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LAWYERS AND THE ACCIDENT COMPENSATION SCHEME—THE SEEDS OF DESTRUCTION?

In 1967 when the Royal Commission advocated the abolition of the common law damages claim and the Workers' Compensation Act, some members of the legal profession, along with the insurance companies, were understandably perturbed at the prospective effect of such legislation upon their business. Their fears must have been allayed to a great extent however, by the provisions of the final version of the Accident Compensation Act. It is now clearly laid down that counsel have the right to appear in proceedings under the scheme at all stages, from those before the Hearing Officers to appeals in the Supreme Court (*a*). It is the thesis of this article that the presence of counsel at this preliminary stage has serious disadvantages both for the injured worker and the scheme as a whole, that it is totally unnecessary, and that the final result of granting such rights to the profession might well prevent the successful implementation of what is otherwise a most impressive piece of social welfare legislation (*b*).

The Select Committee on Compensation for Personal Injury in New Zealand issued the following warning when it made public its Report and Draft Bill:

> "On the other hand we are most concerned at the fact that Workers' Compensation legislation which was intended to be readily comprehensible to laymen has given rise to enormous litigation both here and elsewhere, and provided a feast for the lawyers. We would certainly not like to see our proposals overtaken by a similar fate, but all we can do is to draw attention to the difficulty of charting a course that will avoid both perils."

It is not the effect of the "fault principle", so heavily criticised in the original Woodhouse Report, that the Committee was here referring to, but the disadvantages of the adversary system as a whole; the system, due to its inherent characteristics, slows down proceedings with what may be in this case fatal consequences. It is unfortunate then that the essential factors in the success of the scheme as envisaged originally by Woodhouse, namely the speed and lack of expense in proceedings, may be lost because of its retention.

It is quite possible, if counsel are engaged for a great number of claims, that applications before the Hearing Officer, the speedy disposal of which are essential, will not be dealt with as quickly as envisaged, but become back-logged with a consequential delay in the granting of relief.

The effects of such delay on rehabilitation programmes would be disastrous. Perhaps one of the most emphasised features of the scheme has been the benefits of speedy rehabilitation; it is vital that relief be given to those injured as quickly as possible, without the problems of a full scale hearing (*c*). It must be admitted that the various Bills and Reports have all stressed the informal and administrative, as opposed to

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(*a*) Accident Compensation Act, s. 154. Note that counsel do not have the sole right of appearance; the term used in subsection (5) is "representative."

(*b*) This statement is made of course with the reservation that the writers are disappointed that the Woodhouse Report was not adopted in its entirety.

(*c*) See Woodhouse Report para. 123-125.

legal, nature of these hearings (*d*), but here mere guidelines and good intentions may not be sufficient. The potential dangers of such hearings are clearly set out in the words of a Director of a New Jersey Rehabilitation Centre:

> "Perhaps the greatest bar to complete rehabilitation is the complex pattern of relationships that characterise the present system of compensation administration. Originally intended as a departure from the old court system aimed at an expeditious determination of the facts by informal hearings and conferences, Workman's Compensation has regressed to all the evils of the old system. *An ideal system is that of Ontario. Here there are no controversial hearings before a referee. A field investigation is made before a Claims Officer, who interviews the claimant, the employer, and the doctor, and submits a report to the Chief Claims Officer for decision.* In the U.S. the hearings are standard practice; they have degenerated into a pseudo-system of medical jurisprudence which has been frequently referred to as Courtroom medicine." (*e*)

It is submitted, that in the interests of administrative efficiency and full rehabilitation, the settlement of claims should be quick and complete and "application should not be made to depend on any formal type of claim, adversary techniques, should not be used, and a drift to legalism avoided". (*f*)

Furthermore it is difficult to accept the Committee's estimate of administrative expenses, if counsel are to be given a free right to appear. The Act specifically states (*g*) that parties appearing before any of the various Officers or Tribunals may be compensated for reasonable legal expenses if they are successful in their application for review; the expense of this alone, especially if the presence of counsel has the predictable effect of increasing the number of appeals to the Supreme Court, will be considerable. If on the other hand, legal expenses are not borne by the State, we are back to the common law position, only now relief in many cases will be less than when damages were awarded, with a consequent increase of the financial burden on the claimant. Moreover, one suspects that if the preliminary stages become overloaded due to the drawn out hearing of applications, more Hearing Officers will have to be appointed, increasing the administrative personnel and thus the running costs of the scheme.

What of the arguments in favour of the retention of lawyers in the scheme? The basic argument must rest on the need to safeguard the rights of the claimant to a fair hearing. This approach surely has little application in the majority of cases, for here the Hearing Officer concerned will be quite capable of ascertaining the validity of a claim, of assessing loss, and evaluating the compensation to be paid. The obvious dangers lie in the exceptional case, where the claimants are so incapable of expressing themselves and explaining the circumstances of their claim that their case would be unfairly prejudiced by its presentation, in the absence of counsel. But is it necessary to allow the legal profession jurisdiction in *all* cases merely because it may be of assistance in *exceptional* circumstances? What is to prevent the Hearing Officer being given the discretion to appoint a guardian *adlitem* if such circumstances do arise. There is indeed, no need for the representative to be a lawyer in even claims of this nature; surely a non-legal representative, who was acquainted with the facts of the case, with the nature of work undertaken by the applicant at the time of injury, or at the very least with the personal circumstances and problems of the individual would be in a better position to present a clear factual picture of the circumstances of the particular case. That after all, is all that any representative would be expected to do.

It should be stressed that under the laws of natural justice, no individual has the "right" to demand legal representation (*h*), and this point has been stressed recently by a number of English cases (*i*).

The fact is, that the right to legal representation should only be granted where the circumstances so demand. In the judicial arena, the presence of counsel can thus be justified as being required to protect the liberty of the parties against the unjust application of the law; the problems involved in cases before the Courts and quasi-judicial tribunals often require assiduous research and presentation by experts in the field of law. No such circumstances, on the other hand, justify representation in a scheme such as the one under discussion. The problems will

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(*d*) Select Committee Report para. 128; Accident Compensation Act, s. 154 (3).

(*e*) Kessler, "The Impact of Workmen's Compensation on Recovery", in *Occupational Disability and Public Policy*. (Ed. Cheit and Gordan 1963)...

(*f*) Woodhouse Report para. 309 (b).

(*g*) Accident Compensation Act, s. 154 (14), see also s. 166.

(*h*) Wade, *Administrative Law*, 213. 3 ed. 1971).

(*i*) See for example *Pett* v. *Greyhound Racing Assn.* [1969] 2 All E.R. 221.

in the vast majority of cases be questions of fact, not of law; is it not sufficient that borderline cases and those involving questions of law, where the efforts of counsel may be of some assistance, are well catered for in the provision of a general appeal to the Supreme Court? This provision for appeal should also provide adequate protection against administrative inefficiency and/or error.

Some reference should be made to overseas experience on this subject. Firstly it is of considerable interest to note that the evidence relied on by the Woodhouse Commission and also the Select Committee for their claim that the vast majority of claims would be dealt with at the Hearing Officer stage, came from figures from the Ontario Scheme; unfortunately, no one has really considered it important enough to point out that there is of course a fundamental difference between the two schemes. In Ontario, absolutely no representation of parties is permitted until the third stage, which is in practice the equivalent of an appeal to the Supreme Court—the results under our Accident Compensation Scheme, where legal representation of parties is permitted at all stages may well be totally different, although it is submitted, not to be totally unexpected.

Another example could be taken from the United Kingdom, where the Franks Committee considered in its report the experience of the National Insurance Local Tribunals and the Industrial Industries Local Tribunals. Legal representation before the former was not permitted without the consent of the Chairman; the permission was only granted in approximately 2 percent of the cases. The latter tribunals did not permit legal representation at all, although other representatives were allowed to appear. Both these schemes were accepted by the Franks Committee as being eminently successful, but it is the comments of the Trade Union Congress in their submissions to the Committee which are most interesting; while they advocated retention of both the above procedures, the Congress stated quite categorically that if uniformity was desired, they would prefer a *complete ban* on representation of any kind, rather than the introduction of legal representation where it did not yet exist.

If any conclusion is to be drawn from the above discussion, it is clear that it must come from a balancing of the interests of efficiency and the cheapness of administration plus quicker and fuller rehabilitation due to a reduction in delay and consequent uncertainty, against the need to preserve public confidence in the fair settlement of claims and the safeguarding of the individual against official mistake or oversight. It is submitted that the arguments against the presence of counsel at the first hearing are by no means rebutted by those commonly put forward opposing such a claim. It may be in fact that the legal profession is "playing down" what must be to many of their "trade" the most forceful argument against their exclusion from the thousands of cases coming before the Hearing Officers, namely their loss of business; perhaps in typically logical fashion they anticipate the response of the general public to such a suggestion. What is certain, is that the point, though undoubtedly a valid one to those whose interests may be harmed, is of no importance in assessing the most successful means of implementing the original Woodhouse concept.

In practical terms however, it is clear that legal representation is here to stay, at least during the first few experimental years. No doubt, counsel will do their best to adjust to the system and accept their new roles with responsibility, but before proclaiming the important part lawyers are about to play and how successful Accident Compensation is destined to be, those concerned should have regard to the words of Professor Atiyah (*j*), which it is suggested go to the very heart of the problem:

> "If the bar is to be brought effectively into the tribunal process then it seems certain that some adjustment in the ways in which barristers think and work will become necessary if the tribunals are not to become subject to the same criticisms as the Courts themselves. The tradition of the law may very well be hostile to the political philosophy which underlies the social security system and the Welfare State."

Although admittedly any opinion, based as it may be to some extent on overseas experience, can only for the most part be a subjective assessment, the writers remain unconvinced that the profession in New Zealand will manage the transformation.

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(*j*) Atiyah, *Accidents, Compensation and the Law*, 612. (1970).

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SUMMARY OF RECENT LAW

CRIMINAL LAW—EVIDENCE AND PROOF

General—Direction to jury where the lies of accused form part of prosecution's case. The appellant had tampered with the number of a dollar note in order to become eligible for a prize. The note was examined and the police were called in. The appellant had given a wrong name and address both to the promoters of the competition and to a police officer, but subsequently admitted to the police his correct name and address. There were many conflicts of evidence between the evidence of the Crown witnesses and that of the appellant. It was submitted that the Judge had failed to give a clear direction to the jury concerning the weight which could be attached by the jury to lies or misdescriptions made or given both before and during the trial. The case is only reported on the question of the proper direction to be given. *Held,* Whenever lies form an important part of the case against the accused the direction to the jury should contain the following: (i) That the jury must be satisfied that the challenged statement is a lie and not a mistake or a mere inaccuracy before they can take it into account against the accused; and (ii) That people lie for a variety of reasons and that the jury should guard itself against the natural tendency to think that if an accused is lying he must be guilty; and (iii) If the lies told in the witness box make the prosecution's case no stronger than it would be if the accused had not given any evidence, those lies should be disregarded as adding nothing positive to the case for the prosecution. (*Broadhurst* v. *The Queen* [1964] A.C. 441; [1964] 1 All E.R. 111 applied.) *R.* v. *Gibbons* (Court of Appeal, Wellington. 5, 14 July 1972. Turner P., McCarthy and Richmond JJ.).

RELEVANT FACTS—ADMISSIBILITY OF EVIDENCE

Letter submitted in evidence on former prosecution of appellant admissible in present prosecution as appellant not charged again in respect of any offence for which he had been previously charged and acquitted—Narcotics—"Offer to . . . supply"—Narcotics Act 1965, s. 5. This was an appeal against a conviction on a charge of offering to supply a narcotic contrary to s. 5 of the Narcotics Act 1965. On 7 October 1971 the police searched the premises of W. who was suspected of offences against the Narcotics Act, and found a letter dated 30 October written to W. and signed "Simon", which was couched in the current slang of drug users. The letter had an address in Naenae which led the police to the appellant. The appellant's room was searched and pieces of paper were found with a name and address and subsequently the police, extending their searches, produced evidence of the arrival in and departure from New Zealand of the person named on the pieces of paper and that a cable had been sent to the same person subsequent to his departure by the appellant. A letter was submitted in evidence from W. to the appellant which had been found by the police when searching the appellant's flat in Auckland a year prior to the events leading up to the present charge. This letter had been submitted in evidence against the appellant on a prior charge in the Supreme Court at Auckland which had been dismissed for lack of evidence. *Held,* 1. In the context of s. 5 of the Narcotics Act 1965 "offer to . . . supply" means "an intimation by the person charged to another that he is ready on request to supply to that other drugs of a kind prohibited by the statute". 2. The letter which had been submitted in support of a previous prosecution upon which the appellant had been acquitted was admissible against the appellant in the present transaction and no attempt had been made to charge appellant again with anything for which he had been previously charged and acquitted. 3. The exhibits were admissible to support the Crown's case and were not inadmissible on the ground that their probative weight was small compared with the prejudice against the accused which they might excite in the minds of the jury. Appeal dismissed. *R.* v. *During* (Court of Appeal, Wellington. 19, 20 June; 7 July 1972. Turner P., Richmond and Perry JJ.).

CRIMINAL LAW—MENS REA

Ignorance of law no defence—Prohibited Immigrant—Aliens—Person convicted of criminal offence overseas prohibited immigrant—Immigration Act 1964, s. 5 (1) (a). The appellant having been convicted of criminal offences in England was a prohibited immigrant under the provisions of s. 4 (1) (c) of the Immigration Act 1964. He was not informed of this when he made inquiries at New Zealand House in London as to whether there were any restrictions on emigration to New Zealand. *Held,* 1. In s. 5 (1) (a) of the Immigration Act 1964 the word "unlawfully" means no more than in breach of the Immigration Act 1964 and s. 5 makes it an offence to land in New Zealand in certain cases where the landing is not otherwise excused by law. 2. Where a statute forbids the doing of a certain act, the doing of such act in itself supplies *mens rea* and ignorance of the law is no defence. (*Kat* v. *Diment* [1951] 1 K.B. 32, 42; [1950] 2 All E.R. 657, 661, applied. *Allard* v. *Selfridge & Co. Ltd.* [1925] 1 K.B. 129, 137, and *Sione* v. *Labour Department* [1972] N.Z.L.R. 278, 282, referred to.) *Labour Department* v. *Green* (Supreme Court, Auckland. 14 August; 21 September 1972. McMullin J.).

HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

Orders for maintenance—Separation agreement—Application for maintenance by wife against deceased husband's executors—Lump sum not normally ordered unless special circumstances—Matrimonial Proceedings Act 1963, ss. 40, 41 and 43. The parties were divorced in October 1968, the decree being based on a separation agreement dated 4 August 1960. The husband by his will made no provision for the respondent aged 57, who filed an application for maintenance under the Matrimonial Proceedings Act 1963 in May 1970 against the trustees of the will seeking both a periodical and a capital sum. There was one son aged 31. By 1959 the husband owned all the shares in a motor camp company at Rotorua, and in that year transferred 5 of the shares to the respondent. The parties lived at the motor camp until May 1960, when the respondent left. A separation agreement was entered into dated 4 August 1960 under which the husband purchased the 5 shares of the respondent in the company and agreed to pay £4 ($8) per week maintenance. The respondent was employed as from 1963 and received a free flat and $8 per week towards the cost of food for her employer and herself. The respondent had other employ-

ment at a net wage of approximately $30 per week, and had saved about $4,000. In a previous application by the respondent under the Matrimonial Property Act 1963 claiming a joint interest in the motor camp, the case was dismissed by reason of the provisions of s. 6 (2). The son had a 5-year lease of the motor camp business as from May 1967 and the profit and loss accounts of the company showed little profit. The husband's estate consisted mainly of the shares in the company which were valued for probate at $24,465. Although the separation agreement provided for cessation of maintenance on a decree absolute being granted, the husband had continued to pay $8 per week until his death, after which no payments had been made. In the Supreme Court White J. had made orders for $8 per week for life and a capital sum of $4,000. *Held*, 1. Since married women are now able to achieve economic independence through their own labours, orders for maintenance will normally be periodic in form and a capital sum will not be directed to be paid unless the circumstances warrant a departure from the normal practice. 2. Notwithstanding an absence in the Matrimonial Proceedings Act 1963 of a provision similar to s. 6 (2) of the Matrimonial Property Act 1963, the Court should not readily alter an arrangement made between spouses. 3. The order to pay a capital sum was vacated and the periodical payment was increased from $8 to $14 per week as from the date of the order of the Supreme Court. Appeal and cross-appeal allowed. *Long* v. *Long* (Court of Appeal, Wellington. 24 July; 22 August 1972. Turner P., McCarthy and Richmond JJ.).

MAORIS AND MAORI LAND—ALIENATION

Consent to land being taken for road by proclamation not under seal together with encouragement to construct road was an "alienation"—Maori Affairs Act 1953, ss. 2, 212, 286 (4), 297. Public Works—Roads and streets—"Roadway" laid out under s. 415 of Maori Affairs Act 1953 not a "road"—No power to declare such "roading" a Government "road"—Public Works Act 1928, ss. 110, 112. Landlord and tenant—Licence—How created—Consent not under seal to Maori land being taken for road—Construction of road prior to proclamation irrevocable licence. In this appeal the appellant (as plaintiff in the Court below), being a body corporate incorporated under the Maori Affairs Act 1953, sued the Ministry of Works and its contractor for trespass. In 1954 there was a narrow, windy road or track 26 miles long and impassable in wet weather, which had been constructed by the Hydro-Electric Department for the purpose of erecting power lines. In May 1954, on the application of the latter Department, the Maori Land Court under s. 415 of the Maori Affairs Act 1953 made an order laying out a roadway as described in the schedule over certain blocks including that of the appellant, and declared that no compensation should be payable to any person in respect of the said roadway. In October 1959 the Engineer of the Ministry of Works obtained a consent from the secretary to the appellant agreeing to the Ministry of Works entering upon the appellant's land "for the purpose of construction of a public road", compensation to be assessed under the Public Works Act 1928 and also agreeing to the land required being taken by proclamation and vested in the Crown. This consent was signed by the secretary only but the chairman and the management committee of the appellant knew and approved of such permission being given. After the work had begun the chairman of the appellant in December 1961 gave permission for the establishment of a Ministry of Works camp on the appellant's land, and in other ways demonstrated that the work was proceeding with his consent. By the middle of 1962 the Ministry had constructed a tarsealed road across the appellant's block. In June 1964 the appellant's solicitors wrote inquiring whether the land had been taken by proclamation and advising that a claim for compensation would be made. In reply it was stated that the road had been constructed under the 1954 order and that no compensation was payable thereunder, and furthermore that betterment would outweigh any claim for loss by the taking of the land. The appellant, without opposition, applied for and obtained a cancellation of the 1954 order, but the Ministry maintained its contention about betterment. The appellant sued for trespass and damages. Until the revocation of the 1954 order there had been no complaint of trespass. The land was taken by Proclamation on 21 June 1971. In the Court below Tompkins J held (1) that the 1954 order authorised the construction of the road notwithstanding that the line of the road deviated considerably from the original Hydro-Electric Department road; (2) notwithstanding that the consent amounted to an "alienation" and ought to have been under seal that it was operative as a permission sufficient as an effective defence to a claim of trespass. *Held*, 1. A "roadway" laid out under s. 415 of the Maori Affairs Act is not a road within the meaning of s. 110 of the Public Works Act 1928. 2. Section 112 (1) of the Public Works Act 1928 had no application to the present case and did not justify the construction of the road. 3. The document signed by the appellant's secretary, coupled with encouragement to construct the road, created a right in equity for the respondent to continue in the enjoyment of the road without interference from the appellant. (*Plimmer* v. *Wellington City Corporation* (1884) 9 App. Cas. 699; N.Z.P.C.C. 250, applied.) 4. The Court must look at the circumstances in each case to decide in what way the equity can be satisfied, whether by the licensor paying compensation to the licensee or not. (*Plimmer* v. *Wellington City Corporation* (*supra*), applied. *Chalmers* v. *Pardoe* [1963] 1 W.L.R. 677, 681-682; [1963] 3 All E.R. 552, 555, referred to. 5. The consent together with the equity in the first respondent was an "alienation" within the meaning of s. 2 of the Maori Affairs Act 1953. 6. Section 212 of the Maori Affairs Act 1953 prevented the appellant from denying the validity of the consent on the ground that not being under seal it did not comply with the provisions of s. 286 (4). 7. Section 297 of the Maori Affairs Act 1953 which enables the committee of management on behalf of a corporation to contract not under seal "other than an alienation of land" refers only to alienations of land required by s. 286 (4) to be executed under seal. 8. The appellant stood by and accepted the benefit of full performance by the first respondent of that which it had encouraged and licensed the first respondent to do. Any attempt by the appellant to repudiate the licence would amount to fraud, which a Court of Equity would not suffer to prevail. (*Melbourne Banking Corporation* v. *Brougham* (1879) 4 App. Cas. 156, 168-169, and *Wilson* v. *West Hartlepool Railway Co.* (1865) 2 De G.J. & S. 475, 493, 46 E.R. 459, 466, applied. *Hoare and Co. Ltd.* v. *Mayor, etc., of Lewisham* (1901) 85 L.T. 281, and *Bond* v. *Hopkins* 1 Sch. & L. 413, 433, referred to.) Appeal from the judgment of Tompkins J. dismissed. *The Proprietors of Hauhungaroa 2c Block* v. *Attorney-General and Another* (Court of Appeal, Wellington. 15, 16, 21 June; 1 September 1972. Turner P, Richmond and Perry JJ.).

PRACTICE—NOTICES AND NOTICES OF MOTION

Notice of motion served after provisional date for hearing validly served—Code of Civil Procedure, R 399. A notice of motion containing a provisional date of hearing was served on the respondent after the provisional date. *Held*, Rule 399 of the Code of Civil Procedure, which provides that a notice of motion must be served three clear days before the date named therein for the hearing of the motion, has no application where the date inserted is a nominal date of hearing. *Jones* v. *Commercial Research and Management Co. Ltd.* (Supreme Court, Auckland. 8, 13 September 1972. Mahon J.).

TRANSPORT AND TRANSPORT LICENSING—AIR TRANSPORT

"Maintenance release" and "Certificate of compliance" wrongfully issued—Aircraft repaired—Wood in petrol tank—Court not satisfied that no danger existed—Civil Aviation Regulations 1953 (Reprint S.R. 1970/173), regs. 18 (7), 36. This was an appeal against convictions on two informations respectively brought pursuant to regs. 36 and 18 (7) of the Civil Aviation Regulations 1953, the appellant being an aircraft maintenance engineer. After damage arising out of an accident to an aircraft had been repaired and the aircraft had been test flown, the appellant issued a maintenance release and a certificate of compliance in May 1971. On 5 June 1971 a piece of wood had been found in the petrol tank in the port wing. The wood had been used during repairs to move the bag tank in the wing. Some evidence was given that the piece of wood could have affected the working of the petrol gauge for the port tank while in flight, thereby conveying a false impression to the pilot as to the quantity of petrol in the tank. *Held*, 1. The word "likely" may mean "probable" or "something less than probable" but more than a bare possibility; its construction in any statute or regulation will depend upon the context in which it is used. (*Bayer Products Ltd.'s Application* (1947) 64 R.P.C. 125; [1947] 2 All E.R. 188; *Koufos* v. *C. Czarnikow Ltd.* [1969] 1 A.C. 350; [1967] 3 All E.R. 686; and *The Wagon Mound (No. 2)* [1967] 1 A.C. 617; [1966] 2 All E.R. 709, referred to.) 2. The effect of reg. 36 (2) (a) of the Civil Aviation Regulations 1953 is that it is for the prosecution to establish that the ingredients of an offence exist, and that it is for the person charged to establish the absence of danger to the satisfaction of the Court. 3. The expression "established to the satisfaction of the Court that no element of danger was present" in reg. 36 (2) (a) requires that the mind of the Court must be carried to the point where on a balance of probabilities it can say that no danger was in fact present. (*Blyth* v. *Blyth* [1966] A.C. 643; [1966] 1 All E.R. 524; *Angland* v. *Payne* [1944] N.Z.L.R. 610; [1944] G.L.R. 266; and *Robertson* v. *Police* [1957] N.Z.L.R. 1193, referred to.) 4. The appeal against conviction under reg. 36 dismissed, but under reg. 18 (7), allowed. *Transport Ministry* v. *Simmonds* (Supreme Court, Auckland. 19 May; 3 July 1972. McMullin J.

BILLS BEFORE PARLIAMENT

Admiralty
Broadcasting Authority Amendment
Commonwealth Games Boycott Indemnity
Companies Amendment
Crimes Amendment
Department of Social Welfare Amendment
Domestic Purposes Benefit
Explosives Amendment
Maori Purposes
Marine Pollution
Ministry of Transport Amendment
Moneylenders Amendment
Municipal Corporations Amendment
National Roads Amendment
New Zealand Day
New Zealand Export-Import Corporation
Niue Amendment
Overseas Investment
Post Office Amendment
Rates Rebate
Recreation and Sport
Rent Appeal
Trade and Industry Amendment
Trustee Savings Banks Amendment
Wool Marketing Corporation Amendment

STATUTES ENACTED

Tobacco Growing Industry

REGULATIONS

Regulations Gazetted 15 to 22 March 1973 are as follows:

Agricultural Chemicals (2,4,5-T Specification) Notice 1973 (S.R. 1973/72)
Child Care Centre Regulations 1960, Amendment No. 4 (S.R. 1973/64)
Christchurch Secondary Schools Regulations 1966, Amendment No. 2 (S.R. 1973/65)
Customs Tariff Amendment Order (No. 6) 1973 (S.R. 1973/55)
Customs Tariff Amendment Order (No. 7) 1973 (S.R. 1973/56)
Customs Regulations 1968, Amendment No. 7 (S.R. 1973/66)
Dairy Produce Superannuation Levy Regulations 1952, Amendment No. 4 (S.R. 1973/67)
Health (Burial) Regulations 1946, Amendment No. 2 (S.R. 1973/57)
Indigenous Forest Timber Advisory Committee Regulations 1966, Amendment No. 1 (S.R. 1973/58)
Manual and Technical Instruction Regulations 1925, Amendment No. 18 (S.R. 1973/68)
Maori and Polynesian Scholarships Regulations 1973, (S.R. 1973/59)
Periodic Detention Order 1973 (S.R. 1973/60)
Price Freeze Regulations (No. 2) 1973 (S.R. 1973/73)
Revocation of Exchange Control Suspension Regulations (No. 2) (S.R. 1973/63)
Secondary and Technical Institute Teachers Disciplinary Regulations 1963, Amendment No. 1 (S.R. 1973/69)
Stabilisation of Prices Regulations 1972, Amendment No. 1 (S.R. 1973/70)
Stabilisation of Prices Regulations 1972, Amendment No. 2 (S.R. 1973/74)
War Pensions Regulations 1956, Amendment No. 13 (S.R. 1973/61)
Wildlife Regulations 1955, Amendment No. 8 (S.R. 1973/62)
Wool Prices Stabilisation Regulations 1973 (S.R. 1973/71)

CASE AND COMMENT

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

Income Tax

In *Wheelans* v. *C.I.R*; *Ashton* v. *C.I.R.* (the judgment of Wilson J. was delivered on 22 September 1972) the taxpayers were in practice as the only partners in a firm of public accountants. In October 1965 they decided to take into partnership another accountant, on condition that he paid a sum of goodwill as a condition of joining them. This goodwill was to be calculated in the usual way, on the basis of the income likely to be received in a future period.

One of the sources of the partnersh;p income had been remuneration in respect of accountancy work done on behalf of certain finance companies. There were two parts to this remuneration. One was a commission on moneys loaned and collected on behalf of the finance companies, and the other—designated "office charges"—was a sum of money paid by the hirer under any hire purchase agreements arranged by the partnership. The partners had an arrangement with the finance companies that, in addition to the strict accountancy fees, they would be paid these office charges.

The proposed new partner gave evidence that this part of the income was precarious, in that there was competition among finance companies for the business of dealers, and there was a growing tendency for the dealers to take advantage of this competition to secure the office charges for themselves. Thus, as he saw it, the partnership at any time might lose the benefit of these charges. As a result, he made it clear that, if he was going to join the partnership, he was not prepared to pay goodwill in respect of them.

The taxpayers agreed to this stipulation, and decided to admit him to the partnership at a premium for goodwill which would not take into account the charges received from the time of his admission. The new partner would not be entitled to share in any such charges received by the partnership after the date of his admission.

Consequently it was necessary to make some arrangement for keeping these office charges separate.

Wilson J. noted that the simplest and most ordinary and straightforward way of doing this would have been merely to credit the office charges to a special account in the partnership. This would be divided among the old partners—the taxpayers—only, and the new partner would not participate in it.

However, a recent serious illness of one of the taxpayers had made more urgent the consideration which both of them had been giving to setting up family trusts. When the new partner was admitted, the finance companies terminated the appointment of the old firm as their accountants and, at about the same time, each of the taxpayers became settlor, and, together with a solicitor, trustee, of a trust for the benefit of the wife and children of the other taxpayer. Then, the finance companies involved, instead of appointing the new firm, appointed the two sets of trustees as joint accountants to carry out their work on the same basis of remuneration as the old partnership had been paid. The trustees then appointed the new partnership to do the actual accounting work for their entire remuneration except the office charges. The end result was that the office charges which formerly had been paid by the finance company to the old firm comprising the two taxpayers, now were received by the trustees of the respective trusts.

Wilson J. accepted the evidence given by the taxpayers of their purpose in entering into these arrangements. It was that, while both of the taxpayers now had the benefit of the office charges, if either of them died, the survivor would succeed to the sole benefit of them. By creating the trusts, and having those payments made to them, they were insured against that risk so long as either of them survived to ensure the continuity of the payments. Thus, both families would continue to enjoy the profits equally, instead of one succeeding, on the death of its head, to the full amount of the office charges.

Wilson J. did not accept that these transactions amounted to an ordinary business dealing. In fact, he considered certain facets of them to be extraordinary. However, despite the manifest novelty of the transactions, Wilson J. held that it was an "ordinary family dealing" within the classic test enunciated by Lord Denning in *Newton's* case. Wilson J. held that:

> "Ordinary family dealing means no more than dealing in such a way as the ordinary person faced with the circumstances as faced

the taxpayer would have acted had he not been seeking to evade liability for tax."

Accordingly:

"I am satisfied that I can predicate here with confidence that what was done in the way of ensuring that this income became the income of the family trust rather than the objectors was ordinary family dealing and was not referable in any significant degree to any desire to avoid tax. The question whether this advantage entered the minds of the objectors was not discussed when they were giving evidence but they are public accountants, (or as they are now termed chartered accountants) and I would not insult their intelligence by thinking that they were not conscious of the fact that there would be a tax saving involved. That, however, is very far from finding that that was any significant part of the scheme which they put into operation and as far as I am concerned, having seen and having heard them, I am satisfied that the predominant purpose of the arrangement was to provide security for their families with regard to these office charges which had formerly been paid to them as partners."

The learned Judge considered that, even if he was wrong in holding that this was an ordinary family arrangement, and that, therefore, it was capable of being avoided by s. 108, the effect of that avoidance still would not have made the taxpayers liable. He held:

"In my opinion, if the trusts were annihilated, the situation is that the money was paid by the companies to the trustees. Mr Blank suggested that they were not entitled to that money beneficially, that they, therefore, held that as constructive trustees, and that may well be so; but I fail to find any basis upon which I could say that they held it as constructive trustees *for the objectors*. The money was received by them as trustees. They were appointed as trustees. If their trust was annihilated then they received it in a capacity which did not exist and in my opinion in that case there was a resulting trust to return it to the source from which it came, namely the respective finance companies. . . . [I]f one goes further (as the Commissioner claimed to do) and annihilates the appointment of the trustees as accountants by the companies, that still did not leave the money in the hands of the objectors or make it their income. Indeed, that would be an added reason for saying that such moneys as were in fact paid by the companies to the trustees were held by them on resulting trusts for the company, because they had no right to them whatsoever."

Wilson J. mentioned a matter which came out in the evidence that initially he felt to be very strongly against the taxpayers but which, ultimately, did not go against them. This was that, in May of the year in question, each of the taxpayers had received from their respective family trusts a considerable sum of money which was paid into their respective personal bank accounts, and used for family purposes including housing. Thus, it was used just as it would have been had it gone to the taxpayers as part of their own professional incomes. However, Wilson J. held that these moneys were received by the taxpayers as parents of their children, and that the fact that it had gone through their hands in this way did not make it part of their respective incomes. Accordingly, unless the family trusts could be destroyed, and there could be imported in their places trusts for the taxpayers, the mere receipt of the money by each of the taxpayers in his capacity of parent and guardian of his children could not constitute it, even to that extent, part of his income for the purposes of the assessment of tax.

Accordingly, the assessments were to be amended by deleting from the income of the taxpayers that part which was attributable to the addition of the income from the respective trusts.

A.P.M.

Income Tax

In *Gerard* v. *C.I.R.* (the judgment of Wilson J. was delivered on 11 October 1972) the taxpayer carried on business as a farmer. In 1964 one Murchison created the Thornycroft Family Trust, for the benefit of the taxpayer's issue, with an initial capital contribution of £5. The trustees were the taxpayer's wife, and a trustee company which also carried on business as stock and station agents. By successive agreements in 1966, 1967, 1968, and 1969 the taxpayer agreed to lease various parts of his farm to the trustees at rents expressed to be at a stipulated figure, or whatever higher figure might be assessed by the Stamp Office, so that there would be no element of gift. In each farming season during the currency of these agreements the trustees employed the taxpayer to cultivate the particular lands involved that season, and to sow them, at the usual rates charged by independent agricultural contractors. The trustees paid an outside independent contractor to harvest the crops, and also arranged the sale of the crops and received the proceeds of the sales. In addition, the

trustees met all payments for topdressing, seed, freight, and the like in connection with the crops.

In each of these years the full amount of net trust income was distributed among the infant beneficiaries, and paid to the taxpayer's wife for their benefit. The taxpayer and the trustees returned for income tax purposes the incomes respectively received by them. However, the Commissioner, on the basis that s. 108 avoided the transactions, re-assessed the taxpayer with the total of the net incomes received by him and the trustees, together with the amount debited by the trustees as their commission against the trust income.

In giving judgment Wilson J. noted that neither party had bothered even to cite the actual enactment concerned, s. 108, and expressed the view himself that it was the judicial glosses on that section which now fall to be interpreted rather than the enactment. His Honour referred to the classic statement of Lord Denning in *Newton* v. *C. of T.* [1958] A.C. 450, 466:

> "In order to bring the arrangement within the section you must be able to predicate—by looking at the overt acts by which it was implemented—that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section."

Wilson J. thought:

> ". . . it is tolerably clear from the above passage that arrangements are annihilated by virtue of the section,
>
> (a) where their *purpose* is tax avoidance, in every case;
>
> (b) where their *effect* is tax avoidance, only when they cannot be explained by reference to ordinary business or family dealing.
>
> The first question which the Court must ask itself in a case such as the present in which s. 108 is invoked is, 'Is this arrangement a device for avoiding tax masquerading as ordinary business or family dealing? or is it ordinary business or family dealing which has the incidental effect of saving tax?' If the former alternative is the case the section is invoked; if the latter, it is not. As Lord Denning pointed out, an important aid in making this decision is the method employed by the taxpayer—the overt acts by which the arrangement is implemented."

As to the overt acts, the taxpayer felt unable, in view of the similarity between the present facts and those of *Mangin's* case, to argue that the *application* of s. 108 was inappropriate. However, the taxpayer did argue that the section could not have such an *effect* as to make the taxpayer assessable with the trust income.

Accordingly, the Court proceeded on the assumption that s. 108 was applicable, and examined the effect of the section. Wilson J. observed that:

> "for the purposes of this case the important principle is that the effect of the section is that transactions that come within its terms are treated as never having happened; but that, in itself, does not make any income arising therefrom the income of the taxpayer, unless, in the implementation of the arrangement, moneys have come into his hands which the Commissioner is entitled to treat as income derived by him."

His Honour said further:

> "The basis of liability for income tax under the Land and Income Tax Act 1954 is income 'derived' by the taxpayer. See s. 77. Section 92 is the only section in the Act that for the purposes of the Act 'deems' income to be derived when in fact it has not been derived, and incidentally indicates that 'derived' means 'actually paid to or received by him, or already become due or receivable'. *Mangin's* case decides that no 'deeming' may be indulged in by the Courts in order to make moneys income derived by the taxapyer unless they are in fact paid to or received by him, or already due or receivable, or are deemed to be income derived by him by virtue of s. 92."

He noted, that, on the face of it, none of the income included in the taxpayer's income by the re-assessment, actually was paid to or received by him, or was due or receivable by him, or seemingly was deemed to be derived by him under s. 92. An examination of the transactions which the Commissioner contended to be annihilated did not cause him to change his mind. He found no difficulty in annihilating the successive agreements to lease, nor the employment contract between the taxpayer and the trustees, because, in each case, the taxpayer was a party to them. However, the taxpayer was not a party to either the Deed of Trust, or the harvesting contracts, or the contracts for the sale of the crops.

The Commissioner invited Wilson J. to follow the judgment of Wild C.J. in *Udy* v. *C.I.R.* [1972] N.Z.L.R. 714 where the learned Chief Justice declined to follow the judgment of

Turner J. in *Wishart's* case, where, at p. 327 line 40, 332 line 42, and 334 line 2 he held that only arrangements to which the taxpayer is a party are rendered void by s. 108. Wilson J. declined the invitation. He observed that the matter appeared to have been *res integra* when Turner J. came to examine it, and that Haslam J., at 332, line 3 gave some indication of supporting Turner J., while North P. certainly did not dissent from the proposition. Accordingly Wilson J. considered that the proposition enunciated by Turner J. was "absolutely binding on this Court."
However, Wilson J. did:

> ". . . observe in passing, that, were the points still open, I should have preferred the view that, whenever an arrangement that is avoided by the section is entered into by a taxpayer, not only that arrangement but everything done pursuant to the arrangement (whether or not the taxpayer is a party to what is done) is also rendered void. That view may be reconciled with Turner J.'s conclusion on the basis that transactions by other parties to the arrangement with strangers to it are entered into by them as the taxpayer's agents and he is therefore a party to them; but this attempt at reconciliation presents difficulties having regard to the relevant facts in *Wishart's* case."

Accordingly, Wilson J. held that the only transactions which were avoided by s. 108, because they were the only transactions to which the taxpayer was a party in a direct sense and not through an agent, were the agreements in successive years by the taxpayer to lease various paddocks to the trustees, and the agreement by the trustees to employ the taxpayer to cultivate, sow, and manage the lands agreed to be leased. However, the result of annihilating these was not to reveal any money as having come into the taxpayer's hands, except what was paid to him by the trustee for his work. That latter had been returned by him anyway as part of his assessable income. The remainder of the money, which was the issue in the present proceedings, therefore was not actually derived by him.

Thus, the question was whether the taxpayer was deemed to have derived that part of the income from the proceeds of the sale which he did not actually receive, by virtue of s. 92. That is, whether this money had been dealt with in his interest or on his behalf. Wilson J. held that the money had been dealt with in the interest, not of the taxpayer, but of his children. Although this may have been to the indirect benefit of the taxpayer, there was no evidence to show that it was used to relieve him of any expense with regard to his children. Even if it had, Wilson J. held that this would not have brought the situation within s. 92. The learned Judge took the view that that phrase in s. 92 means directly or immediately in his interest or on his behalf, in the sense that the income really was the taxpayer's. Were it otherwise, any income from a trust by which a taxpayer's dependants benefited would come within s. 92 and be deemed to have been derived by the taxpayer.

Wilson J. then proceeded to examine the case on the assumption that he had interpreted Turner J.'s judgment in *Wishart's* case too narrowly in respect of his construction of the word "party". He referred to the inference he had drawn that the taxpayer, the nominal settlor, and the trustees, had acted in accordance with a preconcerted plan in setting up the trust, entering into the agreements to lease the paddocks, entering into the agreements for employment both of the taxpayer and of the independent harvesting contractor, and entering into the agreements for sale of the crops and payment of the proceeds to the taxpayer's wife for the benefit of the taxpayer's children. On this basis, he held:

> "If that plan were devised and carried out for the purpose of relieving the objector of liability to pay tax on the resultant income and not for the purpose of benefitting his children with the incidental advantage of saving tax (as to which, on Mr Somer's invitation, I make no finding) then it was clearly an 'arrangement' under s. 108 and in my opinion the trustees acted as the objector's agents, in making contracts with strangers to the arrangement for the purpose of putting it into effect. It would then follow that not only the arrangement itself but everything done pursuant thereto would be rendered void by s. 108."

However, his Honour observed that, although the trust would be annihilated, this would not help the Commissioner. It would not reveal the net income of the trust as ever having reached the taxpayer, even merely (as in *Mangin's* case) passing through his hands. The only extent to which he did receive the income was in respect of the remuneration paid to him by the trustees. But he returned this as part of his assessable income.

The Commissioner submitted that the proceeds in the hands of the trustees were held on a constructive trust for the taxpayer. Wilson J. saw two reasons for declining to adopt this course. Firstly:

". . . (unless the taxpayer has received the income at some intermediate stage) it is the end result that must be regarded. Here that end result was receipt of the income, not by the objector but by his wife."

Secondly, his Honour said that to imply a trust in favour of the objector, since it would not be a matter of necessary implication, would be to do what the Privy Council in *Mangin's* case forbade: namely, filling the vacuum left by the Legislature.

Wilson J. concluded his judgment:

"It may well be that it is because the mists that permeate this world of fiscal fantasy make it so difficult to see clearly that the Courts have turned against hypothetical reconstructions of void arrangements for the purpose of enabling taxation authorities to collect more tax. One's thoughts turn naturally to Omar Khayyam's quatrain:

" 'Ah love! Could Thou and I with Fate conspire
To grasp this Sorry Scheme of Things entire,
Would not we shatter it to bits—
And then re-mould it nearer to the Heart's desire!'

"Parliament, by s. 108, has shattered the sorry scheme of things entire; it is for Parliament to re-mould it nearer to the Commissioner's desire. This plea to the Courts to fill the legislative vacuum with an implied trust must fall on deaf ears."

A.P.M.

Offers subject to Solicitor's approval

The fact that a question arises fairly often, it seems, is no guarantee at common law that its answer will be certain. Conditional contracts are a case in point. Agreements "subject to approval" or "subject to contract" have been around for some time. Yet it is, for example, far from easy to determine whether a condition is precedent or subsequent; whether it attaches to the contract or to the offer and acceptance; whether failure brings about termination automatically or only on notice; whether waiver is possible or not; and whether in the case of a condition precedent, its effect is to suspend the existence, or only the operation, of a contract.

A problem of this kind arose in *Buhrer* v. *Tweedie* (Supreme Court, Christchurch, judgment 29 November 1972), an appeal from the Magistrate's Court heard by Wilson J. The appellant, who had a house property for sale, had received an offer in writing from the respondent to buy it for $18,000. The appellant signed a purported "acceptance" of this offer adding the words "This Acceptance is subject to final approval by my solicitors". When the document was presented to the respondent the same day he wrote on it "I agree" followed by his signature and the date. No approval had been given by the appellant's solicitors when, six days later, the respondent purported to withdraw from the deal. A few hours later, the appellant's solicitors intimated that they disputed the respondent's right to withdraw and they purported to give formal approval. The property was eventually sold to a third person for $1,250 less than the $18,500 shown as the purchase price on the written document. The appellant claimed this amount plus additional expenses as damages for breach of contract. The problem at issue, then, was whether a binding contract for sale had been concluded between the parties.

Like the learned Magistrate in the Court below, Wilson J. concluded that no contract had ever been formed. The appellant's purported "acceptance", because it introduced new terms, could at best be only a counter offer. As such, it was expressly subject to the approval of his solicitors. The respondent's "I agree" was therefore not an acceptance creating a contract. It signified his assent to the proposed new terms but it also acknowledged the appellant's stipulation that, until approval had been given, he was not to be bound. The learned Judge went even further. Even after the solicitor's approval had been given, the vendor would have had to make a fresh offer before acceptance could have been possible. *A fortiori*, when the respondent withdrew from the sale, there had been no offer capable of acceptance, let alone the acceptance of a binding offer. Accordingly, the appeal was dismissed and the action for damages failed.

It is interesting to contrast this case with *Scott* v. *Rania* [1966] N.Z.L.R. 527, where the condition read "This offer is subject to my being able to arrange mortgage finance. . . ." Judging from the report, it seems to have occurred to no one in that case that the attachment of a condition to the "offer" might have made it incapable of acceptance, whether before or after finance had been arranged, and, indeed, might have prevented its being an offer at all. According to *Buhrer* v. *Tweedie*, the two cases would be different in that a "subject to finance" clause relates to "some aspect" whereas, in the instant case, the "whole offer" was subject to approval. With respect, it is difficult to see why, merely because finance is only an aspect, the whole offer should not be taken as being subject to finance being arranged. Conceivably a buyer

could be just as eager to avoid a binding engagement until he had obtained finance as world a vendor be before he had consulted his legal adviser. In *Buhrer* v. *Tweedie*, the condition was interpreted to mean in effect "This is not an offer but an advance notice that I may at some time in the future make you an offer, if my solicitor agrees". In *Scott* v. *Rania*, it meant "This is a firm offer to enter into a contract, a condition precedent to which shall be my ability to raise finance." Clearly, differences of this magnitude owe little to the words used, and not much more to the actual subject-matter of the condition. They must turn on the Court's insight into the nature of the transaction as a whole, in the light of all the relevant circumstances.

That apart, there is the further interesting enquiry whether the end result would have been any different if, in *Buhrer* v. *Tweedie*, the condition had been held to attach to the contract rather than merely to the counter offer. If the former, the condition would almost certainly have been held to be a condition precedent in which case it seems clear from his judgment that Wilson J. would have held that the vendor was unable, while the condition precedent remained unfulfilled, to withdraw from the contract.

That result would certainly accord with common sense and with what one suspects would be the instinctive reaction of most contract lawyers. Moreover, it would have the support of the recent decision of the English Court of Appeal in *Smallman* v. *Smallman* [1972] Fam. 25. But in this country it is by no means certain that that result would be the right one. In *Scott* v. *Rania* the majority of the Court of Appeal can be read as saying that, until a condition precedent is fulfilled, no binding contract between the parties is brought into existence. Some support for such a point of view can be derived from the decisions of the Privy Couucil in *Aberfoyle Plantations* v. *Cheng* [1960] A.C. 115 and of the Supreme Court of Canada in *Turney* v. *Zhilka* (1959) 18 D.L.R. (2d) 447. If there is indeed no binding contract, it would surely be open to either party to withdraw at any time before the conditions were fulfilled. And, in that case, the appellant in *Buhrer* v. *Tweedie* would have been doomed from the start.

B.C.

Car Leasing—Those Hire Purchase Regulations Again!

The flow of cases involving car leasing and financing transactions continues unabated. Two decisions by McMullin J. delivered within two days of each other and involving quite similar fact situations deal with a number of interesting points concerning the invalidation of transactions entered into on regular documents but on the faith of illegal assurances by the dealer or the finance company. In the first case, *Associated Group Securities Ltd.* v. *Marsanyi* (Auckland, M. 285/72, 6 February 1973), his Honour dismissed an appeal from a judgment of Mr Nicholson S.M. for the plaintiff holding the transaction to be in contravention of Reg. 8 (b) of the Hire Purchase and Credit Stabilisation Regulations 1957 (Reprint S.R. 1967/192) and thereby void under Reg. 10 (d). The respondent had in 1968 entered into a 3-year lease containing a provision to the effect that no agreement or arrangement existed between the parties whereby property in the vehicle would or might pass to the plaintiff or whereby he might buy it. Upon inquiry from the dealer and subsequently at the appellant's office where he had been sent by the dealer, the respondent was told that at the end of the term of the lease he could "buy the car in his wife's name" at the residual value stated in the lease. As a result he entered into the lease with the appellant. After the respondent encountered difficulty in keeping up the rental payments, the appellant repossessed the vehicle. The respondent thereupon claimed refund of the payments made under the lease, relying on the familiar proviso to Reg. 10. He succeeded before both the Magistrate and McMullin J. The appellant argued that the respondent could not qualify as a "buyer" under Reg. 10 even under the extended definition that term is given by Reg. 2 as including a "prospective buyer". This point appears to have been conceded in *Credit Services Investments Ltd.* v. *Quartel* [1970] N.Z.L.R. 933, 945, where oral, possibly unenforceable, assurances by the lessor that the lessee could purchase at the end of the term were held sufficient to entitle the lessee to a refund by virtue of the proviso. McMullin J. held that the respondent clearly fell within the definition of a "prospective buyer". He said:

> "I do not say that the entertainment of a vague possibility that a party may purchase that property at some time in the future will make him a 'prospective purchaser', but a contemplation brought about by an offer by the lessor, which offer resulted at the subsequent date in the lessee endeavouring to exercise his rights under it, brings him within the definition of prospective purchaser."

With respect, his Honour's decision on this point seems unassailable and consistent with the purpose of the regulations. Two further observa-

tions are, however, in point. His Honour clearly considered that the arrangement whereby the respondent's wife could purchase the car at the end of the term was a subterfuge for a purchase by the respondent. But suppose that there is a *genuine* arrangement that a third person is to purchase the car at the residual value at the end of the term. Arguably, such an arrangement could fall foul of Reg. 8, although it is noteworthy that the Economic Stabilisation (Motorcar Hiring) Regulations 1971 (S.R. 1971/126) which regulate car leasing do not appear to prohibit a sale even to the lessee at the end of the hire term. But even if such an arrangement does contravene Reg. 8 and is thus void under Reg. 10 (d), it does not appear that the lessee can recover under the proviso to Reg. 10 since *he* is not the "prospective buyer". The second point is somewhat related. It is implicit in the learned Judge's reasoning that the prospect of being a buyer ought to be induced by the lessor or his agent, and not merely be the result of the lessee's personal conviction. Whether it is necessary that such inducement occur at or before the time of entering into the agreement, or whether a subsequent arrangement even if unexecuted may contravene Reg. 8, is not readily apparent. The economic harm flowing from the latter transaction is not obvious, since presumably the lessor is free to dispose of the vehicle as he thinks fit at the end of the term. If so, why not to the lessee, so long as no promise or inducement to this effect is held out at the time of entering into the lease? One hopes that the observations of McCarthy J. in *Credit Services Investments Ltd.* v. *Carroll* [1973] 1 N.Z.L.R. 246 to the effect that the regulations should be applied with restraint would prevail.

Two further submissions are of interest. The first, that the transaction was an ordinary business arrangement and thus not caught by the regulations, was firmly rejected by the learned Judge. An oral agreement permitting purchase of the car at the end of the term in the name of the lessee's wife despite an express prohibition in the written contract against repurchase was not to be explained in ordinary business terms.

The second submission, which was not pressed, was that Reg. 8 (b) and the proviso to Reg. 10 were *ultra vires* the Economic Stabilisation Act 1948. The argument, based on the alleged unfairness in a bailee's having free use of a vehicle over a period of years, was predictably rejected. There are numerous *dicta* in the cases to the effect that unfairness in individual cases may be a necessary fact of life in the enforcement of a scheme of economic regulation. The only possible argument against the validity of these provisions seems to be that they cannot possibly be said to promote the economic stability of the country, the express general purpose of the empowering Act as stated in s. 3. The argument would presumably have to proceed along the lines that nullifying such transactions and providing for refunds contributes to economic chaos rather than stability, and that the provisions do nothing to decrease the rate of inflation. Obviously, this sort of submission requires ample expert economic evidence as a foundation. Even then, it is unlikely to fall on receptive ears. Too many cases have come and gone without this complaint being made by the finance companies, and if the point had any substance, it is surprising that it was not made before. Probably the answer has already been supplied by McCarthy J's comments in *Carroll's* case that the regulations are designed to dampen the demand for credit. One perhaps not completely efficient way of achieving this, and thereby promoting economic stability, is to deter the giving of excessive credit through severe criminal and civil penalties. Such penalties are certainly present in the Act and the regulations.

Although the second case dealt with substantially the same factual situation, it is interesting to note some quite different submissions being made in it. *Robert Northe Carriers Ltd.* v. *Cord Motors Ltd. & Another* (Auckland, A. 193/72, 8 February 1973) involved a one-year lease of a Mercedes valued at $14,500 with rental (excluding a refundable deposit) over the period amounting to $7,080. The lease, executed by the plaintiff in February 1971, was in substitution for a lease from the first defendant of a Chevrolet Impala, with which car the plaintiff had become dissatisfied within a short time. The plaintiff alleged, and McMullin J. accepted his account, that before executing the lease on both occasions, he had been told by the dealer's salesman that he could purchase the car at the residual value stated in the lease, in the case of the Mercedes, $9,667. There was no provision in the lease whereby the lessor could buy the car at the end of the term. The lease was assigned, as the first had been, to the second defendant, Credit Services Investments Ltd. After the year was almost up, in response to an inquiry the plaintiff was told by the dealer that he could not buy the vehicle because the regulations had been changed, but that the plaintiff's governing director (who had conducted all the negotiations with the defendants) could buy it at the residual value or lease it in his own name. A second lease was accordingly executed for a 24-months' term

naming that director as lessee, and the salesman said he would ascertain the value at which the director could purchase. This lease was also assigned to the second defendant. After some inconclusive communications with the second defendant concerning the purchase price, the plaintiff issued proceedings in the Supreme Court, claiming the first Mercedes lease was a "hire purchase agreement" or in contravention of s. 8, thereby entitling it to a refund of all monies paid under that lease. The plaintiff accepted that it had to return the car in the event of its claim succeeding.

His Honour held that the plaintiff succeeded against the first defendant dealer, but failed against the second defendant finance company. Only a few of the arguments dealt with by his Honour will be discussed.

A preliminary submission was made that the parol evidence rule prevented the admission of any collateral verbal arrangement in contradiction of the terms of the written lease. It is uufortunately unclear from the judgment whether the oral arrangement was inconsistent with some term in the agreement (such as the one in *Marsanyi's* case prohibiting sales at the end of the term or some term alleging that the document was the sole agreement between the parties) or was merely supplementary to the document. The parol evidence point does not appear to have been dealt with in any of the previous cases on the regulations, although evidence of written and oral arrangements besides the formal executed document has regularly been proffered and acted on by the Courts. McMullin J. had little difficulty in rejecting this submission. He said:

> "The reason for the general rule is that the intention of the parties to a *contract* is best gathered from the form in which they have expressed it. But a *transaction* may consist not merely of a single contract but of a number of contracts or arrangements falling short of a contract. Thus to prove the whole transaction or arrangement oral evidence must be admissible."

(Emphasis in judgment).

Admittedly, oral evidence contradicting the written document ought to be received with caution, but in this case his Honour accepted the plaintiff's version of events. He then held that the document itself was not a hire purchase agreement, but that the oral collateral agreement taken with the lease amounted to a transaction or arrangement which, if allowed to stand, would defeat the purpose and operation of the regulations.

With respect, it seems a little difficult to see why the transaction in this case did not amount to a "hire purchase agreement" in terms of Reg. 2. The matter is not one confined merely to cases on these regulations, but is of general importance in contract law. The definition of "hire purchase agreement" in Reg. 2 includes "an agreement for the bailment of goods under which the bailee may buy the goods . . . whether on the performance of any act by the parties to the agreement or any of them or in any other circumstances". In *Quartel's* case, it was held that "may buy" in this definition means "having the legal right to buy". Further, "agreement" here must surely mean not only the formal document, but the whole bundle of obligations which the parties undertook towards each other. In other words, "agreement" ought to include any legally enforceable collateral agreements. His Honour appears to have looked only to the formal document in considering whether the parties had entered into a hire purchase agreement, for in the passage immediately following his findings on this point, he finds as a fact that the dealer's salesman had promised the plaintiff that it could purchase at the end of the term and that this promise was made "as part of the consideration for its acceptance first of the lease of the Chevrolet and then of the Mercedes. I am of opinion that *but for the making of that promise* the plaintiff would not have entered into the lease." (emphasis added.) This is quite distinct from *Quartel* and *Carroll* where the Court was not asked to go further than the documents in considering the issue. Nor was the point raised in *Marsanyi*, the respondent apparently being quite content to rely on Reg. 8 (b) to invalidate the transaction. Perhaps the learned Judge felt inhibited to some extent by nis own discussion of the parol evidence rule. But to hold that the rule ought to apply to hide an illegality would be stultifying and against all authority (see 8 *Halsbury's Laws of England* 3rd ed., para. 255). In any event, the parol evidence rule does not appear to be insisted upon where "but for the promise made" a contract would not have been entered into by the promisee: (*City & Westminster Properties* (1934) *Ltd.* v. *Mudd* [1959] 1 Ch. 129, involving a lease of land) especially where a standard form is involved (*Mendelssohn* v. *Norman Ltd.* [1970] 1 Q.B. 177). Of course, the matter was not crucial in the case under consideration, since the Court was able to hold the transaction void under Reg. 8 (b).

The case against the second defendant finance company of course depended upon whether the plaintiff could establish that either the company

was a party to the collateral agreement or that a principal-agent relationship existed between it and the dealer. (Presumably the reason why the plaintiff wanted judgment against the second defendant was in order indirectly to get a set-off against the payments owing to the second Mercedes lease.) McMullin J.'s reasoning on this point will undoubtedly be welcomed by finance companies. In *Branchite* v. *Worcester Works Finance Ltd.* [1969] 1 A.C. 552, the majority of the House of Lords held that the question of agency between finance company and dealer is one of fact. Lords Wilberforce and Reid, on the other hand, preferred to take account of commercial realities and to hold that a presumption of agency which must be displaced by the finance company ought to be accepted. McMullin J. felt "obliged" to follow the majority view and to hold on the facts that no agency relationship existed. One cannot quarrel with this conclusion in the context of this case. It is a strong thing to attribute illegality to a person simply on the basis of a presumption. Even in a prosecution under the Act, agency must be strictly established, and it is only then that the burden shifts to the defendant by virtue of s. 18 (2) to establish due diligence and lack of knowledge to escape criminal liability. On the other hand, it would be a pity if Lord Wilberforce's careful reasoning were to be ignored simply on the basis of precedent in a context not involving attribution of criminality. The "no presumption of agency" argument has in some jurisdictions conspired with other devices, such as the holder in due course doctrine in promissory note financing and clauses cutting off assignees' liability, to deprive consumers of any viable remedy in the event of defective goods or fraudulent dealers. To some extent, consumer protection legislation such as the Hire Purchase Act 1971 has alleviated the situation in New Zealand. It would seem to be more in the spirit of such legislation that the presumption of agency argument should operate in the majority of cases, at least in those not involving attribution of serious criminality.

Three concluding observations on these cases seem in order. First, nothing in the Economic Stabilisation (Motorcar Hiring) Regulations 1971 seems to affect the decisions in the instant two cases. Those regulations are silent on the question of disposition of vehicles at the end of the hiring term, save to say that hiring agreements are not renewable (Reg. 3 (3)). Presumably the authorities are content to rely principally on the 1957 regulations to cover irregularities in disposition at the end of the term. It is unlikely that the provisions similar to Reg. 8 and the proviso to Reg. 10 repeated in the 1971 regulations will be held to cover the sort of situations revealed by the two cases discussed. Secondly, no attempt was made in the *Robert Northe Carriers* case to argue that the Court had power to attenuate the severity of its judgment by virtue of s. 7 of the Illegal Contracts Act 1970 which was in force at the time of making the contract. This seems clearly right, for the proviso to Reg. 10 presumably qualifies as an "express provision of any other enactment" (which includes regulations) to which s. 7 is subject. It seems, however, a pity that the Illegal Contracts Act does not apply to Reg. 10. No suggestion is intended that either of the two cases discussed particularly merit the exercise of the discretion in s. 7 even if that section did apply, but one recollects other cases where refunds were ordered consequent upon invalidation of the transaction because of a technical and apparently harmless non-compliance with the regulations. Prosecution would seem to be a far more effective way to enforce the regulations.

The third observation is to some extent bound up with the second. The steady flow of cases involving agreements which contravene the regulations leads to the almost inescapable conclusion that contravention of the regulations is not uncommon in the car trade. An offence against the regulations constitutes an offence under s. 18 (1) (e) of the Economic Stabilisation Act, involving substantial penalties including imprisonment. It seems obvious that enforcement solely through the private sector carried on at the suit of the occasional disgruntled customer is hardly sufficient to ensure compliance. Some firms seem to make a habit of evading the regulations, and the sooner prosecutions are brought by the Department of Trade and Industry against persistent offenders, the better. Action could also be taken to revoke motor vehicle dealers' licences in glaring cases. A fairer means of civil enforcement, coupled with vigorous action taken by the Department, would do much to ensure compliance with what are apparently considered by the Department to be important economic controls.

D.V.

Clement Freud on New Zealand—"And so from Australia and her mini-skirted Sheilas to New Zealand, where they wear the same length of dresses and call their women Myrtles. And where, from a preliminary look at the Auckland papers, every other restaurant has topless staff."

"THE WAGON MOUND" AND PERSONAL INJURIES

Since the decision of the Privy Council in *The Wagon Mound (No. 1)* [1961] A.C. 388 over ten years ago, came down in favour of applying the test of foreseeability to resolve questions of remoteness of damage, there has been much argument, academic and otherwise (*a*), as to the manner and circumstances in which the test is to be applied. Out of this comes one thought that the unfortunate officer who allowed the crude oil to spill into Sydney Harbour, another ten years before, whatever else he may or may not have been able to foresee, could certainly not have foreseen the effect his actions were going to have on the development of the law of torts.

The tort of negligence is, compared with the history of the law, comparatively recent in its development and for this reason its boundaries are still uncertain and in a state of flux. In the nineteenth century the tests of negligence liability, although present, and applied by the Courts, had certainly not been spelt out in the detailed way they have today. Nor had the Courts really begun to think of personal injuries cases as being in any way different from any other action in negligence. The test the Courts applied in all cases was that laid down by Alderson B. in *Blyth* v. *Birmingham Water Works Co.* (*b*). "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." The test of remoteness applied was that consequences are too remote if a reasonable man would not have foreseen them (*c*).

It was these two tests which the Judicial Committee developed into what has since become known as *The Wagon Mound* test, namely that liability arises if the damages in suit are of the same kind as was foreseeable, in other words, foreseeability of consequences is the test for compensation as well as for culpability. Onto this test the gloss of the need to show care in balancing foreseeable risks was cast by the Judicial Committee in *The Wagon Mound (No 2)* (*d*). This test does for the law of torts what the rule in *Hadley* v. *Baxendale* (*e*) and *The Heron II* (*f*) have done for the law of contracts.

After *Blyth* v. *Birmingham Water Works* and *Rigby* v. *Hewitt* there might have been no difficulty in applying the test of foreseeability had not the Courts developed a different rule, namely, that foreseeability goes to "culpability *not* compensation" (*g*), and that having found culpability the perpetrator is not liable for anything more than the "direct" (*h*) consequences of his negligent act. (The rule in *Re Polemis.*) This is the rule which was displaced in 1961 by the Judicial Committee's promulgation of *The Wagon Mound* test. Since then the controversy about the validity of this test, and how it should be applied, has raged. It has certainly been uncertain what the real effect of *The Wagon Mound* on personal injuries cases, particularly those known as the "Eggshell Skull" cases, has been, and in particular how these cases are affected by the application of the test of foreseeability. For this reason the judgment of the Court of Appeal in *Stephenson* v. *Waite Tileman Ltd.* (the judgments of Turner P., Richmond and Macarthur JJ. were delivered on 27 June 1972) will be of considerable moment and interest. In particular, the judgment of Richmond J. contains an exhaustive discussion of the problems involved. (*hh*)

(*a*) For academic discussions, see in particular Goodhart, "Obituary: *Re Polemis*" (1961) 77 L.Q.R. 175; Glanville Williams, "The Risk Principle" (1961) 77 L.Q.R. 179; Dias, "Remoteness of Liability and Legal Policy" [1962] C.L.J. 178; Dias, "Trouble on Oiled Waters: Problems of *The Wagon Mound (No. 2)*" [1967] C.L.J. 62; Jackson, "A Kind of Damage: Foreseeability, Probability and Causation" (1965) 35 A.L.J. 3.

(*b*) (1856) 11 Ex. 781, 784.

(*c*) *Rigby* v. *Hewitt* (1850) 5 Ex. 240, 243, per Pollock C.B.

(*d*) *Overseas Tankship (U.K.) Ltd.* v. *The Miller Steamship Co. Pty. Ltd. & Anor (The Wagon Mound (No. 2))* [1967] 1 A.C. 617.

(*e*) (1854) 9 Ex. 341.

(*f*) *Koufos* v. *C. Czarnikow Ltd. (The Heron II)* [1969] 1 A.C. 350. In *The Heron II* the House of Lords rejected the idea that the test of remoteness of damages in contract, where a higher degree of probability is required, is the same as that in tort.

(*g*) *Weld-Blundell* v. *Stephens* [1920] A.C. 956 per Lord Sumner at 984.

(*h*) *Re Polemis and Furness, Withy & Co. Ltd.* [1921] 3 K.B. 560. (N.B. This was a Court of Appeal decision. The matter has never been directly considered by the House of Lords).

(*hh*) Now reported as [1973] 1 N.Z.L.R. 152 (C.A.)

The appeal in *Stephenson* v. *Waite Tileman Ltd.* was from the judgment of McMullin J. in the Supreme Court, which has been the subject of a "Case and Comment" (*i*) note. The facts of this case were that the plaintiff, who was a steeplejack, had been employed by the defendant on a construction site in Auckland. On the day of the accident he was resetting the wire rope system of a crane, which was being used to construct a multi-storey building. The wire rope (which had jagged projections or frayed bits) sprang free from a sheave and struck the plaintiff's right hand, leaving it with an obvious injury, namely, a cut or slash across the back of his hand. The plaintiff came down from the crane and washed his hand in cold water. Several days later, however, he developed a fever and eventually he was admitted to hospital. Subsequently he had several quite extended periods in hospital and was left with a residual condition of being unable to concentrate, prone to headaches, loss of balance, unable to walk without the aid of a stick and practically unable to look after himself. The appellant (the plaintiff in the Court below), accordingly brought an action in negligence claiming damages for his injuries.

In the Supreme Court a problem undoubtedly arose due to the fact that there was a conflict of medical evidence as to the real "cause" of the appellant's condition, and this had an effect on the legal problems involved in the litigation. Medical evidence for the defendant suggested that a virus had entered the scratch and attacked the nervous system, whereas the respondent's medical witness thought that the symptoms suffered were due to the appellant's personality and that he could be suffering from the recognisable illness known as "litigation neurosis", the symptoms of which would be likely to disappear after the litigation was concluded.

At the trial, various issues were put to the jury, and it was really because of the conflicting answers received that an appeal resulted. In answer to one issue the jury agreed that the cut had been the cause of the appellant's injury, and assessed damages, but in reply to another issue which was put to them as to whether or not the appellant's end condition was foreseeable, the jury answered in the negative.

Since the decision in the two *Wagon Mound* cases there has, in most reported cases, been an acceptance of the principle laid down, and expressions of dissatisfaction with the *Polemis* test, but there are many areas, not only personal injuries cases, where the limits of the test are uncertain and vague. In concluding their advice in *The Wagon Mound* (*No.* 1) the Board said that they had

> "been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is 'direct'. In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by Lord Atkin in *Donoghue* v. *Stevenson*:
>
> " 'The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.' It is a departure from this sovereign principle if liability is made to depend solely on the damage being the 'direct' or 'natural' consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was 'direct' or 'natural', equally it would be wrong that he should escape liability, however 'indirect' the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done: cf. *Woods* v. *Duncan* ([1946] A.C. 401, 442). Thus foreseeability becomes the effective test. In reasserting this principle their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Baron Alderson in *Blyth* v. *Birmingham Waterworks Co.* (1856) 11 Exch. 781, 784; 156 E.R. 1047)". (*j*)

The main difficulty which arises with *The Wagon Mound* test is that granted foreseeability goes to compensation as well as culpability, at what stage does one actually look to see whether the damage is of the "kind" which was foreseeable or not? It seems that the question which must arise is, does the *Wagon Mound* test involve answering two questions involving foreseeability, or does it involve three or more? Little conflict seems to arise in deciding that one question must be asked (and this was also recognised by *Polemis* and whilst not stated in *The Wagon Mound* (*No.* 1) was certainly given greater emphasis in *The Wagon Mound* (*No.* 2)), namely the question as to whether or not the defendant's conduct failed to meet the required standard of reasonable care, thus exposing the plaintiff to a foreseeable risk, or likelihood of

(*i*) "Case and Comment" [1972] N.Z.L.J. 55.

(*j*) Ibid., at p. 426.

harm (*k*). If that question is answered in the affirmative the vagueness of *The Wagon Mound* test becomes apparent. One can then ask whether the damaging event, or initial injury, which caused the harm was of the same "kind" as ought to have been foreseeable to the plaintiff. It is possible to continue the inquiry or even not to ask the previous question at all, but to turn and ask whether the actual damage suffered was of the same "kind" as was foreseeable.

Three comparatively recent cases illustrate the difficulties which arise because *The Wagon Mound* test is lacking in precision. In *Tremain* v. *Pike* (*l*), the plaintiff, a farm herdsman, contracted Weil's disease (leptospirosis), a rare disease, through coming into contact with rats' urine. Payne J. held the defendant not liable, on the one hand because it could not be proved that he had negligently permitted the rat population to increase; but on the other hand because even if "some general hazard involving personal injury, illness or disease was foreseeable, Weil's disease was not, and was entirely different in kind from the effect of a rat bite, or food poisoning by the consumption of food and drink contaminated by rats."

This case may be in tune with the earlier case of *Doughty* v. *Turner Manufacturing Co. Ltd.* (*m*) where, when an asbestos lid fell into a vat of molten lead, the Court was able to distinguish the resulting explosion, from a splash of molten liquid, but if *The Wagon Mound* test is to be interpreted in this way it seems to result in a very rigid and precise application of the test, and would certainly result in a number of plaintiffs failing in their action (*n*).

On the othr hand, in *Wieland* v. *Cyril Lord Carpets Ltd* (*o*), a much more flexible approach was taken. In this case, as a result of the defendants' negligence, the plaintiff suffered an injury which necessitated the wearing of a cervical collar, which in turn interfered with the focusing of her bifocal spectacles. As a result she fell down some stairs, and the defendants were held liable for her additional injuries. In discussing the test of foreseeability Eveleigh J. said: (*p*)

> "Once actionable injury is established, compensation is rarely if ever a valuation of the injury *simpliciter*. It is a valuation of harm suffered as a result of that injury. The valuation which the law adopts is the valuation of that injury with its attendant consequences to the victim. Consequences of a kind which human experience indicates may result from an injury, are weighed in the scale of valuation to a greater or less extent depending on the probability of their materialising. When they have materialised they attract full value. When they are only a risk they attract less value. But in determining liability for these possible consequences it is not necessary to show that each was within the foreseeable extent or foreseeable scope of the original injury in the same way that the possibility of injury must be foreseen when determining whether or not the defendant's conduct gives a claim in negligence."

And later he said: (*q*)

> "If necessary I think the plaintiff's case can also be put against the defendant in another way. It can be said that it is foreseeable that one injury may affect a person's ability to cope with the vicissitudes of life and thereby be a cause of another injury and if foreseeability is required, that is to say, if foreseeability is the right word in this context, foreseeability of this general nature will, in my view, suffice."

Both *Tremain* and *Wieland* were cases involving personal injuries but the Court took the more flexible approach when a similar problem arose in *Vacwell Engineering* v. *B.D.H. Chemicals* (*r*). In that case the defendants supplied a chemical, which they knew emitted a harmful vapour if it came into contact with water, and a warning to this effect was given. They did not know, although there was considerable scientific information available to this effect, that the chemical in fact reacted violently and exploded on contact with water. A scientist working with ampoules of the chemical allowed some of them to drop into a sink, a violent explosion took place which not only killed the scientist, but also damaged the laboratory premises to the extent of some £74,689. Rees J. had to consider liability in negligence for the property damage, and he concluded that (*s*):

> "It was a foreseeable consequence of the supply of boron tribromide without a warning —and *a fortiori* with an irrelevant warning

(*k*) See the interpretation placed upon *Bolton* v. *Stone* [1951] A.C. 850 by Lord Reid in *Overseas Tankship (U.K.) Ltd.* v. *The Miller Steamship Co. Ltd.* (*The Wagon Mound (No. 2)* [1967] 1 A.C. 617 at 641-642.

(*l*) [1969] 1 W.L.R. 1556.

(*m*) [1964] 1 Q.B. 518.

(*n*) Counsel for the defendant in *Stephenson* v. *Waite Tileman Ltd.* seemed to be in favour of this approach.

(*o*) [1969] 3 All E.R. 1006.

(*p*) Ibid. at 1009-1010.

(*q*) Ibid. at 1010-1011.

(*r*) [1969] 3 All E.R. 1681.

(*s*) Ibid. at 1698-1699.

about harmful vapour—that, in the ordinary course of industrial use, it could come into contact with water and cause a violent reaction and possibly an explosion. It would also be foreseeable that some damage to property would, or might, result. In my judgment, the explosion and the type of damage being foreseeable, it matters not in the law that the magnitude of the former and the extent of the latter were not."

In each of these cases the Court considered what may be regarded as the classical "Eggshell Skull" case, namely *Smith* v. *Leech Brain & Co. Ltd.* (*t*), but in not one of them did the Court say it was applying a rule in any way different from the ordinary *Wagon Mound* rule, even although the "Eggshell Skull" rule, which may apply in personal injuries cases has always been regarded as an exception to the *Wagon Mound* (*u*). These cases do suggest that, quite apart from the "Eggshell Skull" rule, and even in some personal injuries cases the Courts have been prepared to hold a tortfeasor liable for somewhat more extensive damage than might have been foreseen in the ordinary sense of the word. This fact was accepted by Lord Reid in *The Heron II*, where he gave "foreseeability" in tort a fairly wide meaning. In contract, he said:

"The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.

"The modern rule of tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it." (*v*)

It is of course possible to reconcile the "Eggshell Skull" cases with the test of foreseeability (although there has been convincing argument put forward, to the contrary, that this is straining the foreseeability test) (*w*), and this would seem to be in accordance with the thoughts of the House of Lords as expressed in *The Heron II*. This, in essence, was the view taken by theCourt of Appeal in *Stephenson* v. *Waite Tileman Ltd.* Richmond J. made an exhaustive review of much of the earlier case law on the subject, and concluded that the foreseeability test should be used to decide whether there is a *risk* of the *kind* of damage which occurred, *not* the *extent* of that damage once it has occurred. It is respectfully suggested that this is not only in accordance with common sense and logic, but in the light of the various authorities seems the correct view to take.

After reaching his conclusions, Mr Justice Richmond laid down three general rules or principles, which he thought could be used to resolve many of the difficulties which can arise in cases such as *Stephenson* v. *Waite Tileman Ltd.*

"(1) In cases of damage by physical injury to the person the principles imposing liability for consequences flowing from the pre-existing special susceptibility of the victim and/or from new risk or susceptibility created by the initial injury remain part of our law.

"(2) In such cases the question of foreseeability should be limited to the initial injury. The tribunal of fact must decide whether that injury is of a kind, type or character which the defendant ought reasonably to have foreseen as a real risk;

"(3) If the plaintiff establishes that the initial injury was within a reasonably foreseeable kind, type or character of injury, then the necessary link between the ultimate consequences of the initial injury and the negligence of the defendant can be forged simply as one of cause and effect—in other words by establishing an adequate relationship of cause and effect between the initial injury and the ultimate consequence." (*x*)

(*t*) [1962] 2 Q.B. 405.

(*u*) The "Eggshell Skull" rule is generally accepted as being that the victim of a tort can claim damages for his whole injury, even although, due to some special bodily condition of which the tortfeasors might not be aware, it was much more extensive than would have been suffered by the ordinary person. In other words, the tortfeasor must take his victim as he finds him. See also *Dulieu* v. *White & Sons* [1901] 2 K.B. 669 and *Malcolm* v. *Broadhurst* [1970] 3 All E.R. 508 (Eggshell personality).

(*v*) *C. Czarnikow Ltd.* v. *Koufos* [1969] 1 A.C. 350 at 385. Lord Upjohn was to a similar effect (at p. 422): "The test in tort, as now developed in the authorities, is that the tortfeasor is liable for any damage which he can reasonably foresee may happen as a result of the breach however unlikely it may be, unless it can be brushed aside as far-fetched. See the *Wagon Mound* cases."

(*w*) See in particular: Millner, *Negligence in Modern Law* (1967) p. 87.

(*x*) p. 168 of the reported judgment.

In the present case, without doubt, the difficulties which arose were to a large part, due to the difficulty of explaining the test of foreseeability in terms which could be understood by a jury, and of drafting the issues (which requires a high degree of skill) in such a way that the jury could readily understand, and answer in accordance with the realities of the injury and the claim. These three principles drawn by Richmond J. are a very real attempt to surmount these difficulties, and should be welcomed for their clarity in what has become an extraordinarily difficult area of the law (highlighted in this country by the jury trial).

The learned Judge concluded his discussion of the question of foreseeability by saying:

> "If I am correct in the foregoing conclusions then juries will be left to deal with the question of foreseeability in an area which is readily comprehensible and in which the test of the ordinary reasonable man can be applied in an atmosphere of reality. They will not have to decide the ability of the ordinary man to forsee the risks of 'kinds' of harm resulting from a 'sub-compartmentalisation' of secondary consequences of an initial injury." (*y*)

The case is an important one, and it has clearly gone a considerable way towards resolving many of the difficulties, which have been apparent since the modern rule of foreseeability was formulated in *The Wagon Mound*. Its importance also lies in the fact that it shows that there is no reason, either in logic or in law (if the two are not synonomous), why personal injuries claims in tort should, as far as the test of foreseeability is concerned, be treated any differently from other claims.

MARGARET A. VENNELL.

(*y*) p. 168 of the reported judgment.

COLONIAL JUSTICE

The re-appearance of the New Zealand Law Reports in Butterworths new photolithographic reprint will be of immense use to the common lawyer in this country but an extra advantage to the uncommon lawyer who dabbles in historical research is the availability of the earlier reports by Macassey (1861-1872) Johnston, F. R. Chapman, Olliver Bell and Fitzgerald and *Macassey's Colonial Law Journal*, all of which have hitherto been as hard to find as the proverbial hen's teeth.

One of the fascinations of delving into the law reports for the first twenty years of a new colony is to find that so often the names of Judges, counsel and litigants are still household words, and that the cases themselves reflect fairly accurately the development and problems of the colony as a whole.

Even the opening "Memoranda" of *Macassey* has its interest for we find Henry Sewell listed as Attorney-General three times between 1851 and 1855, with appointments lasting for twelve months, then four months and eleven months. These comings and goings of Attorneys-General must have been considered undignified, for in March 1867 we find James Prendergast being appointed to the office *for life*, under "The Attorney-General's Act 1866"—an appointment which came to an end with his subsequent elevation to the post of Chief Justice.

The first of an illustrious line of judicial Gressons appears in one of the opening cases of *Macassey*, the rather peculiar proceedings against one S. G. Isaacs for contempt of Court. Isaacs, plaintiff in a civil suit, had been non-suited. His counsel, however, declined to accept the non-suit and the case was adjourned until the following morning. When the jury re-assembled next morning Isaac's counsel (unnamed) failed to appear, apparently in the mistaken belief that the case had ended. One can imagine the hilarity in Court as Gresson J. commented that the proceedings would indeed have concluded the previous day had counsel for plaintiff not objected to the non-suit. However, he adjourned the case until the following Monday. All might yet have been well but for Mr Isaac's comments on the proceedings in a rather impetuous and apparently most "offensive and improper" letter to the Editor of the *Otago Daily Times* which was published on the morning of 8 December when the adjourned hearing again came before the Court. The report does not make it clear whether Isaac's counsel was present on th 8th but in the event, the non-suit was granted "without objection". On 12 December Isaacs and the newspaper's publisher were brought before the Court to face contempt charges. Despite the objections by Barton for Isaacs and J. Prendergast (as he then was) for the *Otago*

Daily Times that the prosecution could not succeed without an affidavit informing the Court of the publication of the letter and some identification of the writer with the defendant Isaacs, poor Isaacs was fined £10 and left lamenting. His Honour decided that there were "technical difficulties in the way of bringing the matter home to Mr Campbell" (the publisher) and so, "considering that he was exercising the summary jurisdiction of the Court", his Honour discharged the rule against Campbell.

It is strange to note that in the middle of the contempt proceedings Gresson J. must have felt a cold wind around his feet for he suddenly suggested to counsel that the matter be remitted to the Court of Appeal. Mr Barton must have feared the possible consequences for he just as promptly declined the offer. Another oddity is the footnote to the report, by the learned reporter, James Macassey, who submitted, albeit "with great deference" that the arguments of both counsel were unanswerable. If Isaac's case shows something of the ineptitude of some of our pioneer brethren, the very next reported case indicates the dangers that faced them. C. W. Richmond J. was on the Bench. His Honour, whose gaunt face and wry, twisted smile are familiar to those who glance at the gallery of Judges in the corridor of the Wellington Supreme Court, had given judgment against one Huddlestone in December 1862. Execution had issued. Three months later he made an order setting aside the judgment and execution and ordered that defendant's costs be personally paid by Mr McGregor, the plaintiff's solicitor, despite the fact that the application has sought only costs—but not as against the solicitor appearing for Huddlestone. Allegations of *mala fides* were raised and denied, and submissions made that the original judgment had been preceded by an effective compromise. From the report it becomes clear that the setting aside of the original judgment, and the award of costs, was not really disputed but the "hot" issue was his Honour's unsolicited decision to make Mr McGregor personally liable for payment of these costs. Mr McGregor's tactics, as it turned out, were disastrous for instead of instituting the proceedings to vary the costs order himself he left his client to "front" for him. Richmond J.'s comment was that "such a motion discloses the solicitor as the real mover in this part of the application" and "if the solicitor felt entitled to this relief he should have applied on his own behalf". To rub salt into the wound his Honour went on to say that if McGregor had done so "I would have felt very strongly disposed to grant such an application" as "the plaintiff himself is certainly the chief offender and as between him and the solicitor I think there is no ground for relieving him. But on the present motion, purporting to be by the plaintiff himself, it is quite plain that I cannot vary the order so as to relieve the solicitor at the expense of the party moving, who is the solicitor's own client. Still less can I now deprive the defendant of costs, at the instance of a party who is not himself liable to pay the costs, but who, certainly, in my opinion, richly deserves to have to pay them."

Readers will be encouraged by the fearless Macassey whose footnote observes without any "deference" whatever this time, that "There seems little doubt that the Order of the learned Judge was bad, in so far as it directed payment of costs by the plaintiff's solicitor. See *Rouch* v. *Alberty* (33 L.J. (Q.B.) N.S. 127), where the point was expressly decided."

Historians may know whether Messrs McGregor and Macassey flourished in the law or later took to gold-mining or timber-felling.

The next case in *Macassey* reveals that land and livestock were not the only subjects for litigation in the pioneer days and that even that rising young barrister, James Prendergast, could flounder and suffer the indignity of an occasional non-suit. The plaintiff's case, in *Wright* v. *Curle*, foundered when Richmond J. ruled that an oral contract for the sale of a 48-64th interest in a steam ship failed to comply with the requirements of the Merchant Shipping Act, and was thus unenforceable. Our reporter was not moved to dissent.

We have seen something of the perils facing a solicitor and *Begg* v. *Casper* highlights the hazards of appearing as a witness, in the days when transport was difficult and expensive. Begg sued Casper for unpaid witnesses expenses of £32 being the expenses involved in a 24-day trip from the Molyneaux to Dunedin. Casper, plaintiff in the earlier proceedings, had left a witness subpoena for Begg at Ross and Glendining's warehouse in Dunedin as he knew that Begg was in the habit of calling there when in port. The unfortunate Begg duly found the envelope addressed to him and appeared at Court, only to discover that "the record was withdrawn at a late stage". Counsel for Casper took the unsportsmanlike point that as service of the subpoena was irregular, and therefore Begg could not have been forced to appear as a witness for Casper, his client Casper should not have to pay any witnesses expenses. Despite argument by Mr B. C. Haggitt for Begg that "it did not lie in the mouth of the defendant to insist upon

the futility of his own proceedings and say that the subpoena by which the plaintiff had been deceived was not properly served", the Court found in favour of Casper upon the ground that Begg had not given his residence or occupation and without these "materials" the Court could not properly assess his expenses.

Strangely enough, the very next report, *Begg* v. *Costa* also dated 15 July, 1863, shows Begg as plaintiff in a "common carrier" action and he is here described as a merchant who owned a trading post on the Molyneaux River. It is pleasing to read that in this action (presumably the next in the list after the Casper defeat), Begg succeeded and the sinking of the defendant's schooner *Pioneer* after striking a well-known snag in the Puerua tributary of the Molyneaux River was held to be plain bad seamanship rather than an "Act of God".

If lawyers and witnesses had their difficulties it seems that even the office of Registrar carried its own dangers in the 1860s, as we see in *Osler* v. *Chapman*. The plaintiff brought an action against Craig and in the absence of the Judge who was attending the Court of Appeal in Wellington he applied to the defendant, as Registrar, for a warrant to arrest Craig upon affidavit that Craig was preparing to leave the Colony. Mr Registrar Chapman prepared his warrant and addressed it to Young, as "Bailiff". Young is described in the report as an usher and Court crier. Young then arrested Craig but negligently permitted him to escape from custody. Osler then brought an action against Mr Registrar Chapman for escape. The question at issue was whether the Registrar, when acting as Sheriff, was a "mere ministerial officer of the Court" or whether he was acting "judicially". If the former, he is liable for the negligence of the Bailiff, as his subordinate officer, but if the latter he is not so liable. Irish authorities were cited and analogies between the Registrar and the "Steward of a Court Baron" were presented. In case any of our worthy Registrars should chance upon this Article and send their deputies out for the nearest *Macassey*, the writer is happy to record that the Court ruled that a Registrar, in issuing the warrant, is acting judicially. Judgment for defendant. It would be interesting to know who officiated as Registrar during the hearing and whether the tones of the Court crier were more subdued than usual.

The jury lists in Dunedin's early days must have included a good sprinkling of canny Scots. In two of *Macassey's* reports, the first consisting of four lines of print and the second of five, the facts are the same while the results differ. In *Chalmers* v. *Roberts*, an action for assault, the jury foreman popped up and asked what amount of damages would carry costs. Chapman J. declined to tell him and damages of one farthing were awarded to plaintiff. A month later, in *Ford* v. *Telfer*, which was an action for breach of promise of marriage, Richmond J. was asked exactly the same question by a juror. "Forty Shillings," announced his Honour. The jury obligingly returned a verdict for plaintiff of one shilling. History does not record whether it was the same juror.

At this point Macassey helpfully interpolates the report of a later case in which he had appeared, successfully, to defend the Warden of a mining Court at Hyde, Otago, who had failed to issue a warrant of execution by *fieri facias*. The demurrer to replication was allowed. That fearsome sounding writ of *fieri facias* is encountered repeatedly in these early reports.

Difficult and complex questions of banking and commercial law were examined in *New Zealand Banking Corporation* v. *Cutten* in 1864. The plaintiff company succeeded in a libel action against the publisher of the *Otago Daily Times* who had described the Bank as a "so called corporation" which "evaded the law by assuming to be a public bank" as it transpired that there was in force no colonial enactment which directly or indirectly prohibited a company from carrying on the business of banking. Three years later, however, in *Bank of Otago* v. *Commercial Bank of New Zealand* we find the defendant moving for stay of execution on the ground that the New Zealand Banking Corporation "alleged to be identical with the defendants" was under process of winding up by the Court of Chancery. A rather interesting little point, and one which may still have some application today, was raised in *Forsyth* v. *Mc Leod* in 1864. Defendant had guaranteed payment of rent by tenants of the plaintiff. The tenants defaulted and plaintiff took action under the guarantee. One of the defences was that plaintiff could have distrained upon the tenant's chattels but through negligence and delay failed to do. The crucial issue was whether the landlord's failure to distrain amounts to laches or negligence as to constitute an equitable answer to the action. This ingenious argument was not accepted as Richmond J. held that the right to distrain is not equivalent to the holding of security and while a landlord may distrain he is not "bound to prosecute measures of active diligence". Indeed, "the motive of a guarantee is usually to relieve the parties from the cost and vexation of the usual remedies".

At page 536 of *Macassey* we once more encounter the unfortunate Mr McGregor. Four years after *Huddleston* v. *Marshall*, when costs were awarded against him personally, McGregor is being sued for professional negligence and we note that he has briefed Macassey to represent him. The report shows clearly that the Colony is passing through its transitional phase when the laws and customs of the "home country" are being superseded by new practices and colonial legislation. The plaintiff, Hunter, commenced his negligence action before the resident Magistrate in Dunedin. McGregor then claimed the privilege, as a solicitor, of being sued in the Supreme Court and so the Magistrate declined jurisdiction. In the Supreme Court, Chapman J. ruled that this particular privilege depended upon the ancient customs of the Courts of Queens Bench, Common Pleas and Exchequer "used from time immemorial" but "how can it attach to a Court which is but of yesterday?" The jurisdiction of our Supreme Court is the same as that of the Common Law Courts at Westminster but, as Chapman J. observes, jurisdiction is "something very different" from privilege.

Readers of the report of *Lane* v. *Langley* (1864) can only assume that the Registrar was inattentive and the Court orderly asleep somewhere in a corner. It seems that a member of the special jury fell ill during the hearing. He retired from the box and the examination of the witness was suspended until his return. Again he fell ill and this time both counsel agreed to continue with eleven jurors only. The case continued. Some time later (the time lapse is not recorded) the twelfth man, apparently now recovered, returned to the Court room and took a seat at the end of the jury box and later retired to the jury room with the rest of the jury and all twelve returned their verdict. Chapman J. claimed that he had not noticed the juryman reappear in Court but, on motion for a new trial, decided that the facts constituted a miscarriage of the trial "by mere inadvertency" as nobody in Court was able to even estimate the amount of evidence missed by the twelfth juror. As his Honour pointed out, "who can now say that the eleventh man may not have been influenced by the twelfth, who did not hear the whole of the evidence?" In charity, we should perhaps assume that both learned counsel were so engrossed in marshalling their arguments that neither noticed the stealthy return of our conscientious twelfth juror.

The Sport of Kings, and its facilities for quenching the thirst of its patrons, was as much a part of the New Zealand way of life a century ago as it is today. In *Clements* v. *Edmondson* both parties had been permitted by the Otago Jockey Club to operate liquor booths at the Silverstream Racecourse and for three days, during the March races, both did flourishing business. During the following week another Club, the Tradesmen's Race Committee, held races at the same course and his Club sold to the appellant the exclusive right to operate a liquor booth. The respondent was given notice of this arrangement but continued to run its own booth. The appellant had then sued the respondent for trespass, in the resident Magistrate's Court, but was non-suited. It seems that the case for the appellant must have been extraordinarily weak or badly argued, in both Courts, for although the evidence showed that one "James Robertson" had permitted the Tradesmen's Race Committee to use the racecourse, with all the privileges belonging to the same, the Court observed that it had been given "not the slightest particle of evidence to show by what right James Robertson made this agreement with the Tradesmen's Race Committee. He may possibly have been the owner of the land . . . or lessee . . . or agent of the owner, but of this the case says nothing. Appeal dismissed." The appellant was obviously undaunted because Macassey reports in a footnote that when the case went to the Court of Appeal, the appeal was dismissed without calling upon counsel for the respondent, the Court holding that the easement in gross or servitude (if it could be so termed) relied upon by the appellant was one unknown to the law. James Macassey is reported as being counsel for the successful respondent.

Goldfields and the Constitution Act were the main ingredients of *Robinson* v. *Reynolds*, an action for trespass and false imprisonment. In 1867 the Otago Provincial Council set up a Committee of Enquiry into the management of the goldfields. Reynolds, as Speaker of the Provincial Council, authorised the issue of a warrant requiring plaintiff Robinson to appear and give evidence before the Committee. Robinson duly appeared but failed to answer certain questions, whereupon he was arrested and imprisoned under the Privileges Act 1856. One of Robinson's arguments was that the Privileges Act was *ultra vires* and transgressed a fundamental principle of natural justice. Chapman J. in delivering judgment, referred to s. 53 of the Constitution Act which gave the General Assembly power to enact laws for the peace, order and good government of New Zealand "provided that no such laws be repugnant to the law of England". His

Honour pointed out that no Court was competent to entertain the question of whether an act of the General Assembly is, or is not, for the peace, order . . . etc. The "repugnancy" proviso was a different matter and the Court "may sometimes find itself compelled to pronounce an Act of the General Assembly void for repugnancy, not as a mere abstract question, but as conflicting with some Imperial Act binding on the Colony. I take the true definition of repugnancy to be this:

> ". . . that any law made by the Colonial Legislature, which shall conflict with any Act of the British Parliament, expressly binding on the particular Colony, either exclusively or as one of a particular group of Colonies, or on Colonies generally, shall be deemed repugnant, and, therefore null and void."

(Law Mag., No. 102, Feb. 1854)

The Court went on to hold that the Privileges Act was not repugnant to any Imperial Act.

The interesting argument that the Act was repugnant to the laws of England inasmuch as it transgresses a fundamental maxim of natural justice "that no man shall be a Judge in his own cause" was dealt with firmly: "It is true there are dicta of Judges to be found affirming that statutes against equity, against common right, against natural equity, against reason, against *jura naturae*, are void; but I know of no case in which a statute has been held by the Courts at Westminster to be void on such grounds." In the event, the plaintiff succeeded, but on other, technical grounds relating to a defect in the intricate pleadings of the day.

Although, from the random section of cases quoted, it may seem that our pioneer justice was a little rough and patchy, this conclusion is not really warranted. The writer has, for obvious reasons, selected the oddities and shunned the ordinary, everyday pieces of litigation in contract, tort and so forth which, in most cases, show that counsel and judiciary alike had a firm workmanlike grasp of the laws, both Imperial and home-made, which formed the tools of their trade.

N. R. A. NETHERCLIFT.

GOING METRIC

The Metric Advisory Board has prepared a recommended timetable for the change to Metric. The change is a gradual process but it is essential that it be planned and carried out in a systematic way.

The Standards Association of New Zealand is metricating general bylaws as they are revised and Building bylaws will be covered by a series of handbooks stating precise conversions and suggesting roundings of metrication conversions. Local Bodies with their own special bylaws will need to metricate them, and the recommended timing is during 1974.

The programme for the conversion of legislation provides for the systematic conversions of Acts and Regulations during the years 1971 to 1976.

Plans and Codes of Ordinances for District Schemes should be metricated at the next review, and if practicable, schemes now being reviewed should be metricated at this stage. The Town Planning division of the Ministry of Works set out recommendations for Town Planning Schemes and these are available from the Ministry of Works.

The recommended timetable on metrication in Road Transport provides for the conversion of existing distance signs over the period 1973 to 1975; for advisory speeds to be converted by erecting supplementary km/h signs above m.p.h. from 1973 to 1974 with the removal of m.p.h. commencing in April 1975.

The change in the metric legal speed limits is programmed for April 1975, with important signs being changed within the first week of that month.

To aid local authorities in implementing the change-over programme, the Divisional Committee on Local Authorities is producing a metric guide, parts of which will be of interest to practitioners.

The Valuation Department has advised that valuation rolls and valuation maps will be metricated at the time of the next revaluation which becomes effective on and after 1 April 1974. The Land Transfer and Land Survey system is being altered as from 1 January 1973, and details are available from Chief Surveyors.

Government policy on the costs of conversion is that the costs should be borne by those incurring them. There is no provision for financial assistance from the Government.

Nothing new—Lincoln's Inn Library has deemed that there has been too much borrowing and it has been ordered that "all the books of the library be called in out of every man's hands." The date of the decree? 1524.