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# CRIMINAL ABORTION IN NEW ZEALAND

"Abortion" is defined as the termination of pregnancy before the foetus is capable of independent extra-uterine life (WHO, 1970 report "Spontaneous and Induced Abortion") thus resulting in foetal death. Abortions may be either spontaneous or induced. Induced abortions are those deliberately undertaken with the intention of terminating pregnancy. This paper is only concerned with induced abortions and primarily those induced illegally by medically unqualified persons.

Historical evidence suggests that abortion occurred so widely in the ancient world as to be almost universal. The oldest known record dates a Chinese abortion technique of 3,000 years B.C. Anthropologists have found that abortion has been used as a method of birth control in nearly all societies that have been studied irrespective of social attitudes or legal prohibition. With regard to the pre-European Maori, Gluckman in "Abortion in the Maori in Historical Perspective" ([1971] N.Z. Med. J. 74, 323) has shown that while abortion did occur rately, it was probable that infanticide was practised more often, as there existed strong mythological opposition to abortion.

Nineteenth century European colonisation of New Zealand resulted in the introduction of British law concerning abortion. Traditionally, English common law permitted abortion if it was performed before quickening (about 16-20 weeks). The first British statute to govern abortion was passed in 1803 and this forbade abortion at any time during pregnancy. This prohibition was automatically imported into New Zealand in 1840. In that year New Zealand became a colony and all relevant British law was enforceable in the colony. The Offences Against the Person Act 1866, which was passed by both houses of the New Zealand Parliament without debate, was based on the earlier British legislation. Apart from some subsequent re-enactments and minor alterations, statute law has retained most of the features of the original Act.

**Existing Law**

The present statute law relating to abortion is contained in sections 182 to 187 of the Crimes Act 1961. These sections have been summarised by Stewart (1967) as follows:

Section 182. (1) Provision is made for up to 14 years' imprisonment for intentionally killing an unborn child.
(2) An exception is provided where the act is in good faith to preserve the life of the mother.

Section 183. (1) There is provision for up to 14 years' imprisonment for unlawfully using a drug or instrument with intent to procure the miscarriage of any woman or girl whether with child or not.
(2) The woman or girl involved is not to be charged as a party to an offence under this section.

Section 184. (1) Up to ten years' imprisonment is provided for unlawfully using means other than those in s. 183, with intent to procure the miscarriage of any woman or girl.
(2) As in s. 183 (2).

Section 185. There is a penalty of up to 7 years' imprisonment for any female who unlawfully procures or attempts to procure her own miscarriage or permits anyone else to do so.

Section 186. Anyone who supplies any means of procuring abortion is liable to 3 years' imprisonment.

Section 187. The foregoing provisions (ss. 183-186) are to apply whether or not the means used are capable of procuring abortion.

These provisions in the Act must be read with reference to case law. Legal abortions in this country are done on the basis of *R.* v. *Bourne* [1938] 3 All E.R. 615 where it was held that a defence is not limited to situations where the mother's life is endangered by the pregnancy. It is also permissible to abort in cases where continuing the pregnancy would result in the woman becoming a "physical or mental wreck". The decision to allow abortion on these serious health grounds has been followed in subsequent cases. There is, however, no provision for instances of pregnancy resulting from rape, incest or where the woman is of unsound mind. Nor is it legally permissible to abort on the ground of foetal abnormality. Despite the fact that these are not lawful grounds it appears that a number of abortions have been performed in public hospitals for some of these reasons. In an analysis of fifty-eight abortions performed at National Women's Hospital between 1959 and 1967, Dunn (in "Therapeutic Abortion in New Zealand" [1968] N.Z. Med. J. 68, 253) reports that eleven were performed because of rubella (foetal abnormality) and one because of rape.

**The Present Law and Medical Practice**

Between two and three hundred therapeutic abortions are performed annually in public hospitals. A number of terminations are carried out in private hospitals but as there is no obligation on medical practitioners to report the number of abortions they perform, there is no way of determining how many are done in this manner. A similar situation existed in Britain before the 1967 Abortion Act (which came into effect on 27 April 1968) was passed. Diggory in "Some Experiences of Therapeutic Abortion" (1969 *Lancet, I,* 873) estimated that the annual number of private therapeutic abortions performed in Britain in 1966 and 1967 was approximately double that performed in public hospitals. With the paucity of available information there is no way of knowing whether a similar ratio occurs in New Zealand.

Gregson and Irwin in "Opinions on Abortion from Medical Practitioners" ([1971] N.Z. Med. J. 73, 267) have shown that medical practitioners are uncertain of the legal status of abortion, with only 35 percent able to correctly state the basis of current New Zealand law. In the light of this fact the observation made by Macfarlane, (in his unpublished paper, "Abortion" (1971)), on medical practice is not surprising when he said that:

> "There is absolutely no doubt that in New Zealand in probably a majority of cases where abortions are performed on the grounds of mental health the so-called 'psychiatric reasons' involved fall far short of those which would leave her a mental wreck, and although they may be legal [sic] and fully justified in relieving the patient of anguish and mental trauma, in relation to existing law they are virtual hypocrisy. This is a thoroughly unsatisfactory situation."

If the present situation is found to be unsatisfactory by members of the medical profession it is even more unsatisfactory for those women not fortunate enough to receive medical operations, who then turn to pills and potions, self-abortion attempts, or the unskilled abortionist.

**Methods of Inducing Illegal Abortions**

Every study of criminal abortion records the extraordinary lengths to which women will go in order to avert giving birth to an unwanted child, irrespective of the consequences to their own health and lives. The methods used can be grouped into three main categories: physical methods; the administration of "abortifacient" drugs; and the introduction of some object or substance into the uterus.

The physical methods sometimes employed include extremely hot baths, taking severe exercise, lifting heavy objects, and violent beating of the lower abdomen. The Society for Research on Women in New Zealand in a study on the unmarried mother in 1970, reported self-abortion attempts by jumping off a table, banging against the floor and walls of a room, and by taking quinine. The theory behind these actions is that they will initiate uterine contraction. The assumption is however false, and such attempts will rarely succeed unless the resulting injury is so great as to endanger the mother's life.

Drugs with reputed abortifacient properties have been used for generations and appear to be an established part of the abortion folklore. The commonest groups are: purgatives, such as castor oil and aloes; intestinal irritants, such as oil of pennyroyal; drugs which stimulate uterine contraction, e.g. quinine and ergot; and poisons such as lead salts, mercury salts or apiol.

These drugs are unlikely to induce an abortion. Some may do so if taken in large enough doses to also cause serious illness to the mother. Depending on the drug used and amount taken the effect on the woman's health will range from violent diarrhoea and vomiting to kidney damage, poisoning and death. In the case of

quinine the foetus may also be damaged. An investigation by Cole, published in *Abortion in Britain* (1966), into various potions available to the public, mostly of the herbal kind, showed that none were likely to cause an abortion and their reputation was probably due to the occurrence of spontaneous abortion after they had been taken.

When other methods fail, or have not been employed, operative attempts through the vaginal canal are used to dislodge or expel the foetus. According to Fisher, in *Abortion in America* (1967), the single most frequently used method of inducing a criminal abortion is the introduction of irritating substances into the uterus. Uterine douches of soapy water or some antiseptic solution are injected by either a hard plastic nozzle connected to a large rubber bulb or by syringe with a blunt needle or catheter attached.

After the third month of pregnancy forcible dilation of the cervix may induce an abortion. This can be done by either introducing an object which will absorb water and swell or by inserting a catheter. A rubber catheter may also be left in the uterus to cause irritation and result in the foetus being expelled.

**Health Consequences of Illegal Abortion**

When abortions are performed in secret by unskilled or semi-skilled persons who have little knowledge of antiseptic requirements the risks are not inconsiderable.

Haemorrhage may result from such inexpert attempts or follow an incomplete abortion. Bleeding may start shortly after the abortion and if untreated can cause death within a few hours. Unclean instruments can infect the uterus, this being the commonest cause of death from criminal abortion. If an infected uterus is not treated the infection may spread to the blood stream resulting in death from septicaemia. When a blood vessel is punctured air or liquid can enter the circulation causing sudden death.

The risks involved in any given abortion attempt will depend on the technique used and skill of the abortionist. It would be wrong to regard all back-street operators as totally unskilled using only the crudest of methods. In Britain before reform of the law, Ferris, in *The Nameless* (1966), observed variation in the skills of criminal abortionists, with some showing regard to hygiene.

MORTALITY

Deaths from Septic Abortion 1938-1968:

| Year | Number | % All Other Maternal Deaths |
|---|---|---|
| 1938-40 | 69 | 18.5 |
| 1941-43 | 74 | 23.4 |
| 1944-46 | 45 | 14.6 |
| 1947-49 | 22 | 11.8 |
| 1950-52 | 17 | 12.6 |
| 1953-55 | 12 | 11.8 |
| 1956-58 | 10 | 9.4 |
| 1959-61 | 12 | 14.1 |
| 1962-64 | 8 | 12.3 |
| 1965-67 | 4 | 8.1 |
| 1968 | — | — |

It is assumed that virtually all deaths from septic abortion were the result of illegal interference. This is not to say, however, that all criminal abortion deaths are contained in the above figures. When abortion deaths are examined for 1968, while there were no reported deaths from septic abortion that year, there were three abortion deaths which occurred in hospitals. A further examination of these deaths reveals that: "two were reported as the result of 'spontaneous or unspecified' abortions; nil were reported as a result of abortion 'induced for medical or legal indication'; one was reported as the result of abortion 'induced for other reasons'."

It is apparent that one death was definitely the result of illegal abortion and possibly (though not certainly) the other two as well. The inadequacy of medical statistics has been commented on in a WHO Report (1970) which stated that:

> "There is substantial agreement among obstetricians and public health workers that, in most countries, a large majority of deaths attributed to abortion result from abortions induced by unqualified persons or by pregnant women themselves. As a rule, this predominance is not adequately reflected in statistics based on death certificates, since physicians do not certify death as being caused by an unlawful act unless the diagnosis has been established beyond doubt."

The problem of abortion statistics being understated because of misdiagnosis of death has been borne out in a study quoted by Simms in "The Abortion Act After Three Years" (1971 *Political Quarterly*, 42, 269) where a British pathologist found cases of criminal abortion deaths which were originally classified as deaths from natural causes.

Despite such qualifications which must be introduced before accepting mortality statistics, there has been a definite decline in both the number of deaths and their percentage of all maternal deaths, particularly since the high mortality incidence between 1941-1943. During

the period under consideration maternal mortality from all causes has substantially fallen due to improvements in medical treatment. It is interesting to note though that septic abortion deaths as a percentage of all maternal deaths persisted at an average of 10.9 percent between 1956-67, indicating a hard-core problem which could not be entirely solved by medical advances.

MORBIDITY

Abortions Reported by Public Hospitals 1940-1968

| Year | Number | Rate per 100,000 mean population |
|---|---|---|
| 1940 | 1,119 | 68.3 |
| 1950 | 3,910 | 203.5 |
| 1960 | 5,153 | 216.8 |
| 1964 | 4,715 | 181.5 |
| 1965 | 4,430 | 167.3 |
| 1966 | 4,397 | 163.9 |
| 1967 | 4,361 | 159.8 |
| 1968 | 4,541 | 164.7 |

The numbers of women requiring public hospital treatment for abortion has remained at a reasonably constant rate between 1950-1968. There has been a slight decline in abortion admissions expressed as a rate per 100,000 of mean population since 1960, but between 1964-1968 the annual average number of admissions has been 4,488 and the rate per 100,000 mean population 167.4. No significant variations have occurred from these averages during this period and it seems likely that this pattern will continue in the immediate future.

As some women will obtain private medical treatment after an abortion attempt and these numbers are not known, it must be realised that public hospital records do not provide complete information. Nor is it possible to assume that all abortions reported by public hospitals were the result of illegal interference as a proportion are the result of spontaneous abortion. Since no breakdown is given it is difficult to determine how many are the result of illegal abortion, but a British gynaecologist (Diggory, 1966) has estimated on the basis of his hospital experience that two-thirds of abortion cases admitted are due to criminal attempts.

If this proportion is valid in New Zealand it would mean, on the basis of the annual average number of admissions between 1964-1968, about 3,000 criminal abortion cases a year.

### Incidence of Illegal Abortion

The true incidence of criminal abortion is unknown and can never be absolutely determined because of its very nature—a secret act performed on a consenting participant.

An official inquiry into abortion took place in 1936 when a special committee was appointed by Government to examine the problem. The committee found that abortion deaths from sepsis were almost entirely due to illegal operations and they believed there were at least 4,000 criminal abortions a year. Also at this time Gordon and Bennett, in *Gentlemen of the Jury* (1937), reported an estimate of 6,000 illegal abortions a year.

The Abortion Law Reform Association of New Zealand commissioned the National Research Bureau to conduct a nationwide survey concerning the circumstances under which abortions should be legally allowed; whether the abortion issue would influence election voting; and women's experience with spontaneous and induced abortion.

Personal interviews in the homes of 1,200 males and 1,200 females 15 years of age and over were conducted between 22 January and 12 February 1972. The nationwide sample was randomly selected by a multi-stage probability method. Questionnaire results were processed on an IBM 360/40 computer. The results were weighted to remove slight discrepancies between the sample's sex, marital status and age distribution and that of the New Zealand population, 15 years of age and over. Only the results of that section of the survey dealing with attempted and successful illegal abortions, which was asked of 1,200 women, are reported here.

### REPORTED ABORTION EXPERIENCES

1. As a percentage of the sample population.

Total Reported

| | % sample population | % married women | % single women |
|---|---|---|---|
| Attempts | 5.8 | 5.8 | 5.7 |
| Successes | 2.4 | 2.4 | 2.2 |

Reported within 2 years

| | % sample population | % married women | % single women |
|---|---|---|---|
| Attempts | 2.2 | 1.9 | 3.3 |
| Successes | 1.3 | 1.0 | 2.2 |

2. Using the national proportions of married and single women the following percentages can be calculated for the women reporting abortion experiences from the sample data:

| | Married | Single | Total |
|---|---|---|---|
| Attempts | 66.0 | 34.0 | 100.0 |
| Successes | 59.5 | 40.5 | 100.0 |

3. Using the national percentage distribution of married and single women the sample per-

centage of abortion experiences can be projected on to the estimated 997,000 women 15 years of age and over at the time of the survey, to provide an average annual number:

| | Married | Single | Total |
|---|---|---|---|
| Attempts | 7,300 | 3,700 | 11,000 |
| Successes | 3,900 | 2,600 | 6,500 |

Examining the estimated annual number of criminal abortions for 1936 and 1971 it is apparent that the rate for the total population has declined. In 1936 the total population was about 1.5 million and now it is about 2.8 million. This decline is not unexpected in view of the advances in the effectiveness and the use of contraceptives, associated with society's increased tolerance towards the unmarried mother.

When the estimated incidence of criminal abortion is compared with the number of convictions for this offence the inherent problems of social and legal control over this type of "crime without victims" becomes evident.

ABORTION CONVICTIONS 1960-1969

| Year | Number |
|---|---|
| 1960 | 5 |
| 1961 | 7 |
| 1962 | 4 |
| 1963 | 9 |
| 1964 | 3 |
| 1965 | 11 |
| 1966 | 7 |
| 1967 | 13 |
| 1968 | 5 |
| 1969 | 1 |

During this ten-year period there was an average number of 6.3 convictions per year. The vast majority of these convictions were obtained against unqualified abortionists, the last time a doctor was convicted occurring in 1968.

It is widely recognised, both in New Zealand and overseas, that the laws against abortion are unenforceable. It is impossible to prevent a private practice where the parties concerned wish to avoid legal restrictions. The extent to which the abortion laws are broken with relative impunity by otherwise respectable persons is probably without comparison in any other area of law enforcement.

## Law Reform and Criminal Abortion

One of the commonest reasons advanced for amending existing legislation so that medical abortion can be more readily available is the desire to reduce and eliminate the back-street operator. Since the British and Californian laws were liberalised and medical abortion was legalised in New York State, there is evidence to show this intention is being achieved.

In the three years before the British reform the annual average number of abortion deaths was thirty, and this at a time when relatively few legal abortions were being performed. During the three twelve-month periods since the Abortion Act came into force deaths have decreased as follows (Hansard, 1971):

| Illegal Abortion Deaths | Rates per 1,000 Births |
|---|---|
| 18 | 0.022 |
| 16 | 0.020 |
| 9 | 0.015 |

There has also been a decline in the number of all abortion admissions through the London Emergency Bed Service, at a time when all other classes of emergencies were increasing. In 1967 abortions accounted for 10 percent of emergencies but by 1969 this had fallen to 6.5 percent.

The New York State abortion law which came into effect on 1 July 1970, permits a licensed physician to perform abortion on request. The maternal mortality rate (including abortion deaths) per 10,000 live births, dropped sharply from 5.3 during October-March, 1969-1970, to 2.6 during October-March, 1970-1971. While the maternal death rate has been falling a survey of ten municipal hospitals has recorded a declining number of abortion admissions, so that now ". . . it would appear that criminal abortions may be on the wane." (Association for the Study of Abortion, News Letter VI, 1971).

In November 1967 the Californian Therapeutic Act was passed. The San Francisco General Hospital has experienced a decline in septic abortion admissions from 69 per 1,000 live births in 1967 to 22 per 1,000 in 1969. The number of maternal deaths due to abortion in California have decreased spectacularly from 8 per 100,000 live births during 1967 to 3 during 1969 (Stewart and Goldstein).

## Changing Attitudes

Within the last two years medical attitudes to abortion have undergone radical change. In 1970 the World Medical Association adopted the "Declaration of Oslo" which approved abortion when endorsed by two doctors and performed on medical premises. The Declaration pointed out that when the vital interests of the mother clashed with those of her foetus the response to this situation was a matter of individual conviction and conscience.

When opinions of New Zealand doctors were studied by Gregson and Irwin they found that 48.2 percent had treated patients who needed an abortion but were not legally permitted to have it. And about 80 percent held views consistent with a need to revise the law.

Last year the Australian and New Zealand College of Psychiatrists adopted a policy which calls for abortion to be removed from the realm of criminal law so that doctors are free to exercise their clinical judgment in this as in other matters. This move has been followed by the New Zealand Medical Association's policy which, in part, wants the law amended so that decision to abort can be made by the doctor and woman concerned.

The extent to which these expressions will affect the present legal situation is not known for the reason noted in 1964 by the eminent English jurist, Glanville Williams: "Fundamentally, the question is not one of medical or social facts but of moral attitude." How long society will continue with the pretence of arrogating the decision regarding abortion to itself in the form of legal strictures only time will tell. In the meantime we can only be certain of one thing—thousands of women will continue to make their own choice.

W. A. P. FACER.

# SUMMARY OF RECENT LAW

## ARBITRATION—SETTING ASIDE AND REFERRING BACK AWARD

*General—Court's discretion if award were set aside or referred back for error in law—Arbitrator would have reached the same decision—Award upheld. Insurance—Personal insurance—Accident Insurance—Construction of policies—Conditions—General exceptions—Event happening whilst intoxicated—Meaning of "intoxicated".* This case was concerned with the interpretation of an exception clause contained in a personal accident and sickness insurance policy. The exception was in the following terms: "In respect of any event happening to the insured whilst . . . (c) intoxicated." The insured had been killed outright when the Holden station wagon which he was driving collided with a bridge. The insured was held to be driving—"under the influence of intoxicating liquor" in respect of a private motor car policy. Both these matters had come before Mr P. J. Mahon, as he then was, as sole arbitrator. The award was not questioned as regards the private motor car policy, but the finding that the insured was not "intoxicated" for the purposes of the above-mentioned exception was challenged. Wilson J [1970] NZLR 795 reversed the decision of the learned arbitrator and this was an appeal from that decision. *Held,* 1 The words of a written instrument must in general be taken in their ordinary sense, not necessarily its etymological meaning but that which ordinary usage of society applies to it. 2 The general rules of interpretation of written contracts apply to insurance policies (*Smith* v. *Accident Insurance Co* (1870) L.R. 5 Exch. 302, 307, applied.) 3. The expression "whilst intoxicated" does not import a causative relationship between the state of intoxication and the event but a purely temporal one. (*Public Trustee* v. *N.I.M.U. Insurance Co* [1967] N.Z.L.R. 530, approved.) 4. The word "intoxication" has a different meaning from "under the influence". The former denotes a reasonably advanced degree of drunkeüness and has a stigma of more finality about it. (*Abraham* v. *Norwich Union Fire Insurance Society Ltd.* [1970] N.Z.L.R. 968, 977, 978, approved.) 5. Although the test applied by the learned arbitrator involved some error in law the Court has a general and unfettered discretion to remit or set aside an award. But if the matter were remitted to the learned arbitrator he must have come to the same result as before and accordingly the Court would not set aside the award and the appeal was allowed. (*Re Baxters and Midland Railway* (1906) 95 L.T. 20, 23; *Grand Trunk Railway* v. *The King* [1923] A.C. 150, 166; *E. Rotheray & Sons Ltd.* v. *Carlo Bedarida & Co.* [1961] 1 Lloyd's Rep. 220 and *Nelson Carlton Construction Co. (In Liquidation)* v. *A. C. Hatrick (N.Z.) Ltd.* [1965] N.Z.L.R. 144, 155, referred to.) Judgment of Wilson J [1970] N.Z.L.R. 795, reversed. *Parsons* v. *Farmers' Mutual Insurance Association* (Court of Appeal, Wellington. 21, 22 February; 21 March 1972. Turner P. Richmond and Macarthur JJ.).

## CONTRACT—INTERPRETATION OF CONTRACT

*Implied terms—Nature of implied terms—Collateral oral agreement to written contract—Admissibility of evidence—Parol evidence rule. Practice—Statement of Claim—Technical misdescription of legal basis of oral agreement in statement of claim not a bar to pleading.* This action arose out of the sale of a farm and stock by the defendants to the plaintiff. Two farming enterprises were carried out on the farm. The defendants as the shareholders in Rochdale Farms Ltd. ran a pig herd on a small portion of the farm, the remainder being farmed as a dairy farm, although the work thereon was done by one of the defendants' sons who owned the dairy herd. The land and buildings were sold for $70,000, the dairy herd being excluded. The shares in Rochdale Farms Ltd. were sold for $12,000 including live and dead stock. The dispute concerned the numbers and weights of the pigs at the date when possession was given on 31 May 1969. On 4 December 1968 the plaintiff went to the farm with a farm adviser. At that date there were over 900 pigs on the farm as it was the height of the season and thereafter the numbers would be reduced in normal farming practice. It was not disclosed that many of the pigs on the farm belonged to the defendants' son who was establishing a farm nearby and had sent his older pigs to his father's property for fattening. It was disputed but accepted by the learned Judge that the defendant had said that he normally wintered 400 to 450 fattening pigs. An oral agreement for sale as a going concern at $82,000 was reached on that day. The following day

the plaintiff asked to be excused from the contract and the defendants agreed. At the end of March the plaintiff's interest revived and he visited the farm on a Sunday with the reluctant permission of the defendant's son and the defendant who was not present was not told of the visit. The plaintiff told the agent he wished to re-open negotiations with the defendant and three meetings were held, the first on Monday 14 April at Mr Allen's office, the second in the agent's office at which Mr Allen was not present on Tuesday 15 April, and the third in Mr Allen's office on Wednesday 16 April when the written contract was drawn. The main topic on the Monday was finance and agreement as to a mode of financing was reached on Tuesday and was typed by the agent and signed by the parties. The stock details were discussed on that day but not reduced to writing and the defendant said he was selling a shed full of pigs and the agreement was that it was a sale of the current herd of pigs less such killings as ordinary farming practice would involve. The farm adviser wanted two matters clarified viz. since farming practices differed he wanted to know the defendant's "killing-down" weight, and if the herd was decimated by some unforeseen occurrence what the minimum figure o stock should be and the defendant offered 250. At the third meeting on the following day the contract was drawn up in a great rush. The farm adviser was not present but Mr Groom, the plaintiff's solicitor, was there. The contract was dictated including the following clauses: "9. The vendors warrant that the assets of the company hereby agreed to be sold will on the day of settlement be free and unencumbered and are the company's own property. 10. In respect of all weaner to pork livestock referred to in the schedule of assets hereto the vendors have the right to sell prior to settlement any livestock down to not less than 90 lb. deadweight stock. 11. The vendors undertake and warrant as follows: (a) That the shares hereby sold and purchased are fully paid up two dollars ($2) shares and are free of any mortgage, lien, charge or encumbrance and that the vendors may claim of any description whether for wages, salary or otherwise against the company. (b) That upon the day of settlement the assets of the company shall consist of the following: (i) 80 sows, 3 boars, not less than 300 pigs from all stages of weaner to pork. (ii) Truck and whey tank. (iii) Electric fence and mains. The legal advisers considered that the document was incomplete and unsatisfactory and queried the meaning of some of the provisions. The plaintiff and defendant said "Don't worry, we have a gentlemen's agreement, we know what we are doing". The matter of concern to the legal advisers was the scheduling of the numbers of stock, which is difficult in the case of a pig farm, and the learned Judge held that the gentlemen's agreement mentioned was what had been discussed the day before, namely whatever might be the interpretation of the unwritten material they understood each other as to numbers. *Held*, 1. The parol evidence rule prohibits extrinsic evidence from being admissible except: (a) Where there is an ambiguity on the face of the instrument if different clauses contradict each other the true meaning may be ascertained from extrinsic evidence. (*Shore* v. *Wilson* (1842) 9 Cl. & Fin. 355 and *Bank of New Zealand* v. *Simpson* [1900] A.C. 182, 188, applied.) (b) There may be a matter omitted but independently agreed upon by the parties intended to be binding and not inconsistent with the written contract. (*Hammond* v. *C.I.R.* [1956] N.Z.L.R. 690, 694 and *Heilbut Symons & Co.* v. *Buckleton* [1913] A.C. 30, applied.) 2. In construing cls. 10 and 11 of the agreement extrinsic evidence of the surrounding circumstances was admissible. 3. There were two conflicting interpretations of cls. 10 and 11 and there was therefore an ambiguity and there was also a collateral contemporaneous agreement. Accordingly extrinsic evidence was admissible under exceptions (a) and (b) supra. 4. An implied term is a term basic to the contract not discussed but implied from the conduct of the parties either: (a) By operation of law (b) By custom (c) By the obvious but unexpressed assumption of the parties from the nature of their dealing. (*The Moorcock* (1889) 14 P.D. 64 and *Heimann* v. *Commonwealth of Australia* (1938) 38 S.R. (N.S.W.) 691, referred to.) 5. In a case such as this where it may be difficult to say upon what legal basis an oral agreement should be pleaded the Court will not exclude the agreement because of a technicality of misdescription in a pleading. (*Walker Property Investments (Brighton) Ltd.* v. *Walker* (1947) 177 L.T. 204, 206, 207, referred to.) 6. There was a shortage of pigs on possession date. *West* v. *Hoyle* (Supreme Court, Hamilton. 28, 29 February; 1, 2 March; 14 April 1972. Speight J.).

## EXECUTORS AND ADMINISTRATORS—PROBATE AND LETTERS OF ADMINISTRATION

*Resealing grants made out of New Zealand—Grant of administration by Southern Rhodesian Court after Unilateral Declaration of Independence—Competence of Commonwealth Court Administration of Estates Act 1952, s. 50.* The Registrar of the Supreme Court refused to reseal a grant of administration made in Southern Rhodesia pursuant to s. 50 of the Administration Act 1952 (now re-enacted as s. 71 of the Administration Act 1969). The question was whether by reason of the Unilateral Declaration of Independence the grant in Southern Rhodesia was made by a competent Court in any Commonwealth country. The intestate died in May 1969 and under the law of Rhodesia his parents succeeded equally to his estate. The plaintiff on 16 July 1969 was appointed dative executor under the Administration of Estates Act 1907 by an order made by M. L. Perry, Additional Assistant Master of the High Court of Rhodesia. M. L. Perry had been appointed under the above-mentioned Act by the Minister of Justice on 13 September 1966. On 22 December 1969 a certificate under the seal of the High Court of Rhodesia certifying the grant of administration was forwarded to the defendant, this certificate being granted by M. C. Atkinson, Assistant Master of the High Court who had himself been appointed on 1 January 1963 by the Minister of Justice. After U.D.I. the Government of the United Kingdom passed the Southern Rhodesia Act 1965 and then the Southern Rhodesia Constitution Order 1965. *Held*, 1. The appointment of Mr Perry was made under the Administration of Estates Act 1907 which was a validly enacted statute which was in force in Southern Rhodesia. (*Madzimbamuto* v. *Lardner-Burke* [1969] 1 A.C. 654; [1968] 3 All E.R. 561 and *Adams* v. *Adams* [1971] P. 188; [1970] 3 All E.R. 572, distinguished.) 2. The act of Mr Perry was done in the normal course of his duty as a civil servant and was in accordance with the directions of the lawful Governor promulgated on 11 November 1965 and repeated on 14 November 1965. 3. Unless the United Kingdom legislation expressly forbad the act of Mr Perry his grant was competent. (*Re Aldridge* (1893) 15 N.Z.L.R. 361 and *Madzimbamuto* v. *Lardner-Burke* (*supra*), followed. *Adams* v. *Adams* (*supra*), not followed.) 4. The act of Mr Perry was neither acting nor supporting action in contravention of the Southern Rhodesia Constitution Order

1965. The issue of a writ of mandamus to compel the Registrar of the Supreme Court to reseal the grant was ordered. *Bilang* v. *Rigg* (Supree Court, Auckland. 8, 23 March 1971. Henry J.).

**INCOME TAX—INCOME TAX PAYABLE**

*Expenses exemptions and deductions—Order for maintenance of wife by husband—Maintenance payments made to wife after husband's death not exempt—Land and Income Tax Act 1954, s. 86 (1) (j).* The objector had obtained in 1958 an order of the Supreme Court that her former husband or his personal representatives pay maintenance to her until her death or remarriage at the rate of $11 per week. The husband died in 1962 and by his will directed his trustees out of his residuary estate to pay to his wife such sums as should be legally payable to her under the said order. The trustees continued to pay maintenance after the husband's death. The Commissioner of Inland Revenue took the view that the objector received the maintenance as a beneficiary under the will. The objector claimed that she took it pursuant to the Court Order and that it was exempt from taxation under and by virtue of the provisions of s. 86 (1) (j) of the Land and Income Tax Act 1954 being income derived in the form of payments in the nature of maintenance made to her by her husband or former husband out of moneys belonging to him. *Held*, After her husband's death the maintenance payments were not made to her "by her husband or former husband" and were not exempt from taxation. (*Gatehouse* v. *Federal Commissioner of Taxation* (1935) 52 C.L.R. 316 and *Case* 109 (1955) 5 C.T.R.B. (N.S.) 651, referred to.) *Provan* v. *Commissioner of Inland Revenue* (Supreme Court, Napier. 9, 22 March 1972. Roper J.).

**MASTER AND SERVANT—WORKMEN'S COMPENSATION**

*Accident arising out of or in the course of employment—Worker using motor cycle on the way to work—Implied authorisation of use by employer—Workers' Compensation Act 1956, s. 5 (b).* In this case Blair J. had stated a case for the Court of Appeal (see [1972] N.Z.L.R. 449) and that Court remitted the case to him to decide on the facts. *Held*, The plaintiff had been impliedly authorised by the defendant to use his motor cycle for travelling to and from his work. *Simpson* v. *Phillips* (*No. 2*) (Compensation Court, Christchurch. 23 August 1971; 14 April 1972. Blair J.).

**REAL PROPERTY AND CHATTELS REAL—PROPERTY LAW ACTS**

*Encroachment—Garage terrace and wall encroaching on plaintiffs' vacant land—Building—Relief by vesting on payment of compensation—Property Law Act 1952, s. 129.* The plaintiffs and the defendants were adjoining owners of residential sections. The plaintiffs' section had no building on it, but the defendants had built a house on their section some years ago. The defendants erected a double garage and a retaining wall some 30 feet long which was connected by a terrace to the house in 1966. These were built on a sand formation. The garage and the wall encroached on to the plaintiffs, property for a width of 16 inches and a length of 50 feet. The plaintiffs sought an order for removal of the encroachment and nominal damages, and the defendants sought relief under s. 129 of the Property Law Act 1952. *Held*, 1. The wall and the terrace as a structure was a building which encroached on the plaintiff's land. 2. The encroachment was unintentional and there was no negligence on the part of the defendants. 3. The removal of the encroachment would involve great expense and interfere with access to existing steps. 4. Relief was granted to the defendants by vesting the strip of land in them subject to paying compensation to the plaintiffs and costs. 5. The measure of compensation was not to be calculated as a proportionate part of the value of the plaintiffs' section. *Collins* v. *Kennedy* (Supreme Court, Auckland. 29 November 1971; 8 February 1972. Henry J.).

**SALE OF LAND—CONTRACT SUBJECT TO CONDITIONS**

*Two contemporaneous contracts between same parties "subject to finance being arranged" and each contract subject to other contract becoming unconditional—Purchaser for unconditional contract suing as vendor in other contract for loss of profit on resale—Finance to be arranged by vendor or purchaser—Vendor plaintiff took no steps to arrange finance for purchaser—Potior est conditio defendentis rule applicable.* The plaintiff and his wife agreed to sell to the defendant a freehold property upon which six flats had been built, and on the same day the defendant agreed to sell a residential property to the plaintiff. Each agreement was conditional upon the completion of the other and each contained in identical terms a condition as to the purchaser, vendor or vendor's agent being able to arrange mortgage finance. The time for fulfilment of the condition was extended on two occasions, the last date being 20 January 1972. On 19 January the plaintiff's solicitors wrote to the defendant's solicitors that mortgage finance had been arranged for the plaintiff's purchase. On 20 January the plaintiff's solicitors wrote to the defendant's solicitors that as the defendant had failed to take reasonable steps and use reasonable endeavours to obtain mortgage finance the plaintiff as vendor would proceed with the sale of the flats to the defendant, the latter being no longer entitled to the benefit of the condition as to finance. On 22 January 1972 the defendant's solicitors replied that as the defendant had to arrange a mortgage for $30,000 for the flats he was unwilling to do so until the plaintiff had arranged mortgage finance for the purchase of the residence and that the defendant had only been informed of the raising of finance by the plaintiff in the letter of 19 January 1972. The letter referred to the refusal by the plaintiff as vendor to extend the time for raising finance and that as the plaintiff had made no obvious steps to arrange finance for the defendant in accordance with the condition the contract was cancelled. The plaintiff and his wife resold the flats and the plaintiff as holder of 19/31st parts of the flat property claimed the sum of $3,983.87, being that proportionate part of the total loss on resale. The plaintiff's wife refused to join in the proceedings. The plaintiff also claimed $2,000 as the loss suffered by him on the failure to purchase the residential property. *Held*, 1. The defendant, the plaintiff (and his wife), and their agent had failed to arrange finance in respect of the purchase of the flats by 20 January 1972. 2. The conditions that the two agreements were mutually dependent on finance being raised in respect of each purchaser was a condition subsequent. 3. It is an universal principle of law that a party shall never take advantage of his wrong. (*Rede* v. *Farr* (1817) 6 M. & S. 121, 124; 105 E.R. 1188, 1189 and *New Zealand Shipping Co. Ltd.* v. *Societe des Ateliers et Chantiers de France* [1919] A.C. 1, 78, applied.) 4. The party seeking the benefit of non-fulfilment of a condition must show that fulfilment failed notwithstanding reasonable efforts on his part to fulfil the condition. (*Scott* v. *Rania* [1966] N.Z.L.R.

527, 534, applied.) 5. The plaintiff had put forward a conditional contract and must prove that neither he nor his wife nor their agent was in default. If they did so then the defendant was called upon to prove he was not in default as he claimed the benefit of the provision. 6. Where both parties are in default the issues ought to be clarified and the rule *potior est conditio defendentis* applied. 7. The party who brings the action must show that he was ready and willing to perform his part of the concurrent acts. (*Forrestt & Son Ltd.* v. *Aramayo* (1900) 83 L.T. 335, 338, applied.) Judgment for the defendant. *Gardner* v. *Gould* (Supreme Court, Auckland. 21, 29 February 1972. Henry J.).

**TRANSPORT AND TRANSPORT LICENSING—OFFENCES**

*Driving while under the influence of drink or drug—"Reasonable cause to suspect"—Absence of driving fault irrelevant—Transport Act 1962, s. 58A.* A non-injury accident had occurred and when the traffic officer arrived neither driver was at the scene of the accident. One car was parked on the verge extensively damaged on the right front, pointing generally in the direction which it had been travelling, the other car had gone through fences on the other side of the road. The respondent came out of a house and said that he was the driver of the car parked on the verge. The informant could smell liquor on the respondent's breath and in reply to a question the respondent admitted he had had several drinks that afternoon. The informant then took breath tests which were positive and the subsequent blood sample analysis was 163 milligrammes of alcohol in 100 millilitres of blood. The Magistrate held that the informant had not had "good cause to suspect" within the meaning of s. 58A of the Transport Act 1962 and dismissed the charge. *Held*, 1. "Good cause to suspect" meant no more than "a reasonable ground of suspicion upon which a reasonable man may act". (*Chesham* v. *Wright* [1970] N.Z.L.R. 247, followed. *R.* v. *Spencer* (1863) 3 F. & F. 854, 857 and *Police* v. *Anderson* [1972] N.Z.L.R. 233, applied.) 2. The fact that no driving fault was established on the part of the respondent was irrelevant. (*Fletcher* v. *Police* [1970] N.Z.L.R. 702, referred to.) Appeal allowed. *Ministry of Transport* v. *Von Hartitzch* (Supreme Court, Napier. 8, 27 March 1972. Roper J.).

## CATCHLINES OF RECENT JUDGMENTS

**Transport**—Breath test—What constitutes "driving"—Section 58 (1) (a) of Transport Act 1962. *Wilson* v. *Barnes* (Supreme Court. Wanganui. 1972. 6 July. Quilliam J.).

# BILLS BEFORE PARLIAMENT

Appropriation
Carter Observatory Amendment
Children's Health Camps
Coal Mines Amendment
Children's Health Camps
Customs Amendment
Electoral Amendment
Finance
Fire Services
*Fire Services Amendment*
(Flat and Office Ownership) Unit Titles
Hydatids Amendment (No. 2)
Indecent Publications Amendment
Land and Income Tax Amendment (No. 2)
Land and Income Tax (Annual)
Marlborough Sounds Maritime Park
Mental Health Amendment
Minister of Local Government
Ministry of Agriculture and Fisheries Amendment
Ministry of Energy Resources
Ministry of Transport Amendment
National Art Gallery, Museum, and War Memorial
Occupational Therapy Amendment
Preservation of Privacy
Public Revenues Amendment
Republic of Bangladesh
Shipping and Seamen Amendment
Soil Conservation and Rivers Control Amendment
Stamp and Cheque Duties Amendmeut.
Tobacco Growing Industry Amendment
Wool Marketing Corporation

**STATUTES ENACTED**

Imprest Supply
Land and Income Tax Amendment

## REGULATIONS

Regulations Gazetted 27 July to 3 August 1972 are as follows:

Customs Tariff Amendment Order (No. 10) 1972 (S.R. 1972/158)
Customs Tariff Amendment Order (No. 13) 1972 (S.R. 1972/161)
Electrical Supply Regulations 1967, Amendment No. 1 (S.R. 1972/159)
Hire Purchase Agreements Notice 1972 (S.R. 1972/160)
Load Line (Assigning Authorities) Notice 1972 (S.R. 1972/164)
Patents (U.S. Postal Emergency) Regulations 1972 (S.R. 1972/162)
Penal Institutions Notice (No. 2) 1972 (S.R. 1972/157)
Poisons Regulations 1964, Amendment No. 7 (S.R. 1972/163)

## ERRATUM

**MALICE IN DEFAMATION PROCEEDINGS** [1972] N.Z.L.J. 315 right hand column 43rd line, the sentence commencing, The learned Judge . . . should read:—

The learned Judge relied also on a passage from *Gatley* supported by only one authority which appears to be to the effect that the Judge can if he wishes defer his ruling until the jury has given their verdict.

# CASE AND COMMENT

## New Zealand Cases Contributed by the Faculty of Law, University of Auckland

**Relationship of Contract to Tort—Liability for Negligent Misstatement**

The recent case of *Holman Construction Ltd.* v. *Delta Timber Co. Ltd.* (the judgment of Henry J. was delivered on 25 May 1972) was an attempt to use the principle of liability for negligent statements laid down in the leading case of *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 529 (subsequently modified by the Privy Council in *Mutual Life & Citizens' Assurance Co. Ltd. & Another* v. *Evatt* [1971] 1 All E.R. 150) to base an action in tort, whereas if in fact there was a cause of action it would only arise out of breach of a contractual duty in terms of a contract, not out of an offer. The learned Judge was quite clear that the law of torts cannot be used in this way, and that the principle of *Hedley Byrne* cannot apply to the situation which arose in the instant case.

The plaintiff was a building contractor who was interested in tendering for the erection of a certain building. The defendant was interested in tendering for the supply of timber, and for that reason the plaintiff supplied details of the various classes of timber which would be required. The defendant among others, then quoted a price to the plaintiff for the supply of the timber. (In fact the defendant's quote had been incorrectly calculated.) Relying on that quote the plaintiff entered into a building contract to construct the proposed building. Five days later, before its offer had been accepted, the defendant revoked its offer to supply the timber. As a result the plaintiff had to pay a much larger sum for the timber. Basing its claim on *Hedley Byrne* the plaintiff claimed the difference between the defendant's offer and the larger sum as damages.

As the learned Judge explained a quote or offer is only an offer to enter into certain contractual relations (and surely it can always be terminated—subject to the usual rules—before acceptance). "It is not a representation that a careful or even an honest assessment of the price asked has been made. It is not advice that the offer will remain open for any specified time. It is no more than the expression of an intention to become bound by contract if the offer be accepted. The offeror can be under no duty to make *vis-a-vis* the offeree a careful estimate of the price he seeks. It is for the offeree to judge the worth of the offer and to accept it while it is still capable of acceptance if he wishes to create any duty on the offeror. It is then no more than a contractual duty in terms of the contract."

In spite of the fact that the "categories of negligence are never closed", it would clearly be a situation in which Pandora's box would be opened if the learned Judge had allowed the claim in the instant case to rest on *Hedley Byrne*. As Henry J. said:

> "The law on offer and acceptance is not to be qualified by some new duty of care, the breach of which will give damages, merely because the offeror was negligent in assessing its terms . . . the sole cause of loss, if any, is the plaintiff's failure to exercise his legal right to accept the offer while it was still possible for him to do so. Recourse to *Hedley Byrne* will not solve these difficulties which lie firmly in the path of the plaintiff."

One must not lose sight of the basic requirements needed to satisfy *Hedley Byrne*, and the learned Judge, it is respectfully suggested was right in disallowing the claim. Although, in this writer's opinion, there might be other circumstances in which if an intent that the plaintiff would act on the statement could be proved, the tort of deceit might lie (see *Pasley* v. *Freeman* (1789) 3 T.R. 51 and *Derry* v. *Peek* (1889) 14 App. Cas. 337). But that is another question.

M.A.V.

**Breach of promise and aggravated damages**

A landmark judgment on a facet of the law of diminishing importance was delivered by Mahon J. in *Reid* v. *Jefferies* (New Plymouth, 17 May, 1972).

The action was one for breach of promise of marriage. It was urgued by the plaintiff that the damages to which she was entitled encompassed an award of exemplary damages. Mahon J., in the course of a lucid survey of the law, noted that such damages were a punishment of the defendant; they are to be contrasted with aggravated damages, which merely compensate the plaintiff for the (aggravated) harm which the particular wrong may have caused.

His Honour reviewed the relevant cases of *Finlay* v. *Chirney* (1888) 20 Q.B.D. 494 (C.A.)

and *Quirk* v. *Thomas* [1916] 1 K.B. 516 (C.A.), concluding that nothing in these cases unmistakably recognised that exemplary damages could be awarded in actions for breach of promise. Furthermore, the Court of Appeal's view in *Dunhill* v. *Wallrock* (1951) 95 Sol. Jo. was expressly all the other way.

A further factor weighing with Mahon J. was that while exemplary damages may, just occasionally, be permissible in the law of torts, it was difficult to see any clear rationale for allowing such awards in actions for breach of promise. These cases were purely contractual and personal to the parties, and not therefore, since society was in no way involved, deserving of exemplary damages.

It may be wondered, with respect, whether this line of argument is completely unimpeachable. A breach of promise seems neither more nor less personal than (let us say) an action for defamation, wherein exemplary damages can be given: *Cassel & Co. Ltd.* v. *Broome* [1972] 1 All E.R. 801 (H.L.). Society, it can be added, has an equal concern in preventing each of these wrongs.

But if his Honour rejected the claim for exemplary damages, he was still disposed to award the plaintiff aggravated compensatory damages. Recognising that she had lost the benefit of the intended marriage, a loss which had been aggravated by her injured feelings and mental suffering, Mahon J. made an award of $1,500.

His Honour was also prepared to compensate the plaintiff for the sums expended in purchasing wedding trousseaux in reliance upon the promise of marriage. Again, one may respectfully ask if this was the correct decision. It is obvious that the plaintiff would have "lost" the money involved even if the marriage contract had been duly performed. Indeed, Mahon J. took this approach when refusing to compensate the plaintiff for the gifts bestowed by herself upon the defendant. It is not easy to appreciate the distinction in the two items of expenditure.

It is suggested that to allow the plaintiff both the benefit of the marriage and the cost of entering into marriage is to compensate her twice over. In *Quirk Thomas* redress was certainly given for similar preliminary expenditure, but only as an *estimate* of the value of the marriage contract, and not in addition to the loss of bargain: see Phillimore L.J., *ibid.*, at p. 534.

In brief, it is suggested that the correct measure of damages, here as in other actions arising *ex contractu*, should be nothing more than the value of the bargain lost.

R.G.L.

# POLITICIANS, POLICEMEN AND PROTESTERS —A CORRECTION

On 2 August the following statement was released regarding the above-mentioned editorial at [1972] N.Z.L.J. 289:

"Mr Jeremy Pope the Editor of the N.Z. Law Journal today agreed that the editorial article of the Journal of 18 July had misrepresented the position of the Hon. R. D. Muldoon. The article associated certain statements attributed to Mr Muldoon with evidence of an attack on freedom of dissent, and stated that he took churchmen to task for becoming involved in political issues. One sentence of the article could also be incorrectly interpreted as implying that Mr Muldoon saw no religious or humanitarian ground for opposing apartheid.

"Mr Pope stated that he did not intend any such implication and was merely drawing attention to Mr Muldoon's criticism of some churchmen for opposing the South African Rugby tour on political rather than religious and humanitarian grounds.

"Mr Muldoon has pointed out that on many occasions he has advocated and supported the right of dissent and that he has publicly supported the duty of the church to speak out on public issues. On the occasion to which the Law Journal editorial referred, Mr Muldoon was in fact advocating that the church should speak out on a wider range of public issues on religious and humanitarian grounds than it has done hitherto, rather than limit its speaking-out to certain selected popular issues. Mr Muldoon also advocated this in a statement to "The Dominion" on 12 June.

"Mr Pope has expressed his apologies to Mr Muldoon for any incorrect impression conveyed in the editorial and Butterworths of N.Z. Ltd. the publishers of the N.Z. Law Journal have associated themselves with the apology."

# CENSORSHIP IN A DEMOCRACY—IS THERE AN ALTERNATIVE TO FREEDOM?

In a democratic society, censorship of books, films and theatre is a contradiction in terms.

One cannot tell people in one breath that they are mature enough to decide whom to vote for and who should govern them, but not mature enough to decide what they should read and what films and plays they should watch.

A member of Parliament cannot tell the people who elected him that he has confidence in their sense of judgment when they elected him, but no confidence in them to know what books are good for them and which films will erode their moral standards.

In a democracy there is no case to be made for the maintenance of censorship for adults. Every sensible citizen could in good conscience support the Society for the Promotion of Community Standards were it not for the fact that that society, instead of addressing themselves to individual citizens to use their good judgment, kept appealing to the Government to regiment that good judgment.

As in other respects, the case of children and adolescents is different. We do not expect them to have enough judgment to vote in elections and we take special care to protect them from literature and films which we think can corrupt them.

But here we have to make important distinctions. There is a difference between television, books and films. Television is available in most homes and can be switched on by almost every child. One must take care, therefore, that nothing is screened that is harmful to children. The NZBC attempts to take such care. It is not quite successful, because they have far too many violent programmes.

I have had recent occasion to watch how infectious the display of violence can become to a four-year-old when a film about Charlemagne's Saxon massacres was screened immediately after Woody Woodpecker.

Books are not nearly as available as television. But books can be readily bought and borrowed. It is therefore sensible that, for the protection of children, some authority like our Indecent Publications Tribunal should have power to ban. It is notoriously difficult to reach good decisions in this matter and it is essential that this tribunal should consist of independent, experienced, thoughtful and educated people and that they should judge the book as a whole.

*This article, by Peter Munz, Professor of History at the Victoria University of Wellington, originally appeared in* The Evening Post.

The establishment of this judicial tribunal was a triumph of good sense. One can understand that sometimes some people allow their emotions to overrule their reason and attack the decisions of the tribunal, even ordinary Courts of law have come in for such criticism, but it is dreadful to find that on several occasions emotional attack on the tribunal has led members of the Government to insinuate that if the tribunal does not bow to popular outcry, it will have to be "reformed."

It does not matter whether the outcry is that of a majority or a minority. If politicians jump on these bandwagons, we are not far removed from lynch justice and one keeps wondering when they will start to intimidate other Courts.

Films and plays are in a completely different category. One has to go out of one's way in order to go to a theatre. Adults who feel that they will be shocked or that their morals will be affected by certain films and plays, need not go. Theatre attendance, after all, is not compulsory.

There can be no justification for censorship of films and plays. All we need is an authority who classifies films as suitable for people over 18 years or restricts them to adults or declares that they are suitable for childern only.

Once this is done, adults must be left free to decide what they wish to see, just as they are left free to decide whom to vote for at Parliamentary elections. It is the easiest thing in the world to keep children out of theatres.

There remains, of course, the question of whether books or films and plays can corrupt adults. Nobody doubts that literature and art can influence people. There are books that inspire to heroism, to self-sacrifice and to love. Others lower sexual inhibitions and others increase them. If one could say with certainty which books do what, one could be on safer grounds.

Even then there would be differences of opinion as to whether books which lower sexual inhibitions should be banned or whether books

which increase them, should be banned. At any rate, some people are better off with more inhibitions; and other people are better off with fewer inhibitions. One cannot make a general rule for every citizen.

The real crux is that we cannot tell. The most unlikely books can have injurious effects on some people. Only simple-minded people can imagine that there is a clear correlation between certain books and films and anti-social or criminal behaviour.

The evidence points the other way.

The only two examples in recent New Zealand experience I recall where a book and a film have been seriously alleged to corrupt, do not concern lurid pornography but a mediocre television serial entitled "The Virginians" and Allan Mulgan's famous classic of New Zealand literature *Man Alone*.

Although both works are seemingly so harmless that few would have taken exception to them, it was plausibly argued in Courts of law that these works had helped to create a frame of mind which had led to murder.

Such allegations are no conclusive proof that the two works were responsible, but the fact that they were made and documented should stop all witch-hunting. It is too easy to hunt the wrong witch.

It is apparently just as likely for a seemingly harmless film or an accepted classic of literature to currupt as for a notoriously indecent book or film, not to corrupt.

Provided we take reasonable and adequate measures for the protection of our children, adults must be left to their freedom of choice. We cannot censor their decision as to what to see and read any more than we can censor their decision as to whom to vote for. There is no alternative to freedom.

# TOWN AND COUNTRY PLANNING ACT 1953—SECTION 35

The first Town and Country Planning Appeal Board decision in which the amended (*a*) s. 35 is given full consideration, *Highway Motors Limited* v. *Mt. Wellington Borough Council* (*b*) both clarifies the issues to be dealt with in a typical specified departure application and indicates how far some of the existing case law will still be relevant to the new provision (*c*).

The two, or three, things that an applicant must do if he is to be successful were stated to be:

(1) To show cause why the application should be granted.

(2) To demonstrate that the application comes within one or other of the limbs of subs. (2).

(3) If the application is not within subs. (2), to seek to have the Board exercise its jurisdiction under subs. (6).

*Showing Cause why the Application should be granted*

This is necessary because departures are the granting of exceptions to a scheme (as stated in subs. (1)) and because Councils are given a discretion to grant or refuse an application (subs. (4)).

*Although subs. (4) refers only to "the Council", it appears that the Board has the same powers, by virtue of the general provisions of s. 42 (3) of the Act.*

The applicant met this requirement by showing that because of the shortgae of suitably zoned land in the area he had no alternative but to locate outside of the zone.

*This circumstance is by no means a common one, and it would be expected that there are other grounds on which cause may be shown. There was, in fact, in the decision a brief incidental reference (part of the sentence quoted in the next paragraph) to showing public need or convenience as a ground. This is generally in line with previous decisions where it has been stated that every applicant for a specified departure is required to show cause why his application be granted, and in respect of a non-conforming use, this may take the form of showing a compelling need for the new facility, or the benefit that will accrue if the departure is consented to (d). The reference to convenience, however, is contrary*

(*a*) By s. 10 of the Town and Country Planning Amendment Act (No. 2) 1971.

(*b*) (1972) Decisions p. 8863. To be reported in 4 N.Z.T.P.A.

(*c*) A change of type face will be used to distinguish the summary of the decision from comments thereon.

(*d*) *Tomin* v. *Hamilton City* (1968) 3 N.Z.T.C.P.A. 111; *Caltex Oil (N.Z.) Ltd.* v. *Hutt County* (1969) 3 N.Z.T.C.P.A. 156; *Waitakere Land Development Ltd.* v. *New Lynn Borough Council* (1971) 4 N.Z.T.P.A. 34.

*to an earlier decision where it was said, as a ground for allowing a departure, that the appellant could establish that in the particular circumstances the public interest would be better served by the granting of the application, but that necessity, and not just convenience, must be shown* (e).

An interesting statement made was that, as a ground for refusing the application, "It is not sufficient for the respondent to say (as it did) that its district is already sufficiently served by car sales premises, as the respondent is not a licensing authority for that form of commercial enterprise, nor is the departure sought out of zone on the grounds of public need or convenience."

*Other principles from previous decisions that may still be relevant to showing how the Council's or the Board's discretion should be exercised include:*

*(i) Account will be taken of the usual sorts of town planning considerations* (f).

*(ii) There is a difference between permitting an extension of a long-established activity already possessing "existing use" rights, on the one hand, and on the other permitting the establishment of a fresh non-conforming use* (g).

*(iii) A departure might be granted to consolidate existing development if the existing use was a conforming use, if there was other land in the immediate locality specifically zoned for such use, or if what was sought was a small addition to a non-conforming use* (h).

*(iv) It is a proper use of the specified departure provisions to establish a strictly controlled non-conforming use as a transitional use between two zones. This presupposes that the district scheme will not be changed as a result of the departure* (i).

*(v) A proposal may be considered in the light of the general purpose of the district scheme as defined by the Act* (j).

*(vi) Relevant considerations are whether the use is provided for by the district scheme, whether it is an "existing use", whether there is a compelling need for the new facility, and what benefit will accrue to the public by consenting to the departure* (k).

SUBSECTION (2)

Only para. (a) was relevant but this was considered in some detail. It was said, by way of introductory comment, that this paragraph indicates circumstances in which the discretion conferred by subs. (4) may be exercised in a manner favourable to the applicant and as limiting the circumstances in which that discretion may be exercised in favour of the applicant; but nevertheless an application may be refused, notwithstanding that by nature it falls within the limits of the first limb of subs. (2), if no cause has been shown to justify the departure.

*This shows* inter alia *the relationship between this paragraph and the "showing cause" aspect mentioned above.*

Proceeding to analyse para. (a), the Board said that it lays down that the Council may consent to a departure only if it will not have certain consequences, namely:

(i) its effect must not be contrary to the public interest;

(ii) its effect must not have more than little town and country planning significance beyond the immediate vicinity of the land concerned; and

(iii) the Council ought not to have to change its scheme as a result of the departure.

Further, that these provisions are conjunctive, that is, all three consequences must be excluded before a given case can be held to fall within the limits imposed by this limb of the subsection, but the three matters are not entirely independent of one another, to some extent they are interrelated.

*Under the previous statutory provision, which did not include the reference to public interest in this subsection, the Board had said that the first and second parts of subs. (2) (a) were conjunctive —that the paragraph must be read as a whole— and that the second part qualifies the preceding words in the sense that the significance must be of a degree that would impel the local authority to change or vary the district scheme if it consented to the departure. Other dispensations would have to follow and council would be forced to change the zoning in such a case* (l). *Or, stating practically the same thing in different words, that the question in subs. (2) (a) as to whether the district scheme can properly remain without change or variation can also be treated as a further test of whether or not the proposal will have planning significance*

(e) *C. A. Hill and Another* v. *Wellington City Council* (1971) 4 N.Z.T.P.A. 29.

(f) *Waitakere Land Development Ltd.* v. *New Lynn Borough Council (supra).*

(g) *Tomin* v. *Hamilton City (supra).*

(h) *D. O'Connor* v. *Waimea County Council* (1971) 4 N.Z.T.P.A. 4.

(i) *Christchurch Regional Planning Authority* v. *Paparua County* (1970) 3 N.Z.T.C.P.A. 315.

(j) *G.U.S. Properties Ltd. and Others* v. *Timaru City Council* (1971) 4 N.Z.T.P.A. 12.

(k) *Davies Properties Ltd.* v. *Auckland City Council* (1972) 4 N.Z.T.P.A. 205.

(l) *Fitness* v. *Pukekohe Borough* (1968) 3 N.Z.T.C.P.A. 153; *Turner and Another* v. *Waimairi County* (1970) 3 N.Z.T.C.P.A. 251.

*beyond the immediate vicinity, for example, if the establishment of a use would impel the council to change its scheme at the next review in recognition of the* de facto *situation (m). Notice, incidentally, the absence of a comma after "public interest" in subs. (2) (a).*

The Board elaborated on the meaning of these three phrases. *(i) Not contrary to the public interest*—"Public interest" is defined in the Act as including all matters which can in any circumstances be of public interest; and therefore it goes beyond purely town planning considerations. But in the great majority of departure applications the relevant matter of public interest will be to see that the general provisions of the district scheme are respected. An applicant must establish that his case is a true exception which necessarily falls outside but does not offend the general provisions of the scheme. Any proposal for a departure which calls in question a general provision of a district scheme is contrary to the public interest.

*A number of these points had been foreshadowed in previous decisions. The upholding of the provisions of a scheme had often been referred to as being a matter of public interest (n). It had been said that the primary matter of public interest is the "integrity" of the scheme, that is, the giving of effect to the provisions of the scheme (o), and that in the public interest only those proposals which are not contrary to the objects of and the policy expressed in the district scheme will be authorised as departures from the scheme (p). Also, that the public interest requires that the proposed zoning be upheld (q).*

*Also foreshadowed was the statutory requirement that, in effect, a departure is* prima facie *contrary to the public interest (r). Previously, the statute only required that the public interest be the paramount consideration (subs. (4) now repealed), so the case law appears to have anticipated this statutory change.*

*Although public interest was not expressly mentioned, antecedents of the above principles can also be found in the propositions that consenting to departures tends to negate the very purpose of planning and to call in question the reliability of the district scheme, unless the decisions are consistent with a general policy clearly expressed in the scheme statement or unless the proposals approved are so small in size and effect that they will not upset the pattern of development laid down by the district scheme (s), and that the desirability of provisions of a district scheme cannot be called in question in a s. 35 application (t).*

*It is possibly with reluctance that the Board conceded that, because of the statutory definition of "public interest", not only town planning considerations are embraced by the term. On this interpretation, applicants seem to have an impossible onus to discharge, in view of the vast range of matters they must apparently show are not affected. In fact, in* Highway Motors *the Board said: "The departure is therefore not contrary to the public interest in the planning sense nor was it asserted that it would offend any other matter of wider public interest." With respect, the latter statement does not seem to agree with what the statute infers as to onus. But perhaps the context of the statutory provision does require a narrower interpretation of the public interest here. This approach would be supported by the reasonably sustainable view that all aspects of subs. (2) (a)* are *intended to be fairly closely related, as mentioned above. Also subs. (6) seems to imply that there will be public interest matters that have not been considered under subs. (2).* (ii) *Scheme can remain without change*—This phrase limits departures to exceptional or abnormal situations for which general or special provision cannot be made or does not need to be made in the scheme, and excludes the granting as departures of those matters which should, when they come into existence, be recognised by and in the scheme if the scheme is to remain an honest document.

*Of interest here are the following (paraphrased) statements in relation to previous s. 35 (2) (a) which was similarly worded in this respect:*

*(i) An applicant for consent to a departure from a general provision of an operative district scheme must first show that the circumstances of his case take him outside the generality of cases covered by*

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(m) *D. O'Connor* v. *Waimea County Council (supra); Rotorua Supermarket Ltd. and Others* v. *Rotorua City Council* (1971) 3 N.Z.T.C.P.A. 373.

(n) It was not always possible to distinguish clearly between statements that related to subs. (2) and those that related to old subs. (4). See, for example, *Waitakere Land Developments Ltd.* v. *New Lynn Borough Council (supra).*

(o) *Waimea Holdings Ltd.* v. *Whakatane Borough Council* (1971) 4 N.Z.T.P.A. 9.

(p) *Waitakere Land Developments Ltd.* v. *New Lynn Borough Council (supra).*

(q) *C. A. Hill and Another* v. *Wellington City Council (supra).*

(r) *Taylor* v. *Upper Hutt City* (1968) 3 N.Z.T.C.P.A. 131; *Caltex Oil (N.Z.) Ltd.* v. *Hutt County (supra); Davies Properties Ltd.* v. *Auckland City Council (supra).*

(s) *G.U.S. Properties Ltd. and Others* v. *Timaru City Council (supra).* It is arguable whether this statement was intended to relate to subs. (2) or subs. (4).

(t) *Waimea Holdings Ltd.* v. *Whakatane Borough Council (supra); Rotorua Supermarket Ltd. and Others* v. *Rotorua City Council (supra).*

*the provision from which he seeks to depart—that is, there are circumstances peculiar to his application* (*u*).

(*ii*) *An applicant must show the need he seeks to meet is not provided for by the provisions of the district scheme and cannot be met through the ordinary processes of zoning* (*v*).

(*iii*) *It is a proper use of the powers conferred by s. 35 to consent in appropriate cases to uses of a specialised or unusual kind, the needs of which cannot be provided for in advance by general provisions in a district scheme* (*w*).

(*iv*) *If a proposal would bring about representations for a change in the disctrict scheme to bring the whole of the site into a zone permitting the* de facto *density and use, and is likely to be opposed by objectors, this would raise matters of significance beyond the immediate vicinity of the property* (*x*).

(*v*) *It can be said that the district scheme can remain without change if a public need has been demonstrated for a particular use to become established on that site; and if it is not appropriate that any other of the uses permitted in the zone in which that use is ordinarily to be found should become established on that site; and/or if it is desirable that the particular use should remain under specific planning control as a non-conforming use, for only then is it not unnecessary to change the zoning and make the use of the site a conforming one so that the district scheme can remain an honest document* (*y*). (*iii*) *Little town and country planning significance beyond the immediate vicinity* —The Board said that the "significance" spoken of is town planning importance or consequence. It can and should be measured in two ways:

(a) in the actual effect of the proposal upon the land uses (actual and prospective) in the immediate vicinity and beyond;

(b) in its consequences in relation to the general provisions of the district scheme and the pattern of development laid down thereby.

As to the second form of measure, if a departure application is not based upon exceptional or abnormal circumstances, and the circumstances are no different from those applying to many other land owners, in the immediate vicinity and beyond, then the consequences of approving the application are great.

*Once more, the statements follow previous decisions:*

(*i*) *"Significance" means significance from the planning angle* (*z*).

(*ii*) *In two decisions* (*a*) *it was stated as has been done, in part, in* (*a*) *above, that "significance" in subs.* (2) (*a*) *means the significance of the proposal on the amenities of the immediate vicinity. However, although this may well be a general consideration to take into account, it is submitted that under subs.* (2) (*a*) *it is in conflict with the wording of the provision which refers to "little significance* beyond *the immediate vicinity of the property".*

(*iii*) *The "significance" spoken of is town planning importance or consequence; and this significance is to be measured not only in respect of the effect of the proposed use upon the immediate vicinity and beyond, but also in respect of its significance in relation to the pattern of development defined by the scheme itself* (*b*).

(*iv*) *The significance of the proposal is judged in the light of the planning principles incorporated in the district scheme* (*c*).

(*v*) *Consent cannot be given under subs.* (2) (*a*) *if the proposals are a fundamental departure from the policy implicit in the district scheme* (*d*).

(*vi*) *Consent cannot be given under subs.* (2) (*a*) *if the proposals would be of major significance in the planning and development of the area* (*e*).

(*vii*) *There may be a serious breach of a prohibition in the scheme that would be difficult to resist in other cases* (*f*). *If innumerable other property owners could make similar applications, the granting of these might effectively remove a significant distinction between two zones, and therefore amount to a change in the scheme* (*g*).

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(*u*) *Waimea Holdings Ltd.* v. *Whakatane Borough Council* (*supra*).

(*v*) *Waitakere Land Development Ltd.* v. *New Lynn Borough Council* (*supra*); *Self-Serve Thrift Market Ltd.* v. *Dunedin City Council* (1971) 4 N.Z.T.P.A. 92.

(*w*) *Z. M. Patrick* v. *Auckland City Council* (1971) 4 N.Z.T.P.A. 26.

(*x*) *Calkin* v. *Rotorua City* (1970) 3 N.Z.T.C'P.A. 326. Following from the "conjunctive" view of para. (a), this statement is equally relevant to the "little significance" aspect.

(*y*) *Davies Properties Ltd.* v. *Auckland City Council* (*supra*).

(*z*) *Simpson and Others* v. *Waimairi County* (1967) 3 N.Z.T.C.P.A. 76; *Fitness* v. *Pukekohe Borough* (*supra*).

(*a*) *Turner and Another* v. *Waimairi County* (*supra*); *D. O'Connor* v. *Waimea County Council* (*supra*).

(*b*) *Davies Properties Ltd.* v. *Auckland City Council* (*supra*).

(*c*) *Turner and Another* v. *Waimairi County* (*supra*); *D. O'Connor* v. *Waimea County Council* (*supra*).

(*d*) *Rotorua Supermarket Ltd. and Others* v. *Rotorua City Council* (*supra*).

(*e*) *Rotorua Supermarket Ltd. and Others* v. *Rotorua City Council* (*supra*).

(*f*) *D. O'Connor* v. *Waimea County Council* (*supra*).

(*g*) *Waimea Holdings Ltd.* v. *Whakatane Borough Council* (*supra*).

*Therefore, the conclusion would seem to be that the insertion of the words "town and country planning" before "significance" in the amended paragraph merely serves to confirm the existing case law. A fair amount of overlap between the different aspects of subs. (2) (a) is apparent.*

*Subsection (6)—Dispensation from subs. (2) principles by Board.*

This subsection replaces previous subs. (7) and is generally similar in intent. The Board has, however, drawn attention to one significant change, namely that the power given by this subsection can only be exercised on an appeal by an applicant for consent.

*Why this limitation is included is not understood. The subsection would seem to be just as applicable to a case where an objector has appealed, and the Appeal Board reverses a Council ruling that the application is within subs. (2), but feels that the case is a suitable one for exercising the subs. (6) jurisdiction.*

The decision illustrates one particular possible application of this subsection, namely, where the absence of provision in a scheme for a needed extension of a zone necessitated the applicant establishing its use out of the zone.

*The Board had previously held that under old subs. (7) it had a discretion in the public interest wider than the limitations of subs. (2) (h). Now that public interest is an aspect of subs. (2), and may be interpreted there to mean in its widest sense (i), it is difficult to see how subs. (6) could be used where the only objection under subs. (2) is that the proposal is contrary to the public interest. On the other hand, if "public interest" in subs. (2) is interpreted to mean "planning" public interest, in subs. (6) it could be taken to refer to considerations that require overriding the plan.*

*The other change found in subs. (6), the inclusion of the words "is found . . . in the particular circumstances of the case", was not referred to in* Highway Motors, *but seems to reflect a statement the Board made in an earlier decision to the effect that it would not use the powers contained in subs. (7) if no special reason to justify going beyond subs. (2) were made out (j).*

*To sum up, apart from the doubt as to the scope of "public interest" in subs. (2) (a), the new section as interpreted in* Highway Motors *by and large just confirms existing trends in the granting of departures, although better organisation makes the issues more clearly identifiable. Even though the Appeal Board does not consider itself bound by its own decisions, the volume of consistent precedent suggests that these trends are likely to be maintained.*

Discussion of the Highway Motors case has brought up every aspect of s. 35 relevant to whether or not a departure should be granted except two—the use of paras. (b) and (c) of subs. (2).

In subs. (2) (b), the change of wording that has been made to the first half of this paragraph means that a Council will have had to have gone somewhat further than previously in the change or variation process for the paragraph to apply.

In respect of the unchanged wording of the second half of this paragraph, the Appeal Board has held that the urgency must be more than a desire to take advantage of an existing market without delay. It must be of a particular and irresistible kind which demands action to protect and enhance the public and not just private interest (*k*).

A new category of permissible consents has been introduced as subs. (2) (c), namely, where the departure is in accord with a change or variation and a certain stage has been reached as regards objections and appeals. Notice that, surprisingly, this does not cover the case where an objection has been lodged, disallowed, and there is no appeal, and the departure is in accord with the change or variation as proposed. Also, the inclusion of "or variation" is not understood. As s. 30B is used to "depart" from proposed changes and reviews, "variation" here must mean a variation of a proposed district scheme. But under Reg. 31 of the Town and Country Planning Regulations 1960, a variations would have merged with the proposed scheme at this stage, so that if the departure is in accordance with the variation and therefore the proposed district scheme there will be nothing to depart from.

For the sake of completeness, two other recent changes in, or relevant to, s. 35, are worth recording.

Firstly, time periods for taking up the grant of departure, and for the lapsing of a consent upon the use being discontinued, are now included in the section.

Secondly, the change in the definition of "Owner" in s. 2 (1) of the Act, effected by s. 2 of the Town and Country Planning Amendment Act 1971, is relevant to the question of who may apply.

D. R. HALL.

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(*h*) *Waitakere Land Development Ltd.* v. *New Lynn Borough Council (supra).*

(*i*) See above.

(*j*) *D. O'Connor* v. *Waimea County Council (supra).*

(*k*) *G.U.S. Properties Ltd. and Others* v. *Timaru City Council (supra); Carter and Another* v. *Howick Borough Council* (1971) Decisions p. 7430—unreported.

# LOOKING BACK—DEFAMATION AND PRIVILEGE

In the furore that followed the Prime Minister's recent announcement that the Government was ready to pay the damages and costs awarded against the Minister of Finance, Mr R. D. Muldoon, the Minister commented that he could have made his "Brooks" statement in Parliament with complete immunity from the threat of a libel suit. The question of when a Minister is speaking as a Parliamentarian and when as a private individual was raised during television programmes.

A case with some parallel aspects (*a*) came before the Courts in England almost 100 years ago although the forum which provided the area of immunity was the Law Court itself instead of Parliament. The facts, described by Chief Justice Lord Coleridge as "somewhat peculiar" were indeed extraordinary and of interest to the legal profession for the plaintiff was a solicitor who took his case through to the Court of Appeal although without success.

The defendant, a forebear of the writer, whose name appears in many law reports of that era and who had been described in an earlier case as a man of honesty and integrity was one of England's leading handwriting experts. In 1875 he had given evidence in a disputed Will case where he had impeached the genuineness of the Testator's signature. The plaintiff in the later defamation action was a solicitor who had attested the Will. The Will was upheld and the "handwriting" evidence firmly rejected. A few days later, when giving evidence in favour of the genuineness of certain documents at the Guildhall Police Court the same handwriting expert was asked if he had been a witness in the earlier Probate action. He admitted that he had. He was then asked if he had heard the (rather scathing) comments made on his earlier evidence by Sir James Hannan who had heard the Probate case. Again, he admitted he had. Counsel then sat down, probably feeling that he had concluded his cross-examination on a rather good note. The handwriting expert then asked to make a statement which request was refused by the Presiding Alderman on the grounds that such a statement would relate to a case not presently before the Court. The witness, probably feeling at this point that all solicitors were knaves, all barristers tricky scoundrels and Judges not much better, jumped to his feet and, although ordered by the Court to sit down and shut up, proclaimed that he still "believed that Will to be a rank forgery and shall believe so to the day of my death." The plaintiff then brought an action for slander for the imputation on his character contained in this statement.

Chief Justice Coleridge let three questions go to the jury:

1. Were the words spoken by the defendant in good faith as a witness or in answer to any question put to him as a witness? This was answered "No".
2. Did he speak then otherwise than as a witness, as a volunteer, and for his own purposes? Answered, "Yes".
3. Were they spoken *maliciously*? Answered, "Yes".

Plaintiff was awarded £50 damages but leave was asked to move to enter judgment for defendant.

In giving the Court's decision the Chief Justice posed the question of whether there was evidence to go to the jury in support of the plaintiff's case. If there was, the verdict was "perfectly correct".

> "The privilege of the various persons engaged in the trial of a suit or action in a Court of Law, of the Judge, of the Jury, of the parties, of the Counsel, of the witnesses is under certain circumstances absolute. But the circumstances which give the absolute privilege are not exactly the same . . ."

In words rather reminiscent of the Muldoon affair the Court held that to be privileged the words spoken must be "spoken in office".

A conflicting view had been current in earlier cases where Judges had been "disposed to hold a Judge liable for words spoken even in office if spoken in abuse of office with express malice and without reasonable cause".

On the liability of counsel the Chief Justice went on to say that

> ". . . their privilege is at least not greater than that of parties and that it may be less for it has been decided that they would be subject to an action for words spoken even during the conduct of a case if the words were irrelevant, mala fide and spoken with express malice, all of which qualities in the words it is to be observed are and must be questions of proof for the Jury."

(*a*) *Seaman* v. *Netherclift* (1876) L.T.R. 878; (1877) L.T.R. 784.

Affidavits are apparently foolproof:

. . .

"for it is almost impossible to imagine a statement in an affidavit to be other than a statement in the course of a judicial proceeding and although false and malicious statements, if so made, may be criminally punishable, they are absolutely privileged as regards civil action."

In an earlier case the rule had been re-stated:

"the rule is inflexible that no action will lie for words spoken or written in the course of any judicial proceedings"

After reviewing various previous decisions the Chief Justice finally ruled that although Counsel's question was "ingeniously suggestive":

. . .

"the cross-examining counsel could not, by stopping as he did, take away the right of the defendant to complete his anwser nor abridge his legal privilege—immunity for the words of the answer when so completed."

Having so ruled, the Chief Justice went on to admit that,

"I ought to have withdrawn the case from the Jury and that judgment should be for the defendant."

As a crumb of consolation for the plaintiff the Court then proceeded to comment on the "recklessness and presumption" of the defendant.

On appeal the plaintiff argued that where malice is found the question of whether the offending words were relevant to the matter in question becomes of prime importance and constitutes an exception of the rule of absolute privilege.

In reply, counsel for the defendant made the very obvious point, which did not seem to have been raised in the Court below, that when the "ingeniously suggestive" question was put to the defendant, counsel could have re-examined as to his belief in the genuineness of the Will and it would have made no difference whether the allegedly slanderous statements were made in answer to a question or not. As counsel put it, defendant "re-examined himself."

Cockburn C.J., in delivering his judgment, put the issue beyond doubt:

". . . if there is any principle of law which may be considered absolutely settled it is that a witness is privileged with respect to the testimony he gives, and the relevancy or irrelevancy of that testimony does not make any difference to deprive him of that privilege."

Various hypothetical situations were put up by the Court by way of contrast; as of the foolish witness who, from the box, suddenly sees a man entering the Courtroom and accuses him of robbery. In the present case the defendant spoke the words for the purpose of defending his character and reputation as a witness and in answer to an attack on his credibility. As the Court noted:

"A witness . . . is perfectly entitled to make such observations in the interests of justice and in his own interest as will tend to rehabilitate him when his credit has been attacked."

And again:

"I think that malice has ceased to be an element in considering whether a witness is privileged unless you can show that the words were spoken dehors the character of a witness altogether."

Bramwell J.A., in his decision, cast doubt on the correctness of the term "relevance" preferring the expression "with reference to". The defendant's reference to the Will having been a "rank forgery" was, in Bramwell J.A.'s opinion, both "coarse" and "foolish" but nevertheless had "reference to" the inquiry and was therefore absolutely privileged. One wonders how Bramwell J.A. would have described an expression such as "a way-out left winger" but no doubt it would have been utterly unintelligable to him and counsel would have been called upon to translate for the benefit of the Bench. Amphlett J.A. was of the same mind:

"In this case the defendant expressed his opinion in coarse and improper language. I think he ought to have spoken with more modesty and reserve".

N. R. A. NETHERCLIFT.

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# THE DRINKING DRIVER—OVERSEAS SITUATION AND EXPERIENCE

*The second in a series of articles on* The Drinking Driver, *by R. R. Ladd, the first of which appeared at* [1972] *N.Z.L.J.* 328.

It has been found that there is generally little deterioration in driving skills at blood alcohol levels below 30 mg. of alcohol per 100 ml. of blood, and thus there is only a slight risk of accident. However, there appears to be a "threshold" point above which most drivers are affected, the accident risk increasing progressively with higher levels of alcohol concentration. Thus in 1954, the Expert Committee onAlcohol of the World Health Organisation stated that:

". . . At a blood alcohol concentration of about 50 mg./100 ml. a statistically significant impairment of performance is observed in more than half of the cases examined . . ." (*a*)

In 1960, the British Medical Association reported that:

". . . Since 1954 a considerable amount of work has been carried out . . . [and] . . . as a result of the knowledge gained the case for adopting a level of 50 mg./100 ml. can now be put even more strongly. . . . On the basis of the evidence examined in the preparation of this Report, the Committee is satisfied that a concentration of 50 mg./100 ml. of alcohol in the driver of a motor vehicle is the highest that can be accepted as consistent with the safety of other road users . . ." (*b*)

Later, in 1965, it was recommended by a Special Committee of the British Medical Association that 80 mg./100 ml. should be the level, excess of which should constitute an offence in a driver (*c*).

Indeed, it has been shown that as compared with a person who has a blood alcohol concentration of zero, a driver who has a level of 100 mg./100 ml. is approximately six times more likely to cause an accident, with the probability rising to 12 times and 25 times as great, with concentrations of 120 milligrammes and 150 milligrammes respectively (*d*).

As a result of such studies, many countries have enacted legislation which provides that it is illegal for any person to drive or attempt to drive with a greater concentration of blood alcohol than the prescribed limit. 50 mg./100 ml. (0.05 percent) has been adopted as the legal limit in Sweden, Norway, Poland and in some states of the U.S.A., whilst a maximum concentration as low as 30 mg./100 ml. (0.03 percent) has been prescribed in Czechoslovakia. In Great Britain, Northern Ireland and Austria the limit has been set at 80 mg./100 ml. (0.08 percent), whilst in Yugoslavia it is an offence to drive with any amount of alcohol present in the blood stream.

The most recent legislation enacted is the United Kingdom Road Safety Act of 1967, s. 1 of which provides that it is illegal for any person to drive or attempt to drive a vehicle if he has more than 80 milligrammes of alcohol per 100 millilitres of his blood (*e*), or alternatively 107 milligrammes of alcohol per 100 millilitres of urine (*f*). Upon conviction under this section a person may be fined or imprisoned and in addition he must be disqualified for a minimum period of 12 months, unless the Court orders otherwise.

This Act also provides for the taking of a specimen of breath (*g*), in circumstances where a constable has "reasonable cause to suspect" a driver of having alcohol in his body or of having committed a traffic offence while the vehicle was in motion. Whilst failure to provide a specimen of breath under s. 2 (1) or s. 2 (2) is an offence carrying a fine of fifty pounds, but not disqualification, a driver who without reasonable excuse, fails to supply a blood or urine specimen is by s. 3 (3) presumed to be guilty of having a blood alcohol concentration above the legal limit, and therefore is subject to the same disqualification and penalties, as if he had returned a positive blood test result and been charged under s. 1 (2) of the Act.

(*a*) Expert Committee of the World Health Organisation Report on Alcohol (1954).

(*b*) Note (c) *ante*.

(*c*) *The Drinking Driver*, Report of a Special Committee of the British Medical Association (1965).

(*d*) *The Role of the Drinking Driver in Traffic Accidents*, R. F. Borkenstein, *et al.* Indiana University, Department of Police Administration, Indiana (1964). Discussed in R.R.L. Report No. 6, *Alcohol and Road Accidents* by R. E. Alsop. R.R.L. (1966).

(*e*) Section 7 (1), Road Safety Act 1967 (U.K.).

(*f*) *Idem.* s. 7 (4).

(*g*) *Idem.* s. 2 (1).

Before the new British Legislation came into effect, the Ministry of Transport and the Automobile Association instigated an extensive campaign to familiarise the motoring public with the requirements of the law. In the first six months of operation, there was an unparallelled reduction in the number of fatal and serious accidents. From October 1966 to March 1967, there were 51,122 reported fatal or serious accidents between 10 p.m. and 4 a.m. However, for the same period October 1967 to March 1968, there was a 14 percent decrease in the number of such accidents to 43,937, and it was estimated that there was a 3 percent increase in traffic during this period. The Minister of Transport in the United Kingdom, Mr Richard Marsh, cited 1,075 lives and 10,222 serious injuries saved in the first ten months as evidence to support his statement that:

> ". . . The Road Safety Act has been proved to be one of the most successful lifesavers there is . . ."

## Methods of Measuring the Proportion of Alcohol in the Body

It was such results and studies of overseas research, combined with an increasing road toll, that prompted the New Zealand Government to take steps to review its drinking and driving laws. It had been thought that the existing law, which provided that it was an offence for any person to drive or attempt to drive while under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle (*h*), was subject to too many different interpretations owing to the intrinsic element of subjective assessment.

Following the Report of the Parliamentary Road Safety Committee in 1966, an attempt was made to amend the Transport Act 1962 in order to set a limit above which a motorist would be presumed to be intoxicated, subject to the possibility of this presumption being rebutted by other evidence. It was enacted that the proportion of alcohol in the blood stream of a person who was apprehended according to s. 55 (2), s. 58 or s. 59 of the Transport Act 1962, would give rise to various presumptions as to his capability of having proper control of a motor vehicle (*i*).

However, owing to the fact that the taking of a blood sample was purely voluntary (*j*), and that no evidence of any refusal to consent to such a sample could be given in any subsequent proceedings (*k*), such legislation was robbed of any effect it may have otherwise had, because most drivers who were so intoxicated as to be well outside the legal limit refused to consent to the blood test. Therefore it was necessary to provide more effective legislation enabling compulsory blood testing for persons suspected of driving under the influence of alcohol.

In November 1967, a Parliamentary Select Committee on Road Safety was appointed to inquire into the adequacy of the existing legislation relating to tests for blood alcohol levels in motor drivers. In particular the Committee was required to review and report on the accuracy of breath testing and its application in New Zealand as a preliminary "on the spot" test to determine whether a motorist should be required to submit to a blood test.

As a result of various test experiments conducted both in New Zealand and overseas, it appears that breath analysis, as an indirect method of assessing the amount of alcohol present in the blood, is not sufficiently accurate to be a final determinant of blood alcohol concentration. This is because breath in the lungs equilibrates with the alcohol in pulmonary capillary blood, but in the first litre of air expelled there is a proportion of alveolar air which varies between individuals from approximately 55 percent to about 93 percent. Thus breath testing devices are calibrated on the basis of an average proportion of alveolar air, which may produce "false positive" or "false negative" results in certain persons.

Breath test readings are expressed in terms of blood alcohol levels by means of a conversion factor, and it is this equivalent which can account for a discrepancy between blood alcohol concentrations, as measured by breath analysis and by blood sample obtained at the same time. If a breath test is carried out too soon after drinking an excessively high reading may result owing to the presence of alcohol in the mouth. However, should no more alcohol be ingested and another breath test be taken not less than twenty minutes after the first test, all mouth alcohol will have disappeared and a more conclusive result may be obtained.

It is to negative such erroneous results that many breath testing tubes are calibrated to show a positive reading at levels up to twenty percent below the legal limit. As most breath analysers show readings below the equivalent blood test concentration, by setting such tubes at 80 mg./100 ml. (0.08 per cent)in jurisdictions where the legal limit is 100 mg./100 ml. (0.1 percent), per-

(*h*) Section 58, Transport Act 1962.
(*i*) Section 62A (5), Transport Act 1962 (as inserted by s. 2 of the Transport Amendment Act 1966).
(*j*) *Idem.* s. 62A (1).
(*k*) *Idem.* s. 62A (7).

sons who have actual concentrations in excess of 100 mg./100 ml. will not return false negative results. Thus althought he breath analyser tubes do not give completely accurate measures of the blood alcohol concentration present, they do give a reasonably reliable indication as to whether or not a blood test should be carried out.

In many countries breath test results are inadmissible as evidence in subsequent Court proceedings, and a prosecution can not be brought on the basis of a breath testa lone. Thus breath analyser tubes are used purely as a "screening" device to enable enforcement officers to determine whether or not the driver should be required to undergo a blood test. Should a person's condition not be attributable to alcoholic intoxication, the breath test will quickly determine his innocence on the spot, without the need for further breath or blood testing.

In reporting back to the House of Representatives, the 1968 Select Committee stated:

> ". . . Offences dealing with drinking and driving are rightly regarded as serious and carry severe penalties. Because of this the Committee considers that any legislation that may be enacted in this regard should be dependent upon chemical analyses which have the very highest standards of accuracy. The Committee therefore recommends that measurement of the alcoholic content of venous blood should be the only method of analysis used for finally determining alcoholic concentrations . . ."

Compulsory blood testing has been objected to on a number of grounds. It has been stated that this measure is such an invasion of the rights and privacy of individual freedom as to amount to an assault. However, in the light of various statutory provisions authorising intervention in personal affairs, such a proposal seems untenable. Section 16 of the Tuberculosis Act 1948 expressly authorises the detention of persons to avoid the spread of infection and s.213 of the Customs Act 1966 allows searching and detention of persons suspected by Customs Officers of having certain goods in their possession. Indeed, one does not have to go further than our Crimes Act to find express authority for arresting on reasonable and probable grounds of an offence having been committed (*l*).

With regard to objections that compulsory blood testing is contrary to the basic doctrine of immunity from being compelled to give evidence likely to incriminate oneself, it may be stated that in no sense can it be said that a man whose body is subject to examination is giving evidence against himself (*m*). Dr A. L. Goodhart has attacked such a contention in the following lecture. He stated:

> ". . . The whole history of English law is against this conclusion. The provision against self-incrimination became part of the English law of evidence because of the fear that if man was forced to give evidence against himself such evidence might be obtained by torture, and the belief that it would probably be false . . .
>
> ". . . There is nothing, however, in the books which would extend the rule concerning such oral testimony to evidence concerning material facts. Such material evidence is not open to the danger of being false because of compulsion, nor will it encourage the use of illegal force . . ." (*n*)

Thus we see that such a doctrine cannot apply to physical evidence which is not subject to falsification by the person required to submit to the test.

It has also been argued that blood testing takes adjudication of innocence or guilt out of the realm of the Judge in his Court, and into that of the analyst and his laboratory. On the contrary it is evident that blood testing minimises human partiality and fallibility by external scientific evidence on the basis of which the Court pronounces a decision.

Obviously any strict or burdensome legislation must take account of private liberty, but at the same time such personal freedom must not be allowed to outweigh the common good. Indeed, when the road toll is rising at such an alarming rate, it may be necessary to sacrifice some such rights and privileges for the benefit of thecommunity at large. When the advantages in the saving of human life and limb, pain and suffering, and economic cost of road accidents, are weighed against the disadvantages of taking away certain individual pleasures, it is evident that the benefits to society are more permanent and valuable when the roads are safer for use by all motorists. In an address to the 1967 Annual Conference of the New Zealand Automobile Association, Mr O. R. Nicholson, Orthopaedic Surgeon at Middlemore Hospital, Auckland expressed the opinion:

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(*l*) Crimes Act 1961, s. 31 (*et seq.*).

(*m*) See, for example, s. 57 of the Police Act 1958—compulsory taking of fingerprints.

(*n*) *Alcohol and the Road User from the Legal Standpoint*, delivered at the Medical Society of London (24 April 1952).

". . . It is in my view entirely incongruous to assert that it is an infringement of the rights of the individual for a blood alcohol level to be determined when that individual may have caused a much more widespread infringement of the life and well-being of other citizens by his actions . . ."

However, statutory provision for compulsory blood testing would only be conducive to public observance and recognition in situations where a person has been driving in such a manner as to draw attention to himself, or where an officer has reasonable grounds to believe that person to be under the influence of alcohol. For this reason it would be inopportune at this stage to introduce a system of "random" testing whereby officers could, for example, set up check points to test every tenth driver, or keep vigil outside hotels and licensed premises. Obviously under our law, the prosecution must prove all the elements of the offence, and in this regard innocent persons should not be put to the trouble and inconvenience of establishing their innocence, unless their driving was such as to warrant this action.

In the United Kingdom, legislation empowering the police to administer random breath tests at the roadside, to check the amount of alcohol motorists had consumed, was proposed in a White Paper on Road Safety Legislation 1965-66 (*o*). This paper stated that the prevention of road accidents caused by drink was largely a social problem, and persuasion would have to be backed by an "effective legal deterrent", which would also make it easier for drivers to refuse to drink before driving without appearing unsociable. It was also stated that "the Government considers that random checks of motorists at the roadside would be preferable to such tests on suspects only"; they would be "completely fair and undiscriminating and would cast no slur on the driver who happened to be stopped."

However, when the Road Safety Bill, which was introduced to implement the proposals contained in the White Paper, was presented to the House of Commons, the provision for random breath tests was omitted. Mrs Barbara Castle, the former Minister of Transport stated in the House that the provision in the original Bill for random breath testing and aroused "almost hysterical and irrational" opposition, and while she did not accept there was anything unfair about an entirely random test, the opposition had convinced her that,

". . . enough people thought that we would in some sense unjustly persecute completely innocent motorists to make me think again . . ."

Nevertheless, with the apparent loss of effectiveness of the breath test as a deterrent to drunken driving, along with an increase in road accident deaths in 1969, it was announced in Britain that the then Minister of Transport, Mr Marsh, saw nothing wrong with police lying in wait outside public houses to give random breath tests to emergent drinkers. Mr Marsh stated:

". . . We are determined to see the breath tests enforced because of their saving in casualties since their introduction. You cannot allow that to just drift away . . ."

In New Zealand, the Minister of Transport, Mr J. B. Gordon, has given repeated assurances that there will be no random testing here. He stated in 1970 that the Government still had no thought of risking the introduction of random testing. The 1968 Parliamentary Select Committee was unanimously opposed to random testing in New Zealand, and it was stated in their report:

". . . The Committee is anxious that the general attitude towards drinking and driving be altered and this would not be achieved unless there was widespread public acceptance of its recommendations. For these reasons we consider that a driver should be required to undergo a test only if the officer believes on reasonable grounds that the driver is under the influence of drink . . ."

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(*o*) White Paper on Road Safety Legislation 1965-66 (published on 21 December 1965. Cmnd. 2859).

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**Frustrated Jurors**—After the all-male jury was picked, the Judge, Mr Justice McMullin, explained that women jurors had been asked to stand aside because they might have found some of the evidence offensive. "Women are sick and tired of being treated midway between dolls and invalids," a spokeswoman for the National Organisation of Women, Mrs Elizabeth Pritchard, said. "We are attempting to assume an equal share in the affairs of the country, which is difficult enough in our culture without the added Victorian idea that women swoon at dirty words." Sharyn Cederman, a spokeswoman for the Women's Liberation Movement, said "Why is it the Judge assumed only women would find the evidence offensive? Surely if it is offensive, it is offensive to all people in general."

# LAW SOCIETY SCHOLARSHIP FUND

Practitioners will recall that when the Centennial Conference was held in Rotorua, two scholarships were established to mark the occasion.

The Maori Scholarship, particularly appropriate for Rotorua, was established as it was felt that there are insufficient practitioners with a Maori background and that both the profession and the community at large would benefit if more could be encouraged to join the profession.

The Maori Scholarship (with a Government dollar-for-dollar subsidy) became established at a figure of $10,000, the largest scholarship held by the Maroi Education Foundation. To date it has been awarded to Mr B. S. Paki of Auckland, who has acquired a B.Com. in addition to his LL.B., and to Mrs Georgina Te Heuheu, another most worthy recipient who was recently admitted as both Barrister and Solicitor, becoming the first Maori woman to be so admitted.

A fund of $5,000 formed the nucleus of the General Scholarship, the only scholarship the Law Society holds and the only source from which (at least at present) it can assist anyone engaged in legal research. The only award so far has been to Mr R. M. Crotty, who used it to study commercial law in the United States. The award this year is $400.

General awareness of the existence of both scholarships seems surprisingly low, and the New Zealand Law Society would be gratified if practitioners were to bring the existence of these scholarships to the attention of those who they feel might be able to benefit from them.

# CORRESPONDENCE

### re: Oxymoron

Sir,

How pleasant to find a Supreme Court judgment embellished, whether by design or accident, with a fine example of oxymoron.

In the June issue of the Reports appears the sentence "Of course, if a sample is unreliable then the defendant's invocation of the exception clause is strongly weakened."

Yours faithfully,

W. V. GAZLEY.

### re Belne Scriptum Esto

Sir,

The writer, at 84, writes a legible signature. It is sometimes necessary to make copies of instruments and so on with signatures of witnesses. He received a paper last week which contained a signature which required to be copied. He turned the paper upside down, looked up the Law list but could make nothing of it. He thinks that it is unfair of a brother practitioner to create such a situation.

L. A. TAYLOR.

**Eating cake**—The vastly unequal distribution of the world's wealth leaves some nations no option but to accept every kind of environmental degradation merely to provide essential jobs and resources to keep their populations above the breadline. Quite apart from the question of social justice, this state of affairs is not in the interests of the world as a whole, because air and ocean pollutants pay no respect to national frontiers.

Secondly, the environmental quality standards now being imposed on all sorts of imports (and especially food) by the wealthy nations will seriously affect the export trade of less developed countries, unless they can install pollution control equipment on their industries and reduce their useage of certain agricultural chemicals. All this will cost money, which the less developed countries simply haven't got.

Thus many of them regard the whole environment conference as a plot by the rich to hang on to wealth won by despoiling the environment while, in the name of ecological purity, depriving the poor of the opportunity to earn their own way in the world. The wealthy countries were unable to keep this question off the agenda, but they have already indicated that they will only be offering token amounts in response to calls for assistance—GUY SALMON.