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SMALL CLAIMS : THINKING AGAIN

In the past weeks a medium-sized law firm in Auckland has been handling, inter alia, the affairs of two clients who are each involved in disputes over monies payable under contracts for service.

In both instances the sums involved do not exceed $140. Both clients wish to recover the money they believe is owed them and the law on the matters in dispute seems to support their position. Yet both have been advised to settle for less, perhaps only for half their claims. This advice has been given in the clients' interest; even if their claims are successfully litigated with costs awarded them, their likely legal fees will make their victories academic.

In the area of small claims in contract and tort, "the main field of injustice," as Lord Devlin has commented, "is not litigation but non-litigation"(*a*). Whatever the merits of the claims, many are frustrated by their non-economic character. The legal work that is required may simply cost more than the claim is worth. Below $150 a firm of solicitors is likely to advise against pressing the claim, on the grounds that the costs of recovery—or defence of a claim—will be greater than the actual sum involved. Anyone in practice knows this is the case, and it seems that the problem is growing more acute.

Perhaps this is because the volume of commercial business, particularly credit transactions, has increased greatly in the last 30 years. This phenomenon, together with increasing incidental costs of legal services such as rental overheads and salaries, has prepared the way for debt collection agencies that process large numbers of claims for business creditors. The large volume of debt-collection work from retail traders indicates an adjustment by the commercial world to routinise Court recovery procedures to their advantage, but what about the consumer with a complaint arising out of the same retail transaction? This same transaction may plausibly involve many vitiating elements prejudicial to the retailer under the law of contract or tort, yet it invariably spawns actions based solely on the recovery of liquidated debts.

The New Zealand situation, although somewhat devoid of statistical analysis in this area, suggests a parallel with the English experience outlined in the UK Consumer Council's publication "Justice Out of Reach", which was published in 1970. The study indicated that the English equivalent of our Magistrates' Courts are used overwhelmingly by credit retailers. Seventy-one and a-half percent of the total summonses in a random survey in 1968 in six County Courts were claims by firms against individuals for goods or services. By way of contrast, the study uncovered not one individual suing a firm on a cause of action arising out of the same kind of consumer transaction. One of the most interesting findings was that in 64 percent of the cases where a defence or counterclaim was filed the action was subsequently withdrawn. This may reflect the usual tendency of opposing solicitors to come to settlement, but the striking absence of judgment to creditors where the debtor takes legal advice is noteworthy.

It is not only at the recovery stage of ordinary or default actions that the imbalance is felt. Much recent consumer legislation, as well as older statutes such as the Sale of Goods Act, are textbook exercises unless the remedies provided can be obtained sufficiently simply and cheaply

(*a*) *New Society* (1967), 29 March.

to make them really effective. The problems in essence are two: the costs of solicitors which make bringing or defending an action for a small sum uneconomic, and the complication and formality of the process of the Magistrate's Court.

One possible solution is the establishment of tribunals to handle small claims quickly and cheaply, relying on expedition and informality. Overseas jurisdictions in Canada and the United States of America (for example, in Ontario and in New York State) have small claims Courts which possess low-figure jurisdictional ceilings for liquidated claims. These systems rely upon simple procedure, arbitrators, and limited classes of plaintiffs; eg, no bodies corporate, moneylenders, or insurers. In some jurisdictions these tribunals are characterised by finality of judgment (appeals only by way of case stated on a point of law) and by prohibition of legal representation. The tribunal Judges are largely free from the strictures of adjectival law, and enforcement procedures are intended to be simplified to enable the layman to attend to them himself.

Since 1970 a scheme in Manchester has provided a pilot project in Britain for arbitration of small claims; the basic distinguishing feature between it and North American schemes is the alternative open to defendants to choose not to be bound by the arbitrator's decision. This element of voluntariness has not achieved universal confidence in the experiment.

Even a forum where justice is quick, cheap, and where lawyers are redundant can lose its attraction if we are only concerned with making substantive legal remedies as unencumbered as possible. Far from becoming the "little man's Court", overseas experience shows a strong tendency for regular commercial litigants to use small claims Courts as cheap debt-collecting mechanisms. Of course, one way to avoid this result is to stipulate that any New Zealand system must exclude corporate claimants, private moneylenders, and insurers. This argument is advanced in order to make the process less intimidating to a litigant who might otherwise face "seasoned regulars" as his opponents. Yet the strong argument against this approach must be that a debt is a debt, due and owing regardless of the legal personality of the creditor. A more plausible and commercially sensible objection to excluding corporate claimants is the prevalence of the small family company in New Zealand. The vast majority of our limited liability companies are modestly capitalised and exist primarily for certain taxation benefits. Is it fair—or logical—to exclude the local grocer from small claims remedies because of his corporate status? In my submission it cannot be, and the result would be a great injustice to marginal business people.

An alternative suggestion—which has distinct advantages of simplicity and brevity — is to abolish altogether Court proceedings for recovery of small debts arising out of retail transactions(*b*). The principal arguments in favour of this proposal centre on the following:

(1) The enforcement of default judgments without inquiry into the substantive issues of each claim has amounted in effect to the judicial sanction of high pressure selling and thoughtless expansion of credit sales.

(2) Court judgment against debtors is in any event increasingly less useful to creditors in comparison with repossession of goods or issuing an adverse credit rating.

(3) An inability to enforce small debts would result in greater care in the granting of credit. It should be noted that the proposal does not envisage the abolition of ordinary proceedings to enforce debts incurred through money lending; a prospective purchaser could still buy what he did not have the immediate money for —in event of default it is obviously not a *retail* debt. Reducing the expansion of retail credit, it is argued, would result in less social harm; eg, garnishment orders on marginal wage earners.

(4) In any event the likelihood of creating a small claims system where purchasers' rights can be given full effect is far too distant. Legislation may prohibit certain selling practices but many statutory prohibitions are not and cannot be enforced. By making small debts incurred by doubtful practices unenforceable some peripheral and unethical activities luring purchasers into credit tangles may be eliminated.

These proposals of Professor Ison envisage the retention of claims for cash loans and for payment of services. Yet only in conjunction with a system more fluid than any we have yet experienced to handle the remaining small claims does Professor Ison see any possibility for real parity of seller and buyer in their access to legal remedies for vitiating elements in contracts, or for tortious acts occurring by and through the transaction.

(*b*) See Ison, "Small Claims" (1972) 32 MLR 18.
(c) F D O'Flynn, "Small Claims Courts", 3rd Business Law Symposium, Legal Research Foundation, University of Auckland, 1973.

A Small Claims Court for New Zealand

The reader should take the opportunity of examining the proposals for a small claims Court of the Consumer Institute which are tentatively offered in volume 82 of *Consumer* (1972). The preliminary suggestions of Mr F D O'Flynn QC(*c*), who has conducted a Parliamentary inquiry into the small claims question, deserves closer scrutiny. He takes the view that:

(1) The tribunal must be limited to *customer* complaints, with some discretion to small unincorporated businesses or traders to bring a certain number of claims over a given period. This is necessary, he thinks, to prevent the tribunal from becoming a debt-collection agency.

(2) The adversary system must be put aside in favour of any investigatory role by the Judge without any onus of proof on either party. Many of the procedural niceties of natural justice would be abandoned, including, it seems, the principle of audi alteram partem which would be sacrificed in certain circumstances.

(3) Additionally: oral claims would be allowed; default judgments within the small claims limits would be abolished; practising lawyers representing either side would be prohibited; the hours of the tribunal would be flexible to be more readily accessible to working complainants; some circumstances would admit instant justice decided by on-the-spot adjudication; no right of appeal except on the most important questions of law; and generally a procedure as informal as possible with arbitrators chosen from a panel of practising lawyers.

The premise behind his suggestions is that the vast majority of commercial transactions arise in the small claims area, and that equality of parties to a dispute can be achieved *procedurally* where it is now only *substantively* assured. However, it would appear that the inarticulate premise is that cheapness, rapidity, and simplicity will make this procedural equality more likely. P S Atiyah (in his *Sale of Goods* at p 116) has noted that "the expense and trouble of litigation are so great that the average consumer gets no protection from the buyers' civil remedies". The question remains, however, whether these tribunals, expected shortly in some form or other in New Zealand, will guarantee the aggrieved consumer his remedy. It is my submission that the problems small claims Courts are designed to avoid are inherent in any Court system for claims of this sort, and that they are an inevitable outcome of commercial activity: for "unless great care is taken in framing the rules under which they are to operate, these . . . Courts or tribunals soon become agencies for mass debt collection, just as ordinary inferior civil Courts have done"(*d*).

The limitations proposed by Mr O'Flynn in order to ensure that these difficulties are avoided have been canvassed above but they are unconvincing. Unless the tribunal is created without apology as a special-interest consumer vehicle our small trading entities will experience injustice. Is a small family company as plaintiff-purchaser to have the advantage of expeditious procedure and quick judgment while the individual seller must rely on the ordinary Courts? Special interest provisions in areas of general law have never sat particularly well with our jurists. If justice is seen as speedier, cheaper and more accessible in one tribunal than another, then I am unable to see why all classes of litigants should not be able to avail themselves of the better procedure. Arbitrary distinctions between classes of litigants may portend "tribunal shopping" as creditors try to fit themselves into the small claims jurisdiction, perhaps by simply assigning their debts to individual persons.

Referring again to the "very careful formulation of small claims Tribunals" it becomes apparent that present proposals seem to demand much for their success. Both Mr O'Flynn and Professor Ison pay much attention to procedural details, all of which are designed to make the tribunal more accessible to claimants. There is much stress on keeping out the influence of the adversary system, eliminating traditional procedural safeguards, and encouraging unorthodox judicial activity.

Professor Ison has at least seen the necessity in a small claims system to abolish debt-collection agencies if corporate creditors are to be admitted as litigants. Overseas experience with commercial recovery attempts is that large claimants return to using collection agencies if the small claims Courts are not helpful to them. Additionally, the need for wide publicity of the scheme is stresed by small claims enthusiasts as well as the need, in the urban New Zealand context, to prepare necessary documentation in different languages. Above all, a complete departure from the ordinary Courts is insisted upon, as procedure and form are regarded as ossifying influences(*e*).

It is not so clear from the proposals how the class of *actions,* as wel las the class of *litigants,*

(*d*) "Small Claims Collection" [1973] NZLJ 57.
(*e*) See J R Gerard, *Small Claims Courts for New Zealand,* LLB (Hons), dissertion, 1972.

is to be determined. Proposals like O'Flynn's or Ison's speak of "most" contract or tort actions, having liquidated sums as the basis for claims. What is to be left out? An intentional tort such as false imprisonment may involve quite a low quantum but it frequently turns on a point of real merit and deserves adjudication just as much, if not more, than a small claims wrangle. How far is the principle of de minimus non curat lex going to be applied? Many tort and contract cases involve difficult questions of proof, but is the law of evidence suddenly to become "inoperative" at a fixed claim figure below which we substitute (even more than we do now) the vagaries of judicial temperament in an "investigatory" system? Admittedly, certain statutes, such as the Domestic Proceedings Act 1968, permit the Court to consider evidence that might otherwise be inadmissible but it is submitted that this is a piece of legislation concerned with a special interest area where the effect of substantive law is less crucial.

Before we throw *Wily, Sim* and *Cross* out the window, it might be worth while to consider not a scheme which abolishes lawyers, but *guarantees* their services. Not access to Courts, but access to *solicitors*. It may be necessary in special interest law such as industrial relations to emphasise lay assessors and to ban lawyers from appearing before tribunals, as in s 30 (4) of the Industrial Relations Act 1973(*f*). In this field the law is not substantive as to the merits of competing claims but merely procedural. This is emphatically not the case with small claims.

If legal representation and advice with small claims is guaranteed (perhaps by some form of maximum-figure legal insurance), the merits, rather than the economics, of each claim might then receive the attention it deserves. The essential problem with the existing system is that at a certain point not very low in money terms the costs of a lawyer exceed the value of the claim. Mr C R Connard of the Auckland Law School has suggested a scheme where a certain maximum amount of legal services insurance, perhaps no more than $100 anually, would be available to every citizen, with a restriction on the number of small claims he could prosecute. While this is only a preliminary suggestion, it has the merit of retaining guaranteed legal expertise rather than evicting lawyers from the Court in the name of economy.

To be sure, there are other difficulties with our ordinary Courts, most particularly with enforcement. Writs of execution, charging and garnishee orders, imprisonment for debt procedings: they are a procedural muddle where luck and intricacy more than logic may determine whether a successful litigant recovers. It is noteworthy that the small claims proposals are silent as to how enforcement will be improved under a small claims system. After all, present recovery procedures were devised as an improvement to private redress, and I cannot imagine that we want a return to the anarchy of self-help remedies. Yet the silence in the small claims proposals concerning enforcement leaves me wondering whether I should not read up on how to "wage my law" and other curios from the days of Runnymede.

The insistence upon limiting appeals from small claims tribunals seems unnecessary. Excessive litigation over small amounts is usually discouraged by the economics of the situation, and this deterrant would still operate against dissatisfied litigants at the small claims level. The proposals to jettison the adversary system and the procedural basis of the ordinary Courts is exciting at first blush but the investigatory or inquisitional system presents many potential abuses(*g*). The adversary system may indeed involve preparation in secret on each side as well as a rehash of the matter again at trial and this is admittedly a trebling of effort. Yet doesn't this offer more likelihood that all the issues will be aired? Overseas experience indicates that small claims Judges can become arbitrary, even whimsical, and petty-minded(*h*).

There remains finally an uneasy feeling that many small claims remain unprosecuted not so much because of alienation from the legal system but because there is a willingness to absorb some losses without active complaint. Legal aid is available for the kind of actions small claims tribunals would decide, but the 1974 annual report of the Legal Aid Board shows that more than 90 percent of all applications were connected with domestic proceedings. Again, the experience of the North Kensington Neighbourhood Law Centre, a successful community effort in a poor London area, is instructive: in 1973 only 6 percent of the total case-

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(*f*) Section 30 (4): ". . . no barrister or solicitor who holds a practising certificate . . . whether he is acting under a power of attorney or otherwise, shall, except with the consent of all the parties, be allowed to appear or be heard before the Commission".

(*g*) See the comments of Mr Justice Mahon in [1974] NZLJ 224.

(*h*) B A Moulton, "The Persecution and Intimidation of the Low-income Litigant as Performed by the Small Claims Court in California", (1969) 21 Stanford L Rev 1657.

load was connected with consumer problems(*i*).

The debate on small claims Courts is no longer so academic. In its report to the Minister of Justice presented on 1 July 1974, the Committee on Court Business chaired by Mr Justice Speight specifically advocated the introduction of small claims tribunals after further specialised study. This proposal is endorsed by the New Zealand Law Society which in its final submissions to this Committee said: "An obvious first step in restructuring our Courts would be the creation of a small claims Court." In addition, the submissions sugegsted that: "As far as the person to preside over these Courts is concerned the Society takes the view that lawyers with their training are best equipped to perform this function"(*j*).

Although it may be too late to reject the small claims Court, or perhaps far too early to advocate the provision of legal services as a free welfare right in small claims cases, the latter alternative does deserve some thought. Much of the disdain toward Court procedure in small claims proposals stems from impatience with the present system that effectively denies justice to small claimants. Yet procedures have been devised over many years to see that judicial determination remains fair at all stages to all parties. It is sometimes forgotten that the Magistrate's Court was designed to be the People's Court of this country, and s 59 of the Magistrates' Courts Act 1948, the "equity and good conscience" section, still has possibilities. It enables the Magistrate to take a broad, commonsense view of the question before him and to take into account the moral and equitable rights of the litigants: see *James v Crockett* [1920] GLR 368. The section has been used to assess the effect of the parties' conduct in the matter before the Court; see *Newling v Le Fevre* (1952) 7 MCD 477. Section 59 operates with respect to sums claimed that are not above $200. Certainly the procedural encrustations in the Magistrate's Court are daunting but new Magistrate's Court Regulations promise a speeding up of the interlocutory stages.

In conclusion, I would merely wish to stress that our existing Court machinery, *coupled with a scheme guaranteeing lawyers' services*, could go very far toward meeting the criticism of the present small claims situation. The law applied in all claims is the same substantive law, irrespective of quantum, and every effort would be made to keep the people who know the law where they belong: inside the Courtroom, providing the litigants with the best advice they have to offer.

J C CLAD

(*i*) Annual Report of the North Kennington Neighbourhood Law Centre (1974).

(*j*) Submissions by the New Zealand Law Society to the Special Committee on Court Business, 27 June 1974.

CORRESPONDENCE

Sir,

Adoption Consents

I would like to draw the attention of practitioners who deal with the taking of adoption consents to one aspect which was recently brought home in a recent case which I was involved in. In that case the natural mother (unmarried) had signed a consent and the supporting affidavit (which was in the old form) and these papers, along with the application papers have been filed in the Magistrate's Court. After a request had been made by me for an affidavit in the new form, the solicitors who took the consent advised that the natural mother had instructed them to make an application to withdraw same. At the hearing of that application it was agreed that the only basis on which the Magistrate would grant her application was if he was satisfied that no full consent had been given. Giving her evidence, the natural mother stated that she was, at the time she signed her consent papers, under the impression that she had 6 months to change her mind after she signed the papers. Apparently this impression had been given to her by a nursing sister in the hospital. She did agree that nothing the Department of Social Welfare had said nor the solicitor taking her consent had created that impression in her mind.

The Magistrate granted her application and stated that in his view, no proper consent had been given, in view of the fact that the girl had been under the impression that she had a period to change her mind when she signed the consent papers. He said that although the solicitor and the Department of Social Welfare had not created such impression, it was also true that nothing had been said which brought home to her the true position. He also pointed out that there was nothing on the consent form either which caused her to query her earlier belief. He also felt it quite a common belief by persons that the 6 months' waiting period between the interim and the final order was given to enable the natural mother a chance to change her mind if she desired to do so.

Accordingly, to avoid any future repetition of this situation, perhaps practitioners may well think it desirable when taking consents to add a warning to the effect that once given the consent cannot be withdrawn, or at least there is no time allowed for change of heart.

Yours faithfully,

P L THOMAS,
Taupo.

SECTION 108 YET AGAIN

In the continuing struggle with the Land and Income Tax Act 1954, a further attempt has been made to reword the offending s 108. The following revised version was introduced in the House on 1 October last:

Agreements purporting to alter incidence of taxation to be void—(1) The principal Act is hereby amended by repealing section 108 (as amended by section 16 (1) of the Land and Income Tax Act (No 2) 1968), and substituting the following section:

"108 (1) Every arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the Commissioner for income tax purposes if and to the extent that, directly or indirectly,—

"(a) Its purpose or effect is tax avoidance; or

"(b) Where it has 2 or more purposes or effects, one of its purposes or effects (not being a merely incidental purpose or effect) is tax avoidance, whether or not any other or others of its purposes or effects relate to, or are referable to, ordinary business or family dealings,—

whether or not any person affected by that arrangement is a party thereto.

"(2) Where an arrangement is void in accordance with subsection (1) of this section, the assessable income and the non-assessable income of any person affected by that arrangement shall be adjusted in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that person from or under that arrangement, and, without limiting the generality of the foregoing provisions of this subsection, the Commissioner may have regard to such income as, in his opinion, either—

"(a) That person would have, or might be expected to have, or would in all likelihood have, derived if that arrangement had not been made or entered into; or

"(b) That person would have derived if he had been entitled to the benefit of all income, or of such part thereof as the Commissioner considers proper, derived by any other person or persons as a result of that arrangement.

"(3) Where any income is included in the assessable income or, as the case may be, in the non-assessable income of any person pursuant to subsection (2) of this section, then, for the purposes of this Act, that income shall be deemed to have been derived by that person and shall be deemed not to have been derived by any other person.

"(4) Without limiting the generality of the foregoing provisions of this section, it is hereby declared that where, in any income year, any person sells or otherwise disposes of any shares in any company under an arrangement (being an arrangement of the kind referred to in subsection (1) of this section) under which that person receives, or is credited with, or there is dealt with on his behalf, any consideration (whether in money or money's worth) for that sale or other disposal, being consideration the whole or, as the case may be, a part of which, in the opinion of the Commissioner, represents, or is equivalent to, or is in substitution for, any amount which, if that arrangement had not been made or entered into, that person would have derived or would derive, or might be expected to have derived or to derive, or in all likelihood would have derived or would derive, as income by way of dividends in that income year, or in any subsequent income year or years, whether in one sum in any of those years or otherwise howsoever, an amount equal to the value of that consideration or, as the case may be, of that part of that consideration shall be deemed to be a dividend derived by that person in that first-mentioned income year.

"(5) Where any arrangement has been made or entered into before the 1st day of October 1974 and the Commissioner is satisfied, in respect of that arrangement or, as the case may be, in respect of a part of that arrangement, that the terms or conditions of that arrangement or, as the case may be, of that part (being legally binding terms or conditions which were agreed upon in writing before that date) prevent the discontinuance of that arrangement or, as the case may be, of that part, the following provisions shall apply—

"(a) Subsections (1) to (4) of this section shall not be applied with respect of that arrangement or, as the case may be, with respect to that part so long as that arrangement or, as the case may be, that part is so prevented from being discontinued and is continued strictly in accordance with the requirements of the aforementioned terms or conditions thereof; and

"(b) So long as the said subsections (1) to (4) of this section are not applied with respect to that arrangement or, as the case may be, with respect to that part in accordance with paragraph (a) of this subsection, the section for which this section was substituted by section 8 of the Land and Income Tax Amendment Act (No 2) 1974 shall, notwithstanding the repeal thereof by the said section 8, be deemed to remain in full force and effect in relation to that arrangement or, as the case may be, in relation to that part.

"(6) For the purposes of this section—

"'Arrangement' means any contract, agreement, plan, or understanding (whether enforceable or unenforceable) including all steps and transactions by which it is carried into effect:

"'Liability' includes a potential or prospective liability in respect of future income:

"'Tax avoidance' includes—

"(a) Directly or indirectly altering the incidence of any income tax:

"(b) Directly or indirectly relieving any person from liability to pay income tax:

"(c) Directly or indirectly avoiding, reducing, or postponing any liability to income tax."

TRIBUTES TO SIR KENNETH GRESSON

On Friday 11 October a special sitting of the Supreme Court honoured the late Sir Kenneth Gresson, first President of the permanent Court of Appeal, who died recently at Christchurch. On the Bench with the Chief Justice, Sir Richard Wild, were two Presidents of the Court of Appeal, Sir Alexander Turner and Sir Thaddeus McCarthy, Sir Clifford Richmond, Sir Owen Woodhouse, Sir Alec Haslam, Sir Douglas Hutchison, Mr Justice Roper and Mr Justice Quilliam.

Addressing the assembly of relatives and practitioners, Sir Richard Wild said:

"We assemble this morning to pay our tribute to the life and service of the Rt Hon Sir Kenneth Gresson, KBE, who died peacefully in his sleep at Christchurch on Sunday evening at the age of 83.

"I speak not only for the Judges of the Court of Appeal and of the Supreme Court who sit with me, but also for our other brethren who are not able to be present. With us, as you see, are retired Judges in the persons of the Rt Hon Sir Alexander Turner and the Hon Sir Douglas Hutchison. The Rt Hon Sir Alfred North, the Hon Sir David Smith and the Hon Sir George McGregor have specially asked to be associated with our tribute. Each of those I have named served at one time or another as a brother Judge with Sir Kenneth.

"The service to the law in New Zealand by the Gresson family, of which Sir Kenneth was so proud, goes back 117 years to 1857 when his grandfather was appointed the first Judge to sit in the Province of Canterbury. Sir Kenneth himself was born in Christchurch. As a young man not long out of school, where he had been Head Prefect, he went off to World War I in the Main Body of the First NZEF, and as an officer in the infantry he had the distinction of taking part in the gallant landing at Gallipoli, where he was severely wounded. On his return to Christchurch he began his practice, with which, during the ensuing 30 years, he managed to combine an impressive range of service to the profession and to the community. For many years he lectured in law at Canterbury College; he was a member of the Council of Legal Education, and an examiner for the University of New Zealand. Ultimately he became Dean of the Faculty of Law at his own College. To the Church of England he gave devoted service in many capacities, culminating in his appointment as Chancellor of the Diocese of Christchurch. He served as a member of the Council of the Canterbury District Law Society and was elected President for the year 1937.

"His professional practice lay mainly in the field of equity and trust work in which he earned a high reputation. In one charitable trust case he was paid a rare compliment when his written submissions were so entirely adopted that they are found in the Law Reports as virtually the whole judgment of the Court. It was no surprise that when, in 1937, Mr Mason set up the original Law Revision Committee, K M Gresson was one of the practitioners first appointed. In that Committee, which worked quietly and assiduously until there was an elaborate reorganisation in recent years, and whose contribution to wise reform was perhaps never fully recognised, Gresson played a very active part for over 10 years. One notable piece of legislation for which he personally deserves much of the credit was the Law Reform (Testamentary Promises) Act 1944, an enactment as novel and scarcely less important than the Family Protection Act which also had been a New Zealand invention.

"Appointment to the bench of the Supreme Court came in 1947 and the new Judge moved to Wellington to begin his judicial service. Despite his background he proved to be no mere academic and his work quickly won the admiration of the profession in this city and the neighbouring circuits. In due course when, at the Law Conference in Christchurch 10 years later the Attorney-General announced the intended establishment of a permanent Court of Appeal and the inevitable speculation about appointments broke out in the profession and no doubt on the Bench there was, I think, general agreement that Mr Justice Gresson was the right man to become the first President. And so he did, assuming office with the inception of the Court in February 1958. He retired from office on reaching the statutory retiring age in July 1963.

"Even the passing of 11 years is perhaps too short a period to justify a true assessment of Sir Kenneth's qualities and services as a Judge

but some points may, I think, be made. He was thorough and he was sound, at his best perhaps in the field that had always most attracted him. The reports contain notable judgments that he wrote—for example, on family protection and trusts. Despite the appearances of his background he was by no means conservative in his approach to legal problems. Indeed he was to a degree unpredictable — as witness the contrast between, on the one hand, his dissent in *Corbett v Social Security Commission* [1962] NZLR 878 where in a landmark decision the majority in our Court of Appeal anticipated the higher English Courts in refusing to follow the House of Lords on the question of Crown privilege, and, on the other hand, his judgment in *In re Lolita* [1961] NZLR 542 where, again dissenting, he took a liberal and advanced view of a novel which today, I suppose, would hardly raise an eyebrow. That judgment brought him some fame at home and overseas and not only with lawyers, and it led directly to the appointment in his retirement which put him, as he liked to say, "in charge of Indecent Publications" as the first Chairman of that Tribunal.

"In Court he wasted no time but, despite an apparent abruptness, was always courteous. He was a compassionate and understanding trial Judge. Some of the sentences he passed which seemed at the time to be too lenient proved in the end to have been soundly based. In banco work, and later in the Court of Appeal, he was a very patient listener, with an exceptional ability to capture the pith of an argument in a succinct and graphic phrase, garnished often by a flash of enlightening humour. He had an occasional bark but there was no bite.

"In his make-up there were some contradictions: the terseness of his oral expression was to be compared with the discursiveness of some of his written judgments. An outward personal modesty concealed a strong self-confidence and awareness of the dignity of his office. It was that characteristic which led to his ultimate achievement—appointment to the Privy Council, the story of which can, I think, properly be told without the slightest disrespect because it illustrates the man. Towards the end of his Presidency the notion of sitting on the Judicial Committee occurred to him. It was typical of him that, the idea conceived, he put it straight into action. Not for him sidling approaches or hints to others. He wrote direct to the Lord Chancellor saying that it would be a matter of gratification to him to complete his judicial career by joining the Judicial Committee. Though I doubt if Sir Kenneth ever knew it, the request came straight back, of course, to New Zealand because appointments are made by the Queen and in this matter she acts only on the advice of her New Zealand Ministers. But the objective was duly attained and Sir Kenneth sat in London for two law terms in 1963. It was a pity that the appointment came so late, for our highest Court is no place for men beyond retirement. But the distinction was entirely appropriate and well merited and Sir Kenneth's contribution — the first by a New Zealand Judge for nearly 50 years—was gratefully accepted and acknowledged by the Lord Chancellor.

"Sir Kenneth was a very human man. Like others who grow older—and it is not confined to Judges—he had his idiosyncracies, and there will be many who will retain glimpses of him as we knew him: doing the rounds of an official cocktail party with Lady Gresson at his coattails; making his one-man protest in refusing to attend the ceremonial opening of Parliament because he thought the Judges had been slighted in being placed in a new position; insisting that the President of the new Court of Appeal should receive appropriate recognition in the honours list; shuffling along the Quay in his retirement with his shopping bag; delighting in walking his grandchildren round Hagley Park. All this reflected a staunch and kindly man for whom we had admiration and affection, and above all respect.

"In the history of the law of New Zealand Sir Kenneth will be remembered as the first President of the Court of Appeal. Through the merits and devotion of him and his brethren in that first five years the foundations were well and truly laid and a high example set for the future. By the quality of its judgments the Court quickly won respect in judicial and academic circles overseas. By the despatch of its work it set a standard which could not be bettered anywhere. A very large part of the credit belongs to Sir Kenneth Gresson.

"For his long and invaluable service to our community of the law we express our profound gratitude: to his daughter and his son and their families we tender our respectful sympathy."

The Attorney-General, Dr Martyl Finlay QC, said that he was honoured to speak on behalf of the Government, at an assembly gathered to mourn the passing, and pay respects to the memory, of Mr Justice K M Gresson.

"The office he held, namely that of first President of the Court of Appeal of New Zealand, would alone be sufficient reason for the

ceremony," said Dr Finlay. "This addition to our judicial and appellate structure was created by my distinguished predecessor, Sir John Marshall. It is strange that so eminent a body did not meet with unqualified approval at the time of its creation, but it soon established and entrenched itself in a firm and unassailable position.

"But it is not only to the position but to the incumbent that we pay tribute today. Mr Justice Gresson quickly demonstrated a capacity to fill his office of President with distinction, decisiveness and leadership; and I am here today to acknowledge, on behalf of successive administrations, their appreciation of the services he and his sucecssors, and their fellow Judges, have rendered to the comunity; and to the notable contribution they have made to the clarification and development of the law. It is a matter of great regret to me personally that they have been required to do this in premises and in surroundings that are quite inadequate and sadly inappropriate to the standing and dignity of the Court. This is a situation I sincerely hope will be remedied, and remedied as quickly as circumstances will allow.

"I do not propose to traverse the life and career of the late President. You have already done so, sir. I confine myself essentially to a personal memoir and tribute.

"Kenneth Gresson was a down-to-earth, nononsense Judge—a plain man of the law (an instrument he regarded as a working tool of society). Whatever else might be said about the law—its elegance, its historical consistency, its logic—it had to work, and if it failed in that, all else was useless. In turn, he himself was ready to adapt. May I illustrate that by reference to four of his most outstanding and luminous contributions to the corpus juris.

"He came to the Bench from the somewhat sheltered and cloistered seclusion of an equity practice, and some queried his understanding of the seamier aspects of life. Yet in *Phillips,* one of his first criminal trials, he disposed of a difficult point of admissibility in a comprehensive oral judgment that was upheld by the Court of Appeal and resulted in a statutory amendment.

"In *Cottle,* an early test to the newly constituted permanent Court, President Gresson delivered a judgment which has been recognised as fundamental to the law relating to the defence of automatism in criminal cases. This elusive concept was firmly grasped by his Honour and defined and developed in a masterly manner just as it was beginning to offer, I must add, the most glittering prospects to the criminal Bar. The judgment has often been cited with respect both here and abroad, and accorded due and deserved deference by the House of Lords.

"*Fraser v Beckett & Stirling* [1963] NZLR 480, another criminal case despite its improbable name, involved the place of mens rea in a statutory offence, where the Legislature overlooked—as it has an unfortunate habit of doing —the mental and cognitive element. In a wide ranging and scholarly dissent, Gresson P stated that the true rule to be applied was that fashioned by Dixon J. in the High Court of Australia, and in Miltonian language proclaimed that in the absence of clear language to the contrary it should always be open to a defendant to rebut a charge by proof that he honestly and reasonably believed in the existence of facts which would make his act innocent.

"In another ringing dissent reminiscent of those of Homes and Brandeis, the President espoused the cause of liberty in *Re Lolita.* Rejecting the proposition that prevailing community standards constituted the sole ground by which indecency should be judged, he wrote what could fairly be described as his epitaph, and I can find no more fitting words with which to close.

" 'Liberty of expression,' he said, 'is too precious a thing to be lightly interfered with, though, of course, freedom of speech must not be carried to such lengths as to lead to a lowering of standards or a debasing of minds . . . freedom of expression should, in my opinion, extend to every field of human conduct, including sexual behaviour.' " he concluded.

For the New Zealand Law Society the newly-elected President, Mr Lester Castle, said:

"The New Zealand Law Society is proud to be associated with the tributes already paid this morning to the late Sir Kenneth Gresson. It is grateful for the opportunity of speaking on its own behalf.

"Most, if not all, aspects of Sir Kenneth's life and work have already been touched upon. Members of the New Zealand Law Society remember with gratitude his services to the profession as a member of the Council of the Canterbury District Law Society for many years and its President in 1937, and as one of the New Zealand Law Society's representatives on the Law Revision Committee from the time of its inception until his elevation to the Bench.

"The abiding memory of this erudite man of great distinction is of his deep understanding

of human frailties, his warmheartedness, patience and kindliness, yet at the same time of firm principle.

"We are all grateful for his lifetime of service not only in and for the law, but in and for the community."

PRIVY COUNCIL PRESENTLY SECURE

On 2 October Mr Blanchfield (West Coast) asked the Minister of Justice: Has he any intention of changing the system whereby the British Privy Council is the final Court of appeal over the New Zealand Court of Appeal, bearing in mind (1) that the council can and does reverse decisions of the New Zealand Court; (2) that the council is composed in the main of a group of English gentlemen trained in a different system of law; (3) that living some 13,000 miles away from New Zealand Parliament where our laws are drafted and passed tends to place a different interpretation on them; and (4) the cost of taking a case to the British Privy Council is mainly beyond the financial circumstances of the average New Zealander?

The Hon Dr A M Finlay (Minister of Justice) replied: I have no immediate intention of recommending to the Government a change in our appellate structure in which the ultimate Court of Appeal is the Judicial Committee of the Privy Council and indeed Government has recently agreed in principle that New Zealand should provide and facilitate the attendance of a Judge to sit at regular intervals of not greater frequency than once in two years, depending on the decision of the Chief Justice as to any congestion or delay his absence will create in Court calendars in New Zealand. The Chief Justice and the members of the Court of Appeal are all Privy Councillors and qualified to sit on its Judicial Committee.

This arrangement does not preclude further consideration, especially if Australia decides to abolish all rights of appeal to the Privy Council.

My comments on the specific points in the question are as follows:

(1) The whole purpose of an appellate Court is to review the cases that come before it and if it concludes they are wrongly decided, make appropriate orders.

(2) & (3) Although the majority of the members who sit on the Judicial Committee are British (but not necessarily English) Judges of distinction, the Committee frequently includes Judges from other judisdictions, including New Zealand as noted above, and the judgments of the Court are recognised as legal rulings of the highest possible eminence and authority. Any difference in life-style can be and is well appreciated and weighed up by their Lordships.

(4) In particular circumstances legal aid is available for appeals to the Privy Council.

(Note: Dr Finlay's paper to the Fiji Convention concerning a Pacific regional appellate Court appeared at [1974] NZLJ 493].

OMBUDSMEN CONFER

The conference of Australasian and Pacific Ombudsmen presently being held in Wellington is the first in the Southern Hemisphere.

The conference began on 18 November with a reception for delegates and their wives, given by New Zealand's Ombudsman, Sir Guy Powles, and Lady Powles. It will conclude on Friday, 22 November.

Delegates are attending from as far afield as Western Australia and Saskatchewan, Canada.

The opening addres was given by the Prime Minister, the Rt Hon W E Rowling, and the Chief Justice, the Rt Hon Sir Richard Wild, is to be guest speaker at a formal dinner at the Wellington Club on Wednesday, 20 November.

Other conference speakers include Mr Herman Doi, Ombudsman for Hawaii; the Leader of the Opposition, Hon R D Muldoon; Professor K Keith, Department of Jurisprudence and Constitutional Law, Victoria University ("A Matter of Administration"); the Attorney-General, Hon Dr Martyn Finlay ("Penal Policy and Practice"); Sir Guy Powles ("The Role of the New Zealand Ombudsman in Penal Complaints: An Individual Approach"); Hon Henry May, Minister of Local Government; and Professor John Roberts, Professor of Public Administration, Victoria University ("The Ombudsman and Local Government").

The New Zealand office of the Ombudsman celebrated its 12th birthday recently—it came into being (second only to Denmark) on 1 October 1962.

DISPUTES : A CAREENING—Part Four

The final in a series of articles by Mr M D Malloy. Earlier articles appeared at [1974] NZLJ 302, 364 and 461.

Anatomy and Conclusions

What glimpses of Court disputes have percolated through historical sources suggest that in other times and places—Elizabethan England, Republican Rome, Imperial China, medieval France and Italy, the Germanic Holy Roman Empire—the issues arising were mainly *between individuals*. This is different from the typical situation of the 20th century. As often as not, now the litigant is an organisation. This may have implications for the settlement of disputes which we only dimly appreciate. The *behaviour* of an organisation and that of an individual is different. It may be that this has an effect upon disputes involving organisations. We must remember that disputes can take place between organisations, between individuals, and between an organisation and an individual.

A different kind of issue affecting disputes is context. If we seek to improve our methods of handling disputes, it seems sensible to try to acquire a knowledge of those surrounding factors effecting a significant influence on the course of events. The precise nature of the relevant cause-and-effect relationships should be known. Some systematic way of gathering data on the events surrounding a dispute may be important.

The beginning of a science is classification. Have we any method of classifying disputes which might be relevant if differing solutions apply to differing types of dispute? It may be that more than one method of classifying disputes is significant for solution.

Law, as we have seen, is only one possible method of social control. There are others. Their characteristics, and the way we might set about developing them, can only be discussed in a tentative fashion at this stage. Ideas are fragmentary, and the relevant technical literature is scattered. No systematic approach to the problem has been attempted.

How might we set about acquiring an appropriate technology for disputes? We seem to face two problems (which may bear on human survival) with differing time dimensions. Short term, we must learn to resolve conflict between States at the dispute stage so that we are not tempted to settle the issues by a war. Long term, we must solve the problem of overpopulation. No doubt the two problems are inter-related in different ways. Based on our efforts in the area of the physical sciences since the 17th century, and the organisation and achievements of big science today,[27] we can reasonably suggest that what worked as a method in solving problems of resource utilisation (ie science) is likely to work as effectively with social problems. Hence, in science we have a possible tool. We have other assets. We have an idea of how to break down the problem into components which can be manipulated. Further, from mathematics we have formal analyses and hypotheses to serve as guides to assist our search for solutions.

The major issues relating to the settlement of disputes thus seem to be: the nature of relevant behaviour; the context problem; the classification of disputes (taxonomy); the discovery of effective treatments; and the role of science. These issues deserve separate scrutiny.

An organisation may be defined as a group of people acting together but with different roles in the pursuit of a common goal. Compared with an individual, behaviour found to be peculiar to a group is likely to apply to organisations but not vice versa. The organisation has a structure in the form of patterned action roles and established communication lines of an idiosyncratic nature. A group does not. This difference has obvious implications for behaviour, including, of course, that found in disputes.

Within organisations, information is typically handled in serial fashion. In part, this is because our world is "a world of serial information processors dealing with complexity that, for all practical purposes, is infinite in comparison with their information gathering powers".[18, 21] An individual can handle information at a maximum rate of about six bits per second. The limit for a small social institution is three to four bits per second, and in a group, three bits per second. It seems that the more components there are in an information processing system, the lower is its capacity.[13] Under some conditions (possibly with distractive effects) group

task performance is hindered rather than helped by increased opportunity for communication.[12] In passing, this finding provides further evidence suggesting difficulties with the jury system.

In tackling human relations problems, the group is not necessarily superior to the individual. However, this may relate to the way an individual and a group seek information from a comparative stranger. Groups seem to ask more questions and solve a practical problem better than does an individual.[11] Groups tend to take riskier decisions with higher payoffs and lower probability of attainment than do individuals.[2, 24, 25, 26] Certain tasks have been found to produce better performance on the part of groups compared with individuals. These include mathematical puzzles, human relations, moving soldiers across a mined road and "twenty questions".[23] It appears that the way groups or organisations operate, such as in asking questions and in distributing information, may have a significant effect in improving performance.

Findings such as these suggest that if, in a variety of situations, the behaviour of organisations differs from that of individuals, this is likely to be reflected in disputes. It seems possible, for example, that organisations may be more or less intractable; they might tend to develop a more or less rigid perception of the organisation's opponent; they could tend to view compromise as more or less equivalent to capitulation. More obviously, they might tend to react differently to a mediator. In certain circumstances, it seems possible that a mediator might have more influence on an organisation than on an individual.

So far, the notion from zoologists that group pack hunting during our pre-history may have a significant effect on behavioural tendencies has stood up well in that it is consistent with a considerable amount of recent experimental results. It seems possible that group behaviour and conflict are somehow related. A glance at the context of human disputes between groups might reveal similarities between structure and conflict process.

We speak of man-machine systems when we refer to organisations which use the sophisticated and varied gadgetry of the 20th century. They are primarily but not exclusively business, bureaucratic and service organisations. Because we believe that the armed services of today are in direct line of cultural descent from human pre-history, we suspect that the modern man-machine system may contain some very old and fundamental aspects of group behaviour—if we can guess where to look. Moreover, this may in some way relate to inter-group disputes.

Commencing with the obvious, let us consider information handling for a possible insight on organisational structure. A system analyst has described the process (primarily in service organisations) thus: some incoming information is selected and some rejected on the basis of relevance; meaning determines some kind of classification; recoding (eg morse into written language) will be carried out if necessary; messages are routed to appropriate sections of the organisation; the recipient adds the message to other stored information of a similar sort and checks for fit; the decision-maker attempts to build up a picture of the state of the organisation using information at his disposal; he attempts to assign cause-and-effect relationships to events as they affect his picture (eg the decisions and actions of the "enemy"); time factors are used to round out the picture; an assessment of possible courses of action is made; a choice is made; action is taken; and finally, feedback information is used to assess effectiveness of the chosen action.[10] In addition to these stages in the processing of information is the perception of incoming messages. What impact they make is affected by the individual's interest, attitudes, previous experience, etc.[1] It is also affected by his attempts to make some kind of order of incoming information such as the abstraction of constants.[28]

In information terms, this analysis of organisational processing points up one major quality: its delicacy. Clearly, organisations have a built-in susceptibility to error. Weaknesses are obvious at both the input and output points. At input, information significant to the organisation may be lost. This may arise through the effect of inappropriate previous learning operating to exclude relevant data. Within the organisation, transmission lines represent further sources of loss (including tinkering). Output occurs in the form of action.

Feedback loops in the form of knowledge of results are as important to an organisation as they are in maintaining the on-line performance of mechanical systems such as the water clocks, thermostats, and windmills discussed previously. Such loops have been studied experimentally with team tasks. When team feedback inappropriately encourages incorrect responses, team performance deteriorates.[23] Hence, any organisational weakness in transmitting feedback information to a decision-maker is detrimental to the efficient functioning of that system. We are all familiar with historical anecdotes demon-

strating this principle—the state servants who fail to report the results of disastrous decisions to the king or president or whatever.

We can expect the organisation to be less sensitive to changes in the dispute situation than an individual would be. We should think of this insensitivity in probability terms — increased probability of input and feedback error. In this way, and springing from its individual design for handling an environment, the delicacy of organisational communication structure resembles the delicacy of another man-made biological system—modern single-crop agricultural method. As such systems become increasingly specialised, they show increasing yield and an increasing susceptibility to destruction (eg pests, economic changes). The same principles of probability seem to apply.[17] Hence we have some reason to suspect that, in disputes, the organisation will on the average tend to be less efficient at adapting to a changing situation than will an individual. This is one of the ways in which humans may pay a price for their cleverness in designing organisations to attain goals which otherwise would not be so readily attainable.

One important aspect of the context issue is the "great man" theory of history. This notion suggests that the causes of events recorded in history books lie more in the characteristics of the leaders of the time than they do in the nature of the situation—be it inter-group relations, national climate of opinion, the education level of a population, or whatever. Within the context of disputes, this theory would emphasise the individual characteristics of the disputants rather than the dispute situation itself. Research has been carried on in this area and has recently been surveyed. Studies of the Prisoner's Dilemma and other matrix games have demonstrated conclusively that "the structure of the conflict situation must be considered as a major factor in any general theory of conflict".[14] Consistent with this is the finding that an accountable negotiator tends to make a smaller initial concession than does a negotiator not accountable to others.[8] A number of factors in the situation have been found to interact with characteristics of the participants. Some tend to *enhance* those characteristics — the strategy of opponents, and the intensity of conflict. Others tend to *moderate* the expression of individual tendencies—the saliency of particular outcomes, role status, and "threatening" situations[7].

Consistent with emphasis on the influence of the situation rather than the leader on the course of events is the notion of open orientations to authority versus closed orientations. Implicit in this is the idea that styles of orientation vary between States. By open orientation is meant that the influence of authority rests upon it being judged correct, accurate and consistent with other information: by closed orientation is means acceptance of influence because of the ability of authority to mete out arbitrary rewards and punishments.[19] Increasingly, it seems that in the information-rich, developed countries, individuals wil use overlapping groups for reference purposes. This complexity of anchoring frameworks for everyday judgments will, for those who use them (the reasonably well educated members of a society), tend to render a charismatic, closed orientation system of government irrelevant. The studies have not destroyed the "great man" hypothesis, but they have considerably modified it.

In order to predict the outcome of negotiations we need to know a great deal about both the negotiators *and* the situation which they face. As dispute situations become more complex and ambiguous, there is likely to be a correlative increase in the reliance upon norm-based reference sets for interpretation. Judges and jurors will experience the same need for assistance in analysis and interpretation. In view of the number of reference seats available, it is impossible to predict the outcome, of what kind of judgment category will be used to define the situation. Hence, we also cannot predict what norms will in fact be used by participants, and by observers. In this way, differing norms may seem appropriate for judgment purposes and as regulators of behaviour in a given situation. Increasingly, it becomes likely that the particular norm or set of norms adopted by a Judge when a dispute situation is referred to him is likely to differ from those of the disputants, whether individuals (using reference groups) or organisations (exposed to reference groups plus their own norms). The more frequent the occurrence of norm disparity, the more frequently we can expect to find rejection of the processes of the law as a relevant device for the settlement of disputes.

Individuals, of course, have their own problems in a dispute situation. High arousal may function to exclude relevant information. Unrealistic stereotypes may induce inappropriate judgments of others.[6] Attitudes and prejudices may distort perception of the situation. We may even find the mirror-image phenomenon, in which each party to a dispute holds the same negative image of his opponent.[4] It seems that

the way a situation is perceived by a negotiator has a great deal of influence on his behaviour.[29] It may be that the major influence of mediators will be in altering such perceptions and in resolving semantic problems. To sum up on context, events extraneous to a dispute and irrelevant to it may exert a significant influence on the course of events in a dispute. Individuals show this effect and organisations can be expected to share the problems of individuals and to add a few of their own.

The disputes with which lawyers and foreign affairs departments are familiar contain two important ingredients: a picture of a state of affairs applying at the time; and a picture of some other and different state of affairs which could apply in the future. In this way, disputes have points in common with the processing of information in man-machine systems. When some other person is believed to play a role as a possible frustrating agent in attaining a goal object (an altered state of affairs) and that person proves resistant to influence in moving in the desired direction, we have a dispute. Hence, one kind of dispute may relate to frustration—one individual frustrating goal attainment on the part of another.

A differing kind of dispute may arise when two people (or two groups) seek to attain the same goal in a situation such that if one succeeds the other cannot. This is the kind of situation which has been studied experimentally[20] and analysed mathematically.[16] It seems particularly difficult to resolve unless the ground rules can be changed (or can be thought to be changed) in some way.

A third form of dispute may arise through dissonance. The norms of society at large or the experience of an individual may determine expectancies on how someone else should drive his car, cut his trees, control his children, look after his stock, and criticise the behaviour of others. Negotiated norms in the form of contracts may help to determine what we expect of a partner, a wife, a borrower, a landlord and a builder. A significant difference between expected and actual behaviour may be described as dissonant. It seems possible that disputes involving dissonance may be different in kind to those involving frustration and competitive goal attainment.

The form of motivation opposite to positive goal attainment is the avoidance of a negative goal. An individual or organisation which has suffered some kind of loss or aversive consequence or is threatened with such a state of affairs may avoid unpleasantness in whole or in part if someone else can be induced or compelled to bear the burden or a part of it. Familiar legal examples of this kind of dispute include negligence cases and arguments on the burden of taxation (say, sales tax).

The fifth suggested kind of dispute relates to status-seeking. This is the presumed modern equivalent of attempted shifts in a dominance hierarchy among our tree-dwelling ancestors. It is akin to goal attainment conflict in that one man's status loss is another's gain but differs in that there is no other controlling goal. We suspect that disputes of this nature may be a real but unacknowledged factor in other disputes. It is, for example, commonly believed to exert a powerful influence in economic behaviour. ("Keeping up with the Joneses".)

These five suggested kinds of dispute seem to differ in their fundamentals. If this is true, differing approaches of settlement may be required. Perhaps our starting point in developing effective methods for handling disputes is to expose their anatomy and to assign a given dispute to its appropriate treatment category. Systematic and well-designed experimentation seems to be the only way to shed light on this problem and to fashion the needed tools. Cutting across the problem of classification is the problem of semantics. Norms of behaviour change. The meaning of words changes. When we codify norms, we express them in a changing medium. This poses problems. What is the meaning of terms placed in storage 50, 100, 200, 400 years ago? When changes occur in the denotative aspect of meaning, what do we choose: meaning at storage or meaning at usage? Lawyers, with their fondness for precedent, normally choose time of storage. This problem can be glanced at in terms of a practical example.

The word "charity" denotes, among other things, the idea of an institution, organisation, or fund for giving help to those in need. It includes liberality to the poor (Webster's dictionary). But needs change. The municipal community chest scheme of today provides one way to index contemporary needs. Causes assisted include ambulances, orphanages, hospitals, deafness, surf life saving, coastguard operations, kindergartens, disabled citizens, illegitimate children, epileptics, solo parents, alcoholism, and the aged poor.

The Courts, when interpreting "charity", tend to refer to the preamble to the statute of Elizabeth (Stat 43 Eliz C 4) which contains a list of charitable objects. Included are the relief of the aged, impotent and poor people, the

maintenance of sick and maimed soldiers and mariners; the education and preferment of orphans; and marriages of poor maids. So far, these goals coincide in part with the goals of the community chest. Others do not. They include schools of learning and free schools and scholars of university; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; the relief, stock or maintenance of houses of correction; supportation aid and help of young tradesmen, handicraftsmen and persons decayed, etc. This, then, is an example of shift over time in the denotative aspects of meaning.

Perhaps more significant are individual differences in the connotative aspects of meaning —the associated images and emotions evoked by a given word. All negotiators are familiar with this kind of problem in dispute discussions. It seems likely (but not certain) that difficulties arising through semantic differences are not as great a factor in disputes as are some other factors, such as the type of dispute.

How does a society set about controlling the behaviour of its citizens? Our glance at New Zealand statutes suggests one possible answer. The traditional view is, of course, punishment. As a direct method, enforceable through the Courts, this method appears in 51.97 percent of the statutes examined. Indirectly, through decision-making powers vested in others, it backs those decisions in a similar way (48.03 percent). Methods of minor frequency include education (3.95 percent), research (3.29 percent), reward (.66 percent) and civil remedy (3.29 percent). These minor methods are of particular interest because a fair amount of scientific evidence and legal experience suggests that they are likely to have greater impact in a wider variety of situations than is the case today. In a world changing with increasing rapidity, education is obviously important to facilitate adaptation. Research is a tool which assists man to penetrate the unknown and to solve problems. Civil remedies are a more flexible method of control than penal-backed norms and promote something more akin to system self-correction (eg a civil remedy rather than a penalty for insider trading in company shares). Selection as a control device takes advantage of individual differences. It uses testing through psychometrics and biographical data to deploy human skills differentially and effectively. As the techniques of psychometrics become better developed and known, more effective selection tools should emerge.

The State thus has a variety of means at its disposal to influence the behaviour of its citizens. The principles and practices of the law make up only one of these means. Which method is most effective for which problem is an issue largely overlooked by legislators and one at which the formal decision-making methods of the State are strangely inept.

What role can non-participants play in a dispute? Should such a role be peripheral, as in the case of technical advisers to international negotiators? Should it be of final importance, as in the case of a trial Judge? Should it be somewhere in between these extremes, as in the case of a mediator or arbitrator? Questions such as these are of basic importance to civilisation. They relate to the bias of initiative in negotiation. It may be that the role of third parties may vary according to the type of dispute. One subsidiary issue does seem to be increasingly clear: the responsibility for information gathering should probably be linked to the responsibility for decision-making. Any other kind of arrangement is likely to render a dispute procedure more error-prone.

Associated with the information-gathering problem is the question of selection of a decision-maker. In a world of increasing complexity, a high level of expertise may be necessary for effective solution of disputes. It may be that the British system of preferring the gifts and honest amateur to the expert needs rethinking. Perhaps some decision-makers should be selected on an ad hoc basis. It becomes increasingly clear that no single profession can claim to pre-empt honesty. Research seems to be the only method of solving the problems of defining a mediation role for a given type of dispute and of selecting a suitable mediator.

Job aids have been briefly mentioned. They exist at present in sometimes undeveloped, sometimes inaccessible form. No doubt many more will be developed if science is introduced to the area. Brief mention may be made of some:

- Libraries, particularly university and specialist libraries, are storehouses of immensely valuable information. The store is growing at a positively accelerated rate. Some more effective method of obtaining access to relevant parts of the store would assist the information-gathering process.
- Techniques for devising multiple-choice questionnaires exist. Their adaptation for disputes procedures should not be difficult.
- It may be possible to establish some kind of routine for the *joint* preparation of a dispute position statement. This might have

the effect of limiting issues and resolving some semantic problems.

- Disputants could attempt to reach agreement on a decision strategy. In the jargon of game theory, most disputes share the important characteristics of zero-sum games with imperfect information. For such situations, an optimum strategy can be assessed mathematically for *each* party.[16] It should not be difficult to use the same method to define an optimum solution for *both* parties assuming agreement on the weighting of goals.
- Disputes, crises and conflicts are not new. It is possible to store the record of their critical components in computers and to use retrieval as a guide in considering options in comparable situations. One such programme is CASCON, which was designed as an aid for the resolution of international conflict.[3] Techniques of this kind are in their infancy, but appear to have considerable potential advantages.
- The skill of negotiators is an important factor in settling disputes. The studies of context do not affect this issue except to assign an appropriate weighting to the role of the negotiator. Some individuals from differing backgrounds and in differing dispute areas (industrial, civil law and foreign relations) seem to have shown skill in this task.

From our survey of dispute procedures to date, we seem to have a few relevant scientific insights which serve mainly to emphasise the magnitude of unsolved problems. To what extent can be generalise from laboratory findings to real life? What are the characteristics of good negotiators or mediators? What is an appropriate role for law in what kind of dispute? The list is long, the existing scientific information slight, and human need (in terms of the potentially disastrous effects of modern conflict) acute. At present, the prognosis must be gloomy. We can see virtually no awareness that we have, in science, a tool with the potential to prevent human disputes (individual, group, and international) sliding into violence.[15]

To conclude: in an attempt to acquire a theoretical perspective of law, we have attempted to start with its biological grass-roots. Both zoological and experimental data point to the fundamental matrix of law-observant behaviour as being the group and the fundamental form the group norm. Recent evidence suggests that a tendency for humans in highly artificial situations to discriminate between the "ins" and the "outs" may be a fundamental aspect of human behaviour,[22A] and the limited sphere of application of group norms may impose an unavoidable barrier to the general acceptability of enacted law.

The group norm seems to have the same status in social behaviour that the habit has in individual adaptation. We can view an individual's habit structure as being shaped by his environment *as a whole*. His norms will be determined by the groups of which he is a member. For both habits and norms the maintaining mechanism will be feedback loops—environmental for habits, purely social for norms. The model requires for the organism, adapting to its environment as a whole, that it has one essential characteristic—activity. The equivalent assumption for the norm is that the individual attempts to influence other humans to some extent.

When we reflect on this model, it seems likely that the group, which supplies the matrix for norm maintenance, is also the key to many dishavioural variance within groups, also tend to promote disharmony between groups. Hence, we suspect that norms have their limitations as tools to settle disputes unless they are perceived as applying to a group of which the disputants are members. It is an ancient observation that the norms of one's own group are "good" while those of another group are "inferior" and (if it is in a position of dominance) oppressive.

The group norm idea acquires a different perspective in the light of population growth. When humans were spread thinly over the earth, it seems likely that the norms of group pack-hunting would have played a significant and straightforward role in survival. Moreover, humans would have been distributed among geographical groups only—tribes. When, in the overcrowded cities of today, humans from differing groups (geographic, ethnic, religious and class) live together, by what alchemy do varying group norms merge into supra-group state norms? As we all know, they do not[9] and in this way a powerful influence on the shape of human behaviour in a population spread thin geographically can become a problem for a swollen population concentrated particularly in cities. This point of view would suggest a new look at criminal behaviour. It is possible that it may be, in part, a function of conflicting group norms rather than deviation from "accepted" norms.

Considerations of this nature suggest, not that state norms cannot exist, but that they are limited in their effectiveness and need to be

supplemented by other methods. Only science has the capacity to fashion those supplementary tools.

Our theoretical perspective suggests that the disputes procedures appropriate to groups in a dispersed and small population will be inadequate for the cities of today and the megalopolis of tomorrow and this expectation is consistent with the experimental work so far completed.

Most people agree that (in theory, anyway) prevention is better than cure. At the level of the individual, we have an idea on how to set about the engineering of enduring situations which will diminish the probability of conflict. Running like a background refrain through the studies of social behaviour discussed above is a theme: small groups such as villages and platoons exert greater normative influence than do large groups such as cities, states, racial groups and major religions.

The design of structures and the way structures relate to each other and to transport methods and routes seem to be important factors in determining the shape of social behaviour.[15, 22] So does organisational framework, which can have an appropriate or inappropriate legal form. If we can develop a science of structures and their inter-relationships (an extension of bio-engineering) and a related discipline in the form of a science of norms (say, bionomology) so that human terrestrial and social relationships are studied in terms of human needs and capacities, we may start to solve some of the chronic problems of city living and of conflict generally. Such disciplines could provide architects, town planners and lawyers with information of a nature conspicuously absent at present, and a more effective approach to their professional problems.

Our approach and conclusions as to the principles and practices of law as they affect the handling of disputes have been different. Principles have not been discussed: behavioural patterns common to all principles have been. This has been done for three reasons: to avoid problems associated with cultural differences in legal codes; to suggest possible avenues for research; and to encourage a way of looking at law such that emphasis is placed on positive ways of promoting compliance rather than on negative ways of discouraging deviance.

A great deal of information has been found in reported studies bearing directly on the trial method of the Courts. If the Court trial is thought of as an institution justified on religious, mystic, gaming, or ceremonial grounds, the studies are irrelevant. However, if the function of the trial is supposed to be the assembly of adequate, relevant, accurate and reliable information and the appropriate weighting of that information, then it has a great number of weaknesses. Ways of overcoming these weaknesses are inherent in the studies.

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PROFESSIONAL PRIVILEGE UNDER SCRUTINY

The Torts and General Law Reform Committee has for some time been considering the position of various professions in relation to privilege before the law, the Minister of Justice, the Hon Dr A M Finlay, said recently. This covers information acquired as professional advisers whether as a result of confidences reposed or otherwise coming into their possession in the course of their professional duties.

"One of these relates to medical privilege, and a working paper, 53 pages in length, was prepared a little over a year ago," he said. "This sets out the present legal position in New Zealand, traces its development, compares it with the situation prevailing in other countries and makes suggestions for a review of the law. The full document was circulated to the New Zealand Medical Association, the Medical Association of New Zealand, the medical schools, the Health Department, Hospital Boards Association and the New Zealand Private Hospitals Association. A letter summarising the paper was sent to the Pharmaceutical Society of New Zealand, the Chemists Guild of New Zealand, the Psychotherapists Association, the Chiropractors Board, the New Zealand Nurses Association and the Royal Australasian College of Radiologists. Most of these have acknowledged receipt and in some cases made brief comments. They have generally welcomed the paper and approved its approach but in no case was any emphasis laid on the need for urgency or any plea made for immediate legislation, and I am rather surprised that some of those who are now complaining of neglect and delay and demanding swift action should not have referred to this paper.

"The Committee," he continued, "is anxious to review the whole field of professional privilege which is a complex and technical branch of the law of evidence and procedure. It would be reluctant to recommend precipitate action in one section of it as it believes a piecemeal approach could create more difficulties than it solves. I have, however, asked it to give further early consideration to the views that have been publicly expressed following recent incidents in Auckland and I hope to hear from it soon.

"The other areas they have been studying, and in respect of which separate working papers have been prepared and circulated to interested parties, are the following: newspapers and news media generally, legal practitioners, clergymen, patent attorneys, psychologists and school teachers. The last of these generated the greatest response and in all cases the response has been generally favourable. A further paper dealing with accountants and bankers is almost ready for distribution," he concluded.

The Committee may be written to at c/- Justice Department, Private Bag, Wellington.

CONFERENCE CORNER

New format—Business sessions at Conference '75 have been planned on a new format. Papers, printed and circulated ahead of time, will not be read. Instead each author will speak briefly to his paper before it is commented on and then made the subject of a full (and, hopefully, free-flowing) debate from the floor. Participation is to be the keynote of the conference, so come prepared to have your say—and not just at the practitioners' forum.

THE LAWYER AND THE COMMUNITY

Part IV—Community Legal Services in the United States

There have been legal aid programmes providing free legal assistance to the poor in the United States since the late 19th century but the movement grew slowly and, despite a sharp increase after the Second World War, there were in 1948 still only 55 Legal Aid Societies with paid staff. These societies could afford to pay only meagre salaries and had little status amongst the profession and in the community. Legal aid was still thought of as a charity. The lawyers assisting carried a too heavy caseload and generally the quality of the service was poor. Legal aid offices were close to the Courts and open only in the daytime. They were inconvenient for those who lived in the ghetto neighbourhoods.

As realisation was dawning in England of the injustices resulting from inaccessibility of legal services, the same discoveries were being made in the United States. An article in the Harvard Law Review in 1967 comments: "With startling suddenness, the legal profession has recently come to realise that a society can guarantee equal justice only by providing all citizens with effective access to the institutions by which justice is obtained and that for millions of Americans, the unavailability of lawyers' services has made justice inaccessible". The article refers to the "new wave" in legal services for the poor which had gained impetus from the Supreme Court decision in *Gideon v Wainwright* and which had resulted in the Legal Services Programme being created in 1965 as a separate division within the Office of Economic Opportunity.

The new wave brought with it the neighbourhood concept—the idea that community legal services should be located amongst the people they aim to service. The neighbourhood concept entails more than just geographical decentralisation—it stresses the importance of the neighbourhood lawyers becoming known and trusted in their local community, so that the poor and underprivileged will identify with them. The local people will feel that the lawyer is on "their" side and will turn to him readily when in trouble. The planners of the Anti-Poverty Programme hoped that the indigent would be encouraged to assert himself politically and economically and so help to break through the apathy of the poor, thus interrupting the cycle of poverty. Jerome E. Carlin, author of *Store Front Lawyers in San Francisco,* saw the role of NLOs, "to find leverage points in the system, to bring about a re-distribution of power and income more favourable to the poor". Carlin claims that $3 million investment in legal services in San Francisco has been responsible for an increase of $50,000-$100,000 in payments of welfare benefits. Thus the State is financing one organisation to squeeze more money out of its own coffers. This may seem strange at first but if it is looked at another way, one can see that had it not been for the legal service offered by the storefront lawyers, many citizens would not be receiving welfare payments to which they were legally entitled.

In addition to providing professional legal services for the local indigents, the aim of the programme was to carry out research and press for law reform, to mobilise the resources of the community and instigate community action programmes, to plan and organise preventative law or community education programmes.

Neighbourhood Law Offices

Those who have watched American television programmes will have some knowledge of Neighbourhood Law Offices or storefront lawyers. They are generally staffed by salaried lawyers assisted by senior law students. In many states students have a right of audience in Courts. The NLOs are set up in poor areas of larger cities and provide a comprehensive free legal service for those in need. Finance is provided mainly by Federal Government through the Office of Economic Opportunity (OEO) set up by the Economic Opportunity Act 1964. In 1966 US$27.5 million was set aside for community legal services in the United States, and by September 1966, 551 offices had been opened in the larger cities. The NLOs have been described as the "most successful agencies of 'War on Poverty' programme".

Unlike the medical profession which opposed the Medicare scheme, the American Bar Association have supported the NLOs (although many lawyers and several local Bar Associations were vociferous in their opposition). Many of the brightest graduates from Harvard and Yale

Law Schools have joined the NLOs in preference to entering prestigious law firms. The scheme started in 1965. By 1968 there were 800 neighbourhood law offices employing over 2,000 full-time lawyers. Lawyers in the NLOs were worked to breaking-point and informed estimates suggested that 25,000 lawyers were needed to meet community needs in the United States.

The NLOs are independently administered and usually have representatives of local groups serving on their boards. They have concentrated on preventative law and public education—through door-to-door visits, debates, television and film programmes. Lawyers attached to NLOs have in many states pioneered simpler and cheaper arbitration procedures. They work with legislators to reform those laws which affect the needs of the poor and of the smaller consumer.

There has been a sudden upsurge of interest in community legal problems and American law schools now run courses in "Poverty Law". NLO lawyers spend much time in taking "civil rights" cases and have had some success in fighting and winning test cases against State and Federal Government. One commentator has said, "It is a symptom of a healthy democracy for the public to be financing cases against the State".

ROBERT LUDBROOK

CONTEMPT OF COURT

Contempt of Court is one of the most ill-defined and ill-understood branches of our law. This is principally because it is not a statutory offence, and has therefore never been succinctly defined in the way that only statute can accomplish. Rather the law on contempt is composed of a large number of reported cases, most of them no more than decisions on their own facts which contain little attempt at rationalisation. (This is not surprising: until recently there was no appeal in contempt cases, and appeal Courts have thus not had the chance to impose some order on the topic.) The result is that our newspapers, which desire clear guidelines as to what they may and may not publish, have not really had much guidance. Most editors have exercised their functions under the hazy belief that there are two main rules about contempt which concern them: first that one must not publish abuse of a Court (known as "scandalising the Court") and second that there are restrictions on what one can publish about cases awaiting trial (often called the "sub judice" rule). The latter of these two rules has always been the more important in practice. Until recently one could have stated it with reasonable confidence in these terms: if Court proceedings are pending one must not publish matter having a tendency to prejudice a fair trial. No doubt that principle was easier to state than apply, but at least it was easy to state.

However, in *Attorney-General v Times Newspapers Ltd* [1973] 3 All ER 54 the House of Lords has raised doubts whether it is possible even to state the law so simply. This is the first contempt case ever to come before the House, and not unnaturally the Law Lords have taken the opportunity to attempt to rationalise the law. In so doing they have to some extent upset previous notions of formulation and categorisation.

The facts

The facts of the case are by now well known. In 1968-1969 a large number of writs were issued against Distillers Ltd, the marketers in Great Britain of the drug thalidomide, by children who had been born deformed because of its use during the pregnancy of their mothers. Negotiations took place with a view to settlement, and no steps were taken to bring the actions to trial; but by the end of 1972 no agreement had been reached. The *Sunday Times* took a keen interest, and on 24 September 1972 it published a powerful article criticising the law which required negligence to be proved before a drug company could be found liable, and also querying the law's method of assessing damages. This article contained a pungent paragraph saying that, whatever the law might be, justice required a more substantial settlement for the children than was currently being proposed by Distillers. "There are times when to insist on the letter of the law is as exposed to criticism as infringement of another's legal rights. The figure in the proposed settlement is

to be £3.25m spread over 10 years. This does not shine as a beacon against pre-tax profits last year of £64.8m and company assets worth £421m. Without in any way surrendering on negligence, Distillers could and should think again." Distillers brought this article to the attention of the Attorney-General as a possible contempt of Court, but he declined to take action.

However, a little later the *Sunday Times* proposed to publish another and even stronger article. Although the article is not set out in the report, it apparently consisted of a detailed examination of the question of whether or not Distillers were guilty of negligence in putting thalidomide on the market at the time they did; it concluded that they were. Suspecting that this article might be contemptuous, the editor of the *Sunday Times* sent it to the Attorney-General, who instituted the present proceedings claiming an injunction against publication. The House of Lords was unanimous in holding that this article was in contempt of Court, and ordered that it be not published. Although it was not necessary for them to do so, their Lordships also expressed their opinions on the earlier article actually published on 24 September. Lords Reid and Cross thought this article was not contemptuous; Lords Diplock and Simon thought that it was; Lord Morris was somewhat equivocal, but can probably be counted with Lords Reid and Cross, for he said (at 70b) that he considered that "the Attorney-General was right in deciding that there was no necessity for him to bring the published articles to the attention of the Court . . . ". (Sed quaere: does this mean any more than that the Attorney-General always has a complete discretion?)

Their Lordships' expositions of the law of contempt are as important as the decision itself. All of them emphasise what is often forgotten: that this branch of the law exists not so much to protect individual litigants as to uphold the wider interests that justice should be duly administered in the Courts and that the public should have confidence in the Courts. The concept of contempt thus presented is not one of sparkling precision, but it is at least clear that contempt can be committed in more ways than often realised. Indeed the importance of this *Times Newspapers* case is its emphasis that while comments about pending litigation are most often found contemptuous because they could prejudice a fair trial of that particular litigation, this likelihood of prejudice to a fair trial is not a necessary condition. Comments may infringe the law of contempt for the wider reason that their long term effect could be a lowering of the authority of the Courts of law.

The first article

The article actually published on 24 September was a rumbustious attempt to persuade Distillers to settle their action for a large sum of money even if the law was on their side. It appears, moreover, that the attempt was successful; Distillers subsequently did raise their offer of settlement. However, Lords Cross, Reid and Morris all state quite clearly that pressure put on a litigant to abandon his legal rights is not necessarily a contempt. Provided that pressure takes the form of fair and temperate criticism it is legitimate (Lord Reid at 63a; Lord Morris at 70g; Lord Cross at 87b). As Lord Reid colourfully puts it, "Why would it be contrary to public policy to sek by their comment to dissuade Shylock from proceeding with his action?" (61c). The fact that a party refrains from enforcing his full legal rights is not regarded as of itself prejudicing a fair trial (sed quaere?) and apparently no other interests are harmed. (See especially Lord Reid at 61f-g.) Yet their Lordships agree that there are limits to this. If one tries to dissuade a litigant by misrepresentation, or by abusing or by pillorying him (Lord Reid at 62d; Lord Morris at 67b; Lord Cross at 87a) the mark has been overstepped, and contempt proceedings may follow. Their Lordships believe that, strong though its language was, the first article did not go beyond the bounds of temperate criticism. Even Lords Diplock and Simon, who think the first article was a contempt, may differ only on the application of the law to the facts, for they, in their statements of principle, say that it is contempt to persuade a litigant by holding him up to public "obloquy"; this is a strong term which does not seem out of line with the tests of "abuse" and "pillory" adopted by the majority Lords.

It thus appears that at least in the view of the majority, it is the manner of dissuasion which makes the difference between contempt and no contempt: that impolite dissuasion is forbidden but polite dissuasion is not. Yet this distinction is not very convincing. The individual litigant is just as likely to be affected by reasoned argument as abuse (sometimes more so); and it is not obvious that potential litigants are going to be any less deterred from approaching Courts in future by the knowledge that the only pressure which can be brought to bear on them is reasoned rather than vulgar. (Lord Diplock's justification for holding it to be contemptuous to subject litigants to "oblo-

quy" is that "potential suitors would be inhibited from availing themselves of Courts of law of the purpose for which they are established."(73d)). Most people had assumed before this case that it is contemptuous to try publicly to persuade a litigant that his legal rights should not be pursued. For in such a case the newspaper is setting up its own notions of justice as being superior to the law, and inviting a potential litigant to accept its views of right and wrong rather than the ruling he would obtain from a Court. Such conduct is scarcely conducive to public respect for the Courts, and it is the function of the law of contempt to foster this respect. It may be that Lords Diplock and Simon, particularly the latter, take this view; in any event they both have no doubt that the article of 24 September was a contempt.

The second article

The House was unanimous that the second, unpublished, article was a contempt for the reason that, by detailed argument and evidence, it attempted to persuade readers that Distillers had been negligent—the very issue which would have to be decided by the Court if the case came to trial. It was a classic instance of "trial by newspaper". The decision is not very surprising, but the reasoning by which it is reached breaks new ground. Their Lordships agree that trial by newspaper is usually highly prejudicial to the eventual Court hearing of the matter, for nothing is more calculated to ensure that jurors and witnesses come to their task with preconceived notions; this form of journalism is normally a contempt of Court for this reason. But their Lordships, with the possible exception of Lord Simon, are unanimous that even if in the circumstances of a particular case trial by newspaper would not be likely to prejudice the eventual Court trial, it is nevertheless objectionable per se. In other words, they hold that there is a blanket rule that, whatever the circumstances, trial by newspaper is a contempt of Court. (See Lord Reid at 65d; Lord Morris at 67g; Lord Diplock at 73h; Lord Cross at 84e.) Indeed Lords Reid and Cross are prepared to believe that, in the light of all the publicity Distillers had received, the article before them would not have caused any further prejudice to their prospects were it to be published. They still hold the article to be contemptuous.

Their Lordships obviously believe then, that "trial by newspaper" in itself infringes some basic public interest. Yet they are not entirely unanimous as to what that interest is. This is not surprising because, as Lord Reid says, such is the instinctive horror inspired in British lawyers by this form of journalism that it is not easy to marshall one's reasons for this horror. Lord Reid concludes, however, that the side effects of such newspaper publications could be far-reaching; the comment, once published, may be responded to by other more "ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth disrespect for the processes of the law could follow . . ." (at 65d). Lord Morris argues, along much the same lines, that to allow such comment would be to open the floodgates to advocacy inspired by partisan motives, and it would be difficult "to stem the tide of public clamour for the victory of one side or the other" (at 67j). Lord Diplock is inclined to believe that public discussion of the merits of a claim could dissuade potential suitors from coming to Court (at 73d). (This argument surely holds good only for civil litigation?) And Lord Cross's reasoning is that to allow discussion in one case could make the public look forward to it, and resent its absence, in other cases which arouse public interest; there could thus be a gradual slide to trial by newspaper, and a consequent loss of respect for the ordinary Courts (at 84d). Thus it is, then, that their Lordships conclude that anything savouring of trial by newspaper, must be banned outright.

This part of the case provokes two comments.

First, what exactly is "trial by newspaper"? Lords Reid, Cross and Morris are substantially at one that what is objectionable is the prejudging of issues which it should be the Court's job to decide: attempting, in other words, to persuade readers that the merits of certain issues lie with one side or the other. Lord Diplock goes a little further: he would ban public discussions not only on the merits but also on the alleged facts of the dispute (at 73c-d). But even if one accepts the majority view, its boundaries are very far from clear, and this in an area where the newspapers have been clamouring for guidance. For what does it mean to "prejudge an issue"? No doubt what the *Sunday Times* proposed to publish qualified for this description: it argued in detail to the conclusion that Distillers had been guilty of negligence. By the same token, publications would probably be objectionable which *either* assumed the guilt or innocence of an accused without

attempting to demonstrate it or, conversely, set out detailed evidence strongly suggesting such guilt or innocence without spelling it out in as many words. However, the newspaper which objectively sets out detailed evidence (perhaps the result of interviews with potential witnesses) without expressing or implying any conclusion, but leaving it to readers to draw their own, is probably not "prejudging the issue" in the ordinary sense of those words, and therefore may not be automatically guilty of contempt. But such behaviour is so calculated to prejudice a fair trial that it would be held to be a contempt on that ground in all but the most exceptional cases. (Could it not be argued that since such a publication is just as likely to provoke further debate as an article which truly prejudges the issue it should be absolutely prohibited too?) Regrettably, however, one is no nearer than before to being able to explain to newspaper editors how far they can go in telling their readers the facts of a sensational crime straight after it has occurred if someone has been caught virtually red-handed and is under arrest when the report goes to press. In such a case, however brief the report is, it is likely to state as facts things which may require proof at the trial, and to that extent may be prejudging issues of fact, something which the majority of their Lordships in the *Times Newspapers* case clearly regard as objectionable (see especially Lord Cross at 84b). Until now the most quoted guide in this situation has been that stated by Griffith CJ in the High Court of Australia in *Packer v Peacock* (1912) 13 CLR 577 at 588:

> "In our opinion the public are entitled to entertain a legitimate curiosity as to such matters as the violent or sudden death or disappearance of a citizen, the breaking into a house, the theft of property, or any other crime, and it is, in our opinion, lawful for any person to publish information as to the bare facts relating to such a matter. By 'bare facts' we mean (but not as an inclusive definition) extrinsic ascertained facts to which any eye-witness could bear testimony, such as the finding of a body and its condition, the place in which it was found, the persons by whom it was found, the arrest of the person accused, and so on. But as to alleged facts depending upon the testimony of some particular person which may or may not be true, and may or may not be admissible in a Court of Justice, other considerations arise. The lawfulness of the publication in such cases is conditional, and depends, for present purposes, upon whether the publication is likely to interfere with a fair trial . . ."

That test has always been extremely difficult to apply in practice. Now it may be even more so, for the test of "whether the publication is likely to interfere with a fair trial" has become only part of the story.

Second, it has always been assumed that with the exception of scandalising the Court, newspaper comment about a case is only contemptuous if the matter is sub judice, ie if a trial is pending or currently in progress. Although the position may be different in England, it has been decided in Australia and tends to be assumed in New Zealand, that the guillotine only falls on discussion when a writ has been issued or proceedings in a criminal case commenced by arrest or by the laying of an information. (See *James v Robinson* (1963) 109 CLR 593.) If the sole test of contempt were prejudice to a fair trial one could (just) understand this limitation. But once it is admitted that there are wider considerations, and that "trial by newspaper is inherently objectionable, should the timing really make such a difference? If, for instance, the newspapers were to conduct a detailed investigation into, say, the Jennifer Beard murder now, at a time when no arrest is in prospect, is this much less objectionable in principle than if an accused were awaiting trial? Yet there is no real suggestion in the judgments of their Lordships that the present rule is to go by the board in this respect. (See especially Lord Simon at 82a.) Lord Reid comes nearest to admitting that the present position is illogical (at 65f), although even he does not go very far:

> "There is no magic in the issue of a writ or in a charge being made against an accused person. Comment on a case which is imminent may be as objectionable as comment after it has begun."

Recent opinion in the UK has tended to the view that "imminence" is the test for whether proceedings are sub judice, and Lord Reid is not breaking new ground in this respect. "Imminence" suggests that arrest or issue of writ is inevitable in a very short time, and this is but a very slight shift from the Australian position. At the most, this dictum of Lord Reid may make us in New Zealand more ready to accept the English rather than the Australian

Other aspects

Their Lordships have some interesting things to say on other aspects of the law which have raised problems in the past.

First, Lord Reid could be taken at one point to be suggesting that once a first instance trial is over, comment can be freely passed even though the case is going on appeal. Having discussed the objections to trial by newspaper he says: "But I must add to prevent misunderstanding that comment where a case is under appeal is a very different matter." He adds that appeal Judges are not likely to be influenced by such publications, and that it would be wrong to limit "proper criticism" of judgments. Too much should not be read into this. The mere fact that his Lordship uses the term "proper" criticism suggests that there can be criticism of a case under appeal which is improper. Although there is no doubt that comment pending appeal is much more leniently treated, it is well established that there are occasions when it will be treated as contemptuous. (A good example is *Attorney-General v Crisp* [1952] NZLR 84.)

Second, the case disposes of the suggestion, occasionally raised, that it is a general defence to a contempt charge that the subject-matter of the case and the article is one of great public importance. The subject-matter of this case was of enormous public concern (it was described in the judgments as a "national tragedy") yet this did not save the *Sunday Times*. However, the point is made by several Lords that discussion on general issues of public importance will not be contemptuous if it has no direct relation to the specific issues of the pending trial, particularly if the discussion has been in progress for some time before the litigation was commenced. As Lord Diplock puts it:

> "I entirely agree that discussion, however strongly expressed, on matters of general public interest of this kind is not to be stifled merely because there is litigation arising out of particular facts to which general principles would be applicable." (at 75g)

Third, the Court of Appeal in this case had held the article not to be contemptuous on the grounds, inter alia, that the proceedings were "dormant". All the Lords are adamant that this approach was mistaken. The matter was being actively negotiated the whole time, and was by no means dead. "Trial by newspaper" is just as objectionable when it relates to a matter which is being settled as to one which is proceeding to trial. And, after all, the negotiations might break down, and there is a possibility then that the matter might come to trial.

Fourth, the House of Lords judgments perpetuate a confusion which has long persisted in this branch of the law. There is probably a distinction to be drawn between an article which is no contempt at all, and one, which, while a technical contempt, is not serious enough to justify the invocation of the Court's summary power to punish. This distinction, although seriously blurred in many of the older cases, is confirmed to exist in the *Times Newspapers* case. Indeed, some of the Lords are prepared to believe that even a publication which prejudices issues might in some cases be a technical contempt only, and not justify punishment (eg Lord Reid at 65 e-f, Lord Cross at 86c). But the matter is not entirely clear. For instance, when Lord Reid says that comment pending appeal is not usually objectionable, does he mean that it is no contempt at all, or that it is not a contempt in respect of which action should be taken? (Lord Simon clearly adopts the latter view—see 83d.) Lord Simon, in fact, confounds confusion even further by finding not just two, but three, categories of case: punishable contempt, contempt which does not call for punishment, and technical contempt, the last of these being defined by him as "conduct which is on the face of it an interference with the due course of law, but which is not intended, nor in fact operates as such." (at 83a). When one recalls that the law on contempt is of more interest to newspaper staff than anyone else, and that what they need is simple guidance, one cannot but feel that such subtle distinctions are misplaced.

J F BURROWS

Experiments with whisky—Whisky and soda makes a man drunk quicker than neat whisky, and it is the fizz that does it, according to Dr Gaston Pawan, of the Middlesex Hospital, after experiments with a team of medical students who volunteered to get drunk. "The bubbles in a fizzy drink make the substance go to the duodenum more quickly," Dr Pawan said, adding that intoxication also came faster from lukewarm drinks and from one containing between 10 and 20 percent alcohol: it would be better for a man to drink stronger drinks, or heavily watered ones. Above 20 percent, alcohol is an irritant, and so will not pass as quickly to the duodenum, from where it is absorbed into the bloodstream," Dr Pawan said. As for "the morning after," the only real cure was a large dose of ascorbic acid (vitamin C) and honey.