The New Zealand
LAW JOURNAL

4 SEPTEMBER 1973 No. 16

THE POLICE, CRIME AND PUBLIC RESPONSIBILITIES

The average reader of official documents must be familiar by now with the pious little homilies that are wont to find their way into the annual reports of various Government departments. In general, such homilies probably have very limited effect. They create a sensation in the Press for two or three days, the permanent head concerned makes a round of public appearances, and sundry unfortunate "experts" appear on television and radio to compress a lifetime's study of the subject into three or four minutes of inane discussion culminating in an off-the-cuff "solution".

This year's annual report of the New Zealand Police Department received no markedly different treatment and by now the Commissioner's statements about the state of crime and the responsibility of the public in relation to it have safely receded into the past. This is unfortunate, for many aspects of the 1973 Report deserve further consideration. In particular it is important to place the remarks made in the introduction about public indifference to the rising crime rate in some sort of perspective.

Commissioner Sharp prefaces his remarks on this topic with a comparison between the figures relating to reported crime for 1945 and those for 1972. He points out that "in 1945, 34,000 crimes of various types were reported to the Police, but during 1972 the total reached more than 200,000". (p. 5)

Before dealing with the conclusions that the Commissioner goes on to draw from these figures, it would be as well to examine briefly the validity of this type of comparison. There are several points of importance here. Firstly, the reported crime rate in 1945 was 19.7 offences per 1000 of population. By 1972 this rate had increased to roughly 69.0 per 1000. This increase in the reported rate is certainly disturbing but it is not nearly as dramatic as that suggested by the raw figures quoted by Commissioner Sharp.

Secondly, it is worth bearing in mind that the number of offences on the statute book has increased markedly since 1945. The report for that year lists 172 distinct offences. Since then some, such as attempted suicide and the illegal sale of liquor to natives, have been abolished while others, such as the bulk of the offences in the "miscellaneous motor vehicle offence" category, have been removed from the jurisdiction of the police force. Nevertheless, the 1972 report lists 201 distinct offence types. Although a proportion of these "new" offences are simply an elaboration of the old ones, a good number are in fact novel offences. Thus it is at least arguable that comparisons of this nature tell us more about the activities of the Legislature than they do about the activities of criminals.

Thirdly, since 1945 the official definition of reported crime itself has changed. Prior to 1955 offences reported to the police but cleared by some means other than prosecution were not even recorded as "reported offences". Today all reported offences are recorded as such, and separate columns are utilised to show those cases cleared without reference to the Court. In 1972 some 31,161 offences were reported which were subsequently handled in this manner.

A final and rather more important point relates to the changing context of police work generally. In 1945 policing was still very much on a "village cop", community-oriented basis. The policeman, at least outside the major urban areas, generally knew his flock fairly well and was expected by everyone to police them without too much actual law enforcement. Indeed the country policeman is still, by and large,

expected to play this sort of role. Policing of this nature almost inevitably means that relatively few of the offences actually known to the police will become crystallised into official reported crime.

In particular, most juvenile offending would either have been handled personally by the officer on an informal basis or referred by him to some suitable non-legal agency such as a school. Even at the Departmental level it is doubtful whether the police at this time set any great store by the collection of accurate statistics. This is at least partially borne out by the fact that, as mentioned above, before 1955 offences which were handled informally were not officially recorded at all. As a result it would probably be true to say that in 1945 offences were only recorded either when they were manifestly of a serious nature or when an offender had been or stood a good chance of being apprehended and a prosecution initiated.

Some evidence for this analysis can be found in the (to modern ears) startlingly high clearance rate reported in those years. In 1945, 83 percent of the offences reported to the police resulted in an arrest or summons. By 1972 the overall clearance rate had declined to 54 percent and of those offences cleared, only 60 percent were cleared by prosecution. Since it is unlikely that the police are becoming less efficient in solving crime, and bearing in mind that the police/public ratio has increased from 1:1,064 in 1945 to a projected figure of 1:800 by April 1974, two things seem to be indicated. In the first place, this would appear to confirm the argument advanced above to the effect that the police themselves are for various reasons recording more complaints than in the past. Secondly, it appears likely that many of these "extra" offences are relatively minor and are thus, by their very nature, difficult to clear up satisfactorily. One obvious causative influence here, which has an effect on both the reporting and the clearance rates, is the fact of increasing insurance coverage. It is likely that many instances of petty theft are now being reported to the police simply in order to satisfy the requirements of insurance companies rather than in any hope of recovering the stolen property. It may even be that a proportion of these incidents are not in fact incidents of theft at all. In neither case are police efforts to clear a matter up likely to be successful, especially once a victim's claim has been met, probably at an inflated valuation, and he has lost all interest in the matter.

Though the discussion so far indicates that any comparisons which can be drawn between 1945 and 1972 are likely to tell us more about legislative and police behaviour than they are about crime, it would be foolish to deny that there has been a real increase in the rate of offending over this period. This may be disturbing but it can scarcely be called unexpected. Since 1945 the structure of New Zealand society has changed considerably. Continuing urbanisation, the increasing proportion of young, single males in the population, increasing affluence, the gradual erosion of Victorian morality and a host of other factors all contribute to the increasing crime rate. The question we should be asking is not whether crime has in fact *increased,* but whether the present crime rate is *excessive* for the type of society we live in now. For such a purpose comparisons with the crime rate of 30 years ago are interesting but not particularly helpful.

Nevertheless, Commissioner Sharp draws three general conclusions from this comparison. Each relates to public indifference to crime and public unwillingness to assist the law enforcement agencies in the "war" against crime. The Commissioner sets out his conclusions as follows:

> "The first one is that, despite much evidence of a public desire to assist in the maintenance of law and order, the increase in the crime rate indicates many more citizens are ignoring their responsibilities.
>
> "Secondly, the figures suggest that society is showing less sensitivity, in that it is attributing less importance to the shameful aspects of crime, and is more prone to accept certain types of offences as being of less social and stigmatic consequence.
>
> "The third conclusion is that if 200,000 reported offences represent the 'tip of the crime iceberg' (and I am sure that they do just that), the degree of public indifference to crime is significantly greater than the statistics indicate." (p. 5)

This passage can be seen to contain two main arguments. Firstly, that crime has increased partly because too many citizens ignore their responsibilities — a claim supported by reference to the "dark figure" of crime and the suggestion that this renders public indifference even worse. The second argument covers similar ground and essentially takes the public to task for being too tolerance of certain (unspecified) types of offending.

These conclusions and the manner in which they are stated are interesting for a variety of

reasons. It is instructive, for example, to see how the statistics relating to offences reported to the police become transmuted in the course of discussion into the much more respectable and ostensibly meaningful "crime rate".

On a different level it is rather difficult to see what the Commissioner means when he talks about citizens "ignoring their responsibilities" and "public indifference to crime". In relation to crime it can be argued that the ordinary citizen has four main areas of responsibility: he should refrain from crime and from doing or omitting acts which might lead to crime, he should restrain others from crime, he should report crime, and he should generally assist the law enforcement agencies in their task.

In relation to the first area of responsibility, the "real" increase in crime over the last few years would certainly indicate that more citizens are indulging in crime. However, to describe the offender as someone who is "indifferent" or who "ignores his responsibilities" in this sense is surely rather ludicrous. More realistically it can be argued that people are ignoring their responsibilities in relation to bringing up children, setting a good example, etc. Now this is a much more controversial field. Plainly citizens have a responsibility not to bring up their children as delinquents. Fortunately, few consciously do. Most people endeavour to give their children a good upbringing within their often limited capacity so to do. If you live in a slum, have six children and your wife has to work to ensure that everyone has enough to eat, it is simply adding insult to injury to be told by the Commissioner of Police that you are neglecting your responsibilities or are indifferent to the future of your children.

Added to this it is evident that there is no general agreement anyway on what a parent's responsibilities actually are in this field. The endless debate over the merits of different child-rearing practices ultimately turns out to be a conflict between differing value judgments which in turn are probably based largely on upbringing. Since the time of Socrates people have sought to link criminality with defective family situations. Such efforts have been marked by a singular lack of success; indeed we have not yet been able to define what a "defective family situation" is. In this context to imply that the citizen has a responsibility to keep his children from crime by adopting "good" child-rearing practices is simply wishful thinking. Most people, and this includes Commissioners of Police and child psychiatrists, would not know a good child-rearing practice if they saw one. Still less would they know the difference between a good child-rearing practice and one that in five or ten years' time will be identified by some expert as having been responsible for the child's delinquency.

However, it is evident from the context of the Commissioner's remarks that "responsibilities" of this type are not his main concern. In discussing public responsibilities in relation to the "public desire to assist in the maintenance of law and order" it seems likely that his remarks relate mainly to the last two areas of responsibility mentioned above. Public participation in police work is, of course, essential to the efficient discharge of the law enforcement function. Indeed, without it the police simply could not operate. There seems to be considerable agreement among both the police and the public that insufficient public assistance is forthcoming. A survey of public attitudes towards the police in New Zealand in 1968, for instance, found that while most New Zealanders expressed great respect for the police, 71 percent of the respondents thought that the public did not help the police enough, at least in relation to actual physical assistance. In response to a similar question 90 percent of the police sample made the same response. (See D. Chappell and P. R. Wilson, *The Police and the Public in Australia and New Zealand*, University of Queensland Press, 1969.)

Increased public participation in the law enforcement process in this manner is, however, a rather contradictory aim. In the first place the Commissioner would plainly like the public to report more crime. Indeed he castigates his readers for their indifference to the submerged portion of the "iceberg of crime". However, as was pointed out earlier, it is highly likely that part of the reason for the increase in reported crime over the last few years is simply that people *are* now more willing to report offences. The Commissioner cannot have it both ways. If he wants more public participation and assistance he will have to put up with a higher crime rate, at least in the short term.

Such a consequence would be perfectly acceptable if it resulted in more criminals being apprehended and more serious anti-social acts being detected. Unfortunately it is not at all clear that this would be the case. This is where the traditional iceberg analogy used to describe the relationship between reported and unreported crime is misleading. Unlike the iceberg, there is not the slightest reason to suppose that the submerged portion of crime is

composed of the same sort of material as the part that sticks up out of the water. Crime is not reported to the police for a variety of reasons. In New Zealand it is probable that the main reasons for offences going unreported are either that the victim doesn't notice them, or that he is a member of the same family as the offender, or that he considers the loss or damage too trivial to bother the police or anyone else with. In such circumstances it is likely that an increase in willingness to report offences will simply cause further erosion of the family unit and swamp the police in a deluge of missing milk-money and ribald neighbours.

There is another, rather contradictory, element in this plea for greater public involvement. If it is to be taken as an invitation to offer physical assistance to the police whenever possible, it is surely rather misguided. Certainly situations do arise where outnumbered or injured policemen need help. Mercifully, however, such situations are rare. In most other situations the citizen who tries to help uninvited is rather like the Boy Scout who insists on helping old ladies across the road, whether they want to go or not. At best he is an inconvenience, at worst he is likely to be arrested for obstruction. Whatever the popular myth may be, the policeman is not a citizen in uniform any more. He is a highly trained professional who is well prepared to handle most of the situations which he encounters in his job without reliance on unskilled outside help. It is interesting to note that in the Chappell and Wilson survey mentioned earlier the Australian police force with the highest public respect rating was the one which took the most realistic view of the amount of assistance it could and should expect from the public, and in fact discouraged too much public involvement.

The second limb of Commissioner Sharp's criticism of public indifference towards crime in New Zealand is also worthy of consideration. The Commissioner points out that the public tends to accept certain types of offence as being of "less social and stigmatic consequence" than others, and implies that this is a bad thing. He also implies that such attitudes result in an increase in crime. However, as the Commissioner would be the first to admit, activity is defined as criminal as much by social definition as it is by legal definition. Indeed, in functional terms it is probably the social definition of an act which is the most important for the law enforcement agencies. To talk in general terms about the shamefulness of crime and to castigate society for regarding some offences as less serious than others thus rather begs the question. Rightly or wrongly, a substantial proportion of the population does not regard certain types of activity as shameful or even worthy of the appellation "criminal". This in itself is not a bad thing. The mores of society change and develop and the law must, as the servant of society, follow suit. Being an elderly lady, however, the law will generally follow discreetly in the wake of social change, and this, in most cases, is as it should be.

There can be no doubt that the police themselves recognise much of this. Police enforcement policies, as a glance at the General Instructions will make clear, depend heavily on public attitudes to crime and criminals. This means in turn that police statistics also depend largely on public attitudes. Indeed the 1972 statistics provide a very good example of this. In spite of public hysteria over the "drug menace" generally, the figures for 1972 show a drop in the number of offences reported relating to possession and use of cannabis. Can this be the result of anything but a studied police decision to concentrate on the "pusher", who is perceived by the public to be the greatest menace in this area, to the exclusion of the relatively harmless, albeit perhaps misguided, user? Yet the Commissioner would be entitled to feel aggrieved if he were to be attacked for attributing less importance to the shameful aspects of pot smoking and thus accepting this type of offence as being of "less social and stigmatic consequence".

On the other hand, the Commissioner deserves considerable sympathy if his complaint is directed at the hypocrisy of a society that, for example, laments the increasing incidence of theft while continuing to connive at "perks" of various sorts. The only comment that can be made here, and it is a singularly unhelpful one, is that double standards of this nature are at least as old as Adam.

Whether public toleration leads to an increase in the crime rate is also highly debatable. In many areas exactly the opposite could be expected to occur. As the public comes to regard such offences as obscene language, consensual homosexual conduct and drunkenness as less serious, so their representation in the statistics of reported crime will decline. Fewer offences will be reported and the police, responding as ever to public opinion, will ferret out fewer offenders. Paradoxically, the clearance rate will probably increase. This,

of course, says nothing about the actual incidence of the conduct concerned, which is certainly likely to increase. Such an increase, however, is unlikely to be regarded by most as serious, for it is, after all, an increase which has been sanctioned by public opinion.

Crime is the subject of many myths. One myth, as the Commissioner points out in his report, and has indeed pointed out on numerous occasions in the past, is that it can be "solved" by the provision of more and better-trained policemen. Another myth, which the Commissioner unfortunately seems to accept, is that crime can be "solved" by greater community participation in the law enforcement process. This view constitutes a myth because it ignores the political and social reality of crime. Crime is not essentially a case of "them" and "us". It is "us" pure and simple. There is no "them" out there on the fringes of society who can be eliminated by "us" if only we will all pull together. Crime is not some distinct category of human behaviour which can be distinguished in some absolute sense from all other forms of human conduct. It is simply some aspects of some forms of human behaviour that have been, temporarily and in a limited number of circumstances, defined by a limited section of society to be worthy of penal sanction. Law enforcement agencies *per se*, even if properly supported by the rest of the community, have only a very limited role to play in this area.

To illustrate this a distinction must be drawn between control and elimination. What has been said in the preceding paragraph leads inexorably to the conclusion that so long as there is social action and so long as there is some opportunity for nonconformity, then there will be crime in one form or another. We surely do not need the parable of the Fall to tell us that. The control of crime, however, is another matter altogether. Crime control does depend in part on the police and on the degree of community support the police receive. It also depends, probably to a much larger extent, on factors outside the control of the police. The level of crime in any given society depends on political factors (what is and is not defined as crime in the legal codes), on community factors (how people react to certain types of law), and, above all, on the structure and nature of the society (how the society reacts to injustice, inequality, minority groups, the profit motive, the capitalist ethic, the young, the nonconformist, etc.).

The citizen who is concerned about crime and whose concern takes the form of assisting the police as much as possible would be an advance on the present situation. But he can only really assist in the repression of crime. To *control* crime what we need, and what the Commissioner needs, is the citizen who is prepared to assist in the restructuring of society. Unfortunately, as things stand at the present, such a person is more likely to be arrested than be regarded as a potential saviour.

NEIL CAMERON

SUMMARY OF RECENT LAW

CRIMINAL LAW — USING OBSCENE LANGUAGE IN A PUBLIC PLACE

What is obscene—Police Offences Act 1927, s. 48. This appeal raises the question as to the test of what is obscene language when used in a public place on a prosecution under s. 48 of the Police Offences Act 1927. *Held,* The test of whether language used in a public place is "obscene" is not whether it has a tendency to deprave or corrupt, but depends upon whether it offends against the contemporary standards of propriety in the community in the light of the particular circumstances and setting in which it was used. (*R. v. Hicklin* (1868) L.R. 3 Q.B. 360, distinguished.) Appeal dismissed. (Court of Appeal, Wellington. 7, 28 March 1973. Turner P., McCarthy and Richmond JJ.)

LANDLORD AND TENANT—RENEWAL

Relief against failure to exercise option to renew —No allegation of breach of covenant on refusing to renew—No jurisdiction—Application for relief must be made within three months of refusal—Property Law Act 1952, ss. 120, 121. The appellant sought relief under s. 120 of the Property Law Act 1952 from failure to exercise an option for the grant of a renewal of a lease. The term expired on 22 November 1970. The appellant not having exercised the option during the currency of the term, there being no specific date before which the option was to be exercised, remained in possession and paid rent. By a letter dated 1 April 1971 the appellant's solicitor gave notice of desire to renew and adverted to the fact that it was late. The respondent's solicitor by telephone said the respondent would not grant a renewal but the appellant could remain as a monthly tenant at an enhanced rental. In reply to a letter requesting details of the new rental, on 28 May 1971 the respondent's solicitor reiterated that the option had gone and stating the new rental. The respondent paid the new rent. After several letters complaining

about rent being overdue, on 20 June 1972 the respondent gave the appellant notice to quit and deliver up possession of the premises on 23 July 1972. On 2 August 1972 the appellant purported by notice to exericse the option. The respondent denied the efficacy of the notice and issued proceedings for possession on 4 August 1972. On 1 September 1972 the appellant filed a defence and also sought relief. *Held,* 1. Section 120 of the Property Law Act 1952 confers upon the Court a very wide discretion to do equity in relieving against refusals by lessors to renew leases. 2. If the refusal purports to be on the ground that there has been a breach of some condition express or implied in the lease the Court has jurisdiction to grant relief. 3. *Per* McCarthy and Richmond JJ., Turner P. dissenting. At no time did the respondent state the ground upon which the refusal to renewal was made, and accordingly there was no jurisdiction to grant relief. 4. Section 121 of the Property Law Act 1952 operates as a limitation provision and no application made after three months from the date of a refusal to renew can be entertained. The judgment of Wild C.J. affirmed. *Vince Bevan Ltd.* v. *Findgard Nominees Ltd.* (Court of Appeal, Wellington. 14, 19 March; 4 May 1973. Turner P., McCarthy and Richmond JJ.).

MASTER AND SERVANT—RIGHTS OF MASTER AGAINST THIRD PERSON

Personal injury to servant—Action per quod servitium amisit. The Crown claimed damages against the defendant in an action *per quod servitium amisit* for the loss of the services of a temporary mechanical appliance operator employed by the New Zealand Government Railways Department, who was injured in an accident caused by the negligence of the defendant's servant. The claim for damages was for recovery of $733 paid by the Railways Department as "make-up" payments paid to its employee during periods when he was unable to work, such payments being the difference between workers' compensation weekly payments and the employee's full weekly wage. In the Supreme Court Henry J. dismissed the action: [1972] N.Z.L.R. 364. On appeal by the Crown, *Held,* 1. The action *per quod servitium amisit* is an action recognised by the law of New Zealand. (*Commissioner for Railways (N.S.W.)* v. *Scott* (1959) 102 C.L.R. 392, followed; *Commonwealth* v. *Quince* (1944) 68 C.L.R. 227 and *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.* (1952) 85 C.L.R. 237 (H.C.); [1955] A.C. 457; [1955] 1 All E.R. 846 (P.C.), discussed.) 2. The action was not restricted to cases in which the person injured was a menial or a domestic servant. (*Commissioner for Railways (N.S.W.)* v. *Scott* (*supra*), followed; *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 Q.B. 641; [1956] 3 All E.R. 338, not followed; *Commonwealth* v. *Quince* (*supra*) and *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.* (*supra*), distinguished; *Attorney-General* v. *Valle-Jones* [1935] 2 K.B. 209, considered.) 3. The action is one for damages for loss of services incurred by the plaintiff, which is not necessarily the same as placing a value on the services which he has lost. 4. In order to claim damages the employer must affirmatively demonstrate the loss that he has suffered, but not all loss suffered consequent upon the absence of the employee will be recoverable. 5. The cost of "make-up" payments was not recoverable as damages. Appeal dismissed. *Attorney-General* v. *Wilson and Horton Ltd.* (Court of Appeal, Wellington. 4, 5, 6, 11, 12 October 1972; 26 March 1973. Turner P., Richmond and Speight JJ.).

MASTER AND SERVANT — INDUSTRIAL INJURIES AND WORKMEN'S COMPENSATION

Personal injury by accident—Arising out of or in the course of employment—Workman leaving place of work for own purpose not part of his employment nor incidental thereto. The plaintiff's husband was employed as a school groundsman, and in conjunction with the school caretaker had a free hand to carry out his duties. His hours of work were from 7 a.m. to 6 p.m. One morning about 8 a.m. he left the school on his motor scooter to fetch a chain belonging to himself to erect goal posts. On his way back to the school he collided with a railcar and died. On previous occasions goal posts had been erected without a chain. His widow, the plaintiff, claimed compensation for his death. *Held,* 1. In order to recover compensation the accident must have occurred while the worker was doing something which his employer could or did expressly or by implication employ him to do or order him to do. (*St. Helens Colliery Co. Ltd.* v. *Hewitson* [1924] A.C. 59 and *Lancashire & Yorkshire Railway Co.* v. *Highley* [1917] A.C. 352, 372, followed.) 2. The plaintiff's husband had elected without authority to leave his place of employment for a purpose which was neither necessary nor helpful for the performance of his work, and was not work for which he was employed or incidental to such work. *Gray* v. *Taranaki Education Board* (Compensation Court, New Plymouth. 21 February; 2 March 1973. Blair J.).

RATES AND RATING—BASIS OF ASSESSMENT

Annual value—Neighbouring properties rated at lower value incorrectly—Nature of relief for person rated correctly. The appellant appealed against the rating valuation of his property on the grounds that his valuation was higher than that of his neighbours whose property had a greater capital value than his own property. His property was correctly valued on the annual rental basis, whereas the neighbouring properties had been incorrectly valued at 5 percent of the value of the fee simple. *Held,* 1. The Court would not grant relief to the appellant by reducing his correct valuation to a lower but incorrect valuation attributed to his neighbours for the sake of uniformity. (*Ladies Hosiery and Underwear Ltd.* v. *West Middlesex Assessment Committee* [1932] 2 K.B. 679, applied.) 2. The appellant could object against the rateable values of his neighbours, who would be brought in as parties under s. 36 (2) of the Rating Act 1967, and whose valuations could be assessed upwards. *Vaughan* v. *Auckland City Council* (Supreme Court (Administrative Division), Auckland. 1 February; 2 March 1973. Speight J. and Mr A. D. Carson).

TORT—GENERAL

Nature of tort of intimidation restricting person's freedom of action—Assessment of damages—Damages—Aggregation and mitigation—"Aggravated" and "exemplary" damages distinguished. The respondent and her husband each had separate farms. The respondent had a pedigree Jersey herd and had moved 60 head of stock to her husband's farm to prepare them for a sale to be held on 30 May 1969. The husband's lease of his farm expired on 1 June

1969. As the husband was in arrear with his rent the appellant on 17 May 1969 distrained some of the stock for rent, including 29 head belonging to the respondent, notwithstanding that at the time she protested that the 29 head belonged to her. The appellant told the respondent that he would return to distrain more stock. The respondent, to prevent further distraint of her remaining cattle, moved them to a "run off". On 24 May 1969 27 head of the respondent's cattle were released; two were missing and never found. The respondent endeavoured to prepare her stock for sale but the equipment used was defective and the stock carrier arrived a day early. The prices realised were much lower than the respondent's expert had advised and she sued for losses occasioned by the appellant's unlawful seizure. *Held,* 1. The tort of intimidation can be a threat by one person that another person must take a particular course of action and if he does not the former will do something that the latter will not like. (*Hodges* v. *Webb* [1920] 2 Ch. 70, 89, followed; *J. T. Stratford & Son Ltd.* v. *Lindley* [1965] A.C. 269; [1964] 2 All E.R. 209 (C.A.) and *Morgan* v. *Fry* [1968] 2 Q.B. 710, 724; [1968] 3 All E.R. 452, 455, referred to.) 2. "Aggregated damages" are extra compensation for injury to the plaintiff's feelings and dignity caused by the manner in which the defendant acted as distinct from "exemplary damages" allowed to punish a defendant for inflicting the harm complained of. *Huljich* v. *Hall* (Court of Appeal, Wellington. 12, 13 March; 18 April 1973. Turner P., McCarthy and Richmond JJ.).

TOWN AND COUNTRY PLANNING—GENERAL

Council by resolution imposing conditional prohibition on subdivision—Subdivision contrary to resolution not a "detrimental work"—No jurisdiction in council to impose conditional prohibition—Town and Country Planning Act 1958, s. 38. The county council on 14 December 1971 by resolution conditionally prohibited any subdivision of certain land registered in K.'s name into lots of less than 50 acres unless such subdivision had been approved by the council, "as any such subdivision would be a detrimental work" under s. 38 of the Town and Country Planning Act 1953. On 22 December 1971 the District Land Registrar signed and sealed a plan of subdivision subdividing part of such land into lots of 10 acres. On 10 Januray 1972 the D.L.R. issued separate titles for these lots. On 13 March 1972 transfers of five such lots to the applicant were registered. On 30 March the council amended its resolution omitting reference to its approval, a copy of which was sent to the D.L.R. on 14 June, who thereupon entered his caveat against each of the lots. The applicant sought removal of the caveats. *Held,* 1. There was an effective completed subdivision of land for the purposes of s. 38 of the Town and Country Planning Act 1953 when the plan was deposited or at the latest when separate titles were issued. 2. Section 38 (2) of the Town and Country Planning Act 1953 does not permit a council to prohibit conditionally the carrying out of any detrimental work. 3. The only effective prohibition was the resolution of 30 March 1972, by which time the subdivision was already completed and accordingly and caveats were ordered to be removed. *Expans Holdings Ltd.* v. *Auckland District Land Registrar, Waitemata County, and Kell* (Supreme Court, Auckland. 8, 9 March 1973. Wilson J.).

HADDOCK ON SWINE

A case was called in the Magistrate's Court recently in which it transpired that the complainant had parked his Landrover outside the Waipara Hotel on 23 June 1973. When he emerged later he discovered that one of three wild pigs he had in his vehicle was missing. The defendant, intending to participate at a dance to be held in the nearby hall, had also been indulging in some preparatory activities in the hotel before the dance. Being a man of light humour, he and his companion considered that a diversion would be created in the hall if they arrived with a pig, but on the way to the hall the constable's car was sighted. They made off, but were soon apprehended.

Doubtless Mr Albert Haddock would have made two main submissions to the Bench. The first would have been that there is no property in a wild pig unless it either dies on the land of, or is killed by, the owner of the land, or it is killed by the grantee or licensee of shooting or sporting rights. *Vide 3 Halsbury,* Vol. 1, p. 658. If, however, the pig is killed by a trespasser, he has no property in the pig and therefore the pig is not "something capable of being stolen". It therefore follows that as the police had failed to establish that the complainant was either the owner of the land where the pig was shot or that the complainant was a *bona fide* grantee or licensee of shooting rights, the information should be dismissed.

Following the conviction which took place, Mr Haddock would then have submitted that this was a case for mitigation referring to the case of *R.* v. *Thomas Piperson* (circa 1580) in which it was reported that the defendant stole a pig and away did run. The report continues that the defendant was beat, the pig was eat and the defendant went running up the street. The only appropriate punishment, therefore, would be the wielding of the birch rod. This form of punishment has now been replaced by s. 42 of the Criminal Justice Act, which should be appropriately applied in the present case.

M.G.L.L.

BILLS BEFORE PARLIAMENT

Animals Protection Amendment
Accident Compensation Amendment
Admiralty
Air Services Licensing Amendment
Animals Amendment
Appropriation
Broadcasting Authority Amendment
Commonwealth Games Boycott Indemnity
Counties Amendment
Crimes Amendment
Customs Amendment
Dangerous Goods
Department of Social Welfare Amendment
Domestic Purposes Benefit
Door to Door Sales Amendment
Door to Door Sales Amendment (No. 2)
Equal Pay Amendment
Explosives Amendment
Fire Services Amendment
Health Amendment
Hospitals Amendment
Imprest Supply
Industrial Relations
Licensing Amendment
Licensing Trusts Amendment
Marine Pollution
Ministry of Energy Resources Amendment
Motor Vehicle Dealers Amendment
Municipal Corporations Amendment
Municipal Corporations Amendment (No. 2)
New Zealand Constitution Amendment
New Zealand Day
New Zealand Export-Import Corporation
Payroll Tax Repeal
Physiotherapy Amendment
Plant Varieties
Property Speculation Tax
Public Works Amendment
Recreation and Sport
Rent Appeal
Reserve Bank of New Zealand Amendment
Sale of Liquor Amendment
Sales Tax
Scientific and Industrial Amendment
Social Security Amendment
Summary Proceedings Amendment
Syndicates
Transport Amendment
Trustee Amendment
Volunteers Employment Protection
Water and Soil Conservation Amendment
Wheat Research Levy
Wool Marketing Corporation Amendment

STATUTES ENACTED

Companies Amendment
Imprest Supply
Judicature Amendment
Maori Purposes
Ministry of Transport Amendment
Moneylenders Amendment
National Roads Amendment
Niue Amendment
Overseas Investment
Post Office Amendment
Rates Rebate
State Services Amendment
Trade and Industry Amendment
Trustee Savings Banks Amendment
University of Albany Amendment

REGULATIONS

Regulations Gazetted 2 August to 10 August 1973 are as follows:

Dairy Produce Regulations 1938, Amendment No. 29 (S.R. 1973/192).
Economic Stabilisation Regulations 1973 (S.R. 1973/198).
Farm-Dairy Instruction Regulations 1949, Amendment No. 7 (S.R. 1973/193).
Motor Spirits Prices Regulations 1970, Amendment No. 5 (S.R. 1973/194).
New Zealand-Australia Free Trade Agreement Order (No. 5) 1973 (S.R. 1973/188).
New Zealand-Australia Free Trade Agreement Order (No. 6) 1973 (S.R. 1973/189).
Periodic Detention Order (No. 3) 1973 (S.R. 1973/190).
Price Freeze Regulations (No. 4) 1973 (S.R. 1973/197).
Shipping (Certificates of Competency as Qualified Fishing Deckhand) Regulations 1973) (S.R. 1973/195).
Ships Meat Lockers Regulations 1966, Amendment No. 2 (S.R. 1973/196).
University Bursaries Regulations 1971, Amendment No. 2 (S.R. 1973/191).
Work Centre (New Plymouth) Notice 1973 (S.R. 1973/187).

Japanese on bowing—A Japanese friend points out that bowing often gives you time to collect your thoughts, like how to deal with an unwelcome visitor, provides a rest for a fencer in the middle of a contest, while it was said of a certain landlady of an inn that she considered she could sum up the character and background of a guest while making her initial bows in greeting him.

"I've shaken hands all round the world," remarked a retired Japanese diplomat. "And while I do so at home with intimate friends, I still prefer our Japanese bow. For, after all, some people have sweaty hands, they can convey germs, and then some foreigners almost sprain your wrist in the warmth of their greeting."—*Japanese news item.*

CASE AND COMMENT

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

Tort of Intimidation—Aggravated and Exemplary Damages

The Court of Appeal decision in *Huljich* v. *Hall* (the judgments of Turner P., McCarthy and Richmond JJ. were delivered on April 18, 1973) will be of interest since the judgments contain some discussion about the ingredients of the tort of intimidation, and in addition, the circumstances in which a threat to commit a tort can be actionable as a tort.

The case arose out of the action of the appellant in levying what he thought was a lawful distress on certain cattle owned by the respondent but which happened to be on a property being farmed by her husband. This property was leased by the respondent's husband from the appellant, and a large sum of money in rent was owing. The appellant impounded 31 of the respondent's cattle and then told her (or threatened her) that he would be back for more. In order to avoid any further acts by the appellant, Mrs Hall, the respondent, removed more of her cattle to another property. As a result of some of the cattle having been impounded, and the others removed, the respondent was unable to satisfactorily prepare them for a sale at which they were to be presented. Lower prices than had been expected were obtained, and accordingly she claimed damages.

In the Supreme Court it was proved, and McMullin J. accepted that an act of trespass in relation to the impounded cattle had taken place, and damages were awarded for the loss which flowed from that tort. In the Court of Appeal it was argued that the threat to remove other of the respondent's cattle amounted to the tort of intimidation. The Court could not agree with this argument. It was stressed that whilst the tort of assault may be committed by the making of a threat, and in some cases the tort of intimidation, in normal circumstances the threat to commit a tort is not an actionable wrong. Both Turner P. and McCarthy J. agreed that a threat is an essential ingredient to the tort of intimidation, another essential element which must be present is the intention to cause harm as a result of someone (either the party harmed in the case of two-way intimidation, or the party doing the harmful act in the case of three-way intimidation) acting as a result of the threat. In the instant case it could not be proved that the appellant intended by his threat to bring about the result which occurred, namely that the respondent would move her cattle elsewhere. In truth the threat and the harm suffered were not really causally related. Accordingly the tort of intimidation had not been committed (see in particular *J. T. Stratford & Sons Ltd.* v. *Lindley* [1965] A.C. 269, and *Allen* v. *Flood* [1898] A.C. 1).

The other point which the Court of Appeal had to consider was whether this was a case in which a New Zealand Court might award exemplary damages in respect of the act of trespass to chattels (see *Australian Consolidated Press Ltd.* v. *Allen* [1969] 1 A.C. 590 and *Cassell & Co. Ltd.* v. *Broome* [1972] 1 All E.R. 801). The Court, however, considered that the claim was in fact a claim for aggravated damages rather than for exemplary damages. Whilst it was true that the appellant had displayed a degree of arrogance in his actions when he attempted to levy distress, he had taken legal advice before doing so, and for this reason the Court did not consider that an award of aggravated damages was warranted. In any event the learned Judges considered that this was a matter which the trial Judge had been in the best position to decide.

The main interest lies in the added light which this case casts on the difficulties inherent in the tort of intimidation, and clearly the Court was right in reaching its decision.

M.A.V.

Domestic Proceedings Act 1968, s. 19 (1) (a) and the Court's Discretion Again

It was not until the decision in *Mitchell* v. *Mitchell* that the Court of Appeal (consisting of Turner P., McCarthy and Richmond JJ., who delivered judgment on 1 March 1973) was squarely faced with the question: must, or may, a Magistrate take into account, when exercising the discretion conferred by s. 19 in a case where the making of the order is resisted, the fact that the state of affairs proved before the Court has been brought about exclusively, or substantially exclusively, by the applicant's wrongful conduct? The facts of the case were as follows: the husband and wife were respectively 19 and 17 years old when they married in 1966, and there was one child of the marriage born in 1967. Early in the marriage the

wife left the husband twice owing mainly to arguments over money matters. The parties then appeared to have settled down for over a year, but in September 1970 the wife finally departed with the child. It was clear that the overwhelmingly effective cause of this third departure was an improper association with another man—an association which was, indeed, not known to the husband until after the wife's final departure. The separation order had been made in November 1971, i.e. about 14 months after this date. The association was thus clandestine. It was not merely a symptom or result of pre-existing serious disharmony originating from other causes. The Magistrate had made a separation order in the wife's favour under s. 19 (1) (a) and the husband successfully appealed to Mahon J. There was a further appeal to the Court of Appeal. It was there made clear that there was no rule that, where the *de facto* separation had been brought about exclusively by the wrongful conduct of one spouse, the Magistrate ought always, or generally, to be exercised against making an order in favour of that spouse. "I think," said Turner P., "that [Mahon J.] was right to allow the appeal, because in all the circumstances of the case before him the discretion should plainly . . . have been exercised against the making of the order. I do not come to this conclusion on an assessment of comparative blameworthiness, but on the justice of the case, having regard to the consequences of making a separation order or refusing one." One serious consequence to the husband, were a separation order to be made, would be that he would be deprived of his right to petition for divorce on the ground of desertion at the end of two years from the date when his wife had left him. He could, however, have petitioned on the basis of the separation order—but would have had to wait over a year extra. On the other hand, were the order refused, the wife would suffer considerably less injustice and inconvenience: if she sought a divorce on the ground of desertion in two years' time, the husband would have had a defence. As regards maintenance, the husband's liability remained the same whether or not a separation order was made.

The learned President continued: "It may be thought that in saying that 'the effect of granting a separation order will be to deprive the *innocent* husband of the right to petition for a divorce' I have allowed considerations of comparative blameworthiness to creep in, and indeed to influence my decision in the case. If I have, it is not because I think that comparative blameworthiness is *in itself* a matter to be taken into account in deciding whether an order should be made under s. 19 (1) (a), but because in deciding whether the consequences of making such an order would be just as between the parties it is impossible to come to any conclusion without taking into account in some degree their respective deserts. While the innocence of the husband, and the blameworthiness of the wife, for the existing situation, cannot in themselves exclude jurisdiction to make a separation order on the wife's application under s. 19 (1) (a), yet the fact that the husband is apparently completely without blame for the *de facto* situation must be a consideration not entirely irrelevant in deciding whether it is just, overall, as between the parties, that an order should be made which will deprive the husband of a vested right which the law has given him." McCarthy J. put the matter neatly when he stated that he "would place the emphasis on circumstance rather than moral guilt and say that there must be some consequence or circumstance flowing from the wrongful conduct itself or which would flow if a separation order were made which makes it inequitable or wrong to make that order". Richmond J. put it succinctly thus: ". . . Mahon J. exercised his discretion by reference to overwhelming fault alone. In my opinion he erred in law in so doing."

It will be recalled that, in *Walker* v. *Walker* Richmond J. had stated that it might well be the case that it was not the legislative intention to enable a guilty spouse to take advantage of s. 19 (1) (a); indeed, he continued, the express provision of s. 19 (1) (c) suggested that, in such a situation, it was only the innocent spouse who had the right to seek a separation order and that, were the position otherwise, s. 19 (1) (c) would be surplusage. In the *Mitchell* case, however, his Honour concluded that such an inference could not be safely drawn from s. 19 (1) (c), observing that it followed from that provision that, in a case where a state of serious disharmony had resulted from any act or behaviour of the defendant affecting the other spouse, the Legislature had given to such a spouse a choice of two grounds on which to proceed. "It may," continued Richmond J., "well have been thought that according to the circumstances one ground rather than the other might be more appropriate. The important point, however, is that whereas under s. 19 (1) (c) the Legislature has used language restricting the remedy to the ceedings Act 1968. The wife had conceived a

innocent spouse it has used no such language in s. 19 (1) (a) but has clearly given a right to either spouse to apply for a separation order on that particular ground. It has chosen to do this although it must obviously have had in contemplation the possibility that the circumstances described in s. 19 (1) (a) could result from the overwhelming fault of only one of the spouses."

P.R.H.W.

Matrimonial Property Act 1963, s. 5—A nice case of valuation of a wife's share in the home

The decision in *Wright* v. *Wright* (the judgment of Macarthur J. was delivered on 6 July last) is of considerable interest to family lawyers. It has been held that the proper date on which to quantify a spouse's share in disputed property under the Matrimonial Property Act 1963 is that the parties' separation where it is the case that they have separated: see *Edwards* v. *Edwards* [1970] N.Z.L.R. 858; *Burgess* v. *Burgess* [1968] N.Z.L.R. 65.

In this case the parties separated in 1968 and shortly afterwards a separation order was made in a Magistrate's Court. The wife obtained a decree of divorce founded thereon in July 1972 ,and at the time of the present hearing was still occupying the home, in which she sought a share. The question of a property settlement had, however, been canvassed from October 1970 to April 1972. Macarthur J. accepted the principle stated above, and also that it was fair to calculate on the basis that the mortgage liability on the house was $4,200 in 1968 when the parties parted and not $2,700 (which it was at the date of the hearing by virtue of further payment off by the husband). On the other hand, in view of the circumstances of this case, his Honour thought that the one-third share which he awarded the wife should be computed on the present-day market value, which was $15,750. Her share would thus be one-third of $15,750 — $4,200, i.e. $3,850. This strikes the writer as a novel and nice variation on the more usual theme

P.R.H.W.

Domestic Proceedings Act 1968, s. 28—Wife's responsibilities to an ex-nuptial child

O'Sullivan v. *O'Sullivan* is an extremely important decision of McMullin J. (judgment was given on 10 July).

This was an appeal by a husband against a maintenance order made against him by a Magistrate's Court under the Domestic Proceedings Act 1968. The wife had had a child after she and her husband had begun to live apart. The child was not his and consequently was not a child of the family. Paternity proceedings brought against the alleged father were, for some reason, dismissed. This child's health was delicate owing to a brain disorder and, as a consequence, the wife could not work, though she would like to have done so and was herself in good health. Hence her claim to maintenance for herself. The Magistrate held that, due to this child's state of health, the wife was unable wholly or partly to support herself and made an order for $15 weekly.

It was argued that the Magistrate had been wrong to hold himself obliged to make an order on the basis that the child's condition was a circumstance within s. 28 (1) of the 1968 Act making the wife unable to provide the necessities of life for herself, and it was submitted that the "other circumstances" referred to in the section were "circumstances" within the marriage. It was further argued that, assuming the Magistrate to be correct in holding himself obliged to make the order, he had failed to give sufficient weight to the wrongful conduct on the part of the wife resulting in the child's birth and that, consequently, an order for a lesser amount should have been made. It would seem that the Magistrate considered the wife's conduct was serious but that he must nevertheless treat s. 28 (1) as a direction binding him to make an order against the husband.

McMullin J. held that no order should have been made at all and entered into a lengthy and scholarly analysis of the relevant sections of Part IV of the 1968 Act, which will have to be read with care and in full by all practitioners in this field. The salient features, however, are:

1. In determining an application for a wife pursuant to Part IV, the first inquiry must be whether there is jurisdiction to make a maintenance order at all.

2. Jurisdiction exists if a wife is not receiving or is not likely to receive proper maintenance from her husband. The matters relevant to that issue are referred to in s. 27 (1).

3. The resolution of the jurisdictional point requires a factual inquiry as to whether a wife is not receiving or is likely not to receive proper maintenance from her husband.

4. If the evidence establishes to the satisfaction of the Court that a wife is not receiving or is likely not to receive proper maintenance, an order may be made, but the making of an order does not necessarily follow upon the establishment of jurisdiction.

5. This is because s. 27 (2) directs the Court, in deciding whether to make an order, its duration and quantum, to have regard to s. 27 (1) (a) and (b) and to s. 27 (2) (a) to (e).

6. That the making of an order is not mandatory, even if jurisdiction is established, is clear from the reservation for the consideration of the Court of the various matters referred to in s. 27 (1) and (2). The Court must regard these matters not only in deciding whether to make an order at all but also as to its duration and extent. In the present case it was not disputed that the husband had paid no maintenance since 1968 and disputed his liability to do so in the future; consequently there was jurisdiction to make an order.

7. It was then necessary to examine s. 27 (1) and (2) to decide whether an order should be made, and the Magistrate was entitled to regard the parties' conduct by virtue of s. 28 (2).

8. Section 28 (1) was not to be construed as a direction that the Court *must* make an order if it found that, by reason of the wife's health, her responsibilities to any child of the family, or to other circumstances, she could not provide the necessities of life for herself.

9. No one of the matters referred to in s. 28 (1) was to be regarded by the Magistrate as a matter from the establishment of which a maintenance order necessarily followed.

10. Section 28 (1), to which the Magistrate had given too much prominence, was not a direction to the Court as to matters which, once established, require the making of any order: all it does is to provide that a wife's claim to maintenance, once satisfactorily established under s. 27 (1) and (2), is not to be refused on the ground of her wrongful conduct if the circumstances referred to in it are made out. The fact that s. 28 (1) provides that an order shall not be refused on the ground of the wife's wrongful conduct implies that the Court must first have decided that the making of an order was warranted, the only obstacle being wrongful conduct on the part of the wife.

11. While, in appropriate cases, wrongful conduct may be a relevant factor moving the Court away from making an order (s. 28 (2)), s. 28 (1) stipulates that it is not to be a *disqualifying* factor if one of the three matters is made out. But s. 28 (1) does not make the wrongful conduct a *qualifying* factor justifying the making of an order.

His Honour then gave the following helpful example. "It is not difficult," he said, "to imagine a number of situations in which a woman might be able to provide the necessities of life for herself. One example would be the case of an adulterous woman to whom in successive years a number of children had been born of fathers against whom maintenance orders for one reason or another proved valueless. The necessity to care for those children might make it impossible for such a woman to provide the necessities of life for herself. In those circumstances the woman's wrongful conduct would not necessarily disqualify her from a maintenance order, provided that she had already made out a case under the statute. But her inability to earn because of children born as a result of her wrongful conduct would not . . . provide the basis for the making of a maintenance order when, but for them, no order would have been made at all."

12. The submission that "other circumstances" in s. 28 (1) referred only to circumstances within the marriage was unacceptable, since there was nothing in the subsection warranting such a limited interpretation, and circumstances created by the wrongful conduct of a wife may, in some cases, be "other circumstances". But it was essential that the "other circumstances", whatever they were, be considered as part of s. 28 (1) only after a case for a maintenance order has been made out.

13. It therefore followed that, in a case where s. 28 (1) arises, the correct approach must be to determine whether it is proper to make an order in the circumstances made relevant by s. 27 (2). If, on a consideration of that subsection, the Court considers it proper to make an order, it is not to be deterred on the ground of the wife's wrongful conduct if, having regard to her health, her responsibiilties towards any child of the family, or other circumstances, she is unable to provide the necessities of life for herself.

14. Too much attention in the Court below had been paid to *Roberts* v. *Roberts* [1968] 3 All E.R. 478 (D.C.), which took a more benevolent line than some New Zealand decisions which had since been blessed by *Lindsay* v. *Lindsay* [1972] N.Z.L.R. 184 (C.A.).

15. In the present case, the wife's responsibility to the relevant child was not one to be taken into account, although there were certainly indications that *de facto* relationships were, on the occasions referred to in the 1968 Act, to be taken into account. Moreover, his Honour also approved the decision of Gilliand S.M. in *C.* v. *C.* 13 M.C.D. 209, though observing that it was not *in pari materia* with the present case.

16. Much was to be said for adopting a realistic view in appropriate cases. Section 27 (2) did not limit a father's responsibilities to legal ones alone and there was no reason why a wife's circumstances where they arise for consideration under s. 27 (1) (b), should necessarily exclude circumstances arising from her immoral associations. Even so, they do not compel the making of an order. All they do is afford material which, set against other relevant factors, justify the making of an order. In his Honour's view, a relevant circumstance under s. 27 (2) (e) was that the child here in question, whose health required the wife's presence at home and thus precluded her working, was not the husband's child and was both conceived and born after the spouses' separation. Had this been appreciated, no order would have been warranted, and s. 28 (1) need never have entered the picture. Accordingly, too little weight had been accorded in the lower Court to the fact that the husband was not the father of the child and too much weight on the wife's situation. Further, too little weight had been placed on the fact that the claim to maintenance had been brought only because the wife had failed some years ago in the paternity proceedings.

His Honour concluded thus: "It would be wrong, in my view, in considering the matters referred to in s. 27 (1) and (2), to make a maintenance order. It is one thing not to withhold a maintenance order because of misconduct. It is another to make that misconduct the *raison d'être* of the order. The Legislature provided a remedy to respondent in respect of Anthony by way of an application for an affiliation order against the father. Her former husband should not be penalised because she was wanting in some matter of proof on that matter. It would be unjust to place upon the appellant an obligation which was, in reality, the obligation of another man. The effect of the order appealed from was to load him with that responsibility. Moreover, the effect was to impose on appellant a liability to maintain respondent even after Anthony had attained the age of five years, whereas respondent's right to maintenance for herself against the child's father, had she established paternity, would have been restricted to a period of five years from the date of the child's birth (s. 53 (2) (b))."

Who can possibly gainsay this?

P.R.H.W.

English Cases Contributed by the Faculty of Law, University of Canterbury

Foresight and a Foolish Woman

Textbooks on criminal law usually include a quite detailed analysis of the states of mind which may be regarded as falling within the concept of *mens rea*. Thus, it is usual to find quite full discussions of the meaning of such concepts as "intention" or "recklessness" (e.g. Smith and Hogan, *Criminal Law* (2nd ed.), 37-40). On the other hand, the Courts do not often find it necessary to embark upon an equivalent exercise, and such terms as "guilty knowledge", "intention", or "wilful blindness" are commonly found in the reports with little or no further explanation of what they comprehend. Occasionally, however, a more refined description of the required *mens rea* may be necessary. This was the case in the recent decision of the English Court of Appeal in *R.* v. *Bingham* [1973] 2 All E.R. 89.

The defendant's husband had been convicted of communicating to a foreign Power, for a purpose prejudicial to the safety or interests of the State, information that might be or was intended to be useful to an enemy (in New Zealand this offence is found in s. 3 (1) (c) of the Official Secrets Act 1951). After this conviction the defendant announced to the news media that she had initiated her husband's offence by going to the Russian Embassy and there arranging for her husband to supply secret information to which he had access. The defendant explained that she and her husband had fallen on hard times and she had looked to the Russians to provide the necessary financial relief. After these admissions had been published the defendant was charged with doing an act "preparatory to the commission" of her husband's offence (in New Zealand this offence is found in s. 10 of the Official Secrets Act 1951). The defendant's answer to this charge was that although she arranged for her husband to supply information she believed that the only material he would in fact supply would be useless and not prejudicial to the interests of the State. This story discloses an ambitious proposal to defraud the Soviet Union, but it also amounted to a denial of *mens rea* in that the defendant was denying that she intended or foresaw any prejudicial purpose or the passing of any useful information, and was

thus denying that she intended or forsaw her husband's offence. The statute did not in fact specify any required state of mind but not surprisingly the Crown conceded that *mens rea* was an essential element of the offence, and as a result of this it was accepted that if the jury thought the defendant's story might be true then she was entitled to an acquittal. The Crown did not, however, concede that the offence required an actual intention that prejudicial information be transmitted and the trial Judge directed the jury that it was enough if the defendant realised that it was possible that the communication of prejudicial information would follow from her preparatory conduct. The defendant was duly convicted and on appeal it was argued that the trial Judge had incorrectly described the requisite *mens rea*: it was argued that it had to be proved that the defendant foresaw the transmission of prejudicial information as *probable,* not merely as *possible.*

The Court of Appeal described the difference between these two states of mind as being "extremely narrow", but it also recognised that the question was important. The Court concluded that the trial Judge had in fact been right in directing that foresight of the possibility of the offence was enough, and in reaching this conclusion the Court emphasised that the offence struck at mere preparatory conduct which might be quite remote from the future substantive offence (which might not in fact be committed): no one could be "a prophet in this regard" and a requirement of foresight of probability would give the offence an excessively narrow scope (92 e-g, *per* Lord Widgery C.J.). It may be added that the same section of the Act expressly penalised attempts an incitements to commit substantive offences against the Act but this does not seem to have been relied upon as suggesting the need for some more stringent form of *mens rea,* although the presence of such offences in the same section would doubtless strengthen the argument that *some* actual foresight of the substantive offence is required for the offence if "preparation" (cf. *Bowen* v. *C.I.R.* [1963] N.Z.L.R. 35). In view of the decision in *Bingham* it may well be that an actual intention to commit the substantive offence need not be proved even on a charge of attempt under this section, for it would be very odd if a more stringent form of *mens rea* was required on a charge of the more proximate inchoate offence (cf. *Murphy* [1969] N.Z.L.R. 959).

Quite apart from the reasoning employed in *Bingham* it seems that the decision can be readily supported as a matter of general principle and although the term is not actually used in the judgment the decision represents a neat example of recklessness being held to be sufficient *mens rea.* Mere negligence is usually insufficient for criminal liability (*R.* v. *Walker* [1958] N.Z.L.R. 810, 816; *Bowen* v. *C.I.R.* (*supra*) and in this context "recklessness" requires actual foresight of prohibited consequences; but it does not follow that such foresight is the only relevant element, nor that there must be foresight of probability. As well as actual foresight the concept of recklessness requires an element of negligence in that the risk which the defendant knowingly takes must be an unjustifiable one, in view of the social utility of his activity and the likelihood of the occurrence of the foreseen harm (Glanville Williams, *Criminal Law, The General Part* (2nd ed.), para. 25; *Smith and Hogan* (2nd ed.), 40). On this basis the defendant in *Bingham* can well be described as having acted recklessly, even on the assumption that she foresaw only a slight possibility of the prohibited event: the foreseen harm constituted a serious offence and the defendant's activity had no social value, so the taking of even a slight risk would be unjustifiable (cf. *Cunningham* [1957] 2 All E.R. 412, where it sufficed if the defendant foresaw that his act "*might* cause injury to someone"; in *Walker* v. *Crawshaw* [1924] N.Z.L.R. 93, 96, the word "probability" should doubtless be read as meaning "possibility"; and see the detailed discussion by Barwick C.J. in *Pemble* v. *The Queen* (1971) 124 C.L.R. 107, 119-121, although McTiernan and Menzies JJ. at 121, 127, appear to require foresight of the *probability* of death or grievous bodily harm for "recklessness" on a charge of murder).

G.F.O.

Once Bitten—The *Irish Times* reports—"It was another dentist, speaking from the floor to the meeting, who suggested that perhaps the dental profession ought to try to encourage engineers to alter the present design of water taps so that children with buck teeth would be less likely to break their teeth when drinking from them."

No Place for Portia—The *Nelson Evening Mail* quotes Mr J. W. P. Watts, S.M., as commenting that "He had yet to find that counsel for a defendant had much to add to a probation officer's report".

"SERIOUS DISHARMONY", AND THE DISCRETION TO REFUSE A SEPARATION ORDER
Part II

By Dr B. D. Inglis and Mr R. F. Pethig

[*Dr Inglis's earlier note dealing with this subject appeared at* [*1973*] *N.Z.L.J. 99 and was written some time earlier as a result of the judgment of Mahon J. in* Mitchell *v.* Mitchell. *In the meantime,* Walker *v.* Walker, *a case involving similar issues, went to the Court of Appeal, with the result that the original note had been overtaken by circumstances and appeared in print at the very time when the finishing touches were being put on an entirely new and revised article discussing the later decisions. This has been further revised and is now submitted as a sequel to the note already published.*]

The problem faced by the Court of Appeal in *Mitchell* v. *Mitchell* was whether it was a proper exercise of the discretion under s. 19 (1) (a) of the Domestic Proceedings Act 1968 to refuse a separation order in a case where all the elements of the ground were proved, but where it was apparent that the applicant had herself been wholly or principally responsible for creating the state of serious disharmony. The difficulty was made all the more acute by the fact that a separation order under the new Act carries none of the penal sanctions consequential on a separation order under the 1910 Act, so that the earlier cases, emphasising that the discretion was to be exercised with caution and a separation order granted only when the applicant could be shown to need the protection it gave, were no longer relevant. Basically the difficulty arose from two competing factors: on the one hand, that there was no point is maintaining a marriage that had hopelessly broken down, and, on the other, that a party who had created the state of serious disharmony could not be allowed to profit from it at the expense of the innocent party. If, in regard to this second factor, it could be said that the absence of penal sanctions in the new style separation order meant that there was little profit to be gained or prejudice to be suffered by an order essentially confirming the *status quo,* the answer would have been that a party does not apply for, or oppose, a separation order without some sufficient reason, for there are, in particular cases, some advantages in a separation order: the ability to obtain a divorce after two years; the fact that, while a separation order is in force, the absolute defence to a maintenance application provided by s. 29 cannot operate; the fact that the existence of a separation order may have a material bearing on the defendant's rights in Family Protection proceedings, and so on.

We have expressed these two competing considerations in the above terms, but it has to be acknowledged that they have more often been expressed in more emotional and less precise terms: on the one hand, that the Legislature, by s. 19 (1) (a), sought to remove matrimonial fault as an element in granting or refusing a separation order; and on the other hand, that a party plainly at fault could not expect any sympathy from the Courts and should not expect any sympathy from the Legislature.

As it stood, s. 19 (1) (a) in itself provided a possible answer. In declaring, as an element of the ground, that it must be shown to be "unreasonable to require the *applicant* to continue or, as the case may be, to resume cohabitation with the defendant", the ground excluded applicants proved to have been wholly or principally responsible for the state of disharmony and resulting state of irreconciliability, for how could it be said that in those circumstances it would be "unreasonable" for the *applicant* to continue or resume cohabitation? But this argument was never tested, for in 1971 the section was amended so that an applicant was required to prove, as part of the ground, that "it is unreasonable to require *the parties* to continue or resume cohabitation". Since the purpose of that amendment must be deemed remedial, it follows that the amendment was designed to avoid that argument. But what must not be forgotten is that the reasonableness or otherwise of a resumption of cohabitation is not an element in its own right, but is a statutory means of assessing the required degree of "serious disharmony". Accordingly, where, for instance, the applicant is shown to have brought about disharmony singlehanded by a persistent course of adultery, the question is whether the resulting state of affairs between the parties can rightly be described as a "state of serious disharmony of such a nature that it is unreasonable to require the parties

to continue or to resume cohabitation". In an assessment of whether the ground for an order is established, much will, of course, depend on the defendant's attitude—if he or she genuinely wants to resume the marriage, the only factor that can be pointed to as an argument that it is "unreasonable" for them to continue or resume cohabitation will be the applicant's own unilateral persistence in wanting to escape from the duty to cohabit. And, since it must also be shown that the parties are irreconcilable, can irreconcilability in that kind of situation, founded solely on the applicant's refusal to be reconciled, be significant?

Questions of this kind have not so far been answered authoritatively. Exactly what state of affairs is required to be proved by s. 19 (1) (a)? What is a state of "serious disharmony" that makes it unreasonable to require the parties to continue or resume cohabitation? What does "unreasonable" means in this context? In many respects it is more vital to know precisely what is involved in establishing the ground for separation in s. 19 (1) (a) than it is to know, once the ground is established, how the discretion to grant or refuse a separation order should be exercised. Yet it is this latter point on which a quite extensive judicial literature is developing. The Court of Appeal has considered the point on three occasions: in *Myers* v. *Myers* [1972] N.Z.L.R. 476 (North P., Turner and Woodhouse JJ.); *Walker* v. *Walker* (1 December 1972, Turner P., Richmond and White JJ.); and *Mitchell* v. *Mitchell* (1 March 1973, Turner P., McCarthy and Richmond JJ.).

Myers v. *Myers* has already been discussed in the earlier note on this topic ([1973] N.Z.L.J. 99), but it is perhaps worth repeating that it was a case in which the Magistrate's refusal to grant a separation order rested largely on the ground that the wife had not made sufficient efforts to save a difficult marriage. White J., in the Supreme Court, in a thoughtful judgment that should have been reported, held that this was not a case where it was right to refuse a separation order, although he envisaged that there could be other cases in which a refusal would be justified. The judgment of the Court of Appeal was delivered by Woodhouse J., and it is perhaps unfortunate that this case (argued shortly before and decided shortly after s. 19 (1) (a) was amended) was not one where any issue of misconduct on the applicant's part could arise. Accordingly, it presented itself as a classic case of disharmony, where an actual resumption of cohabitation was out of the question, and where the parties were irreconcilable. Indeed, perhaps the point of major interest in the whole case was White J.'s finding that the elements of s. 19 (1) (a) fell to be assessed at the end of the hearing in the Magistrate's Court and not at an earlier time, for, in *Myers'* case, as already pointed out in the earlier note on this topic, by the end of the hearing (though not earlier) the husband defendant had in fact recognised that any expectation of the continuation of the marriage was hopeless.

In any event, *Myers'* case reached the Court of Appeal without any serious element of matrimonial fault on either side on the facts, and indeed it is apparent from the terms of the judgment that the Court was limiting itself to this particular class of case. It is now clear that we must read the judgment in the light of the two later cases which reached the Court of Appeal.

In *Walker* v. *Walker* the factual situation was not much different from that in *Myers'* case, the principal feature being the applicant's refusal to contemplate a reconciliation after earlier attempts had failed. It was held on the facts that the Magistrate had rightly held the elements of s. 19 (1) (a) to be established and had rightly exercised his discretion in granting a separation order. What is of interest is the approach of the Court of Appeal, this time somewhat differently constituted from that in *Myers'* case. It was evidently felt that there was a need to clarify what had been said in that case: Turner P. pointed out that the judgment in *Myers'* case "is not to be read as if it were a statute, quasi-Legislature authority being attributed to every phrase", and he stated the *ratio decidendi* in this way:

> "There is a residual overall discretion still left in the Magistrate, even after he has decided that the conditions prerequisite to the making of a separation order, as prescribed in s. 19 (1) (a), have been satisfactorily established; but it is a discretion limited by the policy of the Act. This policy may be stated in very general terms as recommending that in the ordinary run of cases, and in the absence of considerations pointing reasonably plainly in the particular case to a different result, a separation order will follow, once the irretrievable breakdown of the marriage is proved. In so summarising matters I do not wish to be read as substituting my own words for those of the statute."

As Richmond J. also indicated, there is a danger in the use of such phrases as "complete

marital breakdown" and "general breakdown in the marriage" unless it is recognised that expressions of this kind are not used in the Act itself: such phrases "may tend to suggest more a breakdown of personal relationships between the spouses themselves rather than the more complex requirements actually to be found in s. 19 (1) (a)".

Both Turner P. and Richmond J. expressly contemplated the possibility that there could be cases where the discretion should be exercised against a separation order. Turner P. considered that where the blame for a *de facto* separation could be laid entirely or principally at the door of one spouse or the other it might be open to argument that the relevance of that circumstance could not entirely be excluded and might in certain circumstances be decisive. Richmond J. reached substantially the same view. White J.'s judgment is limited to a formal concurrence, but he had already said much the same thing at first instance in *Myers'* case.

At this point an interested observer would have wondered what was going to happen next. Read superficially, the judgment in *Myers'* case seemed to have removed all elements of matrimonial fault from the discretion under s. 19 (1) (a). The judgments in *Walker's* case made it clear that matrimonial fault was not necessarily excluded. But it was, of course, unnecessary to decide the point in *Walker's* case. Further clarification was not slow in coming.

Mahon J.'s judgment at first instance in *Mitchell* v. *Mitchell* was delivered in August 1972, before the Court of Appeal had either heard or decided *Walker's* case. It raised the very point left open in both *Myers'* and *Walker's* cases.

In *Mitchell's* case the essential facts were that the wife deserted her husband because of her association with another man and after 14 months applied for a separation order. During this time the husband had sought to be reconciled but by the time 14 months had elapsed was no longer willing to be reconciled and indeed had formed a friendship with another woman. If the wife obtained a separation order it would terminate her desertion as she was then justified in not cohabiting with her husband. Effectively this could expedite any divorce petition on her part which might not otherwise have been obtained until four years' separation had elapsed, but on the other hand the time in which the husband would be able to petition would be increased from eight months to two years. It will be recalled that the Magistrate had granted a separation order, but Mahon J. reversed this decision on the ground that the discretion should have been exercised against the wife. Mahon J.'s judgment was upheld by the Court of Appeal.

So in *Mitchell's* case the applicant was found to have been primarily responsible for the "serious disharmony" of which she complained. On these facts Mahon J. held that the discretion to make a separation order should be exercised against the applicant:

> "In taking the view that it will be a special reason for exercising the discretion against the application that the applicant is overwhelmingly responsible for the creation of a state of 'serious disharmony' or has, in effect, manufactured that state of affairs for the purpose of obtaining a separation and related orders . . . I am not to be taken as intending to reintroduce 'matrimonial fault' into an area from which it has by statute been excluded. . . . But even if deliberate instigation of 'serious disharmony' against an innocent or uncomprehending partner be regarded as 'matrimonial fault' then in my opinion it is still relevant to the exercise of the statutory discretion. An exceptional case would need to be made out, as required by *Myers* v. *Myers,* but I have no doubt that conduct of the kind I have referred to would be sufficient to warrant the discretion being exercised against the application."

The Court of Appeal agreed that Mahon J. was right in holding that the Magistrate ought in the circumstances to have refused a separation order, but it seems to have been thought that Mahon J.'s judgment might be interpreted as laying down that in every case where a *de facto* separation had been brought about exclusively by the wrongful conduct of the applicant a order should be declined. In a discretionary area such as this such a proposition would, of course, be difficult to support, and with respect to the view of the Court of Appeal it does not appear to us that Mahon J. purported so to hold. But in any event the Court of Appeal provided somewhat different reasoning to justify the result. Turner P. said:

> "In the present case I think [Mahon J.] was right to allow the appeal, because in all the circumstances of the case before him the discretion should plainly, in my opinion, have been exercised against the making of the order. I do not come to this conclusion on an assessment of comparative blameworthiness, *but on the justice of the case, having regard to the consequencs of making a separation*

order or refusing one."

The emphasis is ours. On the particular facts, one important consequence of the granting of a separation order would have been to deprive the husband of the right to petition for divorce on the ground of the wife's desertion at the end of two years from the time when his wife had felt him. which was as we have seen a considerable period before she had made her application for a separation order.

McCarthy J. adopted a substantially similar approach in what may well become a classic passage:

"In my view any moral judgment upon the misconduct or actions of either party has no place in an application based on s. 19 (1) (a). But this is not to say that the fact that the disharmony was due to the conduct of one party cannot have an *indirect* effect. Most human actions produce consequential results, and matrimonial wrongdoing especially produces states of affairs which affect the rights and duties of the other party, and not always only the parties but their children as well. It is those consequential circumstances which are so often of importance in the exercise of the discretion, not moral judgments *per se*. It might be thought that this is saying no more than that the mere fact that the state of disharmony has resulted overwhelmingly from the wrongful conduct on the part of the applicant is insufficient standing by itself as the ground for the refusal of an order and that there must be something more. But I see a difference and I would place the empasis on circumstances rather than moral guilt and say that there must be some consequence or circumstance flowing from the wrongful conduct itself or which would flow if a separation order were made which makes it inequitable or wrong to make that order."

Richmond J., too, rejected the view that the applicant's misconduct *alone* could provide sufficient ground for exercising the discretion against her. But he went on:

"It appears to me to be a proper approach to the exercise of that discretion to consider the consequences which will result from the making of a separation order, both from the point of view of the defendant and the applicant. In the event of it being found that some sufficiently serious consequence is likely to result to the defendant then regard can also be had to conduct in deciding whether it would in all the particular circumstances be just to depart from the general policy evidenced by the Act."

Accordingly we may hopefully restate the *ratio decidendi* in *Mitchell's* case as follows: In any case where a separation order is sought on the ground provided by s. 19 (1) (a) and all elements stated in that subparagraph are proved, the Court must, in exercising its discretion to grant or refuse a separation order, consider whether in all the circumstances, including the parties' conduct, either the applicant or the defendant will suffer unfair prejudice if such an order is granted or refused. We have somewhat broadened the actual words used in the judgments in *Mitchell's* case, but the above proposition as we have stated it appears to reflect the logical consequences of the judgment.

Two matters remain to be discussed. First, we doubt whether it is correct to say now that there is necessarily some presumption, based on the policy of the Act, that the discretion ought normally to be exercised in an applicant's favour. It is really a matter of assessing the individual circumstances of the individual case. In some cases it may be obvious on the applicant's case alone that the advantage to the applicant if an order is made is outweighed by prejudice to the defendant. In other cases the defendant may have a positive burden of demonstrating prejudice. But in any event, as a matter of general principle, it seems clear that the legal onus must lie on the applicant in each case to prove, first, that the grounds in s. 19 (1) (a) exist, and secondly, that the exercise of the discretion in the applicant's favour is justified. We believe that any observations in *Myers'* case which might lead to the impression that the discretion will be exercised against an applicant only in exceptional circumstances are to be read, not as any general statement of law, but rather as a statement that in most cases it will in fact be the position that no significant prejudice to a defendant will be likely to result if an order is made. It will normally be the facts which will pre-dispose the Court to exercise its discretion in favour of the applicant, not some abstract principle supposedly based on the policy of the Act.

The second matter to be discussed is the degree of prejudice to a defendant which will justify the refusal of an order. The self-evident danger of trying to predict what circumstances may or may not come within this category needs no emphasis from us, for the facts of the cases in this area are as infinitely variable as the personalities of the parties themselves. But some very general comments may help. It seems to

us obvious that a defendant who is sufficiently motivated actively to oppose the granting of a separation order must simply by reason of that fact suffer prejudice if an order is granted, for what happens in that event is that the applicant's wishes and interests are being given preference over the defendants' wishes and interest. The applicant must feel he has something to gain by his application or he would not press it against the defendant's opposition. The defendant must feel he has something to gain by opposing the application. There must, therefore, in any exercise of the available discretion, be a balancing of the parties' respective interests to determine which shall predominate. In many cases it will be the position that the real (as distinct from the declared) interests of both parties point to the need to give official recognition to the fact that the marriage had finished, with all the legal consequences that flow from that situation. In some cases, however, the conduct of the applicant leading up to his application will be such that his interests and wishes cannot be allowed to dominate.

MR JUSTICE R. B. COOKE— Meliora video proboque . .

The appointment during 1972 (he was sworn in at Wellington on 8 November 1972) of Robin Brunskill Cooke, Q.C., LL.M. (First Class Honours) (N.Z.), M.A. and Ph.D. (Cantab.), Barrister of the Inner Temple and in New Zealand, as a Judge of the Supreme Court at the age of 46 years will not have come as any surprise to his many friends in New Zealand and elsewhere, including those members of the profession who had long been in the habit of briefing him instantly in any case of difficulty. Opinions about any successful advocate are necessarily personal and are apt to vary in degree but many of the Judge's friends might think that the above tag from Horace could in the present case be improved by substituting *optima* for *meliora*. In the same vein it has been said of an earlier eminent advocate, Serjeant Byles in the old Common Law Courts, who specialised in the negligence actions of the day, that it was undoubtedly actionable negligence on the part of an attorney with instructions in such a case not to brief immediately the learned Serjeant (*Hollams—The Jottings of an Old Solicitor*). Doubtless many of those who have known the Judge in his professional practice as a barrister only from 1955 to 1972 may think there is an apt comparison to be drawn, although in his case it would be on a wider basis. Specialising in every kind of case in which he might be instructed was his habit from the beginning.

The new Judge's family antecedents are well known. His is the third generation of outstanding ability in the practice of law in New Zealand. His grandfather was F. H. Cooke (who died in 1934), an accomplished advocate in his day and best remembered for his work as Crown Solicitor and Borough Solicitor in Palmerston North and also as a cricketer, a slow bowler, who played for Otago and New Zealand. The glittering career of his father, P. B. Cooke (1893-1956) has been felicitously commemorated by Sir David Smith in his notable chapter in *Portrait of a Profession.* Here it is sufficient to remember that before his son P. B. Cooke was the youngest counsel ever to take silk in this country (on 28 January 1936 at the age of 42 years), that his excellence as a banco advocate was regarded in his time as unsurpassed and is still remembered and that despite his own doubts and hesitations about his possible appointment as a Judge at a very young age (see again Sir David Smith) he was at last persuaded to accept an appointment in 1950 which continued until his untimely death in 1956. If P. B. Cooke had lived longer, it is a question of whether the Court of Appeal could have been reconstructed in 1958 without his being likely to have been appointed —such was his prestige and authority as a true leader in his generation at the Bar. It is interesting to speculate how, in happier events, P. B. Cooke would have heard and dealt with the arguments which his rising son must inevitably have addressed to him on many occasions on appeal or otherwise.

The present Judge followed his father at Wanganui Collegiate School, where he distinguished himself, but he made his mark more importantly at Victoria University College over the period 1944-1949. This was the time of J. D. Williams, who had just returned from Sydney to his old Victoria chair, and of R. O. McGechan. Williams, still a relatively young man of outstanding brilliance himself and cer-

tainly not lacking in critical faculty, regarded the present Judge as his best student at the time in all his experience of teaching in Australia and in New Zealand. At Victoria the Judge easily achieved a University Senior Scholarship and went on to take his Master's degree with First Class Honours, which were the first awarded from before 1939. He also carried off the University of New Zealand Travelling Scholarship in law.

Thereafter he embarked on an academic life at Cambridge, first as a research student at Clare College and later as a research Fellow at Gonville and Caius College. He was a pupil of Professor E. C. S. Wade, the authority on constitutional law. He taught law all the time to undergraduates under the Cambridge system of college teaching through supervisions (in Oxford called tutorials). He took his degree of Ph.D. in 1955 with a dissertation on "Jurisdiction: An Essay in Constitutional Administrative and Procedural Law" and achieved the University Yorke Prize with his criminal law essay "Venire De Novo", published in *71 Law Quarterly Review* (1955) 100. Interested readers are referred to the final footnote, where the author's indebtedness to Professors Wade and Glanville Williams is acknowledged.

In 1955 and for a period of some years after, the Judge could well have elected for the Cambridge life as his career with all that this involved, an association with the best minds there and an agreeable life of teaching, combination rooms and as much or as little real work in the way of research and publication as one cared for. With this potential alternative his decision to come back to Wellington and practise as a barrister only, which he did in 1955, calls for special emphasis. No doubt he remembered his grandfather and father and the idea that the third generation could continue in the same way, and was well equipped to do so, came into account. Nonetheless, in Cambridge, further successes as an academic would have been logical and inevitable and life as a perpetual don would have been as pleasant as could be imagined, an overall prospect which must have been difficult to reject.

The Judge practised as a barrister only, in and from Wellington throughout the country from 1955 until his appointment last year. In Wellington in the 1950's with such leaders as Mazengarb, Cleary, Biss, Shorland, Leicester and Hardie Boys (reference is deliberately omitted to persons still living, and readers can add to the list according to their own preferences) the rigours and disciplines of the Bar were indeed severe, and at first sight there was little room for a young academic fresh from Cambridge even if he were a Cooke. Indeed, it is thought that these were surely the days when there was a small volume of real litigation, and depression attitudes from the 1930's were still continuing because ingrained in the older men. The current idea of the case in hand, as remembered, is that this had to be the subject of complete dedication involving total research into every aspect of fact and law and laborious argument on each and every possible point. The merits and demerits of these methods in dealing with litigation in the best interests of clients and for obtaining the best decisions from the Courts can be left to speak for themselves. That these methods no longer hold today must be attributed to some extent to the Judge's influence, which became more commanding as he made his way in his practice throughout the country, particularly in the 1960's.

The lucid argument which presented everything about the case that could matter and brought into decisive pre-eminence a point so obvious that it had previously escaped all other attention and at the same time made clear that the whole case had been mastered and no point of possible relevance was neglected—it is believed that these have become the hallmarks of advocacy as this is now being recognised, but in the 1950's all of this was far from being as obvious as it may now be. In the course of the Judge's practice he certainly rivalled his father as a banco advocate and perhaps the conditions under which he practised were the more demanding. There is, however, another influence which should not be forgotten—that of his father's partner in the firm of Chapman, Tripp, Cooke & Watson—the formidable and unforgettable G. G. G. Watson himself. In his day Watson must have been one of the best *nisi prius* advocates this country has known. He was an old family friend of the Judge and in his usual dominating way he must have exercised a considerable influence on tender years. It is not surprising that in his practice the Judge extended his range to every kind of case of fact and in law before all tribunals and achieved the practising reputation he did on this basis. No counsel is likely to have been more reported than the Judge in the New Zealand Law Reports at any time since the 1920's when the leading Bar in Wellington, which held the Court of Appeal, was as confined as it was. As reported cases can only represent a small part of leading counsel's work in a total

practice, and having regard to the unavoidable restrictions on reporting in recent years, the extent and volume of the Judge's practice at the time of his appointment can well be imagined. Working on only one case at a time was not his habit.

The Judge took silk on 25 May 1964 at the age of 38 years. For some reason not known, the occasion seems to have escaped notice in the New Zealand Law Journal, possibly with the Judge's connivance. However, at that time the profession in New Zealand had a realistic appreciation of the merits or otherwise of a practising barrister choosing to practise as a Queen's Counsel and what this meant in the particular case. If the Judge intended to reduce the volume of his work he would certainly have been disappointed. However, while he can rightly pride himself on his record of practising for 17 years as a barrister only before his appointment—which is believed to be unique—it must not be thought that he never worked as a solicitor. As a Victoria student he was a clerk with Chapman, Tripp & Co., and was indeed a qualified clerk with that firm through being admitted as a solicitor before completing his LL.B. degree under the system of the day.

A special matter which calls for mention here is the Judge's work on the Law Society Centennial Book *Portrait of a Profession*, published by Reeds in 1969. It is believed that the Judge's personal part in the labour not only of producing any book but of producing one of the excellence of this book could be characteristically obscured by his personal description as editor. Surely nothing could show better than this book all the Judge's qualities of his affection, knowledge and understanding of his family's profession, and it can be no detraction from the contributions of others to say this. How the book would have fared without the Judge is an open question. That we have it permanently in the form that it is in must unhesitatingly be attributed to him with all that this involved in sheer routine work such as correcting proofs, writing himself, as in the notable chapter on the Wellington profession, and tactful persuasion and help with other contributions—particularly the important parts of the book which are represented by the memoirs of Sir Hubert Ostler and Sir David Smith. That all the Judge's work on the book was done without interruption to his professional work is as true as it may be difficult to credit.

By way of conclusion there are some personal remarks which should not be avoided. It is well known that the Judge has talents for personal occasions equalling those which he has exhibited in professional practice. If he has reflected from time to time and on the appropriate occasions, in his mirror, it has always been to good purpose and to the pleasure of his listeners. One particular subject that is remembered is a Full Court of Appeal of New Zealand of all time (Judges happily still living being automatically excluded) selected in a similar spirit to that employed by the cricket writers for whom a comparable exercise has long been compulsory. It is also credibly believed that the Judge has experienced the attraction of Bishop Berkeley's philosophical theories, and while it is further believed that, taking time for consideration, he would be prepared to find that the tree existed he would certainly conclude that it grew in a Court and not a quad and would thereby reject the less educated evidence *per contra*.

CORRESPONDENCE

Identity Crisis

Sir,

The commercial world is going through a phase of concern for "corporate identity", and one may wonder whether the legal profession is suffering from an identity crisis. We now have a Law Society tie and cuff links, and perhaps the following could also be considered:

—For the with-it young solicitor, belt buckles embossed with the crest (especially appropriate when wearing shorts in Court!).

—For the mod-miss practitioner, crested earrings.

—Moving into the uni-sex field may we expect to see silken cravats and cummerbunds complete with the crest, and Law Society dress rings?

—Finally, to identify practitioners for errant motorists and traffic officers, perhaps a crest could be made available to be placed on the number plates of motor vehicles.

Yours faithfully,

J. M. VON DADELSZEN,
Hastings.

Wigs and Asses

Sir,

A great deal of damned nonsense is being talked by left-wing liberal pinkoes about the abolition of wigs and gowns. These garments are the cornerstone of our legal system. Abolish them and you abolish the Rule of Law. Unlike the wingeing trendies who bawl for their abolition, I should like to see their use extended into the Magistrate's Court—and I should like to see police prosecutors similarly attired, in smart black gowns with their red sergeant's stripes glowing on their sleeves and vivid navy-blue wigs atop their honest pates.

Yours faithfully,

A. K. GRANT,
Christchurch.

Civil Liberties

Sir,

The recent exchange between the retiring President of the Court of Appeal, Sir Alexander Turner, and the Minister of Justice, Dr. Martyn Finlay, Q.C., was an entertaining but unimportant diversion from reality.

In his criticism of the Judicature Amendment Act, Sir Alexander inferred that the power which it gave to the Government to make temporary appointments to the Court of Appeal might, by striking at the political independence of the judiciary, result in a piece being "chipped off the bulwark which the Court of Appeal affords to the New Zealand citizen" by way of protection of his constitutional and civil liberties.

In his reply, the Minister confined himself to the ground chosen by Sir Alexander, and gave an assurance that the Government would not make use of the powers that Sir Alexander feared.

Both the criticism and the reply contain the implicit assumption that, without constitutional safeguards, a Labour or National Government might be tempted to appoint as a Judge someone who lacks traditional "independence". The assumption is false. Where you have, as in New Zealand, an economy founded upon private ownership of the means of production, the measures taken by those in political life—legislators, ministers and executive officials—are not going to be in fundamental opposition to those private interests. This is the source of the conservatism of government officials, civil servants, Judges, and army and police officers, even though they may see themselves as acting out of a duty to God or Queen or just out of "objective common sense".

The criticism and the reply both tend to foster the illusion that under Parliamentary democracy the Courts and the law protect the citizen from government abuse. Yet it is only 33 years since the British Government, without consulting Parliament, suspended *habeas corpus*, which is supposed to be the noblest guarantee of all. And in New Zealand the Government, also without consulting Parliament, can suspend the entire judicial system by the simple process of declaring a state of emergency under the Public Safety Conservation Act as was done in 1951.

In short, though governments may come and go, the bulk of the State apparatus—including schools, Courts, news media and church—remains the same, having as its purpose the protection of private property and the continuation of the *status quo*.

Yours faithfully,

BARRY LITTLEWOOD,
Auckland.

Abortion and Human Life

Sir,

May I comment on a few of the points in W. A. P. Facer's letter in [1973] N.Z.L.J. 142.

He confuses the two types of potential. First, that of the ovum and sperm separately which is the potency to cause something to come into being. Neither the ovum nor the sperm is a potential human being, they have only the potency to cause a human being. Secondly, that of the zygote which is the potency to become fully what it already is. This second kind of potential can exist only in the actuality of an individual being. A human being cannot develop his potential unless he first exists. The ovum and sperm are both alive, but in and of themselves have reached the fullest development of their potential. The ovum is part of the mother containing her genetic code, and the sperm is part of the father containing his genetic code. Neither can reproduce itself, but when united together they create a unique new being.

The most important and qualified group of natural scientists to have thoroughly discussed and come to a conclusion on when human life begins, came together in the FIRST INTERNATIONAL CONFERENCE on ABORTION held in Washington in 1967. Its almost unanimous conclusion (19 to 1) was:

> "The majority of our group could find no point in time between the union of sperm and egg, or at least the blastocyst stage, and the birth of the infant at which point we could say that this was not a human life.

The changes occurring between implantation, a six-weeks embryo, a six-months foetus, a one-week-old child, or a mature adult are merely stages of development and maturation."

In our pluralist society the only common ground on which we can decide when human life begins is scientific truth and we must bring to bear on the question all the scientific truth that is available. Until some other group of equal scientific importance comes to a differing conclusion, we must accept that a unique human life exists from the very beginning of pregnancy.

In trying to show that a human being is not created at conception, W. A. P. Facer refers to abnormal tumours. These are simply cases where true conception has not occurred. As for "twinning", the probability is that the original zygote, a human being, becomes a parent of another. Where twins or triplets "recombine" into a single individual, one new being survives whilst the others die—probably one of the individual beings absorbs the other. In any event, there is at least *one* unique individual (if not two or more) actually existing at conception.

To say "we can only ascribe innocence where we could ascribe guilt" is incorrect. A young child under, say, seven years old cannot be "guilty"; he is not a "responsible moral agent"—but he is innocent. Innocence is not merely the absence of guilt, but is more positively defined as "sinless" or "harmless", and in this sense the unborn child is correctly described as innocent.

Instead of the word "sanctity" let us use the word "inviolability", and state that the inviolability of innocent human life has been called "the fundamental principle of secular ethics", for if this right to life is not safe, then no other right can be considered safe—and this is a factual matter, not a moral issue.

It is accepted that our present abortion law is probably in accord with the consciences of most in our pluralist society, but relaxation of that law is opposed becaused abortion is the killing of a human being, and no society can claim to be civilised if it attempts to solve its social or economic problems by resorting to the deliberate destruction of unborn human beings, even if these human beings are only a few weeks old, unseen and unable to plead for themselves.

Yours faithfully,
J. M. ARMSTRONG,
Auckland.

On Obscenity

Sir,

In an article "The Concept of Obscenity" [1973] N.Z.L.J. 205 the statement is made that the most common sort of classification made nowadays by the Indecent Publications Tribunal is that a book is indecent in the hands of persons under 18. If that comment is intended to relate only to cases in which the Tribunal makes a classification other than indecent or not indecent it is no doubt correct, but if it is intended to indicate the general trend of the Tribunal's classifications, it is not correct. The following figures may be of general interest as showing not only the amount of material with which the Tribunal now has to deal but also the quality of it.

From its inception in 1963 until 15 June 1973, the Tribunal has dealt with 697 publications. Of those, 444 have been dealt with since the beginning of 1971. Of the 444, the Tribunal has determined 63 to be not indecent, 119 to be indecent in the hands of a specified class (largely persons under 18), and 262 to be indecent without qualification. The 262 have included books, magazines, one sound recording and 37 comics. Two hundred and sixty-two books declared to be indecent may appear to indicate an insignificant problem but many more copies may, of course, be involved, depending on whether a book goes to the Tribunal before or after publication or importation. The Tribunal recently, for instance, classified 17 books as indecent. The aggregate number of copies immediately affected by those determinations was something in excess of 2000.

Yours faithfully,
D. P. NEAZOR,
Crown Law Office,
Wellington.

Wonderful ushers—This example of the imperturbability of the administration of British justice appeared in the *Daily Telegraph* of 9 March among the reports of the bomb explosion in Old Bailey: "A woman usher told me [the reporter]: 'I was in Court 10 with Judge McKinnon, who was still sitting when the bomb exploded. All at once everyone threw themselves to the floor. Then the Judge rose to his feet. I shouted 'Silence, be upstanding', then ushered the Judge from the Courtroom'."

CONTRACEPTIVES AND CONSUMERS

Dr Richard Lawson writes again from Britain

From 1 April next year, contraceptives will be available in the United Kingdom on the National Health Service. This means that they can be obtained for the cost of the prescription, at the moment around 40 cents. What has exercised me considerably in and about this matter is the categories of people to whom supplies will be free. Fair enough, they will go to those living below the poverty line and women who have had children within the preceding 12 months. But it seems that permissive Britain has taken the bit firmly between its teeth by granting free supplies to anyone below the age of 15 or above the age of 65 (60 for women). Ah, the precocious toddlers and the fertile octogenarians of my student days!

This is all by way of illustrating just how much Parliament has become actively involved in what were hitherto very private domains. More specifically, where the maxim used to be *caveat emptor,* it is now the vendor who has to beware.

Take, for example, the Supply of Goods (Supplied Terms) Act 1973. This statute clears away what has always been a strong source of consumer grievance — the exclusion clause. From now on, whether in contracts of sale or hire purchase, goods will have to be of merchantable quality and reasonably fit for their purpose: and any clause purporting to deny the buyer this right will be null and void.

Take, next, the Fair Trading Bill which is awaiting the Royal Assent. This singularly advanced measure allows for the appointment of a Director-General of Fair Trading, whose job, quite simply, will be to ensure that trading will be fair, whether this be a matter of restrictive practices, or the sale of goods in a manner in some way adverse to the consumer.

Then there is the Trade Descriptions Act of 1968. The main function of this piece of legislation was advertising control, and there can be little doubt at all as to its efficacy. Of the 2000 or so prosecutions which have been brought, the most publicised have been those against travel agents: and even selling "a beautiful car" that was not, has been held to offend against the Act. To top up this impressive armoury, a Truth-in-Lending Act is vouchsafed for the next Parliamentary session.

This is much to be applauded, but what I find even more impressive is the way the media have weighed in as well. Both television and radio run regular programmes in which consumers' complaints are listened to and discussed. What is more, the items complained of are specifically identified right down to brand and point of purchase. The newspapers, including the dizzy heights of the *Sunday Times,* run features on much the same lines.

I think it must be agreed that New Zealand emerges badly from a comparison evoked by this survey. The Sale of Goods Act has received no attention (apart from the trivial abolition of market overt in 1961) since the date of its passing in 1908. I exempt from criticism the Hire Purchase and Layby Sales Acts, although the latter covers a very small area of consumer sales. But where is the equivalent of the Supply of Goods Act, the Fair Trading Act or the Trade Descriptions Act? I am well aware of the Consumer Information Act but that, in marked contrast to the Trade Descriptions Act, has been almost a dead letter from the moment it was passed. Nor has there ever been any sign that the New Zealand media have been prepared to adopt the aggressive role now so familiar here. And you certainly do not, to your everlasting shame, supply your pensioners with free contraceptives.

LEGAL LITERATURE

Indexes to the Decisions of the Indecent Publications Tribunal 1964-1972. Compiled by Stuart Perry. McCrae Publishers.

Hitherto the decisions or "classifications" of the Indecent Publications Tribunal have been gazetted but not separately published. With no key, they have been difficult, if not impossible, to be readily identified or consulted. Now the lack has been made good, based largely on records compiled by one of the Tribnual's longest serving members. Publications are listed both alphabetically under "author" and under "title", and both the date and the outcome of the decision in each case are given. Copies of the 60-page booklet are available direct from the publishers, McCrae Publishers, P.O. Box 3509, Wellington.