts. In some cases⁹⁴ the words have been given their full effect, but it would appear clear that nevertheless the minor is unable to recover back money paid on account of goods when they have been consumed or used by him: only where there has been a total failure of consideration may the minor recover.⁹⁵ Moreover, the property in non-necessary goods sold to a minor would appear

⁹² Cohn, Validity of Guarantees for Debts of Minors, 10 M.L.R. 40, at 49 (1947).

⁹³ In contrast to "voidable", used in the same section: cf. the Chief Justice's Law Reform Committee of Victoria's Report on Infancy in Relation to Contracts and Property, para. 18 (1970).

⁹⁴ In Coutts v Browne-Lecky, [1947] K.B. 104, a guarantee by an adult of a minor's overdraft was held to be void on account of the fact that the principal debt was absolutely void under the section. (See further infra, pp. 34-35). In R. v Wilson, 5 Q.B.D. 28 (1879) a minor was acquitted of leaving the country with the intention of defrauding creditors on the ground that, since their claim rested on contracts declared "absolutely void" by the section, the minor had, in fact, no creditors. In Ex parte Jones. In re Jones, 18 Ch. D. 109 (C.A., 1881), a bankruptcy petition against a minor was dismissed on the same ground.

⁹⁵ Valentini v Canali, 24 Q.B.D. 166 (Q. B. Div., 1889); Pearce v Brain, [1929] 2 K.B. 310 (Q. B. Div.). In these two cases, especially the first, the benefit acquired by the minor from the contract was small. Cf. Bo-Lasse v Josiassen, [1973] 4 W.W.R. 317 and see the Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, paras. 132-134 (1978).

to pass on delivery⁹⁶ (at all events where the parties so intend⁹⁷) or perhaps even without delivery.⁹⁸ On the important question of whether a minor may sue upon contracts falling within the scope of the section, there is no direct authority,⁹⁹ and the commentators are divided.¹⁰⁰ The view that has gained most support is that a minor may sue on such contracts.

Contracts Falling Within the Scope of Section 2 of the Infants Relief Act 1874

Section 2 of the 1874 Act provides as follows:

"No action shall be brought whereby to charge any person upon any promise made after full age to pay any

⁹⁶ See Stocks v Wilson, [1913] 2 K.B. 235, at 246.

⁹⁷ Cf. Clark, Contracts for the Sale of Non-Necessary Goods; Vendor's Remedies Against an Infant Purchaser, U. Tasmania L. Rev. 85, at 88 (1978).

⁹⁸ See Watts v Seymour, [1969] 2 Q.B. 647, at 654. Cf. the Canadian decision of Prokopetz v Richardson's Marina Ltd., 93 D.L.R. (3d) 442 (B.C. Sup. Ct., MacDonald, J. 1979), critically analysed by Clark, Property Passing Under a Void Contract - Minor Difficulties, 26 McGill L. J. 110 (1980), and by the same author, Contracts for the Sale of Non-Necessary Goods; Vendors' Remedies Against an Infant Purchase, U. Tasmania L. Rev. 85, at 89-90 (1978).

⁹⁹ In Thornalley v Gostelow, 80 I.L.T.R. 507 (1947) and Godley v Perry, [1960] 1 W.L.R. 9, claims by minors were successful, but in neither case was the defence of infancy pleaded or discussed.

¹⁰⁰ Chitty, states that "it may very well be that the minor himself can sue" (See also id., pp. 237-8, para. 517). Also in favour of this view are Cheshire & Fifoot, 391, who state that "[d]espite the wording of the Act, it has long been the opinion of the profession that the position has not been altered [and that the other contracting party will be bound]". Against the view that a minor may sue is Treitel, 358-9.

debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

This section applies to all contracts made by a minor other than contracts for necessities, education or services (which are binding on him) and contracts for the acquisition of some interest in property of a permanent character (which are voidable by him).¹⁰¹

Until its abolition by statute in 1981,¹⁰² the type of contract affected by section 2 which led to most reported litigation¹⁰³ was the promise to marry.¹⁰⁴ The question frequently arose as to whether a minor on reaching full age had made a new promise to marry (in which case he or she would be bound) or had merely ratified a promise to marry made during minority (in which case, in accordance with section 2 of the 1874 Act, he or she would not be liable). This distinction had been criticised as being "perplexing"¹⁰⁵ and "somewhat subtle"¹⁰⁶ and as leading to "some extreme refinements".¹⁰⁷

¹⁰¹ In Coxhead v Mullis, 3 C.P.D. 439 (1878), it was unsuccessfully argued that section 2 applied only to the ratification of the three contracts specifically declared void by section 1.

¹⁰² Family Law Act 1981, section 2.

¹⁰³ E.g. Ditcham v Worrall, 5 C.P.D. 410 (1880), Northcote v Doughty, 4 C.P.D. 385, Coxhead v Mullis, *supra*, fn. 67, Holmes v Brierley, 4 T.L.R. 647 (1888).

¹⁰⁴ See generally, Shatter, ch. 3.

¹⁰⁵ Cheshire & Fifoot, 393. See also, to similar effect, the Report of the Committee on the Age of Majority, (The "Latey Committee") para. 388 (Cmd. 344, 1967).

¹⁰⁶ Cheshire & Fifoot, 394.

¹⁰⁷ Anson, 189. See also Shatter, 32, Treitel, 365, (1970), Treitel, The Infants Relief Act 1874, 73 L. Q. Rev. 194, at 210-211 (1957).

In Belfast Banking Co. v Doherty,¹⁰⁸ in 1879, it was held that an action is maintainable by a bona fide indorsee for value, against an acceptor of a bill of exchange, accepted by the latter after attaining full age, for a debt contracted by him during minority (though not in respect of necessities). It is clear that considerations of practical commercial convenience weighed heavily with the Court. Fitzgerald, J. said:

"Without the aid of negotiable security the mercantile and financial operations of the empire could not be carried into effect; and we should hesitate before yielding to a contention which might materially and prejudicially affect the position of the bona fide holder for value. The Defendant contends that although he accepted the security, being of full age and of capacity to do so, and delivered it to the drawer in order that the drawer should negotiate it, and obtain money on it, and although the drawer was thus enabled to pass it to Plaintiffs for full value, he is not liable to them, as the consideration was a debt contracted by him whilst under age. I think that we ought not to give such an effect to the 2nd section of the statute, unless the legislature has so clearly expressed an intention to that effect as to cause us to do so.... We should observe that the 2nd section of the Act of 1874 does not declare that the new promise made after full age shall be 'absolutely void' as in the 1st section, but treats it as a contract resting on a void or illegal consideration, and therefore that no action shall lie on it. The 2nd section is but declaratory of the necessary legal consequences. It seems to me, however, that the true reading of the 2nd section is, that as between the parties to the new promise no action lies; but where the new promise is contained in a negotiable security the rights of a bona fide transferee for value are not affected or abridged. The bill in question has two aspects: As between the Defendant and Wilson [the drawer] it is a new promise to pay the debt contracted during infancy, and so cannot be enforced by Wilson, the consideration being illegal; but being in the form of a negotiable instrument, when indorsed to a bona fide holder for value, it becomes a promise to pay him the sum mentioned in the security according to its tenor and effect; and it matters not to the holder what was the consideration, or whether it was illegal by statute or otherwise.

¹⁰⁸ 4 L. R. Ir. 124 (Q. B. Div., 1879).

It may be argued that the policy of the legislature was to protect parties just emerging from minority, and that, in order to do so effectually, it in substance declares the new promise to be illegal and void. The legislature has not said so. It has, on the contrary, drawn a marked distinction between the engagement entered into during minority - which it absolutely avoids - and the new promise of the adult, as to which it declares only that no action shall be brought on it¹⁰⁹

The practical effect of this decision was severely circumscribed by the enactment of section 5 of the Betting and Loans (Infants) Act 1892, which will be considered immediately below. But the reasoning of the case would still apply if, for example, the debt did not arise out of a contract of loans or the loan was not void because it was one for necessities.

Contracts Void Under Section 5 of the Betting and Loans (Infants) Act 1892

A fresh promise given after majority to pay a loan that is void in law, and any negotiable instrument given in respect of such a loan, are "void absolutely as against all persons whomsoever" by virtue of section 5 of the Betting and Loans (Infants) Act 1892.¹¹⁰

Specific Performance

A minor may not enforce a contract by an action for specific performance, since the court would not enforce the contract

¹⁰⁹ Id., at 135-137.

¹¹⁰ 55 & 56 Vict., c. 4.

against him.¹¹¹ But where the minor reaches full age and adopts the contract, thereby becoming bound by it, he may take proceedings for specific performance in relation to it.¹¹²

Non-Contractual Transactions Involving Minors

Where a minor is involved in a non-contractual transaction, such as a gift or a disclaimer or discharge, for example, it appears that the minor is not fully bound.¹¹³ Thus, if a minor makes a gift of property, whether real or personal, he or she may avoid this at any time on the basis that he or she was by reason of age incapable of giving the necessary assent.¹¹⁴ This rule applies even where the gift is made in the form of a deed.¹¹⁵

¹¹¹ Flight v Bolland, 4 Russ. 298, 38 E.R. 817 (1828), Lumley v Ravenscroft, [1895] 1 Q.B. 683. In Melville v Stratherne, 26 Gr. 52, (1878), however, Spragge, C. considered that:

"Where a party has already obtained all the benefits that he was to derive from that part of the contract that is in his favour, such a defence [against specific performance] would be most inequitable, and I apprehend would not be allowed to prevail."

¹¹² Milliken v Milliken, 8 Ir. Eq. Rep. 16 (Blackburne, M.R., 1845).

¹¹³ Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 1.49 (1978).

¹¹⁴ Cf. Lloyd v Sullivan, unreported, High Ct., McWilliam, J., 6 March 1981 (1981-39Sp.), at p. 3:

"Gifts made by infants are voidable."

See also the Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 1.49 (1978), Halsbury's Laws of England, vol. 18, at 369, para. 701 (3rd ed., 1957), disapproving of Taylor v Johnston, 19 Ch. D. 603 (1882).

¹¹⁵ Law Reform Commission of Western Australia, Working Paper No. 2, supra, para. 1.50, Halsbury, supra, vol. 21, at 160, para. 356.

Where property is given to a minor, it vests in the minor immediately upon the gift being completed.¹¹⁶ A gift inter vivos to a minor may not be revoked subsequently by the donor.¹¹⁷ It seems however that the minor may repudiate the gift on attaining full age, whereupon the estate or item of personal property, as the case may be, reverts to the grantor.¹¹⁸

Liability of Minors in Tort

Where a cause is really founded on the wrongful mode of performance of a contract the injured party may not proceed by framing his action in tort. But a minor will be liable for a tort, even where the injury may have occurred in a contractual setting, if the tort is independent of the contract.¹¹⁹ At what point an act ceases to be merely a misperformance of the contract and becomes instead conduct altogether outside the contract is a different question¹²⁰ and clearly will depend greatly on the Court's assessment of the facts of the case in question.

Thus, where a minor hired a horse for riding, he was held not liable in tort for injuring the horse through moderate

¹¹⁶ Law Reform Commission of Western Australia, Working Paper No. 2, supra, para. 1.50.

¹¹⁷ Law Reform Commission of Australia, Working Paper No. 2, supra, para. 1.50, Halsbury, supra, vol. 21, at 159, para. 353.

¹¹⁸ Law Reform Commission of Australia, Working Paper No. 2, supra, para. 1.50, Halsbury, supra, vol. 21, at 158, para. 351.

¹¹⁹ See Pollock on Contract, 62-63 (13th ed., by P. Winfield, 1950), McMahon & Binchy, 72, Clark, 173-174, Pearce, Fraudulent Infant Contractors, 42 Austr. L. J. 294, at 30-301 (1968).

¹²⁰ Cf. Clark, 174: "The test is artificial in the extreme."

riding¹²¹ but, in another case¹²² involving the hiring of a horse, the minor was held liable in contract where, contrary to the express instructions of the owner, he injured the horse by jumping it.

Liability of Minors for Fraudulent Misrepresentation

A minor who, by fraudulent misrepresentation of fact, has induced another to contract with him, may not be held liable for damages in the tort of deceit, since the imposition of liability in such circumstances would facilitate an evasion of the minor's contractual immunity.¹²³ Notwithstanding this exemption of the minor from liability, the other party to the contract may avoid the contract.¹²⁴

The Equitable Doctrine of Restitution

The limits of the doctrine of restitution in respect of benefits acquired by minors "are somewhat ill-defined".¹²⁵ The commentators are divided on the question whether the doctrine should be premised upon a false representation by the minor that he is of full age,¹²⁶ or, more generally,

¹²¹ Jennings v Rundall, 8 Term Rep. 335, 101 E.R. 1419 (1799). See also Fawcett v Smethurst, 84 L.J.K.B. 473 (1914).

¹²² Burnard v Haggis, 14 C.B. (n.s.) 451, 143 E.R. 360 (1863). See also Ballett v Mingay, [1943] K.B. 281.

¹²³ Cf. Payne, The Contractual Liability of Infants, 5 Western L. Rev. 136, at 150 (1966).

¹²⁴ Cf. Payne, supra, at 151. See also Atiyah, The Liability of Infants in Fraud and Restitution, 22 Modern L. Rev. 273, at 277 (1959).

¹²⁵ Cheshire & Fifoot, 396.

¹²⁶ Cf. Anson, 200.

upon any false representation of fact by the minor,¹²⁷ or simply on the right of the other party to recover his property, whether or not the minor was guilty of any fraud in either the legal or equitable sense of the term.¹²⁸

It seems clear, at all events, that restitution may be ordered where the minor obtains goods by fraud and remains in possession of them.¹²⁹ Where the minor has obtained the goods by fraud but no longer possesses them the position becomes less certain. Before examining the case-law it is perhaps desirable to mention briefly the competing policy considerations.

From the standpoint of minors, it can be argued that for the case to go beyond restitution of the very goods obtained to impose liability to repay their value, or to restore another article for which they have been exchanged, "would in effect be to enforce a contract declared void by statute".¹³⁰ The general approach of the law has been "to safeguard the weakness of [minors] at large, even though here and there a juvenile knave slipped through".¹³¹ From the standpoint of the parties contracting with minors - especially fraudulent minors - it can be argued that a restitutionary principle limited to cases where the minor retains the goods or property exchanged for these goods would allow some minors to profit on a rather arbitrary principle.

The decisions on the question are difficult to reconcile. The narrow approach was favoured in the English case pf

¹²⁷ Cf. Payne, The Contractual Liability of Infants, 5 Western L. Rev. 136, at 151 (1966) referring to this view, but not endorsing it.

¹²⁸ Atiyah, The Liability of Infants in Fraud and Restitution, 22 Modern L.Rev. 273, at 287 (1959).

¹²⁹ Cf. Clarke v Cobley, 2 Cox 173 (1798), Lempriere v Lange, 12 Ch. D. 675 (1879). See further Pearce, Fraudulent Infant Contractors, 42 Austr. L. J. 294, at 298-299 (1968).

¹³⁰ Cheshire & Fifoot, 397.

¹³¹ Leslie (R.) Ltd. v Sheill, [1914] 3 V.B. 607, at 612 (per Lord Sumner).

Leslie (R.) v Sheill,¹³² where A.T. Lawrence, J. said that:

"If when the action is brought both the property and the proceeds are gone, I can see no ground upon which a court of equity could have founded jurisdiction."

In the same case Lord Summer expressed the view that:

"the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to show that when an infant obtained an advantage by falsely representing himself to be of full age equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant, even by means of a fraud Restitution stopped where repayment began."¹³³

The contrary approach had been favoured in 1913 in the case of Stocks v Wilson¹³⁴ where a minor who had obtained goods by misrepresenting his age and had later sold them was held accountable for the proceeds of sale.

The question has not been resolved in the Irish courts.¹³⁵ Decisions in other common-law jurisdictions are divided,¹³⁶ and academic commentators take opposing views.¹³⁷ In a

¹³² [1914] 3 K.B. 607, at 627.

¹³³ [1914] 3 K.B., at 618.

¹³⁴ [1913] 1 K.B. 235.

¹³⁵ Clark, 174.

¹³⁶ Favouring the wider view is Campbell v Ridgely, 13 V.L.R. 701 (1887).

¹³⁷ Cheshire & Fifoot, 397, favour a narrow approach. Favouring a somewhat wider view are Atiyah, The Liability of Infants in Fraud and Restitution, 22 Modern L. Rev. 273, at 290 (1959), Payne, The Contractual Liability of Infants, 5 Western L. Rev. 136, at 152 (1966).

recent text on Irish contract law, Dr Robert Clark expresses¹³⁸ the hope that the wider view of equitable restitution may prevail in Ireland.

Guarantees and Indemnities¹³⁹

It appears that a guarantee of a loan to a minor that is "absolutely void" is itself void. This was held in Coutts & Co. v Brown-Lecky,¹⁴⁰ in relation to guarantees by adults of a minor's overdraft from a bank. Oliver, J. stated that since there was no debt, "for the Act of 1874 says so",¹⁴¹ it was not possible to make a legally binding guarantee in respect of credit advanced to a minor for the purchase of non-necessary goods or services. On the other hand, an indemnity in respect of such a loan or credit will be binding,¹⁴² since an indemnity is not collateral to any legal liability on the part of another person. The legal reasoning behind this distinction has been described as "impeccable",¹⁴³ but whether it represents a sound policy has been doubted.¹⁴⁴

This distinction between guarantees and indemnities has been widely criticised¹⁴⁵ on the basis that minority is a

¹³⁸ Clark, 174-175.

¹³⁹ See Cohn, Validity of Guarantees for Debts of Minors, 10 Modern L. Rev. 40 (1947), Steyn, Guarantees: The Co-Existiveness Principle, 90 L. Q. Rev. 246 (1974).

¹⁴⁰ [1947] K.B. 104.

¹⁴¹ [1947] K.B., at 106.

¹⁴² Yeomen Credit Ltd. v Lather, [1961] 2 All E.R. 294, noted by Furmston, 24 Modern L. Rev. 644 (1961).

¹⁴³ English Law Commission, Working Paper No. 81, Minors' Contracts, para. 11.10 (1982).

¹⁴⁴ Cf. infra, pp. 155-156.

¹⁴⁵ Furmston, 24 Modern L. Rev. 648 (1961), Cohn, 10 Modern L. Rev. 40 (1947), Evans, The Need for Reform in the Law of Infants' Contracts - Some Comments on the Latey Report, Auckland U. L. Rev. 65, at 70-71 (1969).

personal privilege merely, and it has not been followed in some Canadian decisions.¹⁴⁶ In the British Columbia case of First Charter Financial Corporation v Musclow,¹⁴⁷ in 1974, Craig, J. stated, obiter:

"I do not agree with Coutts v Browne-Lecky. I think it is wrong, in principle, to allow a person who has guaranteed an infant's financial obligation to contend successfully that he is not liable because the infant's contract which he guaranteed is void when he has made the guarantee knowing that the infant could not be liable for the debt and knowing, too, that the other party would not have entered into the contract unless the adult had guaranteed the debt."

¹⁴⁶ Cf. C.L. Hagan Transportation Ltd. v Canadian Acceptance Corporation, [1974] S.C.R. 491, Edmonton Airport Hotel Co. v Credit Foncier Franco-Canadien, [1965] S.C.R. 491.

¹⁴⁷ 49 D.L.R. (3d) 138, at 145 (B.C.S.C., 1974).

CHAPTER 3 COMPARATIVE ASPECTS

In this chapter we will look briefly at the main features of the law in other jurisdictions and at structures for reform proposed, and in some cases enacted, elsewhere.

Northern Ireland

The law in Northern Ireland is in substance similar to the law in this jurisdiction. One important difference is that the age of majority is 18 in all cases, regardless of whether a person may have married under that age.

England and Wales

In England, the law is also similar but, as will be seen, the English Law Commission has made detailed proposals for reform in its Working Paper, Minors' Contracts, published in 1982, subsequently revised in its Report, Law of Contract: Minors' Contracts (Law Com. No. 134, 1984).

Scotland¹

Persons under the age of majority (18 years) are divided into two categories: pupils and minors. Pupils are boys under 14 years of age and girls under 12 years of age. Subject to what is said below, a pupil has not the capacity to enter a contract on his own behalf, but a tutor may enter certain contracts on his behalf. The pupil's father is normally tutor; if the father is dead, the mother will be tutor. A parent has power to nominate a tutor after his or her death; in default, the Court will do so.

A tutor may enter into contracts on behalf of the pupil

¹ See the Scottish Law Commission's Consultative Memorandum No. 65, Legal Capacity and Responsibility of Minors and Pupils, Part II (1985).

where they are consistent with the purpose of his office. Contracts designed to preserve rather than dispose of the pupil's property will normally fall within the scope of the tutor's authority. Purchases from a tutor may not be challenged but, where the tutor has acted outside his authority, he becomes liable for breach of trust. The tutor may protect himself against liability by obtaining the authority of the Court for a proposed transaction.

At any time within four years after reaching full age, the pupil may challenge a contract entered into by a tutor on the grounds of minority and lesion. Challenges on these grounds are rare and are difficult to sustain.

The authorities are divided on the question whether a pupil, acting without a tutor, may ever enter an enforceable contract. On one view he may not, but on another he may do so to the extent that the contract is beneficial to him. On the latter view, it is not clear whether the pupil is also liable on the contract: there is authority supporting the imposition of liability, at all events to the extent that the minor receives a benefit from the contract.

Minors are children between the age of pupillarity and majority. They have a somewhat greater contractual capacity than have pupils.

Where a minor has a curator (usually a father), contracts entered into by the minor with the curator's consent will bind him subject to challenge (within minority or the quadriennium utile) on the ground of lesion. Where a minor who has a curator enters into a contract without the curator's consent, that contract will be void unless either (a) it relates to employment or to a trade or business carried on by the minor; (b) the minor represented that he was of full age, and the other party reasonably believed him; (c) the minor on reaching full age homologates (i.e. confirms) the contract made during minority (unless the confirmation was made under duress or misrepresentation or in error of his legal rights).

Where a minor does not have a curator, he has the same² capacity to contract as if he were of full age, but with the

² Subject to relatively insignificant limitations: cf. the Scottish Law Commission's Consultative Memorandum No.65, Legal Capacity and Responsibility of Minors and Pupils, para. 2.8 (1985).

right to challenge a particular contract on the ground of lesion (within minority or the quadriennium utile).

The same is true of a minor who has been forisfamiliarated (i.e. who has set out on an independent career with the consent of his or her father or who has married).

What constitutes lesion such as will enable a pupil or minor to avoid a contract depends on the particular circumstances of the case. Clear examples of lesion arise where the pupil or minor has given something away gratuitously or has disposed of it for a serious undervalue.

Generally, where the pupil or minor has entered into a contract with the consent of his or her tutor or curator, as the case may be, a greater degree of lesion will have to be established than in a case where he has done so alone.

United States of America

The law relating to minors' contracts in the United States of America³ bears many resemblances to Irish law. In a number of States, however, statutes have altered the position significantly. The age of majority in the overwhelming majority of states is 18; in Alabama, Nebraska and Wyoming it is 19, and in Mississippi it is still 21.

The position in the majority of States is that, in general,

³ See generally, Cnapp, chapter 2, H.H.W., The Status of Infancy as a Defense to Contracts, 34 Virginia L. Rev. 839 (1948), Navin, The Contracts of Minors Viewed from the Perspective of Fair Exchange, 50 N. Carolina L. Rev. 517 (1972), Denton, Infants' Contracts: Rights and Remedies, 28 Tenn. L. Rev. 395 (1961), Bottiger, Infants' Contracts and their Enforcement, 35 Wash. L. Rev. 465 (1960), Vold, Sales Deals with Minors, 35 Dakota L. Rev. 80 (1958), the English Law Commission's Working Paper No. 81, Minors' Contracts, 173-175 (1982) and the Scottish Law Commission's Consultative Memorandum No. 65, Legal Capacity and Responsibility of Minors and Pupils, paras. 4.6-4.8 (1985).

contracts by minors are voidable by them during minority or within a reasonable time of reaching full age.⁴ Statutes in a number of States (including California, Iowa, Kansas and Utah) specifically provide that failure to disaffirm within a reasonable time after reaching majority will constitute implied affirmation on the contract. Other States (including Maine and Oklahoma) require that ratification must be in writing. In some States, where the contract relates to real property it is void *ab initio*. If a minor misrepresents his age in making the contract, the minor may be estopped from asserting his minority or may be held liable for tortious injury to the third party.⁵ In some States (including Indiana, Iowa, Kansas, Michigan and Washington),⁶ statutory provisions prohibit disaffirmance by the minor in such a case. Where there has been no misrepresentation as to age, in most States the minor on disaffirmance may recover his or her own consideration even though the minor has consumed or otherwise disposed of the goods passing to him under the contract.⁷ In other States, however, the minor is obliged to account for depreciation for the use of the item. Where the minor still has in his possession the property which passed to him or her under the contract, the minor must return it to the other party. Contracts for necessities bind the minor. In certain States (including Iowa, Kansas, New York, Utah and Washington) a minor may not disaffirm any of his reasonable contracts made while engaged in business.

Contracts for legal services, at all events in respect of

⁴ Cf. Edge, Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy, 1 Georgia L. Rev. 207 (1967), Anon., Casenote, 29 Chic.-Kent L. Rev. 361 (1951), McKenzie, Casenote, [1951] U. Illinois L. Forum 325.

⁵ Cf. Greenwald, Contracts: Infants' Disaffirmance: Infants' Right to Void, 52 Marquette L. Rev. 437 (1969), Acchambzau, Infancy - Shield or Sword? 36 Dicta 217, at 211ff (1959).

⁶ Cf. Bottiger, Infants' Contracts and their Enforcement, 35 Wash. L. Rev. 465, at 469-473 (1960).

⁷ Cf. Regan, Note: Restitution in Minors' Contracts in California, 19 Hastings L. J. 1199 (1868), von Biberstein, Comment: Contracts - Liability of Minor Upon Disaffirmance, 37 N. Carolina L. Rev. 484, at 485 (1959), Butrum, Casenote, 12 U. of Detroit L. J. 99 (1949).

litigation or the protection of the minor's personal liberty or reputation, will generally bind the minor.⁸

Where a minor repudiates or disaffirms a contract for services, he will normally be able to recover on a claim based on quantum meruit.⁹

Emancipation of a minor generally does not confer on him the contractual capacity of an adult, although it may be taken into consideration as a factor of practical importance in determining whether a transaction entered into by him was one for necessities. In some States, however - including California, Connecticut, Florida and Tennessee - emancipation has the effect of enabling minors to enter into binding contracts.¹⁰ Former servicemen under the age of majority are also given contractual capacity in certain instances.¹¹

The Uniform Securities Ownership and Minors Act (adopted in the majority of States) prevents a minor who has caused any dealings in his securities from disaffirming or avoiding the transaction unless there was prior notice of the minority. Under the Uniform Commercial Code, s. 3-207 (also adopted in most States) a minor who transfers a negotiable instrument may not disaffirm against a holder in due course. Moreover, in many States statutes permit students under the age of majority to make binding contracts for education loans (cf. the Uniform Minor Student Capacity to Borrow Act).

⁸ Cf. Tan, Annotation, 13 A.L.R. 3d 1251 (1967).

⁹ Cf. Regensteiner, Annotation, 35 A.L.R. 2d 1302 (1954).

¹⁰ Cf. Cady, Emancipation of Minors, 12 Connecticut L. Rev. 62 (1979).

¹¹ Cf. Denton, Infants' Contracts: Rights and Remedies, 28 Tenn. L. Rev. 395, at 396 (1961), Kindred, Basic Problems of Minors' Contractual Capacity: Reform in England, France, Ethiopia and the United States of America, Festschrift Rheinstein, p. 523, at 531, H.H.W., Note: The Status of Infancy, 34 Virg. L. Rev. 829, at 833 (1948).

In general, a surety will be liable on his undertaking in the event of the minor's default.¹² Where, however, the minor disaffirms the contract or where the minor has received nothing under it, the surety will not be bound. The authorities are divided on the question whether the surety will be released from his obligation by the minor's offer to return the consideration, where the other party refuses to accept the offer.

Apart from cases of fraudulent misrepresentation as to age, a minor will not generally be liable in tort where the tort arose out of or was connected with a contract, insofar as enforcing his liability for the tort would, either directly or indirectly, amount to enforcing his liability under the contract.

The law in Louisiana relating to minors' contracts¹³ contains the main elements of the Civil Law approach, requiring generally that the minor's tutor approve of the contract and including provisions regarding lesion, familiar in Civil Law jurisdictions.

In California,¹⁴ contracts by minors for artistic or creative services and professional sports, if approved by the Court, on application to it by either party, may not thereafter be disaffirmed by the minors. Similar legislation has been enacted in New York.¹⁵ Statutes have been enacted in several states enabling minors to enter into binding contracts of life insurance.¹⁶

¹² Cf. Habeeb, Annotation, 44 A.L.R. 3d 1417 (1972).

¹³ Cf. Cater, 22 Loyola L. Rev. 1061 (1976).

¹⁴ California Civil Code, section 36(a)(2) and section 36(b). See the English Law Commission's Working Paper No. 81, Minors' Contracts, 173-174 (1982). For an unsuccessful constitutional challenge to this statute see Warner Bros Pictures v Brodel, 179 P. 2d 57 (Cal. Dist. Ct. of App. 1947).

¹⁵ General Obligations Law, section 3-105. See Shields v Gross, 58 N.Y. 2d 338, 461 N.Y.S. 2d 254, 448 N.E. 2d 108 (1983).

¹⁶ Cf. Fallon, Contracts and Minors in Life Insurance, [1959] Ins. L. J. 473, at 475 (1959).

Canada¹⁷

In Canada, 18 is the age of majority in all provinces save British Columbia, New Brunswick, Newfoundland and Nova Scotia, where it is 19. The law in Quebec is based on the French civil law system. In the other provinces, the common law rules prevail, subject to statutory changes, some similar to, or identical with those affecting the law in this country. In Alberta, a minor is liable on a contract for life insurance; in Manitoba, a minor over 16 living away from home may be liable on a contract to perform work or services unless the Director of Public Welfare declares it void on the ground of injustice.

Proposals for general reform of the law relating to minors' contracts have been made in Alberta and British Columbia, and the subject has also been considered by the Ontario Law Reform Commission. No legislative changes have yet emerged, however. The work of the law reform agencies in these provinces will be considered in detail later in this chapter and in our own consideration of the policy issues relating to reform of the law.

Australia¹⁸

The age of majority in all of the Australian states is 18. The law relating to minors' contracts is substantially the same as in this country. In New South Wales, however, a radically new approach was introduced by the Minors (Property and Contracts) Act 1970. The Act is considered in detail later in this chapter.

¹⁷ See Mueller, 130-133, 230, Percy, The Present Law of Infants' Contracts, 53 Can. Bar Rev. 1 (1975), the Scottish Law Commission's Consultative Memorandum No. 65, Legal Capacity and Responsibility of Minors and Pupils, paras. 4.11-4-13 (1985).

¹⁸ See Finlay, paras. 607-612 and the Scottish Law Commission's Consultative Memorandum, Legal Capacity and Responsibility of Minors and Pupils, para. 4.9 (1985).

Minors' Contracts in Civil Law Systems

Although there are certain differences between the legal provisions of the various jurisdictions within the civil law system, a number of similarities may be discerned. Most of these jurisdictions permit guardians, curators or tutors of minors to enter into certain contracts on their behalf. Other common provisions relate to emancipation and capacity to enter employment and business contracts.

(a) Emancipation

Emancipation is a common feature in most jurisdictions with civil law systems: see the Law Reform Commission's Working Paper No. 2, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects, paras 240ff (1977). It exists, for example, in Belgium, France, Greece, Italy, Luxembourg, Malta, the Netherlands, Quebec and Spain. The effect of emancipation, whether by order of the Court, marriage or by parental permission, is that the minor acquires full contractual capacity or, at all events, capacity to act in ordinary business situations. A limited form of emancipation, solely to confer contractual capacity for business purposes, is also possible in some countries (e.g. Malta).

(b) Employment and Business

A minor is frequently permitted to enter into employment and business contracts, usually on attaining the age of sixteen or, if under that age, with the consent of his legal personal representatives (normally his parents). Provisions on these general lines are contained in the law of several jurisdictions, including Belgium, Cyprus, Denmark, Luxembourg, the Netherlands, Quebec, Sweden, Switzerland and Turkey. In some countries (for example, the Federal Republic of Germany) the consent of a Court is also required. In others, (Austria, Finland, Greece, Norway and Spain for example) the consent of any other person or the court is not necessary.

REFORM PROPOSALS AND LEGISLATION IN OTHER LEGAL JURISDICTIONS

Proposals for the reform of the law relating to minors' contracts have been made in a number of jurisdictions and legislation has been enacted in New Zealand and New South Wales. The subject has also been analysed, without any specific recommendations being made, by the Ontario Law Reform Commission. A brief description of these developments is provided below, dealing first with England, then Scotland, followed by New Zealand, New South Wales, Ontario, Alberta and finally British Columbia.

ENGLAND

The Latey Committee Report

In 1967 the Latey Committee, in its Report on the Age of Majority,¹⁹ considered the law relating to minors' contracts. The Committee approached the subject on the basis that it should make general recommendations only, since it was

"conscious of the fact that it is unlikely that proposals for the reform of this part of the law of contract will be implemented by legislation before the Law Commission has considered them in relation to the law of contract as a whole."

The following are the principal recommendations made by the Committee:

- (1) That the age for attaining full contractual capacity should be reduced to eighteen years.²⁰

¹⁹ Report on the Committee on the Age of Majority (the "Latey Committee") (Cmnd. 3342, 1967), analysed by Evans, The Need for Reform of the Law of Infants' Contracts - Some Comments on the Latey Report, Auckland U. L. Rev. 65 (1969).

²⁰ Id., para. 280.

- (2) That the Infants Relief Act 1874 be repealed²¹ and that (subject to the Committee's other recommendations) contracts entered into by a minor should not be enforceable against him.²²
- (3) That where a minor received money, property or services under a contract which he failed to perform he should be liable to account to the other party for the benefit he had received (subject to the Court relieving him from this liability to such extent as it might think fit).²³
- (4) That where a minor had parted with money or property under a contract which was unenforceable against him he should be entitled to its return, subject to his obligation to account to the other party for any benefit the minor had received, if he resiled from the contract before it was fully performed.²⁴
- (5) That the Court should have a discretion whether to give effect to any term in a minor's contract of service or apprenticeship if it was of the opinion that the term was unreasonable or harsh or not in the minor's interest.²⁵
- (6) That the Court should have wide discretionary powers in restitutionary actions against minors.²⁶
- (7) That section 5 of the Betting and Loans (Infants) Act 1892 be repealed,²⁷ but that section 2 be retained.²⁸

²¹ Id., para. 293.

²² Id., para. 299.

²³ Id., para. 309.

²⁴ Id., para. 310.

²⁵ Id., para. 326.

²⁶ Id., para. 335.

²⁷ Id., para. 340.

²⁸ Id., para. 366.

- (8) That the law should be clarified so as to ensure that a minor would be liable in tort for deceit unconnected with his age even if the effect would be indirectly to enforce a contract,²⁹ but that a minor should remain exempt from liability in tort for deceit as to his age which induced a contract.³⁰
- (9) That contracts of guarantee by persons of full age in respect of minors should be enforceable notwithstanding the unenforceability or nullity of the minor's undertakings,³¹ but that this fact should be made clear to the guarantor in specific terms in the contract to be specified by legislation.³²

A minority of the Committee agreed with the recommendation that the age for attaining full capacity should be reduced to eighteen years,³³ but considered that, where a minor could show that a contract to which he or she was a party was harsh or oppressive, the minor should be entitled to have it set aside and to further relief to such extent as the Court might consider just and equitable³⁴ (except in the case of completed contracts for the disposition of interests in land).³⁵

The English Law Commission's Working Paper No. 81, Minors' Contracts

In 1982 the English Law Commission published a Working Paper on Minors' Contracts.³⁶ The Working Paper analysed the

²⁹ Id., para. 351.

³⁰ Id., para. 354.

³¹ Id., para. 362.

³² Id., para. 366.

³³ Id.

³⁴ Id., para. 598.

³⁵ Id.

³⁶ Law Commission, Working Paper No. 81, Minors' Contracts, (1982).

issue in great detail and made an important contribution to the public debate on law reform on the subject. Many of the Commission's recommendations in its Working Paper and subsequent Report will be considered in detail later in this Report; on this account, the summary of the recommendations in the present chapter will be brief.

In the Working Paper the Commission proposed two alternative approaches. The first would be to reform the present law in specific respects. The second, more radical, approach would be that all contracts should be fully binding on minors aged 16 and over, and not binding at all on those aged below 16.

As regards the first alternative, the Commission proposed that the basic principle of the law of minors' contracts should be "qualified enforceability": a minor's contract should ordinarily be unenforceable against him or her though enforceable by the minor.³⁷ The Commission recommended³⁸ the repeal of the Infants Relief Act 1874. It considered³⁹ that property should be capable of passing under any contract made with a minor, notwithstanding the fact that the contract is unenforceable against him. The Commission recommended⁴⁰ that, in any action brought by a minor to enforce a contract, the adult party should be entitled to raise any defence to the action which would be available to him if the minor had been an adult. The adult party should also be able to plead a set-off or counterclaim up to the value of the minor's claim, but not beyond.

Where a minor was in breach of a contract and was in possession of property which had passed to him under the contract, the Commission recommended⁴¹ that the adult party should be entitled to the return in specie of that property, but not to any other remedy. If the minor wished to retain the property he should pay for it. If the minor was unable to retain the property, he should pay for it unless the

³⁷ Id., paras. 5.8, 6.1-6.3.

³⁸ Id., para. 6.1.

³⁹ Id., para. 6.2.

⁴⁰ Id., para. 6.3.

⁴¹ Id., paras. 6.5-6.12.

minor could prove that he did not dispose of it in order to defeat the claims of the supplier. The adult should not be entitled to recover the proceeds of sale of any such property which the minor had sold, or property acquired by the minor wholly or partly in exchange for the property.

In ordinary contracts of sale, the remedy proposed by the Commission where a minor was in breach of contract should be exercisable by the adult only by order of the court.⁴² In this context, the Commission recommended that the court should have power to order restitution, or to order payment of the purchase price, in either case subject to such variations as it thought fit.⁴³ In hire purchase and credit sale transactions, the Commission recommended⁴⁴ that existing statutory provisions under the (English) Hire Purchase Act 1965 and (English) Consumer Credit Act 1974 should apply.

As an exception to the proposed general rule of unenforceability, the Commission recommended⁴⁵ that where, under any contract, the minor's performance was postponed to that of the adult, the act of issuing a writ should make the minor himself liable on the contract. In such a case, where the adult had performed his part, he should be able to enforce the contract against the minor if, when the time came for the minor's performance the minor failed to abide by his obligations.

The Commission recommended⁴⁶ that a minor should, in an appropriate case, be entitled to enforce a contract by a decree of specific performance against the adult, if the minor had performed his part of the bargain or if the contract was in any event binding on the minor, but then on condition that the minor should perform his part when the relevant time came. Similarly in cases where the minor's performance was postponed to that of the adult and

⁴² Id., para. 6.10.

⁴³ Id.

⁴⁴ Id., para. 6.11.

⁴⁵ Id., paras. 6.14-6.20.

⁴⁶ Id., paras. 6.22-6.24.

the minor sued to enforce performance by the adult, the minor should be liable to have a decree of specific performance made against him.

The Commission recommended⁴⁷ that the category of "necessaries" should be abolished, and replaced by "necessities"; these "necessities" should be limited to items essential to maintain a minimum standard of living. In deciding what are, and what are not, "necessities", the Court should have regard to the status, social position, means or state of supply of the minor in question.⁴⁸ Failing the abolition of necessities, the Commission considered⁴⁹ that the concept should be amended in order to render it more appropriate to modern trading conditions.

The Commission recommended⁵⁰ that contracts of employment should continue to be excepted from the general rule and should be binding on a minor, provided that, taken as a whole, the contract was for the minor's benefit. The Court should have power to sever from the contract any term which was not for the minor's benefit and could reasonably be severed from the rest of the contract without unduly prejudicing the employer, and to enforce the contract without that term. Contracts for the provision of personal services by a minor should be treated in the same way as employment contracts, and should be binding on the minor subject to the same provisos and restrictions as employment contracts.⁵¹ The Commission recommended⁵² that trading contracts should continue to be governed by the general rule and should be unenforceable against a minor.

The Commission proposed⁵³ that a minor should be bound by a covenant in restraint of trade if, in accordance with the

⁴⁷ Id., paras. 7.1-7.35.

⁴⁸ Id., paras. 7.15-7.19.

⁴⁹ Id., paras. 7.5-7.14, 7.25.

⁵⁰ Id., paras. 7.26-7.28, 7.31.

⁵¹ Id., para. 7.29.

⁵² Id., para. 7.30.

⁵³ Id., para. 7.32.

general law concerning such covenants, it was an enforceable covenant. In considering whether or not the covenant was an enforceable covenant the Court should be specifically empowered to take into account the fact that the employee was a minor. The Commission recommended⁵⁴ that loans of money to minors should be governed by the general rule of unenforceability, but considered that there was no need for particular rules further penalising contracts of loans to minors. It considered⁵⁵ that loans of money to a minor for the purchase of necessities (or necessities, if that concept is retained) should be recoverable whether or not the money was in fact used for that purpose: in other words, the loan contract would be binding on the minor.

The Commission was of the view that there was no reason to retain any category of contracts binding on a minor until formally repudiated by the minor before, or within a reasonable time after, attaining his minority. Accordingly, it recommended⁵⁶ abolition of this category.

The Commission did not consider⁵⁷ that there should be any general power to re-open executed contracts. Where, however, a minor could prove that an adult induced him to enter into an important transaction, by taking advantage of his immaturity and lack of experience, the Court should have power to re-open the contract.

The Commission recommended⁵⁸ that an adult recently come of age should not be permitted to ratify a contract made during his minority, so as to render that contract binding on him. The Commission considered that it would be inappropriate to prohibit the making of a new contract, for fresh consideration, to do the same thing as previously contracted for during the young adult's minority, but it recommended that, in any action brought against the erstwhile minor to enforce such a contract he should be entitled to claim

⁵⁴ Id., paras. 7.33-7.38.

⁵⁵ Id., para. 7.39.

⁵⁶ Id., para. 7.40.

⁵⁷ Cf. id., paras. 5.6, 8.1-8.15.

⁵⁸ Id., paras. 9.1-9.9.

relief from it on the ground that its terms are unfair.

The Commission took the view⁵⁹ that there was no need for any procedure for the judicial or other validation of contracts made by minors which might be otherwise unenforceable against them. It also rejected⁶⁰ the argument that minors should acquire full contractual capacity automatically on marriage.

The Commission considered⁶¹ that a minor should not forfeit his protection under the law of contract if he induced the making of a contract by fraud, whether by misrepresenting his age or otherwise. But it recommended⁶² that a minor who induced the making of a contract by fraud should be liable in tort for deceit, so that the adult party should be so liable even if a judgment against him would amount in effect to a full or partial indirect enforcement of the contract. In addition, the Commission recommended that the minor's fraud should be available to the adult as a defence in any action brought to enforce the contract, or as a ground for rescinding the contract. As to other torts, the Commission considered⁶³ that a minor should incur no liability in tort if such liability would amount to an indirect enforcement of the contract.

The Commission recommended⁶⁴ that a dispute arising out of a contract between two minors should be decided according to the same principles of law as apply between a minor and an adult.

Finally, the Commission proposed⁶⁵ that a guarantee by an

⁵⁹ Id., paras. 10.1-10.15.

⁶⁰ Id., paras. 10.17-10.20.

⁶¹ Id., para. 11.1.

⁶² Id., paras. 11.3-11.4.

⁶⁴ Id., paras. 11.5-11.9.

⁶⁵ Id., paras. 11.10-11.13.

adult of a minor's obligation under a contract should not fail by reason of the fact that the contract is unenforceable against the minor. Neither a guarantor nor an indemnifier should be entitled to recover from the minor anything which they may have been called upon to pay under the guarantee or indemnity.

The Commission's alternative proposal, as we have mentioned,⁶⁶ was of a far more radical nature. Under it, the following rules would apply. All contracts of whatever nature would be fully binding on minors aged 16 years and over;⁶⁷ a minor below the age of 16 would have no liability under or by reason of any contract.⁶⁸

Under this proposal, the Commission also recommended⁶⁹ that a minor below the age of 16 should be able to enforce his contracts against the adult party, notwithstanding that these contracts were not enforceable against the minor. In any action brought by a minor below the age of 16 to enforce a contract, the adult party should be entitled to put forward any defence which he might make if the action had been brought against the adult by another adult, and to plead any set-off or counterclaim up to, but not exceeding, the value of the minor's claim against the adult.

The Commission recommended⁷⁰ that, where a minor below the age of 16 was in breach of a contract and had in his possession property which had passed to him under the contract the adult party should be entitled to the return of that property in specie, but not to any other remedy. The Court should have power to make any adjustment of rights as between the minor and the adult, as it might think appropriate. This remedy should not apply to the proceeds of sale of the property if the minor has sold it, or to any other property acquired by the minor wholly or partly in

⁶⁶ Supra, p. 47.

⁶⁷ Law Commission Working Paper No. 81, Minors' Contracts, paras. 12.1-12.18 (1982).

⁶⁸ Id., para. 12.19.

⁶⁹ Id., paras. 12.20-12.22.

⁷⁰ Id., para. 22.22.

exchange for that property. Nor should the remedy apply to money lent to the minor.

Finally, the Commission recommended⁷¹ that a minor below the age of 16 should not ordinarily be civilly liable in tort for fraud if the effect of such liability would be indirectly to enforce against him an unenforceable contract. But, where such a minor has induced a contract by misrepresenting himself to be 16 or over, he should be liable in tort for deceit whether or not rendering him so liable may amount to an indirect enforcement of the contract.

The English Law Commission's Report, Law of Contract:
Minors' Contracts

In June 1984 the English Law Commission's Report⁷² on the subject was published. The Report contained a number of important changes in its recommendations from those put forward in the Working Paper. Most notably, as a result of consultation with interested parties, the Commission abandoned⁷³ its alternative proposal, that all minors of 16 years and over, should be liable on their contracts and that minors under the age of 16 should have no liability in contract.

The Commission reiterated⁷⁴ its view that the law governing minors' contracts should continue to be based on the principle of "qualified unenforceability"; but it now favours a less wide-ranging approach to reform than one which would amount to a codification of the law. Comprehensive legislation would involve diversion of the resources necessary to prepare it from other projects of greater practical importance:

⁷¹ Id., paras. 11.1-11.4, 12.23.

⁷² Law of Contract: Minors' Contracts (Law Com. No. 134, 1984).

⁷³ Para. 2.3 of the Report.

⁷⁴ Id., para. 1.12.

"By restricting our proposals for legislation to reform of specific defects we will be able to submit a short Bill of which the effect should be clear and certain. If the Bill is enacted, the law will be improved and the working of the law, as amended, will be apparent from decisions of the courts."⁷⁵

The Commission reiterated⁷⁶ its recommendation for the repeal of the Infants Relief Act 1874. The Commission dropped⁷⁷ the proviso provisionally recommended⁷⁸ in the Working Paper that, where an erstwhile minor entered a new contract reproducing the effect of an earlier, unenforceable agreement, it should be a defence to the erstwhile minor that the terms of the new contract were unfair to him. It also recommended⁷⁹ the repeal of section 5 of the Betting and Loans (Infants) Act 1892.

The Commission repeated⁸⁰ its recommendation that, where a guarantee is given in respect of an obligation of a party to a contract and the obligation is unenforceable against him (or he repudiates the contract) because he was a minor when entering the contract, the guarantee should not for that reason alone be unenforceable against the guarantor.

The Commission proposed changes in its recommendations on the position where property has passed to a minor under an unenforceable contract and the minor refuses to pay. Although the somewhat restrictive proposals in the Working Paper on this question had received general support among

⁷⁵ Id., para. 3.4.

⁷⁶ Id., paras. 4.2, 4.8.

⁷⁷ Id., para. 4.8.

⁷⁸ Paras. 9.8 and 9.9 of the Working Paper.

⁷⁹ Para. 4.11 of the Report.

⁸⁰ Id., para. 4.14. The Commission noted (id., para. 4.15) that although the proposed repeal of section 1 of the 1874 Act might have been enough to achieve its objective in respect of guarantees, it was safer, in the absence of clear authority at common law, to include a specific recommendation on the point.

those consulted, the Commission in the Report recommended⁸¹ that the Court might, if it was equitable and just to do so, require the minor to transfer to the supplier any of the property so passing or any property representing it. This recommendation would not prejudice any other remedy available to the supplier. The Commission's revised proposal contained⁸² an important limitation: where the minor having sold the property, dissipated the proceeds of sale, the Court should have no power to make any order, as, for example, to pay to the seller a sum equivalent to the purchase price or the value of the property.

The Commission's recommendations for legislation contained in its Report were designed not to apply to any contract entered into before they had been given legislative effect.⁸³

The Commission in its Report abandoned several recommendations⁸⁴ made in its Working Paper concerned with clarifications of doubtful parts and with minor improvements in the law. Having rejected a codification approach, it did not seem to the Commission that "in the absence of any need for these measures, and of any evidence that such an

⁸¹ Id., para. 4.23.

⁸² Id.

⁸³ Id., para. 4.24.

⁸⁴ Relating to:

- (a) the general rules of unenforceability or its effect;
- (b) the rules governing contracts of employment;
- (c) the rules applicable in restraint of trade;
- (d) the rules governing the reopening of executed contracts;
- (e) a rule which would abolish those contracts which are, at common law, binding until repudiated.

enactment would resolve any practical difficulties",⁸⁵ the case for legislation had not been made out.

The Commission in its Report also abandoned⁸⁶ several proposals⁸⁷ of a substantive nature made in the Working Paper. Although these proposals could have been proceeded with independently of codification and although the Commission remained of the opinion that the arguments put forward in the Working Paper were sound, it noted that the defects in the law which these proposals were designed to remedy "do not in practice give rise to the difficulties of which they might, in theory be the sources."⁸⁸

In the light of consultation, the Commission concluded⁸⁹ that the best course would be to leave the existing law on necessities unaltered. The concept of "necessities", advanced in the Working Paper, had not found favour:

"It was argued that the introduction of a new concept so similar to the existing one would serve only to cause confusion. Few commentators saw any advantage in making the change; most thought it would do more harm than good."⁹⁰

The Commission expressed⁹¹ itself satisfied with its rejection, in the Working Paper, of a validation procedure

⁸⁵ Para. 5.2 of the Report.

⁸⁶ Id., para. 5.3.

⁸⁷ Including proposals for a new exception to the general rule to meet the case where a minor seeks to enforce a contract; to enable a minor to obtain specific performance; to extend a lender's right to repayment of a loan made for the purchase of necessities; and to make a minor liable in tort for deceit in certain circumstances where he is not liable under existing law.

⁸⁸ Para. 5.3 of the Report.

⁸⁹ Id., para. 5.6.

⁹⁰ Id.

⁹¹ Id., para. 5.8.

for minors' contracts. On the specific question of validation of large transactions, which would be of particular economic significance, the Commission, after considered analysis, favoured⁹² no change in its earlier recommendations.

SCOTLAND

In June 1985, the Scottish Law Commission published its Consultative Memorandum No. 65, Legal Capacity and Reponsibility of Minors and Pupils. The Consultative Memorandum is a wide-ranging document, extending beyond the question of the contractual capacity of persons under age.

The preferred, provisional, option of the Commission is that the present two-tier law on the legal capacity of pupils and minors, with its divisions at the ages of 12 or 14 and 18, should be replaced by a single tier system based on the age of 16. Above that age, a person would have full contractual capacity without any special protections beyond those afforded by the general law applying to all persons. The Commission also consider that the doctrine of foris-familiation should be abolished, and that the rule of incapacity should not be subject to any exception entitling a person under 16 to act with the consent of a parent or guardian or, except possibly in relation to the making of a will, with the consent of a court.

So far as contracts made by persons under 16 are concerned, the Commission provisionally proposes that these should generally be void save for transactions commonly entered into by a child of the transacting child's age. Where a transaction is void on the ground of minority, the Commission provisionally propose that the rights of parties to the transaction should be determined according to common law principles of unjust enrichment but that the court should be empowered to modify the obligation of the person under 16 to make restitution or recompense in a manner considered equitable in the circumstances.

The second option of the Commission, should the one-tier system based on the age of 16 not prove acceptable, is

⁹² Id.

a two-tier system, comprising age bands of 0-16 years and 16-18 years with the upper age group enjoying only limited protection. The Commission also mentions, but does not specifically endorse, even provisionally, the possibility of giving effect to other options, such as a one-tier system based on some age other than 16, or a revised two-tier system with the same age divisions for boys and girls, or even a three- or four-age band system.

NEW ZEALAND

In New Zealand, the age of majority is 20. On marrying below that age, a person acquires full contractual capacity. The law relating to minors' contracts was codified and reformed by legislation in 1969,⁹³ and has been the subject of minor revision on three occasions since then.⁹⁴

Minors are divided into two classes: those under the age of eighteen years and those who have reached that age. Contracts made by a minor who has reached the age of eighteen years, as well as contracts of service and of insurance made by a minor of any age, have effect as if the minor were of full age.⁹⁵ The Court has wide powers, however, to declare the contract unenforceable against the minor in whole or in part, making such order as to compensation or restitution of property as appears to it to be just, in cases where either the consideration for the minor's promise "was so inadequate as to be unconscionable"

⁹³ The Minors' Contracts Act 1969, (1969, No. 41) analysed by Burrows, The Minors' Contracts Act 1969, (N.Z.), 47 *Austr. L. J.* 657 (1973); see also the analysis provided by the Law Reform Commission of Western Australia in its Working Paper No. 2, Project No. 25: Legal Capacity of Minors, paras. 1.80-1.97 (1978). The earlier law in New Zealand was analysed by Adams, Contracts by Infants, [1952] *N.Z.L.J.* 92, 107.

⁹⁴ The Minors' Contracts Amendment Act 1970, (1970, No. 88), The Minors' Contracts Amendment Act 1971, (1971, No. 111), and the Minors' Contracts Amendment Act 1974, (1974, No. 107).

⁹⁵ Section 5(1) of the 1969 Act.

or any provision in the contract imposing an obligation on a minor as "harsh or oppressive".⁹⁶

Contracts made by minors who have not reached the age of eighteen years are unenforceable against the minor but otherwise have effect as if he were of full age.⁹⁷ The Court may, however, in its discretion, enforce such a contract against the minor either in whole or in part, making such order as to compensation or restitution of property as it thinks just, in a case where it finds that the contract was "fair and reasonable" at the time it was entered into.⁹⁸ In exercising its discretion, the Court must have regard to -

- "(a) The circumstances surrounding the making of the contract,
- (b) The subject-matter and nature of the contract,
- (c) In the case of a contract relating to property, the nature and value of the property,
- (d) The age and the means (if any) of the minor,
- (e) All other relevant circumstances."⁹⁹

Where the Court makes an order in respect of any contract by a minor, it may grant relief by way of compensation or restitution of property not only to any party to the contract, but also to a guarantor or indemnifier of the contract¹⁰⁰ or any person claiming through, under or on behalf of that party, guarantor or indemnifier.¹⁰¹ A guarantee or indemnity is enforceable by the creditor

⁹⁶ Id., section 5(2).

⁹⁷ Id., section 6(1).

⁹⁸ Id., section 6(2) (as amended by the Minors' Contracts Amendment Act 1971).

⁹⁹ Section 6(3) of the 1969 Act.

¹⁰⁰ Id., section 7(1)(b).

¹⁰¹ Id., section 7(1)(c).

against the surety.¹⁰² A minor may enter a binding contract with the approval of the Magistrate's Court.¹⁰³ Although the rule of law that a minor is not liable in tort for procuring a contract by fraudulent misrepresentation as to his age is not affected by legislation,¹⁰⁴ the Court may take any such representation into account in deciding whether to exercise any of its powers with respect to compensation and restitution.¹⁰⁵

NEW SOUTH WALES

In 1970, following the publication by the Law Reform Commission of New South Wales in 1969 of its Report on Infancy in Relation to Contracts and Property,¹⁰⁶ the Parliament of New South Wales enacted the Minors (Property and Contracts) Act 1970.¹⁰⁷ The Act is a complex and comprehensive codification of the law relating to the civil capacity of minors. It assimilates the concept of contract into the larger concept of the "civil act", defined so as to include all types of contracts and other dispositions of property other than those of a testamentary nature.¹⁰⁸

¹⁰² Id., section 101.

¹⁰³ Id., section 9, as amended by the Minors' Contracts Amendment Act 1970, section 2 (1970, No. 88).

¹⁰⁴ Supra, fn. 93, section 15(4).

¹⁰⁵ Id.

¹⁰⁶ L.R.C. 9 (1969), analysed by Pearce, Reform of the Law of Infancy, 44 Australia L.J. 269 (1970).

¹⁰⁷ The Act is comprehensively analysed in Harland, passim, and by Harland, The Contractual Capacity of Minors - A New Approach, Sydney L. Rev. 41 (1970). See also Harris and Zuckermann, Contract, in H. Wade ed., Annual Survey of Commonwealth Law, 1971, ch. 20, at 632-633 (1972). A useful critical analysis is provided in the Law Reform Commission of Western Australia, Working Paper No. 2, Project No. 25: Legal Capacity of Minors, paras 1.51-1.79 (1978).

¹⁰⁸ Section 6(1) and (2). The concept of "civil act" is inspired by that of the "acte juridique" of French law and that of "Rechtsgeschäft" of German law: see Harland, 28.

Very briefly, the Act provides that a contract is binding¹⁰⁹ on a minor if it is for his benefit, unless at the time he made it he lacked, by reason of his youth, the understanding necessary for participating in it.¹¹⁰ Otherwise the contract will not bind the minor unless he affirms it after majority¹¹¹ or does not repudiate it before he reaches the age of nineteen years.¹¹² The Court may, however, affirm a contract¹¹³ whereupon it will bind the minor, or approve of a particular contract,¹¹⁴ or grant him capacity to enter into a particular contract, certain types of contract, or all contracts.¹¹⁵ Before taking such a step, the Court must consider that to do so would be for the benefit of the minor.

A disposition of property to a minor is binding unless consideration is manifestly excessive¹¹⁶ and a disposition by a minor is binding unless the consideration is manifestly inadequate.¹¹⁷ If an independent solicitor or the Public Trustee certifies that a minor makes a disposition of property, understanding its effect and doing so "freely and voluntarily", the consideration not being manifestly inadequate, the disposition will bind the minor.¹¹⁸

¹⁰⁹ The expression "presumptively binding" is used in the Act but it is clear from section 6(3) that what this means is that the Act will bind the minor to the full extent that it would if he were an adult; i.e., such defences as fraud, illegality or mental incapacity remain available in appropriate cases: see Harland, 32.

¹¹⁰ Sections 18, 19.

¹¹¹ Section 30(1).

¹¹² Section 31.

¹¹³ Section 30(2).

¹¹⁴ Section 27.

¹¹⁵ Section 26.

¹¹⁶ Section 20(2).

¹¹⁷ Section 20(1).

¹¹⁸ Sections 28, 29.

A minor may appoint an agent by power of attorney or otherwise.¹¹⁹ A guarantor of an obligation of a minor is bound by the guarantee to the extent to which he would be bound if the minor were not a minor.¹²⁰ A minor is liable for a tort whether or not it is connected with a contract or the cause of action for the tort is in substance a cause of action in contract.¹²¹

The Act has provoked differing responses from those commenting on it. Professor Harland, in his treatise on the Act, stated that he considered it represented "an imaginative and workable approach towards the problems arising in respect of contracts and other civil acts entered into by minors",¹²² although he criticised¹²³ a few aspects of the Act.

The Institute of Law Research and Reform of Alberta in its Report, entitled Minors' Contracts,¹²⁴ in 1975, said of the New South Wales legislation that it:

"imposes liability upon the minor in cases in which the common law did not do so and its policy is therefore open to argument by those who think that his liability should not be increased. It may also be open to criticism on the grounds that it will be difficult for an adult party to determine whether or not the contract is for the benefit of the minor so as to be binding, a

¹¹⁹ Section 46(1)(a).

¹²⁰ Section 47.

¹²¹ Section 48.

¹²² Harland, 212.

¹²³ The power given to a solicitor or the Public Trustee to certify that the minor gives his consent to a disposition "freely and voluntarily" was criticised by Professor Harland (*id.*, 210) on the basis that, in cases of doubt, the matter should be determined by a court. The provisions regarding "presumptively binding" dispositions, especially their operation when the contract on which a disposition is based has been repudiated, were considered unclear by Professor Harland (*id.*, 147-149, 209-210).

¹²⁴ Report No. 14.

problem comparable to that of determining whether or not goods are necessities. The court will face the same problem."¹²⁵

The Law Reform Commission of British Columbia, in its Working Paper on Minors' Contracts¹²⁶ in 1976, stated that it agreed with this analysis of the New South Wales legislation. It continued:

"The principal object of the legislation, with its use of the concept of 'presumptive binding' would appear to be to encourage adult parties to deal with minors and to secure title to property. Yet although it is difficult for us to make completely informed judgments at this distance, it would seem that the legislation, although comprehensive, is sufficiently complex to create some uncertainty in the minds of adult parties concerning their positions regarding minors. To this extent we are disposed to speculate whether adult parties are in fact encouraged to deal with minors by the terms of the legislation."¹²⁷

VICTORIA

The Chief Justice's Law Reform Committee of Victoria published a short Report on Infancy in Relation to Contracts and Property in 1970. Having recommended that the age of majority be reduced from 21 to 18, the Committee discussed the Latey Report and the New South Wales Law Reform Commission's proposals for reform.

The Committee preferred the New South Wales approach, "drastic and novel though no doubt it is".¹²⁸ The only criticism it made of this approach was that it might "enable an infant to run into debt in acquiring luxury

¹²⁵ Id., at 26-27.

¹²⁶ Working Paper No. 16.

¹²⁷ Id., at 38.

¹²⁸ Para. 17 of the Report.

commodities".¹²⁹ The Committee considered ¹³⁰ that this could be rectified by amending section 21(2) of the draft Bill contained in the New South Wales Law Reform Commission's Report so that it would apply only where the consideration had been fully paid by the minor.

SOUTH AUSTRALIA

The subject of the contractual capacity of minors was examined by the Law Reform Committee of South Australia in a report¹³¹ published in 1977. The Committee was unanimously of the view ¹³² that the general principle should be that contracts should not be enforceable against minors, and that the laws should continue to protect minors against exploitation by others and their own immaturity. It unanimously rejected the proposal that there should be different age groups with different rules applying to them, on the basis that this "would simply produce further and undesirable complexity in the law".¹³³ It equally rejected the proposal that full contractual capacity should be given to married minors, since this "might work as an incentive to hasty and early marriage".¹³⁴ Finally, the Committee unanimously rejected the New Zealand principle that a court may declare a contract previously entered into to be binding, on the basis that "it renders the status of all contracts uncertain at the time of their making".¹³⁵

At this point in the Report the Committee's recommendations ceased to be unanimous. A majority of the Committee considered that there should be no change in the general approach to the law. The majority was:

¹²⁹ Id., para. 21.

¹³⁰ Id.

¹³¹ Forty-First Report of the Law Reform Committee of South Australia Relating to the Contractual Capacity of Infants (1977).

¹³² Id., p. 6.

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id.

"impressed by the fact that for all its seeming complexity the law has caused little difficulty in practice for many years, and such difficulties as did arise as well as most of those that may have arisen in the case of youthful traders, have been adequately dealt with by the reduction in the age of majority to eighteen. Consultations with the senior personnel of the Supreme Court, the Local Court, the Industrial Court, the Credit Tribunal and the Prices and Consumer Affairs Branch revealed that none have encountered problems in this area for many years."¹³⁶

The majority also noted that the English Law Commission had encountered "grave difficulties"¹³⁷ in proceeding to practical methods of implementing the Latey proposals.

The minority of the Committee, on the other hand, would have preferred to recommend the adoption of a scheme based on the proposals of the Latey Committee. The combination of the reduction in the age of majority and the fact that it was "doubtful whether the existence of categories as ill devised as those of necessities and beneficial contracts of service does in fact encourage adults to enter into contracts within them with infants"¹³⁸ led the minority to believe that they had become "a useless complexity in the law".¹³⁹

Returning to a position of unanimity, the Committee recommended the abolition of the distinction between contracts that may be affirmed on attaining majority and contracts that are binding unless repudiated within a reasonable time after the attainment of majority.

The Committee could "see no good reason"¹⁴⁰ for the retention of the distinction, and proposed¹⁴¹ that all

¹³⁶ Id

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ Id.

contracts other than those for necessities or of service should require subsequent ratification in writing.

On the question of guarantees, the Committee recommended¹⁴² that the fact that the principal contracting party was a minor should not of itself protect an adult guarantor; the Committee considered it "unsatisfactory that the conjoint effect of the technicalities of the common law of infancy and of guarantee renders the undertaking of the adult guarantor nugatory".¹⁴³

The Committee also recommended¹⁴⁴ the establishment of machinery (similar to that in New South Wales and New Zealand) by which a minor might enter into binding contracts and dispositions with the prior sanction of the Court. The Committee commented:

"It is unlikely that recourse to such a provision [will be] frequent, but there may be circumstances in which such a power in the Court would be useful."¹⁴⁵

The final recommendation of the Committee was inspired by their distaste for the rule denying the restoration of property transferred to a minor who may have obtained only "trivial benefits from a very partial performance of the contract by the adult party"¹⁴⁶ when the minor avoids the contract. The majority of the Committee recommended that a discretion be granted to the Court to enable it to order restitution of some or all of the property provided by the infant when a contract is properly avoided.

ONTARIO

The Ontario Law Reform Commission considered the law

¹⁴² Id., p. 8.

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Id.

relating to minors' contracts, in its Report on the Age of Majority and Related Matters,¹⁴⁷ published in 1969. The Report made no recommendations as to changes in the law, confining itself to a critical analysis of the proposals of the Latey Committee in its Report¹⁴⁸ and to a general discussion of social and legal policy on the subject. The Report stated that

"[t]he studies of the Commission should continue and a further report [should be] made at a future date. There are a number of reasons for not making recommendations now. If the age of majority is lowered,¹⁴⁹ it would be salutary to observe how the law of infants' contracts works in respect of those under the reduced age. In particular, a study should be made of credit granting practices and collection procedures if meaningful proposals for change are to be made. If American commercial experience is followed here, as seems likely, then there will be an expansion of credit granting in the next few years to those in their mid-teens."¹⁵⁰

The Commission, having set out¹⁵¹ in detail the recommendations of the Latey Committee regarding minors' contracts, proceeded to discuss a "number of problems"¹⁵² arising out of these proposals.

The first question was whether the proposals went too far in attempting to be fair to an adult dealing with a minor since, in the Commission's view, the introduction of a

¹⁴⁷ Ontario Law Reform Commission, Report on the Age of Majority and Related Matters (1969).

¹⁴⁸ Report of the Committee on the Age of Majority (the "Latey Committee") (Cmn. 3342, 1967).

¹⁴⁹ Cf. the Age of Majority Act 1971 (Ont.) c. 98, which reduced the age of majority to 18 years.

¹⁵⁰ Supra, fn. 147, p. 53.

¹⁵¹ Id., pp. 47-50.

¹⁵² Id., p. 50.

discretionary judicial restitutionary system would cause "the whole emphasis on protection [to] shift."¹⁵³

The Report stated:

"The present law is largely based on the assumption that an infant does not have the maturity and experience which would enable him to enter into contracts with the judgment of an older person. The law protects the infant by saying that (with exceptions) he is incapable of entering into a contract that will bind him. Persons who deal with him do so at their own risk.

What is the justification for a change from this position? Simply to protect persons dealing with infants. If the age of contractual capacity is reduced to eighteen, should those who contract with children under that age receive the protection the Latey Report contemplates?"¹⁵⁴

The Commission considered that it would be "an entirely different matter"¹⁵⁵ to require a minor to account for a benefit he retained, but not in cases where he had disposed of the article in question and had spent the proceeds or where it had been destroyed. Whilst appearing to view this distinction with some favour, the Commission admitted that it would involve "other problems".¹⁵⁶ it stated:

"Firstly, the extent to which tracing should operate would have to be considered Tracing can be a very complicated matter. Secondly, if the minor knows that he is only going to be responsible for any benefit he retains, then he may be tempted to dissipate it if he learns the other party is about to make him account for it. Thirdly, it would become essential to revive

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id., p. 51.

¹⁵⁶ Id.

the classification of necessities and perhaps that of contracts that are valid until repudiated."¹⁵⁷

The second problem regarding the Latey Committee's proposals was that of the wide discretion involved in its recommendations.

In the Commission's view,

"[t]his may cause uncertainty in a number of ways. Firstly, there will be uncertainty as to when it will be exercised and this is likely to lead to litigation in situations where there is doubt and the expense seems justified. Secondly, because subjective values will be significant, different judges will have varying views on where the discretion should be exercised. One judge may feel that the age of an infant, say 14, should of itself be sufficient to relieve him from liability. Another judge may think not. Much may depend on their philosophy as to whether or not an infant should be accountable.

Furthermore, as many infant contract situations involve amounts that are not worth litigating, the parties should be able to settle their disputes on the basis of a few definite and easily understood rules without having to take court proceedings.

Finally, if there is to be an exercise of judicial discretion, would there not be some standards as to how it should be exercised?"¹⁵⁸

The third problem concerning the Latey Committee Report that the Commission perceived was in regard to the Committee's opposition to allowing a minor to resile from a fully executed contract.

The Commission stated:

"[T]he Report gives no reason why an infant should not

¹⁵⁷ Id.

¹⁵⁸ Id., pp. 51-52.

be able to avoid a contract and obtain the return of the consideration he has parted with (assuming that he will restore the consideration he received). This raises the question of why an infant should lose protection merely because the contract is performed. The law seeks to protect him from his lack of judgment. Why should the law make an exception because he, for example, paid cash and received the goods purchased?"¹⁵⁹

As a general comment on the Latey Committee's Report, the Commission admitted to being

"not convinced that the main thrust of [its] proposals, to impose on infants a liability to account for benefits received, is the best solution. Nor would the imposition of liability to account only where a benefit is retained be likely to achieve practical results."¹⁶⁰

The Commission stated that its "primary concern"¹⁶¹ had been to consider what would be suitable law for persons aged seventeen or less. It commented that,

"[g]enerally-speaking, the present law gives satisfactory protection to this group."¹⁶²

The Commission expressed its general philosophy on the subject as follows:

"It would, of course, be possible to prohibit altogether transactions with minors but such a law would be totally unrealistic. Rules as to minors' contracts must take into account the economic realities of modern life. Vast numbers of contracts are entered into every day by the young. Nearly all of these

¹⁵⁹ Id., p. 52.

¹⁶⁰ Id., p. 53.

¹⁶¹ Id.

¹⁶² Id.

involve purchases, ranging from bubble gum to motor cars. Purchasing power in the hands of the young will continue to increase as our society becomes more affluent. On the other hand, it might well be advisable to consider whether certain kinds of transactions should be permitted or regulated, such as the granting of credit or sales of motor cars¹⁶³.¹⁶⁴

The final comment of substance on the subject made by the Commission was as follows:

"Where it now gives protection to minors, the present law puts the person dealing with them to some extent in a position of risk. If proper protection is to be given to minors such a result is inevitable. Nearly all infants' contracts are with commercial concerns, who are well aware of the risk involved. The risk does not, of course, now arise with cash transactions. Practically speaking, it only arises in credit situations where significant amounts are involved. The person dealing with the infant can protect himself, if he wishes to, by selling under a conditional sales contract where durable goods are being purchased, or by insisting that an adult co-sign the contract or sign an indemnification agreement."¹⁶⁵

The Commission stated that it would continue to keep the law relating to minors' contracts under review, adding that its final recommendations would best be made

"in the light of any legislation that may be passed following this Report and the commercial experience resulting therefrom."¹⁶⁶

¹⁶³ In this context, the Commission referred to the Report of the Ontario Legislature's Select Committee on Youth (1967), which (at p. 283) had recommended that no person under sixteen years should be allowed to purchase a motor vehicle.

¹⁶⁴ Supra, fn. 147, p. 53.

¹⁶⁵ Id., p. 54.

¹⁶⁶ Id.

ALBERTA

The Institute of Law Research and Reform of Alberta published a Report entitled Minors' Contracts¹⁶⁷ in 1975. After a review of the law in Alberta¹⁶⁸ and of reforms elsewhere,¹⁶⁹ the Report made a number of recommendations for change, since its authors considered that the present law was "unsatisfactory",¹⁷⁰ "often uncertain",¹⁷¹ and "sometimes harsh"¹⁷², the Court not having power to relieve against its harshness.

The Report recommended¹⁷³ that, as a general principle, a contract made by a minor should not be enforceable against other parties as if he had reached full age. Where a contract was unenforceable for this reason, the Report recommended¹⁷⁴ that an action for relief might be brought either by the minor or, after he had repudiated the contract, by an adult party. In such an action the Court might grant to any party "such relief by way of compensation or restitution of property or both as is just".¹⁷⁵

On the question whether there should be a special category of contracts enforceable against minors, the Institute could not agree. The majority considered that there should be such a category, expressing its philosophy on the matter as follows:

"[We] believe that the law should interfere with contracts only to the extent necessary to give

¹⁶⁷ Report No. 14 (January, 1975).

¹⁶⁸ Id., pp. 2-20.

¹⁶⁹ Id., pp. 20-27.

¹⁷⁰ Id., p. 27.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Id., p. 28.

¹⁷⁴ Id., p. 29.

¹⁷⁵ Id.

reasonable protection to minors against unwise contracts; that the law should recognise that it is essential for minors to be able to acquire things and services by contract; that it should recognise the interest of adults in being able to deal with minors; that it should not allow a minor to take unconscionable advantage of the protection given to him by law; and that it should be as simple and intelligible as possible."¹⁷⁶

On this basis, the majority recommended that the following provision be introduced into the law:

- "(1) (i) An adult may enforce a contract against a minor if he satisfies the Court:
 - (a) that at the time the contract was made the adult party believed it to be fair and reasonable in itself and in the circumstances of the minor; and
 - (b) that his belief was reasonable.
- (ii) In determining whether or not the adult party's belief was reasonable the Court should have regard only to the circumstances which were or should have been known to the adult party.
- (2) Notwithstanding subsection (1) a Court may refuse to enforce a contract against a minor if the minor satisfies the Court:
 - (i) that the contract was improvident in the interest of the minor; and
 - (ii) that the minor by restitution or compensation or a combination of both has put or will put the adult party in as good a position as if the contract had not been made."¹⁷⁷

The minority would have preferred not to include this provision. Stating that their position was similar to that of the Latey Committee and that they accepted its reasoning, the minority were of the view that:

¹⁷⁶ Id., pp. 29-30.

¹⁷⁷ Id., pp. 31-32.

"[n]o difficulty should be placed in the way of a minor who wants to withdraw from an unwise contract; but if he wishes to withdraw he should compensate the adult for any benefit received."¹⁷⁸

They considered that paragraph (1) of the majority's proposed provision "would increase uncertainty and complexity without commensurate advantage"¹⁷⁹ and that paragraph (2) "would add to the complication of the law while giving little relief to the minor".¹⁸⁰

The Report unanimously recommended¹⁸¹ that the proposed legislation should apply to executed as well as to executory contracts, the Institute being of the view that

"[t]he fact that the adult has pocketed the minor's money or otherwise received the benefit of performance by the minor should not deprive the minor of the protection of the law."¹⁸²

On the question of affirmation and repudiation of the contract, the Report recommended¹⁸³ that a minor should be able to affirm a contract after reaching full age or repudiate it within a year thereafter.

With two members of the Institute dissenting, the Report also recommended¹⁸⁴ that the adult party should be able to ascertain his position by giving written notice to the minor after majority requiring him to affirm or repudiate the contract within thirty days. If the minor did not repudiate it within that period, the contract should become

¹⁷⁸ Id., p. 33.

¹⁷⁹ Id.

¹⁸⁰ Id.

¹⁸¹ Id., p. 34.

¹⁸² Id.

¹⁸³ Id., pp. 35-36.

¹⁸⁴ Id.

enforceable against him. If he did repudiate, the adult party should be entitled to apply to the Court for discretionary relief by way of compensation or restitution.

The Report recommended¹⁸⁵ that the proposed legislation should apply whether or not the adult party was aware that the minor had not reached the age of majority. The Report argued that

"[a]lthough it is the minor who knows the facts, his failure to inform is likely to arise from the very inexperience and immaturity against which the law should protect him; and standard forms of contracts would otherwise easily circumvent the law."¹⁸⁶

Furthermore, it argued,¹⁸⁷ the adult party would have the protection of the Court even if the contract was unenforceable, whilst if an improvident contract were to be treated as enforceable the results to the minor might be serious.

With two members dissenting, the Institute recommended¹⁸⁸ that the proposed legislation should apply even to a case where the minor lied about his age.

On the question of the minor's liability in tort, the Report recommended¹⁸⁹ that an adult should have no recourse against a minor in tort where the minor had lied about his age. Apart from this limited case, however, the Report recommended¹⁹⁰ that it should not be a defence to an action in tort against a minor that the tort was connected with a contract or that the cause of action for the tort was in substance a cause of action in contract (save to the extent that the contract would provide a defence for the minor if

¹⁸⁵ Id., p. 36.

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ Id.

¹⁸⁹ Id., p. 37.

¹⁹⁰ Id.

he had been of full age. The Report condemned the distinction in existing law between tort actions which are in substance actions on a contract and those which are not as being "artificial and uncertain",¹⁹¹ the Institute considering that

"the distinction should be abolished insofar as it puts a minor in a different position from an adult."¹⁹²

The Report recommended¹⁹³ that the Court should be empowered to approve a contract on behalf of a minor on application to it by either party to the contract. The Court should not do so "unless satisfied that approval is for the benefit of the minor"¹⁹⁴

The Report also recommended that the Court should be empowered to grant a minor capacity "to enter into contracts or any description of contracts"¹⁹⁵ when satisfied that to do so would be for the benefit of the minor.

On the question of the position of disposition of property by a minor under a contract that was unenforceable against him, the Report considered that

"the proposed Act should place beyond dispute the effect of [such] disposition[s] It would be unsatisfactory to leave title to property in limbo

¹⁹¹ Id.

¹⁹² Id.

¹⁹³ Id., p. 39.

¹⁹⁴ Id. The Report proposed a monetary division of jurisdiction between the Family Court and the Trial Division of the Supreme Court of Alberta: the Family Court would have jurisdiction where the consideration given by the minor had a value not exceeding two thousand five hundred dollars: Id.

¹⁹⁵ Id., p. 40. Only the Trial Division of the Supreme Court of Alberta would have jurisdiction in this matter: id.

until the contract becomes binding or the court deals with the matters."¹⁹⁶

The Report accordingly recommended¹⁹⁷ the inclusion of the following provision in the proposed legislation:

- "(1) A disposition of property or a grant of a security or other interest therein made under a contract which is unenforceable against a minor is effective to transfer the property or interest unless and until the court orders restitution
- (2) A disposition of property or a grant of a security or other interest therein to a bona fide transferee or grantee for value is not invalid for the reason only that the transferor or grantor acquired the property under a contract which is unenforceable against a minor."

The authors of the Report saw no reason why an adult-guarantor should receive the protection which the law gives to minors and accordingly recommended¹⁹⁸ that the guarantor of an obligation of a minor should be bound by his guarantee to the same extent that he would be bound if the minor were an adult. The Report also recommended¹⁹⁹ that the guarantor should be permitted to seek an indemnity from the minor only to the same extent as any other person dealing with the minor would. The Report stated:

"We recognise that many guarantees are given gratuitously and that it may appear harsh to hold a guarantor to his guarantee without giving him the right to recoup himself fully from the principal debtor, but we think that the protection of the minor must come first and that the intervention of a guarantor should not be a means of indirectly enforcing the contract against the minor."²⁰⁰

¹⁹⁶ Id.

¹⁹⁷ Id., p. 41.

¹⁹⁸ Id., p. 42.

¹⁹⁹ Id.

²⁰⁰ Id., pp. 41-42.

In a number of miscellaneous recommendations concluding its Report, the Institute proposed that a minor should be capable of appointing an agent by power of attorney or otherwise²⁰¹ and that certain statutory provisions already in existence permitting contracts to be made by minors in certain cases²⁰² should be retained.²⁰³

No reform of the law relating to minors' contracts has yet taken place in Alberta.

BRITISH COLUMBIA

In 1976, the Law Reform Commission of British Columbia published a Report on Minor's Contracts.²⁰⁴ The Commission noted in the Introduction to the Report that

"[i]n most instances, although there are significant differences²⁰⁵ in the existing law of Alberta and British Columbia, we have agreed with the

²⁰¹ Id., p. 43. In Alberta, although a minor may legally appoint an agent other than by power of attorney, he or she may not do so legally by power of attorney: see id., p. 19.

²⁰² E.g. under the Marriage Act, the Insurance Act and the Student Loans Guarantee Act.

²⁰³ P. 44 of the Report. The Report recommended, however, that the power of the Supreme Court to approve a binding settlement by a female minor, of at least seventeen years of age, in contemplation of marriage, which existed under sections 11 to 13 of the Infants Act, should no longer be specifically retained: id., p. 45. The authors of the Report considered that such a limited power was an anomaly and that cases falling under it should be dealt with appropriately under the legislation that the Report proposed.

²⁰⁴ Law Reform Commission of British Columbia, Report on Minors's Contracts (LRC 26, 1976). The Report followed a Working Paper on the same subject, published in 1975.

²⁰⁵ The major difference between the two provinces is that in British Columbia there is a counterpart to the Infants Relief Act 1874 but in Alberta there is no similar legislation.

recommendations [in the Report on Infants Contracts published by the Alberta Institute of Law Research and Reform], and have made large-scale use of the Alberta drafting."²⁰⁶

The main recommendations of the British Columbia Report may be summarised as follows:

- (1) That, except where the law might specifically provide otherwise, a contract made by a minor
 - (a) should not be enforceable against him;
 - (b) should be enforceable against other parties as if the minor had attained the age of majority.²⁰⁷
- (2) That, if a contract was unenforceable against a minor because of his minority, an action for relief ought to be able to be brought
 - (a) by the minor; and
 - (b) after the minor had repudiated the contract, by an adult party.²⁰⁸
- (3) That, in any action brought as a result of enactment of the proceeding recommendations, the Court should be able
 - (a) to grant to any party such relief by way of compensation or restitution of property or both as is just; and
 - (b) on doing so ought to be able to discharge the parties from further obligation under the contract,

provided that no grant of relief should enable the party contracting with a minor to recover more than necessary to restore him to his position before entering the contract.²⁰⁹

²⁰⁸ Id.

²⁰⁹ Id.

- (4) That, in making any such order, the Court should have regard to:
 - (a) the circumstances surrounding the making of the contract;
 - (b) the subject-matter and nature of the contract;
 - (c) in the case of a contract relating to property, the nature and value of the property;
 - (d) the age and means (if any) of the minor; and
 - (e) all other relevant circumstances.²¹⁰
- (5) That no special rules should be devised for minors who are or have been married.²¹¹
- (6) That the Report's recommendations should apply to executed as well as executory contracts.²¹²
- (7) That a contract might be affirmed by a minor who had attained the age of majority, and that thereafter it might be enforced against him.²¹³
- (8) That an adult party should be able, by notice in writing, to require a minor who had attained the age of majority to affirm or repudiate a contract within sixty days from receipt of the notice and that, unless the minor repudiated the contract within that time, it should be enforced against him.²¹⁴
- (9) That where such a notice was not issued by an adult party the contract, unless repudiated by the

²¹⁰ Id.

²¹¹ Id., at 33.

²¹² Id., at 34.

²¹³ Id., at 35.

²¹⁴ Id.

infant within one year after the date upon which he attained majority, should thereafter be enforceable against him.²¹⁵

- (10) That for the purposes of the recommendations, repudiation of a contract ought to be able to be affected by
 - (a) a refusal to perform the same or a material term thereof; or
 - (b) the making of a claim for relief under Recommendation 3; or
 - (c) the giving of, or the making of reasonable efforts to give oral or written notice of repudiation to the adult party.²¹⁶
- (11) (1) That nothing in the recommendations should limit or affect the rule of law whereby a minor was not liable in tort where the tort was in substance a cause of action in contract, provided that, if a minor induced another person to enter a contract by means of fraudulent representations as to the minor's age or any other matter, the court might take any such representation into account in deciding whether to exercise any of its powers under an enactment of Recommendation 3.
 - (2) That a minor should not be held to have induced another person to enter a contract by means of a fraudulent representation as to the minor's age unless the person to whom the representation was made had reasonable grounds for believing that it was true.
 - (3) That a minor should not be held to have induced another person to enter a contract by means of a fraudulent representation as to the minor's age by reason only of the fact that the minor signed or otherwise adopted a document relevant to the transaction that:

²¹⁵ Id.

²¹⁶ Id., at 37-38.

- (a) contained a statement that the minor was 19 years of age or otherwise had contractual capacity; and
 - (b) was prepared and tendered by or on behalf of the plaintiff; and
 - (c) was preprinted and used by the plaintiff in like transactions.
- (12) (1) That the Court on an application by a minor or his parent or guardian might by order grant to the minor capacity to enter into all contracts or any description of contracts.
- (2) That the Court should not make such an order unless satisfied that it was for the benefit of the minor and that, having regard to the circumstances of the minor, he was not in need of the protection offered by law to minors in matters relating to contract.
- (3) That a contract made by a minor under any subsisting grant of capacity should be enforceable against him.
- (13) (1) That a minor, his parent or guardian, or any adult party to the contract might apply to the Public Trustee for a grant of capacity to the minor to enter a particular contract.
- (2) That the Public Trustee should have complete discretion in determining the best interests of a minor under this proposal, but, without restricting the generality of the foregoing, that he might take into account
- (a) the nature, subject-matter, and terms of the contract;
 - (b) the requirements of the minor, having regard to his particular circumstances;
 - (c) the financial resources available to the minor; and
 - (d) the wishes, where they can reasonably be ascertained, of any parent or guardian of the minor.
- (3) That where the Public Trustee refused to

grant to the minor the capacity to enter into a contract, there should be a right of appeal to the Court.

(4) That a contract entered into by a minor should be enforceable against him if a grant of capacity was made to him under the recommendation.

(5) That no liability of any kind should attach to the Public Trustee as the result of an exercise of his discretion under the recommendation.²¹⁷

(14) That a disposition of property or a grant of a security or other interest therein made under a contract which was unenforceable against a minor should be effective to transfer the property or interest, unless and until the court makes an order under Recommendation 3.²¹⁸

(15) That a disposition of property or a grant of a security or other interest therein to a bona fide transferee or grantee for value should not be invalid for the reason only that the transferor or grantor acquired the property under a contract which was unenforceable against a minor.²¹⁹

(16) (1) That a guarantor of an obligation to a minor should be bound by his guarantee to the same extent that he would be bound if the minor were an adult.²²⁰

(2) That the term "guarantor" should include a person who entered into a guarantee or indemnity or otherwise undertook to be responsible for the failure of a minor to carry out a contractual obligation, whether that obligation was enforceable against the minor or not.²²¹

²¹⁷ Id., at 42.

²¹⁸ Id., at 43.

²¹⁹ Id.

²²⁰ Id.

²²¹ Id., at 44.

- (17) That, where statutory provision had already been made for allowing minors, at particular ages and in particular circumstances, to make binding contracts, those provisions should remain in force (with the exception of section 4 of the Infants Act, R.S.B.C. 1960, c. 193 (concerned with employment contracts by orphans)).²²²
- (18) That Section 9 of the Sale of Goods Act²²³ should be amended to exclude the reference to the liability of minors to pay a reasonable price for necessities which have been sold and delivered.²²⁴
- (19) To the extent that it was necessary to give effect to the purpose of a grant of contractual capacity, according to its tenor, under the Report's recommendations, all other statutory provisions relating to the contracts or property of minors should be regarded as inapplicable.²²⁵
- (20) That nothing in the recommendations should be construed as
 - (a) disentitling a minor to any defence available to an adult; or
 - (b) imposing upon a minor a greater liability than that of an adult by reason only of his minority.²²⁶

There has not yet been any legislation in British Columbia in response to the Commission's recommendations.

²²² Id.

²²³ R.S.B.C. 1960, c. 34, expressed in terms similar to section 2 of the Sale of Goods Act 1893.

²²⁴ Supra, fn. 204, at 46.

²²⁵ Id.

²²⁶ Id.

CHAPTER 4: PROPOSALS FOR REFORM OF THE LAW RELATING TO MINORS' CONTRACTS

Options for Reform

The present law relating to minors' contracts, as we have seen, is in a number of respects confused and contradictory, yet experience suggests that, with all its difficulties, it works reasonably satisfactorily. A case for reform has not been made by sections of the general public - adults or minors - who claim that they have suffered from the operation of the present law; nor has there been any significant resort to the courts in recent years by parties seeking to have aspects of the law clarified or developed. The essential argument in favour of reform is based on the inherent lack of order, conceptual clarity or consistency of policy in the present law.

The range of possible general approaches that we might recommend may most easily be considered under the following headings:

1. Leaving the Present Law Unchanged;
2. Unqualified Contractual Enforceability;
3. Unqualified Contractual Unenforceability;
4. Unqualified Unenforceability of Contracts Against, but not By, a Minor;
5. A Qualified Enforceability Approach;
6. Reduction of the Age of Contractual Equality;
7. A Restitutionary Approach.

Option 1: Leaving the Present Law Unchanged

It can be argued that the best course would be to leave the present law unchanged. With all its theoretical weaknesses and inconsistencies the present law appears to give rise to no substantial difficulties in its practical operation.

Commercial practices have been built up over the years, resulting in a practical compromise between the various interests of minors and adults. A change in the law would inevitably result in at least a period of uncertainty as to the scope and application of the new rules; there can be no guarantee that, in their practical operation, new rules, whatever they might be, would work out as satisfactorily as the present law, with all its conceptual imperfections.¹

It can also be argued that to concentrate on the imperfections and uncertainties of specific aspects of the present law would involve an out-of-focus perspective of present law. The present law seeks, albeit somewhat imperfectly,² to establish a balance between the competing policies of protecting minors against exploitation as well as ensuring that the legitimate interests of adults are not prejudiced. That it succeeds in its central aims is evidenced by the complete absence of public discussion of the subject, let alone public pressure for reform.

Finally, it may be argued that, in view of the recent reduction in the age of majority, brought about by the Age of Majority Act 1985, the practical size of the problem has been very significantly reduced.

We appreciate the force of the argument in favour of leaving the present law unchanged, which, we admit, serves as a necessary test against which any proposals for reform must be judged. Only if the proposed changes are likely to result in improvements in practice, as well as in theory, should they be contemplated seriously. But we consider that we should examine all the options for reform in detail rather than decide, at the threshold, that the task is not worth the effort.³

¹ Cf. the English Law Commission's Working Paper No. 81, Minors' Contracts, para. 5.8 (1982). See also its Report, Law of Contract: Minors' Contracts, paras 3.2-3.4, 5.3 (Law Com No. 134, 1984).

² Cf. Evans, The Need for Reform in the Law of Infants Contracts - Some Comments on the Latey Report, Auckland U. L. Rev. 65, at 72 (1969).

"The present law both molycoddles and hampers infants."

³ Cf. the English Law Commission's Working Paper No. 81, Minors' Contracts, para. 5.8 (1982).

We consider that it would be unwise to conclude from the relative paucity of litigation on minors' contracts that the law is therefore satisfactory.⁴ As Michael Kindred has observed:

"The infrequency of court decisions can be otherwise explained: an unjust but clear law may give rise to no litigation, since without a legal basis for argument few people go to court; those prejudiced by an unjust law may be of a social or economic class that cannot or does not litigate; the amount ordinarily involved may be so small that the costs of litigation outweigh the possible gain from success. Several of these factors probably combine to keep litigation concerning minors' capacity to a minimum."⁵

Option 2: Unqualified Contractual Enforceability

The second option would be for the proposed legislation to dispense with any specific principles relating to contracts made by minors. The English Law Commission gave short shrift to this argument:

"[T]his approach has only to be stated in order to be rejected immediately. To make a child of twelve fully liable for damages for breach of contract seems to us to do such violence to the first and primary policy consideration [that the law should protect minors against their inexperience and immaturity] as to enable us to dismiss this approach without further discussion."⁶

We think that this is too swift a dismissal. In favour of

⁴ As does Denton (in respect of Tennessee law): Infants' Contracts: Rights and Remedies, 28 Tenn. L. Rev. 395, at 411 (1961). See also the Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 1.2 (1978); and contrast *id.*, para. 1.5

⁵ Kindred, Basic Problems of Minors' Contractual Capacity, Festschrift Rheinstein, vol. 2, p. 523, at p. 526.

⁶ Para. 3.11 of Working Paper No. 81.

this approach it can be argued that such a change would be likely to be far less radical in its practical effects than might at first appear.⁷ The courts would be required to apply the wide range of general principles of contract law that protect the weak and mentally incapacitated against the strong and the oppressive. For example, the principles relating to duress, undue influence, estoppel, mistake (including non est factum), and misrepresentation could all afford relief to minors in certain circumstances.

We are confident that, if legislation were enacted repealing the present specific statutory protections for minors, the courts would strive successfully to fashion and extend principles that would be fair to both minors and adults. But we see two major objections to this approach, which make us reject it as a possible solution.

First, it may be argued that, if the courts can fashion sound and sensible rules in relation to minors' contracts, then presumably the legislature is also competent to do this task. If the legislature were to do no more than abolish the existing specific rules relating to minors' contracts, leaving it to the courts to develop new rules, the legislature could be criticised for having failed to resolve a matter well within its competence. Of course there are areas of the law that may best be developed through the judicial process with little or no legislative intervention and control; but we do not think that minors' contracts constitute such an area.

The second major objection is that it could take a considerable time before the courts would develop a coherent set of principles in relation to minors' contracts.⁸ Until

⁷ Cf. Payne, The Contractual Liability of Infants, 5 Western L. Rev. 136, at 136 (1966). See also Norwood National Bank v Allston, 152 S.C. 119, 149 S.E. 593, 65 A.L.R. 133 (1929).

⁸ This has certainly been the experience under the Infants' Relief Act 1874, where, well over a century after the enactment, several questions of interpretation of the statute's provision remain as yet unanswered - and in some cases unaddressed - by the courts in either Britain or Ireland. Whether the same slow development would take place under legislation that had removed explicit rules relating to minors' contracts is, however, impossible to predict.

then, the law would be uncertain and the legal position of minors in some respects more vulnerable than today. In the absence of the present specific (primarily statutory) exemptions of minors from liability, it could (and presumably, by some adults, would) be argued that a minor was no longer exempt from liability. If the issue were eventually litigated, the Court might well hold that the minor was exempt from liability but the individual circumstances of many minors could encourage them to settle the case to their detriment rather than risk speculative litigation.⁹

We should also discuss briefly a separate argument in favour of abolishing all existing specific protections for the minor against contractual liability. This argument reflects a radically different approach from the argument that the courts may be relied on to protect the minor, which we have just considered. This argument is based on a principle of equality between contracts and torts: it contends that, if the law makes minors capable of being held liable for their torts,¹⁰ it is not inherently unreasonable that minors should also be liable for their contracts.¹¹ The English Law Commission disposed of this argument as follows:

"A tort is a unilateral act, of which the consequences are an injury to an innocent victim, wholly or partly unavoidable by him. A contract on the other hand is a two-sided relationship. An adult is not bound to contract with a minor, and the law protects minors in part by discouraging adults from doing so. Adults are deemed to know that they deal with minors at their peril. The younger the minor is, the greater his need for protection on account of his greater immaturity, and in our view there is no acceptable basis on which to make a young minor fully liable for breach of contract."¹²

⁹ Cf. Kindred, supra, fn. 5.

¹⁰ Cf. McMahon & Binchy, 65-72.

¹¹ Cf. H.R.W., Note: The Status of Infancy as a Defense to Contracts, 34 Virg. L. Rev. 829, at 831 (1948).

¹² English Working Paper No. 81, Minors' Contracts, para. 3.11 (1982).

We are somewhat less than confident that this analysis fully disposes of the issue: there is, after all, a wide variety of circumstances in which a tort may be committed in the context of "a two-sided relationship";¹³ moreover, if protection on account of immaturity is a sound policy in relation to minors' contracts, it could be argued that the same policy should also apply in relation to minors' torts. Nevertheless, like the English Law Commission, we take the view that the law of contract raises somewhat different issues of policy from that of tort. Accordingly we do not consider that minors should be rendered fully liable for contracts, as this argument would propose.

Option 3: Unqualified Unenforceability of Contracts, Both By and Against a Minor

Under this option contracts made by a minor would be totally unenforceable by either the minor or the other party. This approach would unquestionably protect minors but it would do so at the expense of introducing what would appear to us to be manifestly inappropriate disincentives to adults to contract with minors in circumstances where this would be for the benefit of the minors in question.¹⁴ Moreover, it could result in cases of hardship and injustice for parties contracting with minors.¹⁵ We do not consider that this approach is satisfactory and will not discuss it further.

¹³ Cf. Holyoak, Tort and Contract after Junior Books, 99 L. Q. Rev. 519 (1983).

¹⁴ Cf. the English Law Commission's summary dismissal of this option in its Working Paper No. 81, Minors' Contracts, para. 3.9 (1982).

¹⁵ Of course it could be argued that a party who chose to enter into an unenforceable contract with a minor would have only himself to blame and that it is not therefore appropriate to speak of such a condition as involving self-induced "hardship and injustice". This would not be the case, however, where the minor induced the contract by fraudulently representing that he or she was of full age.

**Option 4: Unqualified Unenforceability of Contracts
Against, but not By, a Minor**

Under this option, minors would be entitled to enforce contracts they make but the other party or parties to these contracts would not be entitled to enforce them against the minors. Although this option is marginally more attractive than Option 3, it still suffers from the major objections¹⁶ affecting that option, namely, the important disincentives to making contracts with minors that are for the benefit of the minors concerned and the risk of hardship and injustice for parties contracting with minors in some cases. Accordingly we do not consider that this option would be a good basis for the proposed legislation.

Option 5: Qualified Enforceability of Contracts

An approach that has been favoured in some other jurisdictions may for convenience be described as that of qualified enforceability. This approach may take one of two forms. Under the first form, certain categories of contract are presumed to be enforceable, subject to certain exceptions; under the second form, certain categories of contract are presumed to be unenforceable, subject to certain exceptions.

An example of the first form is contained in the New South Wales legislation of 1970.¹⁷ Under this Act a contract is presumptively binding on a minor if it is for his benefit unless at the time he made it he lacked, by reason of youth, the necessary understanding of its consequences.¹⁸ A disposition of property to the minor is presumptively binding on him unless the consideration was manifestly excessive, and a disposition of property by the minor is presumptively binding on him unless the consideration was manifestly inadequate.¹⁹

¹⁶ Cf. the English Law Commission's Working Paper No. 81, Minors' Contracts, para. 3.10 (1982).

¹⁷ Minors' (Property and Contracts) Act 1970.

¹⁸ Id., sections 18, 19.

¹⁹ Id., section 20.

Where a minor participates in a civil act and a bona fide purchaser for value who is not party to the act acquires a property interest as a result of the act, the act is presumptively binding on the minor, provided the third party was without notice of the minority.²⁰

A minor, or a court, may repudiate a civil act that is not for the minor's benefit before he reaches the age of majority.²¹ The act of repudiation does not have effect against other parties where the civil act is presumptively binding on the minor.²² Where the civil act is not presumptively binding, a court, on application to it by any interested party, may either affirm or repudiate the civil act.²³ Where there has been a repudiation, the court is empowered to adjust rights between the parties, but where the civil act is presumptively binding in favour of any person, the court may not make any order adversely affecting his rights except with his consent.²⁴

This approach has not met with widespread support. The Alberta Institute of Law Research and Reform noted that the 1970 legislation:

"imposes liability upon the minor in cases in which the common law did not do so and its policy is therefore open to argument by those who think that his liability should not be increased. It may also be open to criticism on the grounds that it will be difficult for an adult party to determine whether or not a contract is for the benefit of the minor so as to be binding, a problem comparable to that of determining whether or not goods are necessities. The court will face the same problem."

²⁰ Id., section 24.

²¹ Id., section 32, 34.

²² Id., section 35.

²³ Id., section 36.

²⁴ Id., section 37.

²⁵ Alberta Institute of Law Research and Reform's Report on Minors' Contracts, p. 26-27 (1975).

The Law Reform Commission of British Columbia agreed with these comments. They added:

"The principal object of the [New South Wales] legislation, with its use of the concept of 'presumptive binding' would appear to be to encourage adult parties to deal with minors and to secure title to property. Yet although it is difficult for us to make completely informed judgments at this distance, it would seem that the legislation, although comprehensive, is sufficiently complex to create some uncertainty in the minds of adult parties concerning their positions regarding minors. To this extent we are disposed to speculate whether adult parties are in fact encouraged to deal with minors by the terms of the legislation."²⁶

Under the second form of the qualified enforceability approach, to which we have referred,²⁷ certain categories of contract are presumed to be unenforceable, subject to certain exceptions. The Alberta Institute of Law Research and Reform, by a majority, favoured this form of approach. Having recommended²⁸ that contracts in general should not be enforceable against a minor, the majority proposed the introduction of the following legislative provision:

- "(1) (i) An adult party may enforce a contract against a minor if he satisfies the court:
- (a) that at the time the contract was made the adult party believed it to be fair and reasonable in itself and in the circumstances of the minor; and
 - (b) that his belief was reasonable.

²⁶ Law Reform Commission of British Columbia's Report on Minors' Contracts, p. 39 (1976). For criticism along similar lines, see Beale, Book Review, 39 Modern L. Rev. 358, at 360 (1976) and the Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 3.5 (1978).

²⁷ Supra, p. 91.

²⁸ Alberta Institute of Law Research and Reform's Report on Minors' Contracts, pp. 28-29 (1975).

- (ii) In determining whether or not the adult party's belief was reasonable the court shall have regard only to the circumstances which were or should have been known to the adult party.
- (2) Notwithstanding subsection (1) a court may refuse to enforce a contract against a minor if the minor satisfies the court:
 - (i) that the contract was improvident in the interest of the minor; and
 - (ii) that the minor by restitution or compensation or a combination of both has put or will put the adult party in as good a position as if the contract had not been made."²⁹

The majority considered that this proposal was fair to both the adult and the minor. So far as the adult was concerned:

"It is true that he must take a decision as to whether the contract is fair and that he must consider the possibility that a court may disagree with him, but in most cases the difficulty will be more apparent than real. A contract for food, clothing or shelter at the going price would usually appear to be fair and reasonable in the interest of the minor and the circumstances would not usually suggest the need for inquiry. However, if the contract is for an expensive fur coat or automobile, the adult party would have a heavy burden of inquiry. Even if the adult party is mistaken as to the fairness of the contract he can expect the court to exercise its discretionary powers to do justice between himself and the minor. Nor will he suffer if the minor is allowed to escape from a contract which is apparently fair and reasonable but actually improvident if the minor must restore him to his original position or to an equivalent position."³⁰

The majority considered the proposal to be fair to minors because, in their view it was:

²⁹ Id., pp. 32-33.

³⁰ Id., p. 31.

"in the interests of minors that they be allowed to make fair and reasonable contracts. If the contract is fair and reasonable a minor should not be heard to complain about carrying it out. While there may be some cases in which a minor is bound by a contract which, because of circumstances unknown to the adult party, is not fair and reasonable in the interest of the minor, such cases should be rare. Their importance (particularly since the minor will not be bound unless the contract is fair and reasonable in itself) is outweighed by the importance to minors of enabling adult parties to deal with them in the much more common cases in which the appearance of fairness corresponds with the facts."³¹

The approach favoured by the majority was rejected by the minority of the Alberta Institute on the basis that paragraph (1) "would increase uncertainty and complexity without commensurate advantage",³² and that paragraph (2) "would add to the complication of the law while giving little relief to the minor."³³

The Law Reform Commission of British Columbia agreed with the minority of the Alberta Institute. They said:

"While we are entirely sympathetic to the aim of the Alberta majority, which is to encourage adults to contract with minors, we are in some doubt that the proposal will in fact do this. For the adult party to be secure, the contract must not only be fair and reasonable in itself, but must also be fair and reasonable in the circumstances of the individual minor. In making his assessment the adult must have regard not only to the facts known to him, but also to facts which should have been known to him. This places on the adult a burden of inquiry which it will be difficult for him to know that he has discharged. But even if the adult does discharge the burden to his and a court's satisfaction, the contract is still subject to upset by virtue of the second part of the proposal. It seems to us, therefore, that the net

³¹ Id., pp. 31-32.

³² Id., p. 33.

³³ Id.

result of the proposals will be to create around the law of minors' contracts an atmosphere of uneasiness that will lead adult parties to the general belief that it is better not to contract with minors at all, unless there is some more certain means of assessing the consequences."³⁴

We must now look briefly at the solution adopted by the New Zealand legislation, since it combines elements of the qualified enforceability approach with those of the restitutionary approach, which we will discuss in greater detail below.³⁵

Under New Zealand law a contract made by a minor of eighteen or over, or a contract of service³⁶ or for life insurance made by a minor of any age, will have effect as if the minor were of full age.³⁷ Where, however, the court is of the opinion that the consideration for the minor's promise to act is unconscionable or that a provision of the contract imposes an obligation on the minor which is, at the time, harsh or oppressive, it has a wide discretion to cancel the contract or declare it unenforceable in whole or in part.³⁸

Some aspects of these provisions have been criticised. It has been suggested, on the one hand, that the grounds on

³⁴ Law Reform Commission of British Columbia's Report on Minors' Contracts, p. 47 (1976).

³⁵ Infra, pp. 103ff.

³⁶ The scope of a "contract of service" as defined in the Act may be different from a contract of service that binds a minor at common law; most significantly, it would extend to contracts of service that are not beneficial for the minor: cf. the Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 1.82 (1978).

³⁷ Minors' Contracts Act 1969, section 5(1).

³⁸ Id., section 5(2). The precise scope of the Court's powers is not clear: see Burrows, The Minors' Contracts Act 1969 (New Zealand), 47 Aust. L. J. 657, at 659-660 (1973), the Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, paras. 1.81, 1.83 (1978).

which a court may upset a contract are too narrow.³⁹ For example, it is not clear whether a contract with a harsh or oppressive exemption clause would be included, since an exemption clause does not impose an obligation on the minor.⁴⁰

On the other hand it has been pointed out that the court's power to order compensation or restitution extends to making orders for the transfer of property and there would appear to be nothing to prevent the title of an innocent party being upset.⁴¹

We have already indicated⁴² that in New Zealand a contract made by a minor under eighteen, other than for life insurance or a contract of service, is unenforceable against a minor.⁴³ In all other respects the contract has full effect as if the minor were an adult.⁴⁴ Where, however, a court, on application to it, finds that the contract was

³⁹ Cf. Burrows, The Minors' Contracts Act 1969 (New Zealand), 49 Austr. L. J. 657, at 658 (1973).

⁴⁰ Cf. the Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 1.83 (1978).

⁴¹ Cf. the Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 1.86 (1978). It has been suggested by one commentator that:

"Presumably such a disruption of security of title would be resorted to only in an exceptional case."
Burrows, The Minors' Contracts Act 1969 (New Zealand), 47 Austr. L. J. 657, at 659 (1973).

The Law Reform Commission of Western Australia (W.P. No. 2, para. 1.86) note that it:

"Would also appear unlikely that an order would be made unless the third party could otherwise be compensated."

⁴² Supra, p. 58.

⁴³ Minors' Contracts Act 1969, section 6(1).

⁴⁴ Id.

fair and reasonable when it was entered into, it may enforce it or declare it to be binding in whole or part.⁴⁵ If the court finds that the contract was not fair and reasonable, it may cancel the contract, make an order entitling the minor on conditions to cancel the contract or, at its discretion, make no order.⁴⁶

In exercising its discretion the court may take into account the circumstances surrounding the making of the contract, the subject matter and nature of the contract, the nature and value of the property, the age and means of the minor, the question whether the contract was procured by a fraudulent misrepresentation by the minor, and all other relevant circumstances.⁴⁷

The court may also grant an order for compensation or restitution, and in contrast to cases where it is dealing with a contract that is prima facie binding, such orders do not depend on any order being made as to the enforcement of the contract.⁴⁸

The Law Reform Commission of Western Australia observes that:

"it is interesting to note that as a result of these provisions minors under eighteen years of age in New Zealand have greater protection than they had at common law. They are no longer bound by contracts even for necessities unless the court so orders. The common law right of the minor to bind the adult party to the contract, however, is retained. This must give rise to considerable uncertainty as to such contracts from an adult's point of view, although the court's wide

⁴⁵ Id., section 6(2).

⁴⁶ Id., section 6(2)(f).

⁴⁷ Id., section 6(3), 15(4).

⁴⁸ Id., section 7(1). See also the Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 1.90 (1978).

powers to grant relief will hopefully prevent him from being out of pocket"⁴⁹

Our Conclusions

We support the policy goal of the principle of qualified enforceability, which seeks to impose contractual responsibility on minors to the extent that it would be fair to do so, but no further. We share with some other law reform agencies and commentators, however, the apprehension that in its practical operation the principle of qualified enforceability involves such uncertainties as to render nugatory much of its theoretical attraction. We have considerable sympathy with the Law Reform Commission of British Columbia who came, reluctantly, to the conclusion, after analysis of earlier schemes of qualified enforceability in other jurisdictions, that:

"any attempt to compromise based on the adult's ability to prejudge the inherent fairness or benefit of contract, and the probability of a court's reinforcing that judgment, will have no more encouraging effect on the adult than if the law simply provided that contracts against minors are unenforceable against him."⁵⁰

In our view, a general principle of qualified enforceability would not improve the law to such a degree that we should recommend its introduction. A party contracting with a minor could have no certainty as to whether the contract would be fully enforceable, or whether restitution would be ordered. It is true, of course, that nothing is certain in this world and that even contracts between adults have a degree of uncertainty - they may be void, voidable or unenforceable on account of mistake, misrepresentation or illegality, for example - yet no one would suggest on this account that the general principle of enforceability of contracts should be set aside. In the case of minors'

⁴⁹ Law Reform Commission of Western Australia's Working Paper NO. 2, Project No. 25: Legal Capacity of Minors, para. 1.91 (1978).

⁵⁰ Law Reform Commission of British Columbia's Report on Minors' Contracts, p. 48 (1976).

contracts, however, a principle of qualified enforceability would involve a greater degree of uncertainty. It is reasonable to predict that, after a period of time in operation, with the establishment of a body of judicial precedents, the qualified enforceability principle would acquire some elements of predictability; but it would be unwise to place too much reliance on this development. We have seen how, more than a century since the enactment of the Infants Relief Act 1874, many questions concerning its central provisions have not yet been resolved by the courts.

Although we do not recommend the introduction of a general principle of qualified enforceability, this does not mean that we also reject the possibility that, as a qualification to a general principle of unenforceability, certain specific categories of contract may be enforceable in at least some circumstances. We will be examining this possibility below.⁵¹

Option 6: Reduction of the Age for Contractual Capacity

We must now consider the argument that the age for contractual capacity should be reduced. As we have noted already,⁵² the Age of Majority Act 1985, which came into operation on 1 March 1985 provides, in section 2(1) that the age of majority is reduced from twenty-one years to eighteen years or the age of marriage, whichever is the lower. Contractual capacity is reduced accordingly. We do not wish to reopen consideration of the question whether the age of majority, and of contractual capacity should have been reduced from twenty-one or whether a person should attain full age on marrying. It may be argued however, that the minimum age for contractual capacity should be reduced still further - to fourteen, fifteen, sixteen or seventeen years, perhaps, or to an unspecified age, contingent on the particular circumstances and degree of maturity of the particular minor. We must give this argument serious consideration. The English Law Commission, in its Working

⁵¹ Infra, pp. 115ff.

⁵² Supra, p. 2.

Paper on Minors' Contracts, published in 1982, proposed⁵³ that the age of full contractual capacity be reduced to sixteen. They made this proposal as an alternative to their proposals to reform the law within the existing age framework.

The English Law Commission argued in favour of the proposal as follows:

"It seems to us that minors of 16 and over do not necessarily need the same degree of protection as those below that age. Secondly, protection for the minor may be provided by the law in general and not necessarily by special rules relating to minors. Indeed, the very concept of a law of minors' contracts to some extent begs the question: special rules are needed only insofar as the required degree of protection is not provided by the general law. We think it arguable that the protection afforded to consumers by the general law is adequate to meet the needs of minors aged 16 and over. Finally, none of these issues can be judged in a vacuum. The needs of minors, and the level at which the law must supply them, depend on the social and economic circumstances under which minors must live. We think it arguable that looked at in this light the present law of minors' contracts protects older minors to a degree greater than they really require."⁵⁴

The English Law Commission favoured the age of sixteen as the time at which full contractual capacity should arise because "society, as a practical matter, already recognises

⁵³ English Law Commission's Working Paper No. 81, Minors' Contracts, Part XII (1982). The Commission noted (in para. 1.12) that its proposal to reduce the age of contractual capacity to sixteen raised "issues which go beyond detailed law reform" and were primarily social rather than legal. They therefore made no formal recommendation concerning the proposal but stated that they would welcome readers' views. The Scottish Law Commission, in its Consultative Memorandum No. 65, Legal Capacity and Responsibility of Minors and Pupils, para. 5.15 (1985) has provisionally proposed that a person should have full contractual capacity on reaching sixteen.

⁵⁴ Id., para. 12.2.

to some extent"⁵⁵ this age as the dividing line for several important matters: in England at sixteen, compulsory schooling ends; a minor may enter the labour market; the parental obligation to maintain the minor comes to an end; the minor becomes eligible to claim social security benefits; he or she may marry (with parental consent) and may legally consent to sexual relations; he or she may independently acquire a domicile of choice.

While there are other dividing lines both above and below the age of sixteen, the English Law Commission considered that distinctions based on the age of sixteen correspond to "an important social reality",⁵⁶ namely that at that age a minor

"is probably in practice making many of his own decisions and the decision he makes may to a considerable extent determine the future course of his life. He may need advice and assistance, and will no doubt continue to receive it after 16 as before, but at this age he, and not his parents or his teachers, or, if he is at work, his employers, or his adult acquaintances, will be deciding what he is to do and to become. At this age most minors do in fact leave school and begin to make their own way in the world. We think that it is arguable that among the decisions which a 16-year-old minor is fully capable of taking are on what he shall spend his money and what obligations he shall incur. These considerations give some support to the argument that young people of 16 should be given full contractual capacity."⁵⁷

In its Report⁵⁸ on the subject, published in June 1984, the English Law Commission abandoned their provisional proposal that the age of contractual capacity should be reduced to sixteen years. They did so in the light of the mixed reception it had been given by those whom they had consulted. They concluded:

⁵⁵ Id., para. 12.5.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

"It is plain that [this proposal would be controversial and would arouse considerable opposition. It is also plain that there is not sufficient support for it to justify its adoption in the face of the objections that have been, and would again be, raised. Although, therefore, we still see merit in the proposal and although we still doubt whether it would, in practice, have the harmful consequences that some fear, we do not propose to take it any further."⁵⁹

We have quoted in some detail from the English Law Commission's argument on this matter so as to indicate the full force of the proposal to reduce the age of contractual capacity to sixteen years. Having closely examined the proposal, however, we are not convinced by it. Of course there are some minors of sixteen - and, indeed, of fifteen or younger - who have a high degree of maturity and sophistication. But we do not consider that it can be said with complete confidence that minors of sixteen and seventeen, as a group, have sufficient maturity and experience to justify the removal of an important legal protection, especially when the removal of that protection would confer no substantial benefit in practice on either the minor or the party with whom he or she is contracting. We do not consider that the reduction of the age of contractual capacity to sixteen would lead to widespread injustice, since the general principles of contract law could be called in aid in many cases of inequitable conduct,⁶⁰ but we simply are not convinced that such a change would generally improve the law for either party to a contract in which a minor participates.

Option 7: The Restitutionary Approach

Under the restitutionary approach, a contract made by a minor would be enforceable by him against the adult party but would be unenforceable by the adult against the minor.

⁵⁹ Id.

⁶⁰ We have recognised this already, supra, pp. 87-88, when considering the more radical, but not dissimilar, proposal that there should be no specific minimum age for contractual capacity. See also the Scottish Law Commission's Consultative Memorandum No. 65, Legal Capacity and Responsibility of Minors and Pupils, paras. 5.13-5.14 (1985).

The adult in such a case would not necessarily be deprived of all rights of recovery against the minor: the adult would be entitled to apply to the court for compensation from the minor based on restitutionary rather than contractual principles. It will be recalled that in England the Latey Committee in 1967 proposed:

- "(a) that where [a minor] receives money, property or services under a contract which he fails to perform he should be liable to account to the other party for the benefits he has received; and
- "(b) that the court should be empowered to relieve the [minor] from this liability to account to such extent as it thinks fit."⁶¹

The Latey Committee also recommended⁶² that where a minor had transferred money or property to an adult he should be entitled to repudiate the contract and recover the money or property, but that, in such circumstances, the minor should be liable to account to the adult for any benefit he had received under the contract up to the time of repudiation.

On the same general lines, the Law Reform Commission of British Columbia recommended in 1976 that legislation be enacted along the following lines:

"....

3. If a contract is unenforceable against a minor because of his minority an action for relief ought to be able to be brought:
 - (a) by the minor; and
 - (b) after the minor has repudiated the contract by an adult party.
4. In any action brought as a result of any enactment of the preceding recommendation the Court ought to be able to:

⁶¹ Report on the Committee on the Age of Majority, para. 309 (Cmd. 3342, 1967).

⁶² Id., para. 310.

- (a) grant to any party such relief by way of compensation or restitution of property or both as is just; and
- (b) upon doing so ought to be able to discharge the parties from further obligation under the contract;

provided that no grant of relief should enable the party contracting with a minor to recover more than is necessary to restore him to the position in which he found himself before entering the contract.

- 5. In making any order under an enactment of the preceding recommendation, the Court ought to have regard to:
 - (a) the circumstances surrounding the making of the contract;
 - (b) the subject-matter and nature of the contract;
 - (c) in the case of a contract relating to the property, the nature and value of the property;
 - (d) the age and the means (if any) of the minor; and
 - (e) all other relevant circumstances.⁶³

The restitutionary approach has been perceived by some lawyers as having several advantages. First, it will provide some degree of encouragement for adults to provide goods or services for minors. Although the adult will lose the chance of a profit in a case where the minor repudiates the contract, he will have a reasonable prospect of being restored (in part or in full) to the position he would have been in had he not made the contract.⁶⁴ It may be argued that, for responsible adults contemplating a contract with a minor, the prospect of a fair system of restitution will be a sufficient incentive to them to enter the contract,

⁶³ Law Reform Commission of British Columbia, Report on Minors' Contracts, p. 51 (LRC 26-1976). See also McCamus, Restitution of Benefits Conferred under Minors' Contracts, U. of New Brunswick L. Rev. 90, at 116-117 (1970).

⁶⁴ Cf. the Law Reform Commission of British Columbia, Report on Minors' Contracts, p. 49 (LRC 26-1976).

provided, of course, the independent commercial incentives are sufficient.

As against this it can be argued that it would be too narrow to regard contracts between adults and minors as necessarily isolated events. Commercial realities dictate otherwise. In many cases the adult (or business company) will not be contemplating making a contract with a minor, but will instead have to make a decision as to whether to contract with minors as a class. Whereas an adult contemplating a single contract with a minor might well be satisfied with the prospect of a restitutionary principle being applied if the minor seeks to resile from the contract, a large-scale business concern might well be less enthusiastic where the risks are multiplied by the large number of possible contracts involved.

The second advantage to the restitutionary approach is that it goes a good way to ensuring that a minor may not, as he may under the present law, use the defence of minority as a means of wrongfully profiting at the expense of the adult.⁶⁵

The third advantage of the restitutionary approach is that to some degree it resolves the problem where (under present law) a minor who repudiates a contract may be unable to recover money he has paid or the value of services he has rendered.⁶⁶

Of course, support for the introduction of the restitutionary principle as a general rule does not exclude the possibility of exceptions being made in the proposed legislation for specific categories of contract, where different rules may apply. We will examine this possibility later in the Report.⁶⁷

The restitutionary approach has not attracted universal support. The English Law Commission in its Working Paper

⁶⁵ Cf. id.

⁶⁶ Cf. supra, p. 22.

⁶⁷ Infra, pp. 115ff.

No. 81, Minors' Contracts, published in 1982, criticised⁶⁸ the recommendations of the Latey Committee that had favoured the restitutionary approach.

One objection was that the Latey Committee had not put forward any detailed proposals or guidelines to be followed by the courts in determining the question of restitution. This of course is not, in itself, a fundamental objection to the restitutionary principle since it is possible for the legislation to include specific guidelines for the court - indeed the English Law Commission itself envisages and spells out possible detailed guidelines.

Another objection to the restitutionary principle is its uncertainty of application. The English Law Commission, in its examination of the Latey Committee's proposals, expressed this objection in the following terms:

"The need for a relative degree of certainty in the law is, in our view, of very great importance. The law serves not only to solve disputes when they arise but also regulate conduct so as to avoid them. In order to avoid disputes the law must be reasonably certain in its application. If contracts are unenforceable against minors, that is, in most cases, the end of it. While such a rule may in some cases lead to unjust enrichment it also avoids much fruitless litigation. Those who know the law can take precautions against its abuse by unscrupulous minors. Potential abuse of the law or its procedures is not limited to minors; many adults avoid paying their just debts by refusing to pay and leaving the creditors to the expense of trying to trace them and of getting and enforcing a judgment. The best protection, as is widely known, is not to give credit to the untrustworthy.

Under the Latey Committee's proposals of a general duty to account, coupled with a relieving power in the court, the outcome of any case would be uncertain and this uncertainty would exist on several levels: on the valuation of the benefit conferred; on the question of whether the minor should be relieved of his liability to account; and, if so, on the extent to which such relief should go. These uncertainties would make out of court settlement less likely. The scheme might well cause some increase in litigation: and, in a

⁶⁸ W.P. No. 81, paras. 4.6-4.15.

large number of cases, there would be a need for legal aid on one or both sides."⁶⁹

We appreciate the force of this argument but we consider that it overstates the problem. Obviously a rule of absolute enforceability "avoids much fruitless litigation" but if the rule is not itself an entirely fair one⁷⁰ it seems to us that this factor should not be given much weight. So far as the likely volume of litigation is concerned, we do not consider that the existence of a judicial discretion would necessarily increase the incidence of litigation. It is of course, quite possible that, under the restitutionary principle, litigation would be threatened or commenced; we do not see this as necessarily a bad thing, and we do not consider that what the English Law Commission stigmatises as the "uncertainties" of the restitutionary principle would make an out-of-court settlement significantly less likely than in the normal run of litigation.

Whether the restitutionary approach would leave the law in a more or less "uncertain" condition is a matter of prediction on which there may be differing views⁷¹ but we do not consider that a discretionary principle is to be dismissed on account of its very flexibility.

On balance we consider that the restitutionary principle affords the most satisfactory general approach for the proposed legislation to take. We consider that it best resolves the divergent policies of protecting minors against unscrupulous adults and the risks that their youthfulness and lack of experience involve, on the one hand, and of

⁶⁹ Id., paras. 4.12 - 4.13.

⁷⁰ As the English Law Commission (para. 4.12) appeared willing to concede.

⁷¹ It is worthy of note that one commentator has commended the Latey Report as follows:

"The principal virtue of the recommendations is their simplicity and the relative certainty which they would provide in the law": Evans, The Need for Reform in the Law of Infants' Contracts - Some Comments on the Latey Report, Auckland U.L. Rev. 65, at 75 (1970) (emphasis added).

protecting the interests of adults who contract with minors in good faith, on the other.

On the basis that the legislation should introduce the restitutionary principle we must now consider the criteria to which the Court should have regard in making its decision. Of course, ultimately the Court will have to determine what weight it is to give, respectively, to each of these criteria but we believe it desirable for the legislation to give such guidance as it can in assisting the Court in its task.

We have examined in detail the criteria proposed by the Law Reform Commission of Alberta on this question, and we have taken into account the analyses of other law reform agencies and committees, in particular the English Law Commission in its Working Paper No. 81. We take the view that the legislation should be drafted so as to enable the Court, in proceedings for restitution,⁷² to grant to any party such relief by way of compensation or restitution of property or both as is proper, and, upon doing so, to discharge the parties from further obligations specified by the contract if it considers it proper to do so. In making any order under these powers the Court should have regard to:

- (a) the subject-matter and nature of the contract;
- (b) where the contract relates (in part or entirely) to property, the nature and value of the property;
- (c) the age, mental capacity and general experience of the minor at the time of making the contract, and at the time of the hearing, respectively;
- (d) the specific experience and knowledge of the minor relative to the particular circumstances of the contract;
- (e) the respective economic circumstances of the parties at the time of the making of the contract and at the time of the hearing, respectively;
- (f) the circumstances surrounding the making of the contract, and in particular the reasonableness and

⁷² As to the circumstances in which proceedings for restitution may be taken and to the limitations in respect thereof, see *infra*, p. 113.

fairness, or otherwise, of the conduct of each party relative thereto;

- (g) the extent and value of any actual benefit obtained by each party as a result of making the contract;
- (h) the amount, if any, of any benefit still retained by each party at the time of the hearing;
- (i) the expenses or losses sustained and likely to be sustained by each party in the making and discharge of the contract;
- (j) all other circumstances that appear to the Court to be relevant.⁷³

We consider that the best approach is for the legislation to spell out these factors but not to attempt to give any one of them greater weight than the others. This balancing process can only be done by the Court having regard to the individual circumstances of each case; as judicial experience every day confirms, a factor that is of great importance in one case may be of relatively small importance in the next, in the light of the other factors in each case.

Executed Contracts

Under present law it appears that⁷⁴ where a contract with a minor has been performed on both sides, the minor is not permitted subsequently to resile from it, whether, before it was performed it was void, voidable or unenforceable. This rule applies however disadvantageous to the minor the contract may have been.⁷⁵

The legislature and law reform agencies that have examined

⁷³ We will be recommending the inclusion of other specific factors later in the Report.

⁷⁴ Cf. the English Law Commission's Working Paper No. 81, Minors' Contracts, para. 8.1 (1982).

⁷⁵ Cf. id.

this rule are divided⁷⁶ as to what the correct policy should be. The case in favour of making no distinction between executed and executory contracts was well stated by the Law Reform Commission of British Columbia in 1976:

"We agree that there is a superficial attraction in the notion that once a contract is over and done with, even if it involves a minor, it should remain undisturbed in the interest of bringing certainty and finality into affairs. Yet reflection reveals that an unwise or unfair transaction does not lose its character simply because it is concluded. When a young person agrees to pay too high a price for a car or a piece of land, and then makes payment and takes possession of the car or the land, there is nothing about the conclusion of the transaction which would justify logically a withdrawal of protection which the law would give if payment had not been made or possession had not been taken."⁷⁷

As against this argument, the English Law Commission in their Working Paper in 1982, forcibly present the opposite view:

"It is arguable that, if a contract could have been repudiated by a minor at any time before it was performed, it ought logically to be open to review at any time afterwards. But it is one thing to frustrate people's expectations; it is another to disturb the basis of concluded transactions. We think it does not follow that just because a particular transaction is not legally enforceable before it is performed it may therefore be undone after performance. If executed transactions are to be reopened it must accordingly be

⁷⁶ The legislation in New South Wales and New Zealand makes no distinction between executed and executory contracts. The Alberta Institute of Law Research and Reform and the Law Reform Commission of British Columbia have made a recommendation to similar effect. The English Law Commission has proposed that executed contracts should not be disturbed save in limited specified circumstances.

⁷⁷ Law Reform Commission of British Columbia's Report on Minors' Contracts, p. 54 (LRC 26-1976). See also Kindred, Basic Problems of Minors' Contractual Capacity: Reform in England, France, Ethiopia and the United States of America, Festschrift Rheinstein, p. 523, at p. 541, and the Alberta Institute of Law Research and Reform's Report No. 4, Minors' Contracts, p. 34 (1975).

on some basis other than their mere unenforceability in their executory state."⁷⁸

The English Law Commission were willing to concede a power to re-open executed contracts in only limited and specified circumstances:

"We think, first, that the court must be satisfied that the adult party induced the minor to make the contract. Secondly, the inducement, while not fraudulent, must have consisted in some way in the adult's taking advantage of the minor's immaturity, his lack of years, experience and knowledge of the world, though it should not matter that the inducement might equally have persuaded an undiscerning adult. Finally, the bargain must have resulted in hardship to the minor. It should be for the minor to establish that all these conditions have been met. In making any order, the court should have power to adjust the rights of the parties, having regard to the minor's ability to restore the subject matter of the contract."⁷⁹

The Commission were haunted by the spectre of significant commercial disruption if the law were to permit the re-opening of concluded transactions on the basis of the minor's improvidence, in the absence of evidence that the adult had taken advantage of the minor:

"Any minor could, after repenting of a bargain, or growing bored with his acquisition, threaten the supplier with proceedings if the bargain were not rescinded or varied. No shopkeeper could be certain

⁷⁸ English Law Commission's Working Paper No. 81, Minors' Contracts, para. 8.5 (1982).

⁷⁹ Id., para. 8.14. The English Law Commission, in its Report published in June 1984, did not proceed with this proposal as it considered it to be a minor amendment effecting marginal improvement in the law. Since the Commission in its Report rejected the more comprehensive approach it had adopted in the Working Paper, this specific recommendation relating to the reopening of executed contracts (as well as several other recommendations made in the Working Paper) were effectively abandoned: cf. Law of Contract: Minors' Contracts, para. 5.2 (Law Com. No. 134, 1984).

that an apparently concluded transaction with a minor was in fact final, and there would be nothing he could effectively do to ensure that it was. We think that the law ought not to foster a state of uncertainty of this kind. Should it do so, one possible effect might be to make some shopkeepers unwilling to deal with minors at all, except perhaps for small transactions. We do not think that this would be in minors' own best interests."⁸⁰

We do not perceive the risks as quite so alarming. We consider that the restitutionary principle can work as sensitively with regard to concluded transactions as with regard to those that have not yet been concluded and accordingly we recommend that it should apply to both types of transaction. We would not see any benefit in including specific limitations to the right to re-open concluded contracts on the lines proposed by the English Law Commission. Nevertheless, to take account of the type of apprehensions indicated by the English Law Commission, we recommend that the legislation should include a provision that, in exercising its discretion when applying the restitutionary principle in cases where the contract has been concluded, the Court should have regard to the extent of the difficulties likely to result for the party who contracted with the minor from re-opening the contract. We feel that this general guideline will be sufficient to ensure that minors do not take or threaten actions based on specious assertions of improvidence.

Dispositions of Property

We must now consider the important question of dispositions of property. We would not wish to bring about a position in which conveyancing practices were unduly interfered with, or commercial life was unduly inhibited, as a result of our proposals regarding minors' contracts.

The general question has been considered by other law reform agencies. The Alberta Institute of Law Research and Reform, in its Report on Minors' Contracts in 1975 took the view that the legislation:

⁸⁰ Para. 8.10 of the English Law Commission's Working Paper No. 81.

"should place beyond dispute the effect of a disposition of property by a minor under a contract which is unenforceable against him. It would be unsatisfactory to leave title to property in limbo until the contract becomes binding or the court deals with the matters (sic). We believe that the best way to deal with the problem is to use the analogy of a voidable contract and to provide that title passes to the other party until the court or the parties decide otherwise. We believe also that third parties who in the meantime acquire property or an interest in it in good faith and for value should be protected."⁸¹

The Institute accordingly recommended that:

- "(1) A disposition of property or a grant of a security or other interest therein made under a contract which is unenforceable against a minor should be effective to transfer the property or interest unless and until the court makes an order [for compensation or restitution of property, or both].⁸²
- (2) A disposition of property or a grant of a security or other interest therein to a bona fide transferee is not invalid for the reason only that the transferor or grantor acquired the property under a contract which is unenforceable against a minor."⁸³

The Law Reform Commission of British Columbia⁸⁴ expressed "complete agreement with both the reasoning of, and recommendations advanced by", the Alberta Institute.

The Law Reform Commission of Western Australia addressed the question briefly. It considered that:

"To avoid confusion as to the ownership of property passing pursuant to a contract with a minor, and to

⁸¹ p. 40 of the Report.

⁸² Cf. Recommendation 3(2) of the Report (id., p. 29).

⁸³ Id., p. 41.

⁸⁴ In its Report on Minors' Contracts, p. 74 (LRC 26-1976).

provide that any disposition of property pursuant to a contract whether binding or non-binding on the minor should pass good title. In the case of a non-binding contract, however, this should be subject to any powers exercisable by a court to order restitution or compensation."⁸⁵

Our Recommendations

We have come to the conclusion that the best approach for the legislation would be to provide that property passes in an unenforceable contract. We do not consider it proper or sensible that a person who receives any property from another person should have to concern himself or herself as to whether the donor, grantor, vendor or lessor, as the case may be, derived the article from a minor. Nor do we consider that only bona fide purchasers for value should be entitled not to concern themselves as to this question: we recommend that property should pass in all such cases. However, we consider that so far as the parties to the contract - the minor and adult (or other minor, as the case may be) - are concerned, the Court should be free to make any order affecting title to the property (to the extent that either of them retains title) as it may consider proper, in its application of the restitutionary principle.

Should Certain Categories of Contract be Binding?

It will be recalled that, although we rejected the possibility of creating a general principle of qualified enforceability of contracts, we left for later discussion the question whether certain specific categories of contract should be binding.⁸⁶ Having recommended⁸⁷ the establishment of a general restitutionary principle, we must now consider whether, by way of exception to the restitutionary principle, certain specific categories of contract should be binding.

⁸⁵ In its Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 3.34 (1978).

⁸⁶ Supra, p. 100.

⁸⁷ Supra, pp. 109-110.

We will begin our analysis of this question by considering whether it would be desirable to retain a concept of necessities as a specific category of enforceable contracts. It seems clear to us that the real issue is not whether the present law as to necessities should be retained in its exact form: the important question is whether a reformed category of binding contracts for necessities should be included in the legislation as an exception to the restitutionary principle.

We have already documented⁸⁸ the deficiencies of the present law relating to necessities. These include the following:⁸⁹ the ambit of the category of necessities is imprecise; it is not clear whether a minor is liable under an executory contract for the supply of necessities; a minor will not be liable for necessities where he already has an adequate supply, even in cases where the supplier could not have been aware of this fact; it appears that the goods must be necessities both at the time of the making of the contract and at the time of delivery.

It would, of course, be possible to remove some, if not all, of these deficiencies by statutory provisions drafted in fairly narrow terms; but we must consider whether a more extensive change would be desirable.

The English Law Commission in its Working Paper⁹⁰ proposed the replacement of the concept of contracts for necessities by the concept of contracts for necessities, which would be enforceable against minors. "Necessities" would be "goods or services of a kind which, if bought by minors, would normally be bought by them in order to meet basic needs".⁹¹ The concept would not cover items of luxury or even luxurious items of utility, but only those things that are

⁸⁸ Supra, pp. 3ff.

⁸⁹ Cf. the English Law Commission's Working Paper No. 81, Minors' Contracts, paras. 2.28, 7.12.

⁹⁰ Supra, fn. 89, para. 7.17. In its subsequent Report, however, published in June 1984, the English Law Commission abandoned all its proposals for change in regard to the law relating to necessities: Law of Contract: Minors' Contracts, para. 5.6 (Law Com. No. 134, 1984).

⁹¹ Para. 7.17 of Working Paper No. 81.

"essential to the maintenance of basic living standards".⁹² Whether or not the minor had an actual need of the goods or services in question would not be relevant: it would be enough that the item was suitable to meet such a need if it should exist.

It appears that, in making its recommendations on this matter, the English Law Commission were unhappy with the principle of making a minor's contractual obligation vary according to his or her particular economic circumstances:

"Whereas the wealthy minor may, in justice be held liable to a supplier in respect of a greater number of more expensive goods than the poor minor, it may be seen as unacceptable to base legal liability, even in this comparatively small area of credit transactions by minors, upon the capacity to pay. It may seem that the notion of 'reasonable requirements' according to the 'condition in life' is an unsuitable basis for the rules relating to the contractual capacity in a minor."⁹³

We do not share this view. It appears that the principle of egalitarianism has been invoked in an inappropriate context, so as to result, at least arguably, in injustice to some adults who behave unimpededly in their contractual relationship with minors. The present law proceeds on the basis that, desirable or otherwise, it is a fact that there are inequalities in social, educational, physical and economic circumstances between different minors. What may be regarded as reasonably necessary for one minor to maintain him "in his status and condition"⁹⁴ may well not be so regarded in respect of another minor in less advantaged economic circumstances. The facts of some of the reported

⁹² Id.

⁹³ Id., para. 7.15. See, however, id., para. 7.5.

"The doctrine of necessities appears old fashioned because it discriminates between minors on the basis of social condition, but, in as much as it renders liable to pay for goods and services those minors who in general have the money to pay, therein lies its fairness, and also its flexibility."

⁹⁴ Id., para. 2.4.

decisions,⁹⁵ involving the extravagant life-styles of the Victorian and Edwardian upper classes, not unreasonably may inspire distaste in some modern readers but this should not lead to the conclusion that it is improper for the law to distinguish between minors, so far as concerns their contractual obligations, on the basis of their individual circumstances.

An example will perhaps make this clear. Two small computers, costing £500, are sold to two seventeen-year-old minors. The first minor is from a relatively disadvantaged social background but is an excellent student, studying computer science at the university. Arguably the computer is, for him, a necessary. The second minor is from a more advantaged social background but is virtually innumerate; he has bought the computer as no more than a plaything to amuse himself and impress his friends. Quite possibly, for him, the computer is not a necessary.⁹⁶

This example makes it plain that distinctions based on individual circumstances should not be regarded as deriving from a premise that the "legitimate" needs of rich people are more extensive than those of poor people.

We have spent some time on this point because we consider that it is as well to be clear on the normative basis of the English Law Commission's recommendation on an important aspect of the subject.

Of course, if the concept of contracts for necessities were to replace that of contracts for necessities, then, to the degree that the new concept ranged less extensively than the present concept, there would be a reduction in the rights of adults to enforce contracts against minors. In other words, the English Law Commission recommends the abrogation of the present legal rights of an adult who contracts to supply a minor with a necessary that is not a necessity; it makes this proposal, not because it regards an adult as in any way undeserving but because of entirely independent considerations relating to the principle of egalitarianism.

⁹⁵ E.g. Ryder v Wombwell, L.R. 4 Ex. 32 (1868).

⁹⁶ The reported cases involving beneficial contracts of service may also be considered in this context.

We will consider below⁹⁷ whether this proposal would be a desirable basis for change in our law. Before that we must refer to the alternative recommendation made by the English Law Commission in its Working Paper as a substitute for the proposal we have already described, in the event that that proposal did not find acceptance.

In this alternative recommendation⁹⁸ the English Law Commission proposed that the law relating to necessities be changed in three respects. We will look briefly at the merits of these proposals, in their own right, before considering the larger question whether the concept of necessities, in amended form, should be included in our law. Irrespective of our resolution of the larger question, consideration of the English Law Commission's proposals on necessities is helpful in clarifying the issues involved.

The first change recommended by the English Law Commission is uncontroversial. It would abolish the requirement that goods must be necessities both at the time of the making of the contract and at the time of delivery. In their view, "the sensible time"⁹⁹ for considering whether or not goods are necessities is the time of the making of the contract; whatever happens afterwards, to which the supplier is not a party, should not affect the issue.

We are of the same opinion. We can see no justification for penalising the supplier because of the subsequent conduct or good or bad fortune of the minor with whom supplier has dealt.

The second change proposed by the English Law Commission in its Working Paper is more controversial. The Commission were rightly concerned with the difficulty facing a supplier in enquiring into the state of the minor's existing supply of the goods or services in question:

"Obviously he must rely entirely on what the minor tells him, though under the present law the minor will not be bound to the contract if he provides false information.

⁹⁷ Infra, pp. 121ff.

⁹⁸ Also subsequently abandoned in its Report.

⁹⁹ English Law Commission, Working Paper No. 81, Minors' Contracts, para. 7.9.

But even if the information provided is correct, the supplier may find it does not greatly help him. Necessaries are not confined to goods and services of which the minor has an immediate and essential need and a thing may be a necessary although the minor possesses others of its kind. The minor's actual requirements must inevitably be his reasonable requirements."¹⁰⁰

The English Law Commission gave hypothetical practical examples of borderline cases where it might be difficult for the shopkeeper "to have to pick his way among the nice distinctions that may arise"¹⁰¹ They went on to propose that the existing state of the minors' supply of the goods or services in issue should be disregarded in determining his actual requirements at the time of the contract.

While we fully appreciate the difficulties facing a supplier on this question we do not consider that the law should provide an express exemption in all cases from an obligation on the part of the supplier to act reasonably in respect of the existing state of the minor's supply. It is easy to envisage situations in which a supplier would be well aware of the fact that the minor already had a more than ample supply of the goods in question: the minor may have developed a particular interest in the product in question and, to the supplier's knowledge, have accumulated a large store of the product.¹⁰² It seems to us that it would not be a sound rule for the law to require that such knowledge be ignored. We do not consider that the present law is fair or sensible in assuming a knowledge on the part of the supplier that does not exist; equally we do not consider it

¹⁰⁰ Id., para. 7.11.

¹⁰¹ Id.

¹⁰² The English Law Commission (para. 7.12) gave as an example a minor who seeks to buy a 250cc motorcycle and who tells the salesman that he already possesses a moped. Such a case is borderline. But there will also be clearer cases, as, for example, where the salesman is aware that the minor purchaser of a motorcycle is interested in racing and already owns several other motorcycles. It seems to us quite artificial for the law to take no account of this knowledge in determining whether the latest purchase is for a necessary, where the minor already owns three or four motorcycles - manifestly it is not.

would be fair or sensible for the law to ignore such knowledge when it does exist. We consider that the question should best be resolved in terms of a criterion of reasonableness of belief rather than imposing, or exempting, responsibility for actual knowledge in cases such as this.¹⁰³

The third major change in relation to necessities recommended in its Working Paper¹⁰⁴ by the English Law Commission was that the supplier should be able to rely on the answers given by the minor to his enquiries, provided these answers appear reasonable in the circumstances. This recommendation seems to us sensible and uncontroversial.

We must now consider what general approach the legislation should take to the problem. We could, of course, propose that the present law on necessities, with all its imperfections, should be continued, on the basis that, whatever theoretical criticisms may be made against it, it has worked out quite satisfactorily in practice. Another approach would be to replace the concept of "necessaries" by that of "necessities". As we have seen, the English Law Commission looked with favour on this approach in its

¹⁰³ The English Law Commission mentioned two other objections to what they proposed. First, they noted that the effect of their recommendation might be that in some cases a minor would be bound to pay for something of which he had no particular need. They state (para. 7.12) that they were "not much troubled by this", because in practice such cases would be rare. Secondly they stated (id.) that their recommendation would be "somewhat artificial" in excluding from the calculation of the minor's actual requirements the state of his existing supply. They stated that they were "prepared to accept this artificiality in the interests of achieving a simple, workable concept which would, we think, in most cases provide a just result". Neither argument commends itself to us. As to the first, we do not consider that it is necessary for the law to be framed so that any cases "should cause hardship" to either party. As to the second, we do not consider that "a simple, workable concept" requires the creation of an artificial criterion. In both cases a criterion based on reasonableness should work fairly and sensibly in the interests of both parties.

¹⁰⁴ English Law Commission Working Paper No. 81, Minors' Contracts, para. 7.13.

Working Paper. We have already recorded¹⁰⁵ our doubts as to its utility. It is interesting to note that, in its Report published in June 1984 the English Law Commission abandoned the proposal. They noted that, in consultation with interested parties:

"our concept of 'necessities', as a replacement for 'necessaries' did not find favour. It was argued that the distinction between the two concepts was largely verbal and that the introduction of a new concept so similar to the existing one would serve only to cause confusion. Few commentators saw any advantage in making the change; most thought it would do more harm than good."¹⁰⁶

A third approach to the problem would be to retain the concept of necessities but amend it on the specific lines considered above. A fourth, more radical, solution would be to abolish the concept entirely.

It can be argued that, in practice, those who trade with minors do not generally do so on account of their reliance on the doctrine of necessities and that if such contracts ceased to be binding, little if any change in trading practice would result.

Having considered each of these possible approaches and analysed their implications so far as the restitutionary principle is concerned, we have come to the following conclusions.

On balance we consider that the restitutionary principle will be sufficiently flexible to ensure that justice will be done between the parties, and that existing trading practices will not be likely to be disturbed to any significant extent. We recommend, further, that the legislation should include specific provisions enabling the Court, in applying the restitutionary principle, to have regard to whether the goods or services which were the subject matter of the contract were suitable to the

¹⁰⁵ Supra, pp. 117-118.

¹⁰⁶ Law of Contract: Minors's Contracts, para. 5.5. (Law Com. No. 134, 1984).

condition in life of the minor and to his actual requirements at the time of the making of the contract, so far as the other party was, or could reasonably be, aware, having regard to the circumstances, including any information given by the minor on this question. We are satisfied that specific inclusion of provisions to this effect will ensure that adequate weight will be afforded to the adult party's interests in these circumstances.

Although we have rejected the proposal that the legislation include contracts for necessities as a special category of enforceable contracts, we must now consider whether certain types of contracts for necessities (and analogous contracts) should be enforceable. We have in mind contracts of employment and for personal services.

Let us begin by considering contracts of employment. Under present law, as we have seen,¹⁰⁷ a contract of employment will bind a minor if, taken as a whole, it is for his benefit. We see great merit in this approach and recommend that it be continued. As the English Law Commission noted in its Working Paper:

"To do otherwise would diverge from commercial reality and common sense, and run the risk of deterring adults from entering into such contracts. Moreover, contracts of employment often contain terms settled by collective bargaining and designed to regulate the relations between the employer and his work-force as a whole. It would be undesirable if these terms were not enforceable against some members of the work-force merely because they were minors."¹⁰⁸

In these difficult times when teenage employment is hard to come by, we would not want the law to create any unnecessary disincentive to the employment of minors. We are satisfied that the present law in this respect does not work unduly harshly on minors and we recommend that it continue to apply, subject to the modification and clarification that we will propose below.

¹⁰⁷ Supra, pp. 14ff.

¹⁰⁸ English Law Commission's Working Paper No. 81, Minors' Contracts, para. 7.28 (1982).

The modification that we recommend would apply where the Court found that a contract, taken as a whole, was not for the minor's benefit, because it contained a particular term or terms. In such circumstances, rather than being obliged to declare the contract unenforceable against the minor, we recommend that the Court should have power to strike out the term or terms in question, if severable from the rest of the contract.

The English Law Commission in their Working Paper in 1982 made a recommendation to this effect.¹⁰⁹ We agree with their qualification¹¹⁰ that, in exercising this power, the Court should not be entitled to re-draft the contract, and that the contract as enforced should be substantially the same as the original contract. We also agree with their proposal¹¹¹ that the Court should take into account the interests of the employer before deciding to enforce the contract without the unduly onerous term or terms.

A small matter which we think the legislature could with benefit clarify is the fact that minority may be relevant

¹⁰⁹ Id., para. 7.31. The English Law Commission abandoned this proposal in its Report published in June 1984 on the basis that, "in the absence of any need for [this measure], and of any evidence that such an enactment would resolve any practical difficulties, we do not think the case for legislation is made out": Law of Contract: Minors' Contracts, para. 5.2 (Law Com. No. 134, 1984). It should be noted that, in contrast to our reference to "a particular term or terms" of the contract which render it not for the minor's benefit, the English Law Commission in their Working Paper spoke variously of "a term sufficiently harsh to render the contract not to the minor's benefit" (id.), an "unfair term" (id.), "unduly onerous terms" (id.) and "any terms which is not for the minor's benefit" (para. 13.22). Rather than complicate matters by raising issues of "fairness", "harshness" and "due" or "undue" degrees of onerousness, we have preferred to adopt the most general and neutral description of the term or terms in the contract which render the contract, taken as a whole, not for the minor's benefit.

¹¹⁰ Id., para. 7.31.

¹¹¹ Id. The proposal was abandoned in the English Law Commission's Report: cf. fn. 106, supra.

in determining whether a covenant in restraint of trade is reasonable. Clearly, the question may arise in respect of a contract of employment of a minor.¹¹² It seems to us sensible that minority should be a factor to be taken into account in such circumstances. The English Law Commission in its Working Paper considered that "such is already the law",¹¹³ but that, for the avoidance of doubt, specific provision should be made to that effect. We agree.

We now turn to consider contracts for personal services, which, as we have seen,¹¹⁴ are governed by the same principles as contracts of employment. It appears to us that the same principles as we have already recommended with respect to contracts of employment should apply to contracts for personal services.¹¹⁵

We do not consider, however, that all contracts should be treated in the same manner. As the English Law Commission in its Working Paper observed, "a minor who is trading on his own account is generally carrying on a commercially more hazardous activity than are employees: in the latter case someone else is bearing the direct risk of the business."¹¹⁶ The English Law Commission reached the provisional conclusion¹¹⁷ that, as regards contracts by virtue of which

¹¹² Cf. supra, pp. 14ff.

¹¹³ English Law Commission, Working Paper No. 81, Minors' Contracts, para. 7.32 (1982). But in its Report, the English Law Commission abandoned this proposal: cf. fn. 106, supra.

¹¹⁴ Supra, pp. 14ff. The present law on this matter, as has been pointed out, is somewhat uncertain, since the Irish Courts on occasion appear to have gone well beyond the concept of contracts for personal services. Our recommendations relate only to contract for personal services in the narrow, rather than this broader, sense.

¹¹⁵ The English Law Commission in its Working Paper made a similar proposal: Working Paper No. 81, Minors' Contracts, para. 7.29 (1982). The proposal was abandoned in the Report: cf. fn. 106, supra.

¹¹⁶ Para. 7.30 of Working Paper No. 81.

¹¹⁷ Subsequently abandoned in its Report: cf. fn. 106, supra.

a minor might earn his living other than contracts of employment and contracts for the provision of personal services "the need to protect the minor outweighs the fact that minors may have a particular interest in such contracts and may derive particular benefit from them".¹¹⁸ We agree. We consider that minors' trading contracts should be governed by the restitutionary principle rather than treated in the same manner as employment contracts and contracts for personal services.

Loans to Minors

As we have seen¹¹⁹ the present law relating to loans to minors goes very far in protecting minors against claims by lenders, whether commercial or private. We must now consider what the future policy on this question should be.

It could be argued that the present law gives too much protection to the minor, especially in the light of the increased protection that contract law today offers parties to contracts generally, in contrast to the late nineteenth century when the specific protection in respect of loans to minors was fashioned by legislation.¹²⁰

It could also be argued that the best disincentive to commercial institutions lending money to minors is not the law but the sound commercial judgment that, on account of their comparatively low earning power and uncertain prospects, minors may not be a good credit risk.¹²¹

These arguments have some force but they do not, in our view, outweigh the policy that minors should, so far as the

¹¹⁸ Id.

¹¹⁹ Supra, pp. 25ff.

¹²⁰ Cf. the English Law Commissions's Working Paper No. 81, Minors' Contracts, para. 7.34 - 7.35 (1982).

¹²¹ Cf. id., paras. 1.8, 7.36.

law may reasonably bring this about, be discouraged and protected from entering into contracts that may be for their detriment. Contracts for the loan of money in a significant number of cases result in hardship to minors. We consider that the best approach is to continue the policy of making such contracts void. We do not consider that it would be desirable to apply the restitutionary principle in this context, since it might encourage less scrupulous adults to lend money to minors in the hope that at least some of these minors would be intimidated by the threat of legal proceedings, albeit only for an order of restitution based on judicial consideration of all the circumstances.

In recommending that contracts of loan to minors should be void we include the principle¹²² that no action may be brought on a promise made after full age to pay any debt contracted during infancy, and the principle¹²³ that a fresh promise after majority to pay a loan that is void in law, and any negotiable instrument given in respect of such a loan, are void and may not be enforced against the former minor.

We do not consider that the legislation should include any exception with regard to loans for necessities.¹²⁴ We do not believe that this refinement to the present law is of any practical importance. Even though, under other proposals, we have recommended the abolition of the concept of necessities, it would present no substantial difficulty for us to recommend the retention of the concept in the present context if we thought that it would serve any useful purpose.¹²⁵ But we do not think that it would do so. We consider, on balance, that a clearcut rule to the effect

¹²² Cf. the Infants Relief Act 1874, section 2.

¹²³ Cf. the Betting and Loans (Infants) Act 1892, section 5.

¹²⁴ Cf. supra, pp. 12-13.

¹²⁵ The English Law Commission recommended that contracts for the loan of money made to a minor for the purchase of necessities (or necessities, if the present concept were retained) should be binding on the minor whether or not the money was in fact used for that purpose: Working Paper No. 81, Minors' Contracts, para. 7.39 (1982). This proposal was not proceeded with in the English Law Commission's Report.

that all contracts of loan are to be void is more likely to protect the minor's interests than would a rule that would allow for debate as to its enforceability, after the event. The risk that a change in the law in this specific area will in practice result in actual damage to the interests of minors seems to us to be a small one, outweighed by the benefits for the minor the change will bring about.

Ratification and Repudiation

Under present law, as we have seen,¹²⁶ section 2 of the Infants Relief Act 1874 provides that no action may be brought to charge any person on any promise made after full age to pay any debt contracted during minority, or on ratification made after full age of any promise or contract made during minority, whether or not there is any new consideration for that promise or ratification after full age.

A new contract, however, made for good consideration after reaching full age is not a ratification of a contract made during minority even though it may do the same thing as intended by the earlier contract. We have seen¹²⁷ how difficult it is in present practice to draw this distinction. We have also seen¹²⁸ that certain types of contract involving obligations of a continuous nature - such as contracts for the purchase or lease of lands, partnership agreements and marriage settlements - are binding unless repudiated within a reasonable time after reaching majority.

We must now consider how best the law can be formulated with respect to ratification and repudiation in the light of our proposals earlier in this Report. We will first examine the changes made or proposed in other jurisdictions.

In New South Wales, a civil act (including a contract), whether originally binding or not, is binding on a minor

¹²⁶ Supra, p. 26.

¹²⁷ Supra, pp. 26-28.

¹²⁸ Supra, pp. 19ff.

unless he repudiates it within one year of reaching full age, or unless the Court repudiates it on behalf of the minor before the minor has reached full age.¹²⁹

The Law Reform Committee of South Australia, in its Report on the subject, recommended¹³⁰ that all contracts other than those for necessities or of service should require subsequent ratification in writing. The Committee believed that:

"if protection for infants is to be effective, ratification of the contract upon attainment of the age of majority must be prohibited (as it is in jurisdictions which have enacted the Infants Relief Act) or restricted. In neither case would there be any inhibition upon the making of a new contract to perform the same obligation as that entered into during infancy. Where ratification is impossible the new promise is likely to make binding only agreements where there are still executory promises on both sides and a fresh promise to pay for property already supplied by the adult may well fall foul of the doctrine of past consideration. But if ratification is possible, then the proposers of the Infants Relief Act feared that an offer of a further minor benefit by the adult might well induce a ratification of the whole contract by the infant upon attaining majority. The Committee has encountered no evidence that this possibility constitutes a pressing social problem in South Australia today, and adoption of the proposal [that all contracts other than for necessities or of service should require subsequent ratification in writing] may

¹²⁹ Minors (Property and Contracts) Act 1970, sections 31, 38. Cf. The Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 1.67 (1978):

"With typically youthful inaction the consequences of this provision is that a minor might inadvertently find himself bound in later life by a particularly harsh contract which he entered into only because of his immaturity.

¹³⁰ Forty-First Report on the Law Reform Committee of South Australia Relating to the Contractual Capacity of Infants, p. 7 (1977).

perhaps give further weight to the retention of the power to ratify the contract¹³¹

The Law Reform Commission of Western Australia favoured a different approach. They recommended that a minor on reaching full age should be bound by a contract which he or she then ratifies "in writing, words or otherwise and whether communicated to the enforcer or not".¹³² If he or she does not ratify it, the adult should be able to apply to the Court for an order requiring the former minor to make a decision either to ratify or to repudiate the contract.¹³³ The Commission considered that, in view of this proposed procedure, it might be unnecessary and undesirable to provide that any contract with a minor should be automatically binding if not repudiated before he attains the age of nineteen.¹³⁴

In Canada, Alberta's Institute of Law Research and Reform recommended that after a minor reached full age, he or she should be able to affirm a contract made during minority, even though that contract was unenforceable against him or her during minority.¹³⁵ The Institute also considered that:

"the danger that the minor may repudiate the contract should not threaten the adult party indefinitely. It is sufficient that the law gives him a reasonable time after majority to repudiate the contract, and if he does not do so the contract should become binding upon him. We think that a reasonable time is one year."¹³⁶

Subject to a dissent by two out of their eight members, the

¹³¹ Id., pp. 7-8.

¹³² Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 3.14 (1978).

¹³³ Id.

¹³⁴ Id. See also id., paras. 1.67, 1.71.

¹³⁵ The Alberta Institute of Law Research and Reform's Report on Minors' Contracts, p. 34 (1975).

¹³⁶ Id.

Institute also recommended that an adult party who wished to ascertain his or her position should be able to give a written notice to the minor after majority requiring the minor to affirm or repudiate the contract within thirty days of the receipt of the notice. If the minor did not repudiate, the contract should become enforceable against the minor. If the minor did repudiate, then the adult party would be entitled to ask the Court for whatever relief he or she was entitled to under the restitutionary principle.¹³⁷

The Law Reform Commission of British Columbia took a similar approach. They stated that their recommendations were:

"based on the judgment that while minors ought to continue to receive some protection in the law, adults have no need of the particular protection [that makes it impossible for a minor, on reaching majority, to affirm a contract made during minority]. It seems to us to be a logical extension of this judgment that if an adult decides that it is to his advantage to consider himself bound by a contract made during his minority, he is capable of taking responsibility for that decision."¹³⁸

The Law Reform Commission of British Columbia agreed with the Alberta Institute's proposals on this question, as they believed it to be:

"reasonable that once a minor has reached adulthood the law should not go out of its way to extend a privilege and protection that is attributable to minority. The parties may deal with each other as adults, and we can perceive no reason why one party should not be entitled to ask the other to declare himself on whether he intends to affirm or repudiate the contract."¹³⁹

The only matter on which the Commission differed from the Alberta Institute was the length of time suggested for the former minor to make a decision. The Commission recognised

¹³⁷ Id., pp. 34-35.

¹³⁸ Law Reform Commission of British Columbia's Report on Minors' Contracts, pp. 55-56 (1976).

¹³⁹ Id., p. 56.

that, while any chosen period would be "largely arbitrary",¹⁴⁰ sixty, rather than thirty, days would be more appropriate.

In England the Latey Committee recommended that the law should contain no provision preventing persons from ratifying contracts they made during their minority. The Committee were:

"quite clear that while protection against contractual liability is needed by persons under the age of majority there is no justification for protecting adults against the consequences of fresh contracts or of ratification."¹⁴¹

The English Law Commission, in its Working Paper published in 1982, expressed the provisional view that it was not desirable that contracts made during minority should be capable of being ratified after the minor reaches full age.¹⁴² The Commission went further by stating that:

"While we do not think it is practicable to propose that an adult, albeit one who has only just come of age, should not be permitted to enter into a new contract binding himself to perform an act which he agreed to do during his minority, we would, in any action brought against him on any such contract, allow him to plead that the effect of the contract was to render enforceable an obligation previously unenforceable because of his minority; that its terms are unfair; and that he should therefore be relieved in whole or in part from its performance. It would be for the court to determine whether the contract was a contract of that kind and to what extent it should be enforced against the former minor."¹⁴³

¹⁴⁰ *Id.*, p. 57.

¹⁴¹ Latey Committee's Report on the Age of Majority, para. 339 (Cmd. 3342, 1967).

¹⁴² English Law Commission's Working Paper No. 81, Minors' Contracts, para. 9.8 (1982).

¹⁴³ *Id.* The Commission (*id.*, fn. 195) noted that their proposals need not affect sections of the Betting and Loans (Infants) Act 1892, which precludes a new contract for the repayment of an existing loan contracted during minority.

The English Law Commission considered that it was not realistic to afford to a minor legal protection against the consequences of his immaturity and inexperience and yet to allow that protection to be withdrawn retrospectively immediately he comes of age:

"A minor may choose voluntarily to perform his contracts even while he is a minor. Similarly, he may after he comes of age choose to do that which he agreed to do while he was a minor. For example, having entered into a hire purchase agreement during his minority, he may continue to make the payments under it after he comes of age. No law can, or should attempt to, prevent this. But this is not at all the same thing as to permit a former minor to assume a legally binding obligation to do that which he was not previously bound to do. We think that to allow this would be to subject young adults to the obvious risk of pressure from creditors (and others) which in some cases might negate the whole purpose of the law which previously protected him."¹⁴⁴

The English Law Commission took a different view in their subsequent Report, published in June 1984. They noted that their proposal had found no favour with those who had commented on the Working Paper. The commentators had preferred the Latey Committee's approach. The Commission added:

"As we recognise, there is an inescapable measure of illogicality in a law which allows an 18-year-old to bind himself absolutely, however imprudent he may be, by entering into a contract unconnected with any previous transaction, while imposing a restriction on his liability if the contract in question reproduces an existing, though unenforceable, obligation. Our original proposal is also open to two other objections:-

- (a) by making the erstwhile minor's defence to an action on a new contract dependent on what is 'fair', it introduces an element of uncertainty into the law;
- (b) while getting rid of one source of fine distinctions (between 'ratification' and a 'new

¹⁴⁴ English Law Commission's Working Paper No. 81, Minors' Contracts, para. 9.9 (1982).

contract'), it may let in another (between a new contract that reproduces an existing obligation marginally different)."¹⁴⁵

The English Law Commission recommended the repeal of section 2 of the Infants Relief Act 1874 "to ensure that ratification of a minor's contract should be made effective and that no qualification should be imposed on the effectiveness of a 'new contract'".¹⁴⁶ In their view,¹⁴⁷ in order that no qualification should be imposed on the effectiveness of a new contract, it became necessary to repeal section 5 of the Betting and Loans (Infants) Act 1892.

On the question of contracts binding on a minor until repudiated by him or her, the English Law Commission in its Working Paper recommended¹⁴⁸ that there should be no such separate category of contracts. Whether or not there was a justification for this category of contracts under existing law,¹⁴⁹ the Commission did not think that the contracts that comprise the category "are of sufficient importance today to warrant their continued exception from the general rule".¹⁵⁰ The Commission considered that, in any case, the reduction in the age of majority to eighteen "makes it less likely that a minor will enter into any of these contracts".¹⁵¹ In its subsequent Report,¹⁵² the English Law Commission abandoned its proposal on this question.

¹⁴⁵ Law of Contract: Minors' Contracts, para. 4.7 (Law Com. No. 134, 1984).

¹⁴⁶ Id., para. 4.8.

¹⁴⁷ Id., para. 4.11.

¹⁴⁸ Para. 7.40 of Working Paper No. 81.

¹⁴⁹ As to which, see supra, pp. 19ff, and the English Law Commission's Working Paper No. 81, Minors' Contracts, paras. 2.10 - 2.12 (1982).

¹⁵⁰ English Law Commission's Working Paper No. 81, Minors' Contracts, para. 7.40.

¹⁵¹ Id.

¹⁵² Law of Contract: Minors' Contracts, para. 5.2 (Law Com. No. 134, 1984). See further fn. 106, supra.

Our Proposals

We have come to the following conclusions as to how this aspect of the law should best be reformed. First we propose that minors, once they come of age, should be free, if they wish, to ratify undertakings made during minority as well as making new contracts with a fresh consideration with respect to such undertakings. We make this recommendation, not principally because of the difficulty in practice in distinguishing between ratification and a new contract,¹⁵³ but because we consider that a person who has become an adult should be treated as such. We do not see merit in the legislation creating inhibitions on the capacity of persons who have recently come of age. The only exception - which we have already proposed¹⁵⁴ - concerns contracts with respect to loans.

We would of course be anxious that a person who has recently come of age should not be exploited by others, unscrupulous and more experienced. We are satisfied that existing principles, such as those relating to mistake, misrepresentation, duress and undue influence, will adequately protect the former minor.

We must now consider the position of contracts involving continuing obligations which commence when a party is a minor but which continue after that party comes of age. When the contract begins, it is under our proposals, unenforceable. We consider that after the minor comes of age a contract involving continuing obligations should become fully enforceable, with respect to obligations contracted and to be discharged by the parties whether before or after the minor comes of age. In other words, if a minor wishes not to be bound by a contract of this nature, he or she must take steps to have the Court apply the restitutionary principle before he or she reaches full age.

We consider that this recommendation provides an appropriate solution for the cases where under present law a contract will be binding unless repudiated within a reasonable time

¹⁵³ As to which see supra, pp. 25-27.

¹⁵⁴ Supra, p. 127.

of reaching full age. Such contracts will in future fall under the restitutionary principle while the minor is under age but will be binding once the minor has come of full age.

Validation

We must now consider whether it would be desirable for the proposed legislation to include a validation procedure whereby the court (or other agency or person) would be empowered to approve of a contract at the time it is made; a broader form of validation procedure would enable the Court to confer contractual capacity (whether or not subject to limitations) on a minor.

Before examining in detail the several issues of policy raised by this question we must refer briefly to experience in other jurisdictions.

In New South Wales the Supreme Court is empowered to grant to a minor "capacity to participate in any civil act or in any description of civil acts or in all civil acts"¹⁵⁵ unless it considers that the order is not for the benefit of the minor concerned.¹⁵⁶ A court of petty sessions may, on application by a minor, by order approve a contract that the minor proposes to make, where the minor is undertaking obligations to the value of no more than seven hundred and fifty dollars, and the order is for the benefit of the minor.¹⁵⁷

In New Zealand, the Magistrate's Court may give its prior approval to a contract entered into by a minor, on application to it by the minor, any other party to the proposed contract or the minor's guardian.¹⁵⁸

¹⁵⁵ Minors' (Property and Contracts) Act 1970, section 26(1).

¹⁵⁶ Id., section 26(3).

¹⁵⁷ Id., section 27.

¹⁵⁸ Minors' Contracts Act 1969, section 9.

Proposals by law reform agencies have varied widely. The Alberta Institute of Law Research and Reform in its report in 1975 recommended that judicial approval, whether before or after the making of a contract by a minor,¹⁵⁹ should render it enforceable against the minor. An application for such approval could be made by the minor or "any adult party to the contract",¹⁶⁰ the Court might not approve the contract unless satisfied that approval was for the benefit of the minor.

The Institute also recommended that the Trial Division of the Supreme Court of Alberta, on application by a minor, might by order grant to the minor "capacity to enter into contracts or any description of contracts".¹⁶¹ The Court might not make such an order unless satisfied that it was for the benefit of the minor.¹⁶² A contract made by the minor under any subsisting grant of capacity should be enforceable against the minor.¹⁶³

The Law Reform Commission of British Columbia made a detailed examination of the subject. We will be considering specific aspects of their analysis below, but at present we will merely note their recommendations. The Commission recommended that the Supreme Court of British Columbia, on application by a minor or his parent or guardian, might by order grant to the minor capacity to

¹⁵⁹ Alberta Institute of Law Research and Reform's Report on Minors' Contracts, recommendation No. 11, p. 39 (1975). The Report recommended that where the consideration given by the minor under the contract or disposition had a value not exceeding two thousand, five hundred dollars, jurisdiction should lie with a Judge of the Family Court; in any other case the Trial Division of the Supreme Court of Alberta should be empowered to give its approval: recommendation No. 11(4).

¹⁶⁰ Id., recommendation No. 11(2). The reference to "any adult party" should presumably extend also to the rare case where both parties to the contract were minors.

¹⁶¹ Id., recommendation No. 12(1) (p. 40).

¹⁶² Id., recommendation No. 12(2).

¹⁶³ Id., recommendation No. 12(3).

enter into all contracts or any description of contracts.¹⁶⁴
The Court should not make such an order unless satisfied
that it was:

"for the benefit of the minor and that, having regard to
the circumstances of the minor, he is not in need of
the protection offered by law to minors in matters
relating to contracts."¹⁶⁵

A contract made by a minor under any subsisting grant of
capacity should be enforceable against the minor.¹⁶⁶

The Commission also recommended that "a minor, his parent or
guardian or any adult party to the contract"¹⁶⁷ might apply
to the Public Trustee for a grant of capacity to the minor
to enter a particular contract either before or after the
contract is entered into. The Public Trustee should have
"complete discretion"¹⁶⁸ in determining the best interests
of the minor, but without restricting the generality of this
discretion, might take into account:

- "(a) the nature, subject-matter and terms of the
contract;
- (b) the requirements of the minor, having regard to his
particular circumstances;
- (c) the financial resources available to the minor; and
- (d) the wishes, where they can be reasonably
ascertained, of any parent or guardian of the
minor."¹⁶⁹

¹⁶⁴ Law Reform Commission of British Columbia's Report on
Minors' Contracts, p. 72 (L.R.S. 26-1976).

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ Id. (Note, in this context, the comments in fn. 159,
supra with respect to the proposal of the Alberta
Institute of Law Research and Reform.)

¹⁶⁸ Id., p. 73.

¹⁶⁹ Id.

An appeal would lie to the Supreme Court against a refusal by the Public Trustee to grant the minor the capacity to enter a contract. The Public Trustee might be directed to state his reasons for his refusal, and the Court would be entitled to substitute its own discretion for that of the Public Trustee.¹⁷⁰

A contract entered into by a minor would be enforceable against him if a grant of capacity had been made to him.¹⁷¹ Furthermore "no liability of any kind"¹⁷² should attach to the Public Trustee as the result of the exercise of his discretion in respect of granting a minor the capacity to enter a contract.

In England, neither the Latey Committee nor the English Law Commission favoured the introduction of a validation procedure.

In their Working Paper,¹⁷³ the English Law Commission took the provisional view that there was no specific case for either judicial conferment of contractual capacity on a particular minor or for validation of transactions of small economic value. They also took the provisional view, though less strongly, that a validation procedure for transactions of considerable economic value should be established.

In their subsequent Report, the English Law Commission recommended that no validation procedure of any kind should be introduced. Their arguments are worth recording in detail:

"(a) The evidence we have received does not make us think we were wrong in supposing that the absence of any such procedure does in fact (though it could in theory) cause problems; and it would be inconsistent with our present approach to legislative reform of

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Working Paper No. 81, Minors' Contracts, paras. 10.3 - 10.16 (1982).

this area of the law to make any recommendation unless it were aimed at resolving some practical difficulty or removing some anomaly in the law.

- (b) It would not be easy for the Master or Registrar to reach a satisfactory decision. Every party appearing before him would want him to approve the proposed contract and there would be no "contradictor" ready to argue on the other side. That role could be filled only by the Master or Registrar himself, and he would face difficulty in filling it. In the family 'minor's settlement' application, the court can draw on its wide experience of similar claims for damages; the parties are adversaries and the issues are usually not complicated. Whether the terms of a contract offered to a 16 year old pop-singer are on balance for his own benefit may pose questions both unusual and complicated.
- (c) We doubt whether, in reality, any minor who wishes, for example, to become a pop-star or a film-star and who has found a potential employer has failed to conclude a contract of employment simply because he is a minor. At present, those who are concerned with the drawing-up of such contracts have to resolve any doubts in favour of the minor if they are not to run the risk of the contract being held to be unenforceable because [it is] not for the minor's benefit. A validation procedure would probably be useful to some employers but, while they would have the advantage of there being no risk of contract subsequently being held to be unenforceable, they would be likely to seek to draft the contract less in the minor's favour and to try to have that draft validated by the court. If the court disapproved of the provision in question, it could be altered but if the court approved it the contract would be binding. In most cases the principal consideration in the minor's mind would be that he should end with a concluded contract. He is unlikely to want to raise difficulties with the court about the contract proposed by his potential employers."¹⁷⁴

The Law Reform Commission of Western Australia, in its

¹⁷⁴ Law of Contract: Minors' Contracts, para. 5.8 (Law Com. No. 134, 1984).

Working Paper¹⁷⁵ expressed the tentative view that a minor should be bound by contracts up to the value of five hundred dollars which had been approved in writing in advance by his parents or parent or guardian. In the event of a dispute or of approval from parent or parents or guardian not being forthcoming, application for approval might be made to a magistrate for contracts up to the value of three thousand dollars or to the District Court for contracts up to a value of twenty thousand dollars or to the Supreme court where no maximum limit would apply.¹⁷⁶

The Commission considered that the Supreme Court, or possibly the District Court, should have power to grant capacity to a minor to enter into certain types or categories of contracts, or contracts generally.¹⁷⁷ A court, when considering an application for approval for a contract should be empowered to obtain a report or other assistance from a minor's parents or guardian, the Public Trustee or possibly a solicitor instructed independently of the parties.¹⁷⁸ We will also be examining the Commission's policy analysis of these various issues below.

The Law Reform Committee of South Australia recommended¹⁷⁹ that a provision be introduced enabling the Court to permit a minor to enter binding contracts and dispositions. The Committee considered that it was unlikely that recourse to such a provision "is frequent, but there may be circumstances in which such a power in the Court would be useful".¹⁸⁰ Victoria's Chief Justice's Law Reform

¹⁷⁵ Law Reform Commission of Western Australia, Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 3.29 (1978).

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ Forty-First Report of the Law Reform Committee of South Australia Relating to the Contractual Capacity of Infants, p. 8 (1977).

¹⁸⁰ Id.

Committee recommended¹⁸¹ the introduction of provisions based on the New South Wales model.

We will now consider the argument in favour of introducing a validation procedure in our law, and we will then examine the argument against taking this step.

The Argument in Favour of a Validation Procedure

The central argument in favour of introducing a validation procedure¹⁸² is that it would enable minors and parties contracting with them to enter into contracts with the reasonable expectation that the contracts will be legally enforceable. If such a procedure were not available, there might well be cases where a minor's interests would be prejudiced. An adult might make it clear that he would be willing to contract with a minor if he could be assured that the contract would be enforceable, but that he would not be willing to do so if the contract was unenforceable: for some adults the protection afforded by the restitutionary principle might be considered too meagre or too uncertain. The imprimatur of a court (or other agency) could well be the incentive that would encourage them to enter the contract with a minor.¹⁸³

So far as the grant of contractual capacity to a minor is concerned, the advantage would be that a minor with sufficient maturity to engage in contracts - whether of

¹⁸¹ Victoria's Chief Justice's Law Reform Committee's Report on Infancy in Relation to Contracts and Property, p. 8 (1970).

¹⁸² We are speaking here of a procedure that would permit the validation of particular contracts and the granting of contractual capacity (general or restricted) to minors.

¹⁸³ Cf. the Law Reform Commission of British Columbia's Report on Minors' Contracts, p. 66 (LRC 26-1976), and the Law Reform Commission of Western Australia's Working Paper No. 2, Project No. 25: Legal Capacity of Minors, paras. 3.19 - 3.20 (1978).

every kind or of a limited range - would not have to come back to the court on frequent occasions in respect of different contracts. Minor traders would be particularly likely to benefit from this change in the law.

The Argument Against a Validation Procedure

The argument against the introduction of a validation procedure is essentially a practical one. Where the contract is for a small economic value, parties are unlikely to resort to a validation procedure because it would not be worth the time and money involved.¹⁸⁴ The number of minors under the age of eighteen years seeking a grant of general contractual capacity is likely to be very small.¹⁸⁵ Moreover, there are other, more certain, options available to parties wishing to contract with minors but hesitant to do so on account of the lack of enforceability of the contract. Such parties may more conveniently seek a guarantee of indemnity from an adult party.

There is moreover, little likelihood that many important contracts of employment with young persons have not been

¹⁸⁴ Cf. the English Law Commission's Working Paper No. 81, Minors' Contracts, para. 10.8 (1982). The cost factor could, of course, be reduced or entirely removed by a State subsidy, and the process could be made very informal, so as to reduce the time and effort involved in seeking approval; but to the extent that the procedure became less formal it would run the possible risk of becoming less effective.

¹⁸⁵ Cf. the Law Reform Commission of British Columbia's Report on Minors' Contracts, pp. 65-67 (1976).

entered into simply because of the fact of their minority.¹⁸⁶

Our Recommendations

We have concluded that, on balance, it would be desirable for the proposed legislation to include a validation procedure, whereby approval may be obtained for a contract to which a minor is a party, and for the granting of contractual capacity, general or subject to limitations, to a minor. We share with other law reform agencies the view that this procedure is not likely to be of major practical significance, but such effects as it may have seem likely to be beneficial.

A number of specific aspects to the validation procedure must now be considered. The first concerns the person or agency to be charged with responsibility for making the decision as to whether validation should be permitted. As we have seen, a wide range of persons and agencies has been adopted or proposed elsewhere, including the Court, the Public Trustee, a solicitor or the parents of the minor concerned. We do not consider that parents should be

¹⁸⁶ Cf. the English Law Commission's Report, Law of Contract: Minors' Contract, para. 5.8, clause (c) (Law Com. No. 134, 1984). We should note at this point that we do not take the view, adopted by the English Law Commission (*id.*, clause (b)) that "[I]t would not be easy" for the judicial authority to make a decision as to validation in the absence of a "contradictor" ready to argue against the benefits of the proposed contract. We are satisfied that the judicial capacity to authorise proposed courses of action, which already extends very widely, would comfortably embrace a validation procedure. Nor are we convinced by the English Law Commission's argument (*id.*, clause (c)) that a validation procedure would encourage employers to draft contracts less in the minors' favour than at present. This speculative argument (based on an unproven assumption as to existing practices) ignores the fact that the Court (or other authority) must oversee and be satisfied with the fairness of the contract.

given new powers in this respect. Of course, it is proper that parents may, if they wish, with their minor children's consent, become parties to contracts to which these children are also parties, or that parents may give guarantees or indemnities with respect to contractual obligations undertaken by their minor children; but we do not consider that parents should be permitted, by their mere consent, to render enforceable contracts that would otherwise be unenforceable. As has been pointed out more than once, in some cases parents may not be in a position to exercise an informed and helpful decision as to whether it would be desirable for their minor children to make a particular contract or be given contractual capacity.

This is not to say that we consider the role of parents in this context to be irrelevant; on the contrary, we recommend that the wishes of parents, whether supporting or opposing the making of the contract in question, should be taken into account by the person or agency charged with the decision.¹⁸⁷

If parents are not to be charged with the decision, who should be? We have no strong views on this question. We consider that the aim of the legislation should be to maximise ease of access by the parties involved, as well as minimising costs and delay. On the other hand, the decision whether or not to validate a contract is an important one, involving consideration of issues of justice and equity. While we appreciate the advantages involved in charging solicitors or other officers of the court with this task, we consider that, on balance, it is more desirable to situate the power within the judicial process. We therefore consider that the Courts should have jurisdiction to make an order validating contracts or granting contractual capacity. The District Court should have jurisdiction where the consideration of the contract or value of the property concerned does not exceed £2,500. The Circuit Court should have jurisdiction up to a value of £15,000. We have selected these jurisdictions to accord with the general levels of jurisdiction laid down in the Courts Act 1981. The High Court would have no monetary limits on jurisdiction.

We consider that any party to the contract should be permitted to apply to the Court for an order for

¹⁸⁷ Cf. *id.*, p. 70.

validation,¹⁸⁸ but we recommend that such application should be made only before the contract has been made or, if it has already been made, only when the contract contains a condition precedent that application for validation will be obtained. We consider that to permit applications for validation to be made at a later stage might bring about a situation of some considerable confusion in practice: the restitutionary principle would become subject to significant qualification by what would in effect be a principle of qualified enforceability.¹⁸⁹ We have already rejected¹⁹⁰ the introduction of the principle of qualified enforceability on the basis that, although desirable in theory, it would lead to some uncertainty and confusion in practice; when combined with the principle of restitution, it would in our view lead to even greater uncertainty and confusion.¹⁹¹

As regards the considerations to be taken into account by the Court in deciding whether or not to validate a proposed contract or confer contractual capacity (whether absolute or subject to limitations) we recommend that the court should have regard to all the circumstances, but, without prejudice to the generality of this discretion the court may take into account:

- (a) the age of the minor;
- (b) the nature, subject-matter and terms of the contract;
- (c) the reasonable likelihood of performance of the contract by each of the parties to it;
- (d) the requirements of the minor, having regard to his particular circumstances;

¹⁸⁸ Where an application for the granting of contractual capacity is concerned, the minor would be the appropriate applicant.

¹⁸⁹ As to which see pp. 91ff, *supra*.

¹⁹⁰ *Supra*, pp. 99-100.

¹⁹¹ Cf. the Forty-First Report of the Law Reform Committee of South Australia Relating to the Contractual Capacity of Infants, p. 6 (1977), stating that the Committee were unanimous in rejecting the principle that a Court may declare a contract previously entered into to be binding, "on the basis that it renders the status of all contracts uncertain at the time of their making".

- (e) the financial resources of the minor;
- (f) the wishes, where they can reasonably be ascertained, of the guardian or guardians of the minor.¹⁹²

Contracts Between Minors

There has been very little discussion about the specific question of contracts between minors. The number of occasions where such contracts are of significant financial dimensions must be relatively small, but it is reasonable to assume that minors have frequently bought from other minors items of some value, such as guitars, stereos, motorcycles and cars. We consider that our proposals should address the question, since clearly it is one that will present itself to the courts sooner or later.

One possible approach considered, but rejected, by the English Law Commission would be to treat both minors as adults. We also reject this approach. A minor does not cease to be in need of protection on account of his or her immaturity and lack of experience merely because the party with whom he or she is contracting happens also to be a minor.¹⁹³

In our view the restitutionary principle will cope adequately with problems that may arise in relation to contracts between minors. The Court will be able to have regard to the respective ages, degrees of maturity, and business capacity and experience of the minors; this discretion will ensure that an experienced or exploitative minor will not be able to profit unjustly at the expense of a less experienced minor.

¹⁹² Some of these considerations, proposed by the Law Reform Commission of British Columbia in their Report on Minors' Contracts, p. 73 (1976), have already been set out supra.

¹⁹³ Cf. the English Law Commission's Working Paper No. 81, Minors' Contracts, para. 11.6 (1982).

Tort and Contract

The present distinction that is made in the law¹⁹⁴ between a wrongful mode of performance of a contract, on the one hand, and the commission of a tort in a contractual setting, on the other, has frequently been criticised for its conceptual uncertainty, but it is not so clear how the law should best be reformed.

Several solutions have been adopted or proposed. In New South Wales, a minor is liable for all torts, including deceit, whether or not the tort is connected with any contractual obligation.¹⁹⁵ As well, the court may enforce a non-binding contract against a minor where this has been procured by a fraudulent misrepresentation by him as to his age.¹⁹⁶

In New Zealand the legislation comprises the common law rules relating to torts connected with a contract, including the tort of deceit. But the restitutionary principle applies where the minor has procured a contract by fraudulent misrepresentation as to his own age or any other matter.¹⁹⁷

Canadian law reform agencies have taken differing approaches to the question. The Alberta Institute of Law Research and Reform in its Report on Minors' Contracts¹⁹⁸ in 1975 recommended that a minor should not be liable to an adult for damage resulting from false representations as to the age of the minor, but that, in all other cases, it should no longer be a defence to an action in tort against a minor that either (a) the tort was connected with a contract, or (b) the cause of action for the tort was in substance a cause of action in contract, save to the extent that the contract would provide a defence for the minor if he had attained his majority.

¹⁹⁴ Cf. supra, pp. 30-31.

¹⁹⁵ Minors (Property and Contracts) Act 1970, section 48.

¹⁹⁶ Id., section 37(2).

¹⁹⁷ Cf. the Minors' Contracts Act 1969, section 15(4).

¹⁹⁸ Pages 36-37 of the Report.

The Law Reform Commission of British Columbia, in its Working Paper on Minors' Contracts, published in 1975, recommended that the general principle relating to minors' exemption from liability for torts connected with a contract should continue; by way of exception, however, it recommended that minors should be liable in tort for deceit as to their age. In their Report, however, the Commission no longer recommended that this exception should be made. The measure of damages in actions for deceit (as in other torts) is to place the plaintiff in the same position as if the tort had not been committed,¹⁹⁹ and the Commission considered that such a measure of damages would "rarely exceed in scope the best relief available"²⁰⁰ to the party contracting with the minor under the restitutionary principle that the Commission had proposed elsewhere in its Report.

In two respects, the Commission considered that special provision should be included as a gloss to the restitutionary principle in cases of fraud as to age by the minor. First the Commission was concerned about the use of standard form contracts containing forms of words such as "I warrant that I have attained the age of majority". While the Commission did not think that the situation was likely to arise frequently, it believed that a document containing this or a similar form of words, signed by the minor would probably be the evidence of fraud most frequently advanced by a small number of unscrupulous adults seeking to mitigate their losses in contracts involving minors.

The solution proposed by the Commission was that a minor should not be held to have induced another person to enter a contract by means of a fraudulent misrepresentation as to the Minor's age by reason only of the fact that the minor signed or otherwise adopted a document relevant to the transaction that:

- (a) contained a statement that the minor was of full age or otherwise had contractual capacity; and

¹⁹⁹ Cf. Hepting v Schaaf, [1964] S.C.R. 100, Parna v G. & S. Properties Ltd., 5 D.L.R. (3d) 315 (Ont. C.A., 1969) Northern & Central Gas Ltd v Hillcrest Collieries Ltd., [1976] 1 W.W.R. 481 (Alta. S.C.).

²⁰⁰ Page 60 of the Report.

- (b) was prepared and tendered by or on behalf of the plaintiff; and
- (c) was preprinted and used by the plaintiff in like transactions.²⁰¹

The other aspect of the problem related to the rule that it is not ordinarily a defence to an allegation of fraud that the plaintiff was negligent or had an opportunity for verifying the fraudulent statement. The Commission considered that:

"even where an adult is confronted with a deliberately fraudulent minor who lies about his age in order to induce a contract, it ought to be a condition of the minor's liability that the adult's belief in the truth of the statement ought to be reasonable. It would, in our view, be going too far to allow an adult to aver that he relied on the fraudulent statement of the average twelve-year-old that he was nineteen."²⁰²

The Law Reform Commission of Western Australia endorsed²⁰³ the approach favoured by the Law Reform Commission of British Columbia.

In England the Latey Committee recommended that no change be made in the law save in relation to a minor's fraudulent misrepresentation: where the misrepresentation was unconnected with the minor's age, the minor should not be permitted to escape liability, but where the misrepresentation related to age the minor should continue to be exempt from liability (although subject to the possibility of having an order for restitution made against him or her).

²⁰¹ Page 63 of the Report.

²⁰² Page 62 of the Report.

²⁰³ The Law Reform Commission of Western Australia's 2nd Working Paper, para. 3.49 (1978).

The Committee feared that:

"If the law were to provide simply that an infant who held himself out as being of full contractual age should be liable in contract as if he were of full age, or be liable in tort for his fraud, then a way round the whole law of infancy might be opened. We should soon find in contracts a clause to the effect that 'I am over 18' (or whatever the age of capacity is to be). The adult party would refrain from asking questions and would, no doubt, in many cases be able to show that he relied on the infant's misrepresentation."²⁰⁴

In its Working Paper on Minors' Contracts, the English Law Commission considered the questions of minors' liability in tort and the liability of fraudulent minors. It recommended that the present law relating to a minor's liability in tort should be retained, subject to a qualification it proposed regarding fraudulent misrepresentation.

The Commission referred to the position in Scotland,²⁰⁵ where a minor who falsely represents himself to be of age, and is reasonably believed, loses his protection. The Commission commented.

"If all cases of fraud involved planned, deliberate and calculated lies this approach might well be justified. In practice, however, many cases of fraud will consist of a fraudulent misrepresentation as to age, and many of these representations may be made by the minor more or less on the spur of the moment. A minor may, for example, sign a tear-off slip attached to an advertisement containing a statement that the person who signs is over the age of 18, or he may answer an unexpected question as to his age by saying that he is 19. This type of fraud may be committed without any premeditation. We appreciate that when an adult enquires about a person's age, precisely so as to avoid dealing with a minor, it is hard on the adult if the

²⁰⁴ Latey Report.

²⁰⁵ Cf. supra, p. 37.

fraudulent minor still retains his protection from liability under the contract. However, we consider that the probable absence of premeditation outweighs this factor. In any event we think that if the minor is to be punished because of his fraud, this should be achieved by the criminal law."²⁰⁶

The Commission took the provisional view that a fraudulent minor should not forfeit the protection against liability in contract which he would otherwise have under the Commission's recommendations in the Working Paper; but the Commission considered that the present law goes too far in protecting the fraudulent minor by refusing the adult a remedy in tort in circumstances where allowing such a remedy would be an indirect way of enforcing the contract. They supported the rule under present law that the adult party should be entitled to rely on the minor's fraud as a ground for rescission, or as a defence if the minor sues to enforce the contract.

The English Law Commission provisionally recommended²⁰⁷ that, while the minor should retain his protection in respect of actions in contract, he should nevertheless be liable for the tort of deceit and that he should be so liable whether or not the remedy sought by the adult might amount to indirectly enforcing the contract. In their Report,²⁰⁸ published in June 1984, the Commission did not proceed with this recommendation on the basis that, on balance, change was not necessary.

Our Recommendations

We have come to the conclusion that the best approach for the legislation to take would be to retain the rule that a minor should not be exposed to an action in tort where this would amount to an indirect enforcement of an unenforceable

²⁰⁶ W.P. No. 81, Minors' Contracts, para. 11.1 (1982).

²⁰⁷ Id., para. 11.2.

²⁰⁸ Law of Contract: Minors' Contracts, para. 5.3 (Law Com. No. 134, 1984).

contract. We are satisfied that the restitutionary principle will afford the adult party adequate protection in such circumstances. On the more difficult question of fraudulent misrepresentation as to age, it would in principle be difficult to justify a rule which enabled such a fraudulent minor to "get away with it" with no protection for the adult party. Such an absolute exemption could perhaps be defended on the basis that fraudulent misrepresentation of age is just the type of youthful indulgence that is to be expected of minors and that it would be wrong, and inconsistent with the general policy of protecting minors against indulgence, to hold them liable for such misrepresentation.²⁰⁹ Moreover, as we have seen, many law reform agencies consider that there is a risk that some adult parties might tempt a minor into making a misrepresentation as to his or her age by inclusion of a question regarding age on an application form.

In our view, the best approach is to let the restitutionary principle apply to cases of misrepresentation as to age. This seems to us to be the most sensible and fair solution - demonstrably better than any other that has been adopted or proposed elsewhere. The weaknesses of the other solutions may be mentioned briefly. Absolute liability in tort could be unjust to the minor in cases where, for example, he had acted in an unpremeditated manner,²¹⁰ where the adult party, whether wittingly or otherwise, had "walked him into" making the misrepresentation or where the adult party had not acted reasonably in relying on the misrepresentation. It would be possible for the

²⁰⁹ Cf. Kindred, Basic Problems of Minors' Contractual Capacity: Reform in England, France, Ethiopia and the United States of America, *Festschrift Rheinstein*, vol. 2, p. 523, at p. 539. See, however, H.H.W., Note: The Status of Infancy as a Defense to Contracts, 34 *Virg. L.Rev.* 829, at 832 (1948), arguing that the imposition by estoppel of contractual liability on minors who deliberately misrepresent their age is:

"manifestly fair since most [minors] artful enough to successfully practise such subterfuge are also of sufficient intelligence to be charged with the contractual responsibility of their deceit."

²¹⁰ We have already mentioned that the English Law Commission had regard to the fact of the presence or absence of premeditation in this context in its Working Paper No. 81, Minors' Contracts, para. 11.1 (1982).

legislation to attempt to introduce specific rules covering circumstances such as these but, in our view, such a solution would almost certainly fail to cover some cases where it would not be fair to impose full liability on the minor. The restitutionary principle appears to us to afford the degree of sensitivity to individual circumstances that is necessary on this question.²¹¹

Another objection to the solution of absolute liability (whether or not subject to qualifications of the type mentioned above) is that the tort formula of seeking to restore the status quo ante²¹² may not be appropriate in every case. In some cases, restoration may not be sufficient; in others it may not go far enough. The restitutionary principle more adequately responds to these variations of circumstances.

The solution of total absence of liability of a minor for fraudulent misrepresentation as to age seems to us to be manifestly overbroad. In allowing a minor with a high degree of premeditation and intelligence to trap an adult, it would in our view go too far in protecting minors generally against unduly oppressive consequences for their youthful indiscretion.

The present law's solution based on quasi-contract²¹³ seems to us a genuine, but somewhat crude, attempt to come to terms with the problem. We do not consider that the extent of the minor's liability should depend on contingencies as to the disposal of the property by the minor before the legal proceedings have taken place.

We are satisfied that the best proposal is to let the restitutionary principle resolve the problem of

²¹¹ It could be argued that application of contributory negligence principles would be an adequate solution. We do not agree. There are some cases where, without any "fault" on the part of the adult, it may be appropriate for the Court to provide only partial compensation to the adult.

²¹² Cf. McMahon & Binchy, 12, 558.

²¹³ Cf. supra, pp. 31-34.

misrepresentation as to age. Its simplicity and flexibility make it preferable to any other possible solutions that have been given effect or canvassed elsewhere.

Guarantees and Indemnities

Under present law,²¹⁴ a guarantee of a loan made to a minor is void, because the contract of loan is itself void under the Infants Relief Act 1874 and there cannot be a valid guarantee of a void contract. In contrast, an indemnity given in respect of such a loan is valid and enforceable, since an indemnity constitutes an independent primary obligation, rather than the secondary and conditional obligation that a guarantee involves.

This distinction commands virtually no support today. It has been abolished by legislation in New Zealand²¹⁵ and New South Wales²¹⁶ and proposals for reform on these lines have been made in England,²¹⁷ Alberta,²¹⁸ British Columbia,²¹⁹

²¹⁴ Cf. supra, pp. 34-35.

²¹⁵ Minors' Contracts Act 1969, section 10.

²¹⁶ Minors (Property and Contracts) 1970, section 47.

²¹⁷ Cf. the Report of the Committee on the Age of Majority (the "Latey Committee"), para. 362 (Cmd. 3342, 1967) the English Law Commission's Working Paper No. 81, Minors' Contracts, para. 11.13 (1982) and their subsequent Report, Law of Contract: Minors' Contracts, para. 4.14 (Law Com. No. 134, 1984).

²¹⁸ Alberta Institute of Law Research and Reform, Report on Minors' Contracts, p. 42 (1975).

²¹⁹ Law Reform Commission of British Columbia, Report on Minors Contracts, p. 76 (LRC 26-1976).

South Australia²²⁰ and Western Australia.²²¹

The main objection to the present law is that it works against the interests of minors, since:

"one who might be prepared to advance money to a minor upon the additional security of a guarantee from an adult will not be able to do so: the guarantee will be worthless."²²²

Another objection is that the distinction between guarantees and indemnities is a technical one, which may require the party contracting with the minor to seek expert legal advice.²²³

We consider that these objections have force. We take the view that a guarantor should not be relieved of liability in respect of a guarantee by reason only of the fact that the person in respect of whom the guarantee is given is a minor. We do not consider it necessary for the legislation to provide that this fact should be made clear to the guarantor in specific terms in the contract (as the Latey Committee proposed in England):²²⁴ we believe that generally a person who enters a guarantee for a minor would expect that the guarantee would bind him.

A separate point requires consideration. This concerns the question whether the guarantor should be entitled to

²²⁰ Forty-First Report of the Law Reform Committee of South Australia Relating to the Contractual Capacity of Infants, p. 8 (1978).

²²¹ Law Reform Commission of Western Australia, Working Paper No. 2, Project No. 25: Legal Capacity of Minors, para. 3.51 (1978).

²²² English Law Commission Working Paper No. 81, Minors' Contract, para. 11.10 (1982).

²²³ Cf. the English Law Commission's Working Paper No. 81, Minors' Contracts, para. 11.12 (1982).

²²⁴ Latey Committee Report, supra, para. 362.

seek an indemnity from the minor on whose behalf he made the guarantee where the guarantor is obliged to pay the creditor on foot of the guarantee. A variety of solutions may be considered. They range from a virtual exclusion of the right to seek an indemnity,²²⁵ through application of a discretionary principle of restitution²²⁶ to placing the guarantor of a minor's contract in the same position as guarantors of contracts generally.

We take the view that the best approach is for the legislation to enable the restitutionary principle to apply in these circumstances. Manifestly, it would be unjust to deprive the guarantor of any possibility of recourse against the minor; equally it would appear oppressive on the minor to enable the guarantor obtain a full indemnity from him or her in every case. We consider that the discretionary restitutionary principle would best be able to deal with the wide variety of circumstances where a guarantee has been obtained, including such factors as whether the guarantor was pressurised into giving the guarantee, the relationship between the guarantor and the minor, and the role of the adult party in the transaction.

We consider that the restitutionary principle should apply to all cases, including cases where the minor enters a binding contract. It would be possible to put the guarantor in the same position as if the minor were an adult, so far as indemnity is concerned, but we take the view that, even in these cases, the restitutionary principle would operate more equitably.

²²⁵ As in New South Wales: cf. Harland, 71-72.

²²⁶ Cf. the Alberta Institute of Law Research and Reform's Report on Minors' Contracts, pp. 41-42 (1975), the Law Reform Commission of British Columbia's Report on Minors' Contracts, pp. 75-76 (LRC 26-1976).

CHAPTER 5

SUMMARY OF RECOMMENDATIONS

1. The legislation should introduce a general principle of restitution whereby a contract made by a minor with an adult party would be enforceable by the minor against the adult but unenforceable by the adult against him; the adult would, however, be entitled to apply to the court for compensation from the minor based on restitutionary rather than contractual principles:
p. 108.
2. The legislation should be drafted so as to enable the Court in proceedings for restitution to grant to any party such relief by way of compensation or restitution of property or both as is proper, and, upon doing so, to discharge the parties from further obligations specified by the contract if it considers it proper to do so: p. 109.
3. In making any order under these powers the Court should have regard to:
 - (a) the subject-matter and nature of the contract;
 - (b) where the contract relates (in part or entirely) to property, the nature and value of the property;
 - (c) the age, mental capacity and general experience of the minor at the time of making the contract, and at the time of the hearing, respectively;
 - (d) the specific experience and knowledge of the minor relative to the particular circumstances of the contract;
 - (e) the respective economic circumstances of the parties, at the time of the making of the contract and at the time of the hearing, respectively;
 - (f) the circumstances surrounding the making of the contract and, in particular, the reasonableness and fairness, or otherwise, of the conduct of each party relative thereto;
 - (g) the extent and value of any actual benefit obtained by each party as a result of making the contract;

- (h) the amount, if any, of any benefit still retained by each party at the time of the hearing;
 - (i) the expenses or losses sustained and likely to be sustained by each party in the making and discharge of the contract;
 - (j) all other circumstances that appear to the Court to be relevant: pp. 109-110.
4. The legislation should not give any one of these factors greater weight than the others: p. 110.
 5. The restitutionary principle should apply to both concluded transactions and to those that have not yet been concluded: p. 113.
 6. The legislation should include a provision that, in exercising its discretion when applying the restitutionary principle in cases where the contract has been concluded, the Court should have regard to the extent of the difficulties likely to result for the party who contracted with the minor from re-opening the contract: p. 113.
 7. The legislation should provide that property passes in an unenforceable contract; a person who receives any property should not have to concern himself or herself as to whether the donor, grantor, vendor or lessor, as the case may be, derived the article from a minor; this should apply whether or not bona fide purchasers for value are involved. However, so far as the parties to the contract - the minor and adult (or other minor, as the case may be) - are concerned, the Court should be free to make any order affecting title to the property (to the extent that either of them retains title) as it may consider proper, in its application of the restitutionary principle: p. 115.
 8. The legislation should include specific provisions enabling the Court, in applying the restitutionary principle, to have regard to whether the goods or services which were the subject matter of the contract were suitable to the condition in life of the minor and to his actual requirements at the time of the making of the contract, so far as the other party was, or could reasonably be, aware, having regard to the circumstances, including any information given by the

minor on this question: pp. 122-123.

9. Subject to recommendation 10, a contract of employment or for personal services should bind a minor if, taken as a whole, it is for his or her benefit: pp. 123-125.
10. Where the Court finds that a contract, taken as a whole, is not for the minor's benefit, because it contains a particular term or terms, then, rather than being obliged to declare the contract unenforceable against the minor, the Court should have power to strike out the term or terms in question, if severable from the rest of the contract. In exercising this power, the Court should not be entitled to re-draft the contract, and the contract as enforced should be substantially the same as the original contract. The Court should, moreover, take into account the interests of the employer before deciding to enforce the contract without the unduly onerous term or terms: p. 124.
11. For the avoidance of doubt, the legislation should specifically provide that minority may be relevant in determining whether a covenant in restraint of trade is reasonable: pp. 124-125.
12. Minors' trading contracts should be governed by the restitutionary principle rather than treated in the same manner as employment contracts and contracts for personal services: p. 126.
13. Contracts of loans to minors should continue to be void: p. 127.
14. No action should be capable of being brought on a promise made after full age to pay any debt contracted during infancy: p. 127.
15. A fresh promise after majority to pay a loan that is void in law, and any negotiable instrument given in respect of such a loan should be void and incapable of enforcement against a former minor: p. 127.
16. Recommendations 13 to 15 should apply to all contracts of loans, including loans for necessities: p. 127.

17. Minors, once they come of age, should be free, if they wish, to ratify undertakings made during minority as well as to make new contracts with a fresh consideration with respect to such undertakings: p. 135.
18. After a minor comes of age, a contract involving continuing obligations should become fully enforceable, with respect to obligations contracted and to be discharged by the parties whether before or after the minor comes of age: p. 135.
19. The legislation should include a validation procedure, whereby approval may be obtained for a contract to which a minor is a party, and for the granting of contractual capacity (general or subject to limitations) to a minor: p. 144.
20. Parents should not be given powers in respect of the validation procedure proposed in recommendation 19: pp. 144-145.
21. The Courts should have jurisdiction to make an order validating contracts or granting contractual capacity. The District Court should have jurisdiction where the consideration of the contract or value of the property concerned does not exceed £2,500. The Circuit Court should have jurisdiction up to a value of £15,000; the High Court would have jurisdiction without monetary limit: p. 145.
22. Any party to the contract should be permitted to apply to the Court for an order for validation; but such application should be made only before the contract has been made or, if it has already been made, only when the contract contains a condition precedent that application for validation will be obtained: pp. 145-146.
23. As regards the considerations to be taken into account by the Court in deciding whether or not to validate a proposed contract or confer contractual capacity (whether general or subject to limitations) the Court should have regard to all the circumstances, but, without prejudice to the generality of this discretion, the Court may take into account:

- (a) the age of the minor;
 - (b) the nature, subject-matter and terms of the contract;
 - (c) the reasonable likelihood of performance of the contract by each of the parties to it;
 - (d) the requirements of the minor, having regard to his particular circumstances;
 - (e) the financial resources of the minor;
 - (f) the wishes, where they can reasonably be ascertained, of the guardian or guardians of the minor: pp. 146-147.
24. Where a contract is made between minors, the law should not treat the minors as adults: the restitutionary principle should apply: p. 147.
 25. The legislation should retain the rule that a minor should not be exposed to an action in tort where this would amount to an indirect enforcement of an unenforceable contract: pp. 152-153.
 26. The restitutionary principle should apply to cases of misrepresentation as to age: p. 153.
 27. A guarantor should not be relieved of liability in respect of a guarantee by reason only of the fact that the person in respect of whom the guarantee is given is a minor: p. 156.
 28. So far as the minor's relationship with the guarantor is concerned, the restitutionary principle should apply, whether or not the minor has entered into a binding contract: p. 157.

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