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INTEGRITY, SERVICE AND EFFICIENCY— THE PREREQUISITES FOR PUBLIC CONFIDENCE

By L J CASTLE, *President of the New Zealand Law Society.*

What are the New Zealand Law Society's areas of concern? This is not my question, but was asked of me following my election on 27 September 1974.

In May this year, my predecessor, the late W G Smith, in a discussion of his aspirations, listed three criteria for the survival of the legal profession. They were needs to:

(1) Justify our restrictive practices as being in the public interest and relevant to present-day conditions.

(2) Retain the confidence of the community in the ability and integrity of lawyers in present practice to provide an efficient, honest, confidential legal service for all who are prepared to pay fair and reasonable fees for such service.

(3) Accept responsibility for seeing that law making and law enforcement agencies function in the public interest and that justice is denied to none. (see [1974] NZLJ 249)

In writing this short paper, I embrace with respect Guy Smith's comments and aspirations.

If we are to retain the confidence of the public our integrity must be unquestionable, our service to the community public-spirited, and our efficiency recognisably high. I believe our integrity becomes questionable when we engage in entrepreneurial activities either alone or in conjunction with clients, or with clients' funds. I believe, too, that misuse of the nominee company could be instrumental in loss of faith in the profession by the public. Either we stick to law as our profession or we give it away and become merchant bankers, operators of finance houses, speculators and developers. Frankly, there is no room in the profession for "mixed businesses" of these natures.

I believe we must continue to promote and support, even at some continuing cost to ourselves, social services such as the Duty Solicitor scheme and the extension of legal aid to divorce and to the giving of advice.

Our Society has known for some time that there are some geographical areas where, for economic reasons, it is impossible for law offices to be established. In England, The Law Society has been instrumental in initiating legislation to provide for the establishment of area offices in such localities. Staffing will be by qualified lawyers, who will be paid by the Treasury but who will be subject to the discipline and control of The Law Society. Pending appropriation of the required funds by legislation, volunteer lawyers are manning these offices and providing a service. Should we not be promoting similar legislation as an adjunct to legal aid to ensure that legal services are available in those areas where the need is so often so great? Should we provide legal counselling services of a civil nature at prisons? These matters will, no doubt, occupy the attention of the Legal Aid Committee of the New Zealand Law Society and the profession generally.

I hope for more than this—that ways and means can be found to take general knowledge of the law to the people. For example, legal aid is not yet well understood by many people. Can

we not inform them (using literature, newspaper articles, radio and television) about legal aid, land tenure, the proving of wills and administration of estates, the Accident Compensation and New Zealand Superannuation Corporation Acts, and the effects of other new legislation on the individual? Simple, straightforward, educative material? Already the Society has published the pamphlet, "Twelve simple ways to get the best value from your lawyer", and has in train leaflets on subjects such as "Buying a house", "Making a will", and "So you want a divorce?" The State Bar in California publishes curricula, teachers' guidebooks and casebooks on legal subjects for use in schools. The New Zealand Society is to consider the introduction of a similar programme here.

If we are to continue to provide a unique and invaluable service to the community, we must equip ourselves to do just this. The demands on the members of our Society in practice and in the community are insatiable; yet so many give unstintingly of their time and talent throughout the days and nights—a fact that is too seldom appreciated. These factors, the consequences of social change, and the tendency—perhaps the necessity—to specialise, may spell the doom of the "family solicitor", the counsellor, confidant and friend. In a few years, we may have seen the demise of the headmaster and teachers in this role. Now through a variety of factors we are seeing the hard-pressed, overworked general medical practitioner suffering the same fate. In my view, it would be tragedy if the death-knell of the family solicitor were about to be tolled.

The current course structures in our universities are not helping. It has been said, and I agree, that though members of the present generation are better educated than their forbears, they are lost in theory. I acknowledge that present law degree courses are broad compared with those in other disciplines, and that no-one would wish a return to the part-time law degree. But many say that training for the profession now includes too little that is useful in practice. For the man and woman who wish to practise law with all its pressures, obligations, duties and rewards there must be a nice admixture of the academic and the practical. There is no real substitute for the hard school of personal experience. Perhaps an earlier introduction to the practicalities is warranted.

It is fair to say that the profession has barely started to promote and provide opportunities for continuing education. Overseas there are exciting developments that we might well adopt here. For instance, in California, video cassettes made by a lawyer-staffed organisation are used to provide educational programmes to those in towns and villages who are not able to attend seminars in bigger centres, as well as to those in the metropolitan areas themselves. Overseas, too, continuing education is becoming viewed as so important that attending courses and/or passing examinations after a period in practice may become a prerequisite for retaining a practising certificate. How should we view that development?

One of the greatest attributes and needs today is the ability to listen. It was largely the willingness on the part of some of our members to listen to our younger brethren, not yet in their ivory towers, that legal advice bureaux were established. There must be other areas of concern—for example, the establishment of a Law Reform Foundation—where we should be listening and initiating progress.

Any shortcomings in our professional integrity, and in the kinds of service we provide and the ways we do so, disastrously affect how we are viewed by the community that educates and support us. Conversely, the immense service rendered to the people of New Zealand by lawyers individually is the essential foundation of our standing as a learned profession. I intend that during my term of office, the New Zealand Law Society will foster development both of the profession and of the public's understanding and appreciation of it.

MAINLAND "DEVILS"

Results from South Island "Devil's Own" held at Temuka Golf Club on 21 and 22 September 1974 were:

Best gross trophy, M Radford (145); runner-up, P J Toomey (157). Best net trophy, N W McGillivray (133); runner-up (lot), I Main (133). Stableford, J Ryan (42); runner-up (lot), K Marks (39). Sunday medal, B Lloyd (67); runner-up, J Lemon (68). Bogey, B J Petrie (+3); runner-up (lot), A Borrick (+2). Teams match, J Lemon, P J Toomey, D Quigley, B J Petrie (209); runners-up, R Keen, A Borrick, J Guthrie, M Radford (211). Longest drive, P J Toomey. Nearest pin, R S Frapwell. Wooden spoon, H A Smith. Sweep: Stableford, J Conradson; Sunday medal, H Smith. Bogey, N McGillivray.

CASE AND COMMENT

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

Sale of land to purchaser or his nominee

It has become common of late to see agreements for the sale and purchase of land entered into with the purchaser "or his nominee". Up until now the validity or effect of such an agreement has not, to the writer's knowledge, been the subject of judicial decision in New Zealand. This gap has been filled by Wilson J in his judgment in *Silk Pemberton Ltd v Lambly* (Supreme Court, Auckland: A. No. 966/73, judgment delivered 15 August 1974). This was a purchaser's action brought by the nominee for specific performance to which a number of defences were raised. The most substantial defences dealt with by his Honour centered around the meaning and effect of the words "or his nominee or nominees" which followed the name of the purchaser in the agreement. The defendant pleaded (1) that these words rendered the agreement too uncertain to be enforced: *Causeway Shopping Centre Ltd v Muise* (1967) 63 DLR (2d) 26, affirmed 70 DLR (2d) 720; (2) alternatively, that a previous nomination had been made prior to the plaintiff's nomination and the contract contemplated only one nomination; (3) alternatively, that there was no privity of contract between the plaintiff and the defendant.

Wilson J rejected all these defences and granted specific performance. His Honour held that the agreement was not too uncertain. Both parties "knew that the eventual purchaser would be either Pemberton or his nominee and the language used left it to Pemberton to decide which it should be. It was not left for further negotiation between him and Mrs Lambly. Moreover his decision had to be made before settlement. It was an example of certum est qui certum reddere."

On the second point, his Honour held that he did not have to decide whether two nominations could be made because he was satisfied that there had only been one nomination, to the plaintiff. There had been an offer made to a previous purchaser but this did not amount to a nomination because that purchaser's acceptance was conditional on his raising sufficient finance to purchase the property and, further, Pemberton had never notified the defendant of the alleged nomination which had come to the defendant's knowledge from the proposing first purchaser himself.

On the third point, his Honour held that there was privity of contract between the plaintiff and the defendant. The form of contract gave Pemberton the option of being the purchaser himself or of nominating someone else. "The consequence of that nomination was the same as if the plaintiff had been originally named as the purchasing party, and it thereby became a party to the contract and entitled to enforce it."

With respect, each of these holdings seems open to some criticism. On the second matter (the alleged prior nomination), for example, it does not seem to be any objection to a valid nomination that, as between the nominator and nominee, the sub-sale is subject to finance. The nominee must take the head contract as he finds it and any stipulations between him and the nominating party are simply res inter alios acta. Further, it is not readily apparent why notice of the nomination has to come from the nominating party and why, as in the case of revocation of offers or, more pertinently, assignments, the notice cannot come from any reliable source, including either nominating party or nominee. One might further add that it is unlikely that a number of successive nominations could be made. In *Reardon Smith Line Ltd v Ministry of Agriculture* [1962] 1 QB 42 a charterer was given power to select one port from a number of stated ports at which to load cargo. The selected port was strikebound and the shipowner argued that the charterer thereupon became under an obligation to nominate another port. It was held that the selection of a port was in effect an election which bound both parties and from which neither could withdraw. As Willmer LJ said, "... If the charterer is to be entitled to change his mind once, on what principle is he to be denied the right to do so again and again?"

But more major criticism may be directed against his Honour's other holdings.

The nature of "nomination" of a third person under a contract for the sale of land is somewhat obscure. This obscurity was held fatal in the Canadian case cited by the defendant,

Causeway Shopping Centre Ltd v Muise (supra). In that case a lease entered into with "Muise or his nominee" as lessee was held too uncertain to be enforced as a contract. Wilson J distinguished the case by relying on the Canadian Courts' finding that the parties in *Causeway* were never ad idem, the lessor believing that Muise would continue to be personally liable after nomination, the lessee believing the contrary. The parties in *Silk Pemberton* on the other hand were, his Honour held, ad idem. With respect, it is doubtful whether this is a valid distinction. A holding that the parties are not ad idem is quite distinct from a holding that an apparent agreement is too uncertain to be a contract. In the first case, the evidence will establish that the parties were not in fact in agreement on all essential terms, and that was certainly the case in *Causeway*. The parties had failed to agree whether or not Muise's personal liability continued after nomination of a third party to be lessee. In the second case, the parties appear to be in agreement but have used words the meaning of which the court cannot definitely ascertain. It is plain that the appeal Court in *Causeway* held there to be no contract in that case on *both* these grounds (63 DLR 26 at 34-37). This is borne out by the extensive citation in *Causeway* of Lord Wright's speech from *Scammell v Ouston* [1941] 1 All ER 14, 25-6, where that Judge held that a promise to enter into a "hire-purchase agreement" in respect of a car was unenforceable as a contract on both these grounds. The *Causeway* Court then proceeded to apply Lord Wright's reasoning almost verbatim to the facts before it. The Supreme Court of Canada to which a further appeal was taken seemed to rest its judgment solely on the ground of uncertainty, saying the document was not a lease "because the lessee is named as 'Muise or his nominee'" (70 DLR 720). It would seem thus that *Causeway* is only distinguishable on the basis that "or his nominee" is uncertain in Canada but certain in New Zealand.

Whether there is any greater certainty in New Zealand as to what a nominee purchaser means in this context is, however, open to dispute. Nominee shareholders, companies and directors are certainly familiar concepts, but a "purchaser or his nominee(s)"? Does it mean that the purchaser is an agent for an undisclosed or unnamed principal; or is it intended to permit assignment; or is the intention to have two presently contracting parties; or is a trustee/beneficiary relationship intended between purchaser and nominee and, if so, who is the trustee, the purchaser or the nominee? These are all obvious difficulties and one sympathises with his Honour in his attempt to overcome them and create certainty where there previously existed doubt. But, assuming there to be sufficient certainty, is it reasonable to assume that the vendor intended that the effect of a nomination would be that the original purchaser was thereupon freed of all his obligations under the contract which were thenceforth assumed by the nominated party? With respect, this is hardly reasonable and "the more unreasonable the result the more unlikely it is that the parties can have intended it" (*Schuler v Wickman* [1973] 2 WLR 683, 689 EF, per Lord Reid). Such a construction would mean that a purchaser could wriggle out of an agreement by nominating a paper company, a minor, a lunatic or a man of straw against whom the vendor could have no practical remedy. The vendor may have relied on the credit of the purchaser, especially if the agreement is a long term agreement for sale and purchase or where (as here) the deposit was small. The matter cannot be cured by saying that a bona fide nomination must be made before it can properly be called a "nomination" under the contract, for the purchaser may bona fide, but mistakenly, believe in the creditworthiness of his nominee and the vendor is still faced with the same problem. There is further some authority that the holder of an option need not consider the interests or convenience of the optionee but solely his own advantage (*Reardon Smith Line Ltd v Ministry of Agriculture* [1963] 1 All ER 545, 560 AB, per Lord Devlin). It is submitted that, if a meaning must be given to the phrase, it should be one which ensures that the original party continues to be liable to the vendor; in effect that the vendor is no worse off than if there had been an assignment of the purchaser's rights (but of course not his obligations) under the agreement. Such a via media is found in *Tonelli v Komirra Pty Ltd* [1972] VR 737 where the Victorian Supreme Court was faced with construing the meaning of an agreement to sell land to "Gino Tonelli and his nominees". The Court held that the meaning of the agreement was that Tonelli throughout remained a party to the contract but that the addition of the phrase "and his nominees" empowered Tonelli to direct the vendor to convey to such parties as Tonelli stipulated. It may, of course, be objected that the purchaser has this implied right anyway (*Williams on Title* (3rd ed,

1966), 678) and one ought to presume against superfluity in a contract. On the other hand, the phrase may have a certain utility. By agreeing to it, the vendor would, in effect, advise the purchaser that the identity of the person ultimately acquiring the land is immaterial to him. It might further be added that in *Tonelli* the court expressly rejected a contention that the phrase "Tonelli and his nominees" meant that the unnamed persons were immediately contracting parties. It did add, however, that a further possible construction in the event that it was wrong on its main holding was that "the contract might be regarded as made with the plaintiff as sole purchaser but as including a grant by the vendor to the plaintiff of an option to bring about a novation by nominating co-purchasers who agreed to be bound, *along with the plaintiff*, by the terms of the sale note" ([1972] VR 737 at 740, lines 19-24. (emphasis added)). The case cannot be used as an authority for construing the phrase *"or* his nominee or nominees" as a grant of an option in the purchaser to nominate a substitute party, for the essence of the holding in *Tonelli* was that the original party would continue to be liable jointly and severally with the co-purchasers. The vendor would indeed benefit by the nomination of co-purchasers in that the purchaser's credit would be supplemented by the credit of the nominated parties. In *Silk Pemberton*, on the other hand, the vendor could be worse off through the nomination of a party in worse financial standing than the original purchaser and without the latter continuing to be liable. And it is clear that Wilson J could not have intended that the original party remained a joint promisee under the contract for he was neither a co-plaintiff nor co-defendant; a joint promisee cannot sue on a promise in his own right but must join his co-promisor either as co-plaintiff or as defendant: *Coulls v Bagot's Executor* (1967) 40 ALJR 470.

It is undeniable that the decision in *Silk Pemberton Ltd v Lambly* will not present an insuperable obstacle to another Court ascribing a different meaning to the phrase "or his nominee" appearing in another contract for the sale of land set in different surrounding circumstances, even if the contract is on the same standard form (*Lombanks Ltd v Excell* [1964] 1 QB 415). Nevertheless a subsequent Court may tend to hold that, in the light of *Silk Pemberton,* the parties must have intended to ascribe to the words the same meaning as in that decision. A justifiable fear of this occurrence may mean that conveyancing practice will negate the effect of this case. It is hardly likely that prudent solicitors acting for vendors will henceforth permit the insertion of the phrase in agreements for sale and purchase in view of the potential adverse effect of an objectionable nomination upon the vendor's practical ability to enforce the agreement.

DV

Lump Sums and the Domestic Proceedings Act 1968

The case of *Hoogendam v Hoogendam* (the judgment of Mahon J was delivered on 18 September last) is of prime importance to practitioners in the domestic proceedings field. The case concerned an appeal by a husband against the quantum of a magisterial maintenance order, made on a rehearing. The net wages of the husband were $74.50 per week and he had $4,600 in the bank. Part of this money had come from a workers' compensation lump sum payment and the rest had been accumulated by careful financial management. The wife discovered the existence of this savings account for the first time in 1970 and this caused matrimonial difficulties. She had been required to run the house on a very economical basis. Though he had improved the home, the husband had always been thrifty if not parsimonious. The wife presented a budget of $64.16, which the Magistrate thought might, to some extent, be overstated. The husband presented a budget of $56.66 and this was thought by the Magistrate to be substantially exaggerated. There were certainly some items therein which appeared inconsistent with his past record of careful economy. The Magistrate ordered the husband to pay $7 a week for each of the parties' three children and $22 for the wife.

Counsel for the husband conceded that the husband's budget might more properly be estimated at $51 weekly, but pointed out that even on this basis the balance available to pay the maintenance obligations was only $23.50 having regard to his net wages of $74.50. The amount which the husband was ordered to pay was $43; hence there was a deficit of some $20 per week if the order were to be sustained. It appeared that the Magistrate had looked on the cash savings of the appellant husband as a source of periodic maintenance and said that the husband could have recourse thereto to meet his obligations for periodic maintenance.

By s 26 (1) (c) of the 1968 Act, it is provided that the Court may make orders for maintenance including ". . . (c) an order directing the husband to pay such lump sum towards the future support of his wife as the

Court thinks reasonable". By s 26 (2) it is provided that any such order may be directed to be paid by instalments or on such terms and conditions as the Court thinks fit. It was contended for the husband that these provisions were not appropriate in the present case and yet, in effect, the Magistrate had applied them. It was argued that, if the available weekly income of the appellant was $20 less than the amount of the order, then it followed that he was in fact being directed to make payments from capital to the extent of $20 per week—which would mean that his total savings, together with his compensation, would be exhausted in something over four years. Counsel drew an analogy between that situation and *Long v Long* [1973] 1 NZLR 379 (CA) in which it was held that a lump sum should not be ordered by way of maintenance under the Matrimonial Proceedings Act except in special circumstances.

For the wife, it was submitted that the case was not one involving a lump sum at all. It was argued that the Magistrate had jurisdiction to require the husband to have recourse to his capital for the purpose of meeting periodic liability for maintenance by reason of s 27 (2) (a) and (e) of the 1968 Act (these respectively require the Court to take into account "the means of the husband, including his potential earning capacity" and "any other circumstances that the Court thinks relevant"). "Means", it was argued, included the capital assets of a husband as well as his periodic earnings and, in any case, the existence of a capital fund was a "circumstance" rightly taken into account under para (e). Mahon J accepted these submissions as correct, stating: "The effect of the order is to compel the husband to resort to his cash savings from week to week in order to meet his liability for periodic maintenance, but that is not a lump sum order under s 26 (c). I think that in the present case paras (a) and (e) of s 27 (2) are applicable and that those paragraphs either singly or in conjunction supply jurisdiction for this maintenance order which substantially exceeded the ability of the husband to meet maintenance out of his weekly income."

His Honour proceeded to observe that even though the order was within the Magistrate's competence, the further question arose whether he should, on the facts, have made the order he did. Counsel for the husband submitted that it was very unusual in the case of a working man to make an order against him of such amount as to require him to exhaust his savings and then necessarily to require him to apply for a variation as from the date when his savings were no longer available. "I should think," remarked his Honour, "that this submission was correct. The practice of the Magistrate's Court in its domestic jurisdiction will normally be to limit the amount of periodic maintenance to such an amount as the estranged or re-married defendant is able to pay from his weekly income. There is, of course, no reason why in a suitable case a lump sum should not be made under s 26 of the Domestic Proceedings Act, although some special need for such an order would no doubt be required to be shown, in conformity with the opinions on that topic expressed by the Court of Appeal in *Long v Long* (supra). Likewise there may sometimes be cases where the husband had a substantial cash fund which the Court may rightly take into account in fixing periodic payment under s 27, for example in a case where the husband can or will not, for some reason or another, earn an ordinary salary or wage. But where a husband is continuing to earn the same wage or salary after the separation as he was earning during the subsistence of marital cohabitation, I should not think it right in the generality of cases to augment the limited weekly sum now available to pay maintenance by stripping him of his capital assets by instalments."

His Honour continued thus: "It has been said several times that as a matter of general public policy, persons who can afford to perform their statutory obligations under the Domestic Proceedings Act should not be permitted to throw the burden of maintenance on to the Department of Social Welfare: *Spanjerdt v Spanjerdt* [1972] NZLR 287, and *Gaspar v Gaspar* [1972] NZLR 174. Those cases, however, have reference to the ability of a husband to pay periodic maintenance out of his earnings, although the principles therein expressed might also be applicable to a special case where a husband's eaning abilities were voluntarily curtailed or restricted and where he had a substantial cash fund which should reasonably have been resorted to in order to supplement the maintenance which he should have been able but was not in fact able to pay. In such a case, the capital funds of the husband may have to be paid out progressively to lighten the burden on the general taxpayer. But the position seems more doubtful in a case such as the present where the husband is earning the full weekly available wage but cannot, by reason of the existence of two separate households, fully meet his maintenance obligations out of his periodic earnings. The effect of the pre-

sent order, as it now stands, is to require the husband to pay over all his savings to the relief of the general taxpayer, a course which may not have been contemplated by the combined legislative policy of the Domestic Proceedings Act 1968 and the Social Security Act 1964."

Mahon J noted that there was another and quite independent consideration which was relevant in considering the propriety of the order made. He stated as follows: "The savings in the sum of $4,600 represent, to a major extent, a sum of money which has been accumulated by the combined thrift and prudent management of husband and wife. The wife must have a prima facie claim under the Matrimonial Property Act to such part of the household cash savings as may represent her contribution to economic household management. In the event of such a claim being advanced, the husband would no doubt submit a strong argument that he was entitled, in his own right, to at least some substantial proportion of those savings. But it would then be impossible, after the determination of that question, for the wife to maintain a claim for a capital sum under s 26 (1) (c) of the Domestic Proceedings Act in the case of divorce, because by virtue of her previous lump sum award she could not justify such an application in terms of *Long v Long* (supra).

"It therefore seems to me, on the basis of the evidence given in the Court below, that the wife has a prima facie claim to some part of the accumulated savings from wages at present held in her husband's bank account. If this is so, then she is entitled at the present time to lodge a claim accordingly, and if her application were successful she would obtain a lump sum and the husband would then be left with a capital fund amounting to less than $4,600. The question whether the husband should then be liable to pay by way of maintenance periodic instalments out of his remaining capital resources in terms of s 26 (2) of the Domestic Proceedings Act may thereafter have to be considered, but as already indicated, if the wife by obtaining part of the fund of $4,600 under the Matrimonial Property Act thereby disqualifies herself from being entitled to a capital sum on account of maintenance under s 26 of the Domestic Proceedings Act, as suggested by *Long v Long*, it does not seem right that she should proceed to obtain exactly the same periodic instalments by way of an order under s 27. I am not determining the question one way or another. But I consider that the claim of the wife under the Matrimonial Property Act in respect of the household savings should first be considered, and if necessary determined, before any order is made for periodic maintenance which will necessarily erode that capital fund. I therefore take the view that no order should have been made, at this stage of the proceedings, requiring the husband to supplement maintenance available from earnings by paying over instalments from a capital fund which may be the joint property of himself and his wife."

His Honour concluded that the periodic maintenance ought not to be higher than $30 per week available from the husband's wages. He accordingly allowed the appeal by reducing the wife's maintenance to $9 per week and leaving that of the children at $7 per week each. He awarded the wife $50 costs.

The case, it is respectfully submitted, was rightly decided and may usefully be compared with *Eade v Eade* [1973] Recent Law 275.

PRHW

Domestic Proceedings Act 1968, s 44

The case of *Eddy v Eddy* (the judgment of Wilson J was delivered on 3 October last) is of importance, not so much because of its facts but because of two valuable points made by the learned Judge. The case was an appeal from the refusal of a Magistrate to make an order under s 44 of the Domestic Proceedings Act 1968 granting the appellant wife the right to the exclusion of the respondent to occupy the matrimonial home.

The first point made by the learned Judge was that "Where occupation of the matrimonial home is in dispute, the general principle is that occupation should be given to that spouse who has the custody of the children. That is because it is not merely the matrimonial home—it is also the family home. In all these domestic matters the Court is concerned not only with the spouses, but in a very real sense, with the welfare of the children. The family home, then, should, unless good reason to the contrary be shown, be given to the occupation of the family. That means the children and the spouse who has custody of them."

The second point made by Wilson J was that it had been drawn to his attention by counsel for the wife "that apparently a number of Magistrates in Auckland consider that where the value of the matrimonial home exceeds the limit referred to in subs (4) of s 5 of the Matrimonial Property Act 1963, the Magistrate's Court has no power to grant exclusive occupation of the matrimonial home under

s 44 of the Domestic Proceedings Act, notwithstanding the proviso to that subs (4) which is in these words:

> " 'Provided that a Magistrate's Court may make an order under this section granting to the husband or wife the right to occupy a matrimonial home irrespective of the value thereof.'

"The view taken by those learned Magistrates (and I interpolate here there is nothing in the judgment before me in this case which indicates that that view is held by this Magistrate) is that the proviso to subs (4) only allows for an order for occupation, not an order for *exclusive* occupation. Now I dealt with this matter in the case of *Kilkelly v Nikoloff* [1969] NZLR 842 at p 845, and I pointed out that although the words used in the proviso were simply 'the right to occupy', that clearly in the context meant a right exclusively to occupy. I am still of that opinion, and quite frankly I fail to understand how any Magistrate's Court has the right to ignore the view that I have expressed in that way, but even if I were wrong in that, there is another very good reason why the order can be made under s 44, because, whatever the deficiencies of the proviso under s 5 (4) of the Matrimonial Property Act 1963, the terms of s 44 of the Domestic Proceedings Act are explicit, and it empowers the Magistrate's Court in so many words to make an order under s 5 of the Matrimonial Property Act 1963 granting exclusive occupation to one of the parties. I can hardly imagine that anything could be clearer. I am sorry that it has not appeared so to the learned Magistrates." Clearly practitioners must bear these cautionary words in mind in the future.

Since delivering his judgment, his Honour evidently read *Bracey v Bracey* (1972) 13 MCD 420, in which the Magistrate had declined to follow *Kilkelly v Nikoloff* (supra). The Magistrate said that what Wilson J had said on this point was obiter and was not fully argued. Wilson J observed that the Magistrate was mistaken on both points and went on to cite what the Magistrate had said with reference to s 44, viz:

> "The insertion of the words 'to the exclusion of the other' cannot be justified and in effect s 44 cannot and does not alter the law as set out in s 5 (4). The Legislature has proceeded on an erroneous assumption of the law. Nothing has the force of law which is not law. Section 44 cannot invest s 5 with something that the latter section does not possess."

"In effect", concluded his Honour, "the learned Magistrate held that the enactment of the phrase, 'to the exclusion of the other' was ultra vires. That is clearly wrong. Parliament is sovereign, and no Court—not even the Privy Council—has jurisdiction to question its power to legislate as it sees fit in matters relating to the good government of the Dominion."

PRHW

Recognition of foreign divorce

An important landmark in the context of recognition of foreign divorces is afforded by *Re Darling* (the judgment of Casey J was delivered on 8 October last). This was an application under s 17 of the Matrimonial Proceedings Act 1963 for a declaration whether according to the law of New Zealand the applicant's marriage had been validly dissolved by divorce in Monrovia, Liberia, on 12 October 1973. The applicant and her husband were both born in New Zealand and were married in Christchurch in 1970. They purchased a property in Otago and lived there for some time and, in 1972, the husband took employment under a three year contract with an English firm which entailed the parties leaving this country at the end of 1972 to go to Liberia in fulfilment of the contract. They travelled on New Zealand passports as New Zealand citizens, and both intended returning to this country which, according to the wife, they regarded as their permanent home. Their house was leased while they were away, with the intention that they would take up residence again in it on their return. "On these facts," said Casey J, "it appears that at all relevant times the domicile of both husband and wife has been New Zealand, and there is no evidence suggesting otherwise."

The wife said that, even before they left New Zealand, her husband had assaulted her several times and that his conduct became much worse when they reached Liberia. She consulted the British Embassy there and, as a result of their advice, she applied for and obtained a local decree of divorce, apparently on the ground of the husband's cruelty.

The husband was still overseas and the present application was made ex parte. Service was directed to be made on his attorney in New Zealand and he took no step to become involved, so the case was argued on an ex parte basis. Counsel for the wife presented her case on the basis that the Liberian divorce was not valid under New Zealand law and that the marriage still subsisted. It is not stated in the report upon what ground the Liberian Court

exercised jurisdiction over the parties, but the learned Judge said that s 81 (1) of the Matrimonial Proceedings Act 1963 did not apply and proceeded to observe that subs (2) enacted that "Nothing in this section shall affect the validity of any decree or order or legislative enactment for divorce or dissolution or nullity of marriage or of any dissolution of marriage otherwise than by judicial process, that would be recognised in the Courts of New Zealand apart from this section." His Honour went on to say that the statement of Lord Wilberforce in *Indyka v Indyka* [1969] 1 AC 33 (HL) ([1966] NZLJ 343; [1967] NZLJ 53; 534) at p 105 that the Courts will recognise a foreign decree obtained by a wife petitioner in the Courts of her country of residence wherever a real and substantial connection is shown between the petitioner and the country exercising jurisdiction had become generally accepted. "The Court," continued the learned Judge, "must consider in each case both the length and quality of residence and take into account such other factors at nationality which may reinforce the connection. (The Court aptly referred also to *Mayfield v Mayfield* [1969] 2 All ER 219.) His Honour also cited the following words of Lord Pearson in the *Indyka* case, at p 112: "The broad distinction is between a person who makes his home in a country and a person who is a mere sojourner there. A person may be appointed to some diplomatic or military or commercial post in a foreign country and serve there for three or more years without becoming either dissociated from the community of his home country or associated with the community of the foreign country. His wife may be in the same position."

Relying on this, Casey J thought that both spouses could be described as "mere sojourners" in Liberia at the relevant time by reason of the husband's three year contract and the evidence of their intention to return to New Zealand. In his opinion neither spouse was shown to have had a "real and substantial connection" with Liberia and accordingly the marriage had not been validly dissolved by the Liberian decree. His Honour declared accordingly and ordered that a sealed copy of the declaration be served on the husband's attorney in New Zealand.

It is gratifying to have judicial authority to the effect that s 82 (2) of the 1963 Act embraces the *Indyka* rule and its subsequent refinements, which are detailed in Bromley & Webb, *Family Law* (1974) at p 259 et seq.

In the present case it will be observed that the wife sought the Liberian decree in Liberia and then sought to have it declared invalid in New Zealand. Suppose she had been attempting to claim under her husband's intestacy as his widow: would Casey J have allowed her to do so or would he have held that she was estopped from so doing?

In any event, the case may be usefully compared with *Peters v Peters* [1968] P 275 ([1967] NZLJ 534), where an overseas decree was not recognised pursuant to the *Indyka* rule.

PRHW

SOCIAL AND ECONOMIC CHANGES REFLECTED IN THE ACCIDENT COMPENSATION ACT 1972

By L M GRAHAM, *Commissioner, Accident Compensation Commission.*

On 1 April 1974 there occurred a quite breath-taking revolution in our society which, though it happened quietly, will only be seen in its true perspective with the passing of time. Social change of significance is generally born of conflict and controversy, of anguish and protracted periods of indecision and uncertainty. But in the Accident Compensation legislation of 1972 and 1973, a change of direction in social and legal evolution was written into the law with scarcely a shudder in the ship of state.

The change of direction was quite dramatic. For a 100 years and more it had been accepted that compensation for injury arising from accident must have, as its basis, proof of negligence by the person causing the injury. It is true that that basic idea was not very old in legal history. It is equally true that the principle was being evaded in a number of ways. At the turn of the century, compulsory Workers' Compensation Insurance, though meeting with bitter resistance in some instances, came to be generally accepted. This was followed by Motor Vehicle (Third Party) Compulsory Insurance, and was accompanied by a parallel development of the Social Security system.

But perhaps the greatest impetus to the acceptance of the concept that the cost of misfortune should be spread—ultimately to community-wide sharing—came from the insurance industry itself. People protected themselves in all kinds of ways from being found at fault.

Public risk insurance, comprehensive motor vehicle insurance and general accident insurance have all had the effect of transferring the responsibility for loss bearing from the individual on to the community. And although the jury system fulfills an indispensable place in the administration of justice, many of its defenders, as well as critics, have noted the effect of the existence of insurance company backing on damages awards.

The idea that the best way to make people careful was to make them pay for their carelessness and negligence was regarded as one of the great virtues of the negligence system. But the brutal facts of life in this accident-prone era show how ineffective it has become. Sir Kenneth Manning, the first Chairman of the Law Reform Commission of New South Wales, and recently a member of the Court of Appeal of that State, is quoted in the recent Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia as expressing the following succinct views on the fault rule of liability:

> "(The rule is) a product of the latter part of the 19th century. It is outmoded, archaic, and, in a sense, does not bear discussion. The rule was inspired principally by two things—as retribution and as a deterrent to others. In most British countries a decision was made years ago to overcome the difficulty by making people pay insurance, known as third party or liability insurance. The effect was to cause the disappearance of the two main reasons for the fault rule, as the insurance companies provided the answer to both retribution and deterrence."

The fragmented, inadequate, piecemeal approach to combating all the problems, both individual and national, both social and economic, which are an inevitable consequence of our accident prone way of life have come under mounting criticism in all western countries in the last decade. The blueprint for dealing with these problems in New Zealand was provided for us by Mr Justice Woodhouse and is arousing worldwide interest. A very distinguished international company of legal scholars and savants have provided us with a convincing literature on the need for this revolutionary change. Let me mention a few of them:

Professor T G Ison, *The Forensic Lottery* (London).

Professor F James, Jnr, *Social Insurance and Tort Liability* (New York).

Professor John Fleming, *Law of Torts* (1971 ed) (Melbourne).

Professor P S Atiyah, *Accidents, Compensation and the Law* (1974). Oxford University and Australian Nat. Univ.

These and other similar works provide irresistible evidence of the deficiencies, the shortcomings, the inadequacies, the irrelevancies, and, too often, the fickleness and the capriciousness of the systems hitherto available for compensating and rehabilitating accident victims. Why was compensation for the permanently incapacitated employee under the Workers' Compensatio nAct limited to six years? Why was there no statutory recognition of the need under Workers' Compensation to rehabilitate the injured employee? Why was one car driver penalised for a momentary diversion of attention whereas 300 others who were guilty of more culpable lack of care escaped penalty? There were anomalies everywhere.

Although all writers on the development of the law of torts do not agree on how and when proof of negligence became the basis for recovery of compensation at common law, it is generally accepted that the old action of trespass against the person (which depended on proof of the fact of trespass) was narrowed by requiring proof of negligence by the trespasser. This development occurred in the first half of the 19th century. Over the last 100 years or so this concept of success in claiming compensation depending on proving fault has become central in common law actions for damages. But the parallel developments of complex industrial, technological and transport systems on the one hand, and new financial concepts of insurance and the welfare state on the other, have completely undermined any social benefits which the negligence action may at one time have possessed. And the important point should be made that the negligence action which the Accident Compensation Act replaced had made a comparatively brief appearance in the unfolding drama of the law. In the course of that appearance it had obviously become increasingly irrelevant to the main theme of the play. The main beneficiaries were the lawyers, the insurance companies and a limited number of injured people who were fortunate enough to win sizeable prizes in the common law lottery.

We are perhaps still too close to 1 April 1974 to see clearly what the social effects of s 5 of the Accident Compensation Act, which abolished the common law right of action for damages, are going to be. I think it could be

claimed with confidence that the legislation has generally been favourably received and that the great majority support it. Of course there are those who see it as another downward step on the road to social decadence and moral decay. But there is no evidence of an increase in malingering over the past six months. Carelessness and irresponsibility do not appear to have increased on our roads, and contact sports do not appear to have grown any more vicious.

It has sometimes been claimed (and it is a valid claim) that the great advantage of abolishing the adversary procedures which have hitherto held sway, will lie in the promptness with which claims for compensation will be dealt with. But I suggest that there is a much more significant social benefit in the change. To be able to blame someone for one's own misfortunes may satisfy a very human trait. But it can have seriously damaging effects on good human relationships on which the fabric of the kind of society we aspire to is being woven. Some two months ago, a four-year-old grandson of mine was knocked down by a car outside his home. Fortunately, medical treatment and a bit of surgery put him right in a couple of weeks. But recriminations, controversy and the apportionment of blame to decide who should be responsible for paying the medical costs did not arise. Instead, there was mutual sympathy and understanding and good will. Even had the child suffered some permanent disablement or incapacity, fear of the consequences for both parties was removed. And added to this is the very great advantage that an objective appraisal of the causes of the accident is made is made much easier, because the financial motivation, to make excuses or to cloud the issues with legal obscurities is removed.

This does not mean that there should be any relaxation of the law of criminal negligence. Indeed penalties in some areas may require reviewing. But I suggest that had the driver of the offending car been drunk, appropriate punitive measures against him should be a matter for the criminal law and not for private vengeance.

At this point in my paper, I should emphasised that the views I am putting forward are my own personal views, and do not necessarily express the views of the Commission or of my fellow Commissioners. Having said this I can perhaps let my imagination have a little more freedom when I gaze into the future and try to find out where this new path in social evolution is taking us.

The first vexing question which I feel will increasingly press itself upon us is whether we should continue to confine the scheme to incapacity arising from accident or whether it should also embrace incapacity resulting from illness. Having accepted that the cause of the accident is immaterial, and that a work nexus between accident and injury is no longer necessary to qualify for compensation, are we not driven by the logic of the case to accept that the cause of the incapacity becomes irrelevant if social justice is to be done? This, of course, is where the villain "economics" raises its ugly head. The original Woodhouse Report in 1967 said this on this topic:

> "(a) It is possible to argue that if incapacity arising from accidental injury is to be the subject of comprehensive community insurance then interruption of work for reasons of sickness or unemployment, or other causes which cannot be guarded against should equally be included.
>
> "(b) We are able to understand the logic of the argument, but the proposal we now put forward is far-reaching and is designed to remedy a situation which at present is the subject of attention by unrelated processes which produce inconsistent and inadequate results. Moreover, there is a need for more statistical information in the area of sickness and disease before firm decisions could be taken as to the cost of a scheme which would embrace incapacities arising from these causes."

The Gair Committee of the House of Representatives emphasised the need for caution in this area while accepting the logic of the case. It said:

> "We believe that, eventually, social security payments to the sick and to widows should become comparable in a broad and fair sense with payments made under accident compensation. This can be done with accident compensation arrangements separate from social security. In the future, at some stage, it may be desirable for accident compensation to become either linked with social security as proposed by the Woodhouse Royal Commission or merged entirely into one administration: we have an open mind on the matter. The Royal Commission statements on the advantages of complete administrative integration of the two fields carry considerable force."

The McCarthy Commission on Social Security in 1972 was also cautious. It said in effect, "Let's wait and see how accident compensation gets on, and then perhaps we shall be able to decide on the proper course to follow."

In the final analysis, of course, economic considerations must determine when and how any extension of the scheme to cover disease and illness is practicable. But the logic of the case for such an extension is strengthened when we consider the arbitrary nature of some of the decisions which have to be made in regard to those cases (fortunately a small percentage of the whole) which arise in the grey areas between accident and disease. And there are further apparent anomalies arising in the occupational disease area. If a breadwinner suffers injury by accident at home, he is compensated in exactly the same way (except perhaps for the first week of incapacity) as he would be if he suffered the same injury at work. But if his incapacity arose from illness at home, he would not be compensated, even though the same kind of illness, if it was due to the nature of his employment, would give an entitlement to compensation.

The Accident Compensation scheme has now banished from the family unit the fear of hardship which so often was brought about by injury to the breadwinner. It has done this by ensuring that, up to the limit of $160 per week at present prescribed, all but a small fraction of the after-tax purchasing power of the accident-disabled earner is retained for him. The stability of the economy has benefited from this change. There are some changes in the patterns of employment in the legal and insurance fields, but these are being achieved with a minimum of disturbance. Also, some $50 or $60 million a year is being diverted from the insurance industry to the Accident Compensation Commission. The insurance industry has claimed that a good percentage of this money —that represented by Motor Vehicle Compulsory (Third Party) Insurance—was not able to be handled profitably by it. The patterns of investment of those portions of the funds available for capital investment will probably not be very different from what they have been in the past, but the volume will be a good deal greater. This increase in the volume of money available for capital investment will be brought about by three main factors. Firstly, earnings-related compensation will generally be paid out by periodical payments, whereas previously many settlements were made by lump sum payments. Secondly, administration costs will be lower overall. For example, in the Workers' Compensation field, insurance companies were, until a couple of years ago, operating on a target ratio of 70 percent of premium income for claims and 30 percent for administration and profit. Over the last two years the ratio was amended to 80 percent and 20 percent. The Accident Compensation Commission expects to operate at under 7 percent for administration costs. The third factor is that the annual income of the Commission is expected to be over $20 million greater than the annual amount collected for the last year of Workers' Compensation and Motor Vehicle (Third Party) Insurance. The main reasons for this increase are that Workers' Compensation self-insurers (such as Government Departments and agencies) are covered by and contribute to the new scheme, and the self-employed are also included.

Our claims experience has not yet been sufficiently long to enable accurate estimates of the needed build-up of reserves to be made, but clearly the Commission will become an important instrument in making increased capital investment available for such socially-desirable projects as housing, local body loans and so on. It has already made a start by investing some millions of dollars in these fields.

The economic consequences of the legislation can therefore, in my view, be judged as entirely beneficial. It will preserve the purchasing power of incapacitated earners and it will assist stability in capital investment.

One of the financial matters relating to the Earners' Scheme in which your Institution will be deeply interested is the levy structure and how the rebate and penalty systems provided for in s 73 of the Act are to operate.

Levies payable by employers on their wage bills are fixed at prescribed rates between the statutory minimum of 25 cents and the statutory maximum of five dollars per 100 dollars. Apart from this compression at bot hends, the rates do not differ markedly from the rates which were set by the regulations under the Workers' Compensation Act. There are, however, three developments in the new levy structure that will inevitably lead to the need for investigating, on the basis of operational experience, whether that structure is equitably based and socially sound.

The first development is the move made in the new regulations towards industrial classification rather than occupational classification of

the earnings of employees. This move has been only partially practicable at present, and the reduction in the number of individual rates which the Gair Report looked forward to, has not proved possible. But there has been some move away from the old insurance concept of making every occupation pay a rate of premium appropriate to the accident risk of the occupation.

The second development helping to undermine this insurance concept is the provision that the levies payable by employers are now to provide the funds needed to cover their employees 24 hours per day, seven days per week. I am not suggesting that they should not do this. But it is clear that accidents which occur outside working hours should play no part in determining the appropriate rate of levy for an industrial classification. And the third development is the fixing of a flat rate of levy of one dollar per 100 dollars of leviable income for the self-employed.

The differential rates of levies payable for different industrial or occupational classifications are not designed to play any part as incentives to better safety programmes. It is the implementation of systems of bonuses and penalties on particular employers within individual classifications that will have that objective. I suggest, therefore, that the time will soon arrive when an objective study of the levy structure for financing the earners' scheme should be undertaken. It is my personal view that a flat rate of levy, of say 1 percent on employers, which would bring in about the same total amount as the present differential rates, would be socially more just and administratively more economical. It would, of course, mean that part of the total cost of financing the scheme would be transferred from the farming, manufacturing, transport and construction industries to servicing industries generally, such as finance, insurance, merchandising and professional and similar occupational employers. But in the national interest, this does not appear an undesirable result.

I have mentioned safety incentive systems of bonuses and penalties on individual employers. Such systems could operate just as effectively—and perhaps more effectively—with a single general rate of levy. It is worth recalling, however, the comment made by Mr B J Legge, QC, the former chairman of the Workmen's Compensation Board, Ontario, Canada, in an address he gave to the Third National Industrial Accident Prevention Congress held in Auckland in May 1969. Speaking about the penalty provision in the Ontario legislation, he referred to the misuse which had been made of the merit rating system previously operating. He went on to say:

> "This penalty section obviously requires statistical criteria that will objectively separate the offender from the innocent and avoid arbitrary judgments. This is done by isolating those with abnormal numbers of accidents as well as higher-than-average accident costs.
>
> "These penalties are not invoked unless the employer qualifies on three separate counts:
>
> "In the first place, he must have incurred a deficit accident cost experience in two of the last three years.
>
> "Secondly, he must have incurred a lifetime deficit accident cost experience.
>
> "And, in the third place, he must have incurred during two of the last three years of operation a frequency rate of compensable accidents at least 25 percent higher than the average rate in his industry.
>
> "The last actual annual payroll is the basis for the penalty assessment, and increases are 100 percent of the regular assessment for the first penalty, 125 percent for the second, 150 percent for the third, and 175 percent for the fourth."

The Accident Compensation Commission is using data processing procedures by computer for its statistical analysis of accident records. This statistical analysis will, it is hoped, enable employers with consistently bad accident records to be identified and positive steps taken to isolate the causes and the appropriate remedial measures called for. It seems reasonable, however, that the Commission will require two years' or so experience of the new system before considering the imposition of penalties.

I have dealt in this paper with two or three of the broader issues of social and economic change involved in the new legislation. I am no expert in accident prevention and it would be presumptuous of me to attempt to talk in detail on that subject, but I hold very firmly the view that the new system will enable the true causes of accidents and the circumstances leading up to them to be more clearly identified, and I look forward to a more vigorous, active and effective accident prevention programme being implemented.

CHRISTCHURCH PAYS TRIBUTE TO SIR KENNETH

In recognition of the special claims of Christchurch to the late Sir Kenneth Gresson, in addition to the special sitting of the Supreme Court at Wellington (reported at [1974] NZLR 511) a similar sitting was held in Christchurch, where Mr Justice Macarthur presided.

"The name of Gresson has been intimately linked with the administration of justice and the practice of law in Canterbury for the past 120 years," he said. "Henry Barnes Gresson arrived in New Zealand in 1854 and became the first Judge of the Supreme Court who resided in this Province. He has been described as the founder of a Canterbury legal dynasty, for so many of his descendants have become lawyers. One of his grandsons was the man whose memory we are honouring today.

"Sir Kenneth Gresson will go down in New Zealand history as a Judge of the first rank. But he was much more than that. He was a man who gave great service to his country—he served his Church, his profession, the University and the community as a whole.

"In 1962 Sir Kenneth was appointed to the Privy Council and in 1963 he attained that which lawyers would generally regard as the pinnacle of achievement. He sat as a member of the Judicial Committee of the Privy Council for the hearing of some seven cases and he himself wrote the opinions of the Board in two of those cases.

"On retirement from the Bench he accepted appointment as Chairman of the Indecent Publications Tribunal which had the task of administering the new legislation on this subject. The Chairman's liberality of outlook and approach to the problems before the Tribunal probably surprised some who knew of him only as a Judge. The successful foundation of the Tribunal was due in large measure to its first Chairman.

"He lived to the great age of 83 years. In his domestic life he had the blessing of complete happiness. He was very much a family man. One of his most endearing characteristics was his love of the young. His relaxed enjoyment with them, from law students down to very young children, and particularly his own grandchildren, was plain for all to see. His wife who had been his dear companion for more than 50 years died only three years ago. He is survived by his son and daughter. On behalf of the Judges of this Court I extend to them and their families our deepest sympathy in their loss," his Honour concluded.

In paying tribute on behalf of the Canterbury District Law Society, Mr P G S Penlington said that Christchurch and Canterbury remember Sir Kenneth because during and after his distinguished career Sir Kenneth's ties were always to their part of New Zealand.

"To all who appeared before Sir Kenneth, either at first instance or in the Court of Appeal, he was courteous, firm and fair," he said. "He commanded the immediate respect of all. He was renowned for his tolerance and patience towards counsel, parties and witnesses alike. He set the same standards for counsel as he set for himself, both at the Bar and on the Bench—thorough preparation, succinct expression and presentation and an unrelenting pursuit of the appropriate legal principles shorn of irrelevancies.

"When, as he described it himself, he had become 'statute barred' and had to retire, he returned to Christchurch where his old University honoured him with an Honorary Doctorate of Laws, where he resumed his old friendships, where he made new friends, especially with the later generations of his chosen profession, and where he finally died peacefully at the grand age of 83 years.

"We shall always recall his courage of mind and body, his independence and determination, his excellent sense of judgment, his humility and his dedication to the service of the Law. We shall remember him as essentially a traditionalist who was also liberal minded, for he showed us on many occasions that a liberal approach and tradition are quite compatible in this modern age. Above all, we shall have fond memories of his matter of fact manner, his direct and, at times, terse and abrupt expression which concealed his deep humanity and his lifelong love of people, particularly young people," Mr Penlington concluded.

Their cup floweth over—The joys of conveyancing in other lands were highlighted by an article in a recent English legal periodical. Its title? "Probate—Valuing a Wine Cellar".

WHATEVER HAPPENED TO HEDLEY BYRNE?

By PETER MCKENZIE *and based on an address given recently to a Wellington District Law Society seminar.*

It is now 11 years since the House of Lords gave its decision in *Hedley Byrne & Co Ltd v Heller and Partners* [1964] AC 465. In the intervening period case law has built up to the point where it is possible to discern the direction in which the law is moving. One academic writer described the House of Lords in this case as being like that other great law giver, Moses, who "led the people out into the wilderness and left them there"(*a*). This comment is certainly defamatory of Moses, but is perhaps less so of the House of Lords. Although it is clear that their Lordships were prepared to recognise that a cause of action existed for the recovery of damages for financial loss arising from the making of a negligent mis-statement, the scope of the action and the detailed requirements of the relationship which gave rise to liability were left undefined. Lest we should be too critical of the decision it is necessary to remember that the House of Lords was entering into what was then a novel area of liability, and in the tradition of the common law the House was hesitant to lay down a legislative statement of liability which would fetter later Courts in applying the principle to individual cases.

It is the ambitious purpose of this paper to seek to point the way out of the wilderness and in to the promised land—the promised land because, in the present Woodhouse wilderness created for the profession by the Accident Compensation Act 1972, the action for damages for negligent mis-statement is one expanding area of tort law not covered by the Accident Compensation scheme.

The facts of the case can be dealt with briefly. A banker's reference was given by the defendants to the plaintiff's bank on the creditworthiness of a customer, Easipower Ltd. The reference was marked, "For your private use and without responsibility on the part of the Bank or its officials". The bank advised that Easipower was "a respectably constituted company good for its ordinary engagements". Within a week the defendant bank itself called on Easipower to reduce its overdraft, and within three months had appointed a receiver. The plaintiff, which had relied on the reference in giving credit to Easipower, lost over £17,000. It was not surprising that in these circumstances the plaintiff had strong feelings on the matter and took its case to the House of Lords.

The House of Lords was unanimous in holding that a duty of care would lie with respect to the giving of careless advice which caused financial loss of the recipient of the advice, provided the necessary relationship existed between the parties. On the facts of this case however the defendant was protected by the disclaimer given with its reference and in the view of at least two of the Judges it appears that even apart from the disclaimer liability would not have arisen because of the absence of these facts of the necessary relationship(*b*). In recognising that a duty of care might lie in respect of the making of careless statements causing financial loss, the House of Lords distinguished its earlier decision in *Derry v Peek* (1889) 14 Ap Cas 337 and rejected the view of the majority of the Court of Appeal in *Candler v Crane Christmas & Co.* [1951] 2 KB 164. The dissenting judgment in that case of Denning LJ was approved.

A detailed analysis of the decision itself will not here be attempted. It has been done adequately elsewhere(*c*). Five principal areas of doubt remained after this decision. In this paper each of these areas of doubt will be examined and an attempt will be made to discern the direction which, in each case, the law is taking.

1 Characteristics of the relationship

The details of the relationship were not precisely given in *Hedley Byrne*. It is clear from the judgments of the House that the relationship was a "special" relationship outside the existing relationships which earlier cases had recognised gave rise to liability in damages, namely fraud, contract, and a fiduciary relationship. Three elements of the relationship established in *Hedley Byrne* were:

(*a*) R B Stevens, "*Hedley Byrne v Heller;* Judicial Creativity and Doctrinal Possibility" (1964) 27 MLR 121, 141.

(*b*) Lord Morris at 503; Lord Hodson at 513.

(*c*) Stevens supra *fn* (*a*); Honore, "*Hedley Byrne & Co Ltd v Heller and Partners Ltd*" (1965) 8 JSPTL 284.

(i) The recipient of the advice(*d*) must rely on the advice, or as Lord Reid expressed it(*e*), trust the adviser to exercise reasonable care.

(ii) The adviser must know or ought to know that he is being relied on or trusted.

(iii) It must be reasonable for the recipient of the advice to rely on it. Only Lord Reid referred to this element of the relationship but it finds support in later cases(*f*).

Although it was clear from all of the judgments in *Hedley Byrne* that reliance by the recipient of the advice on the adviser is a necessary element of the relationship, it was not clear whether the adviser must possess some particular skill and competence in the giving of advice before the relationship would arise. In an early New Zealand case, *Jones v Still* [1965] NZLR 1017, regarded the duty in *Hedley Byrne* as being limited to professional advisers. A much broader view of the relationship was taken by the majority in the High Court of Australia in *MLC Assurance Co Ltd v Evatt* (1968) 122 CLR 556. Barwick CJ regarded the relationship as arising where the speaker realises or ought to realise that he is being trusted and was in a better position to be informed or to form a judgment on the matter in question than the recipient of the advice or information (at p 571).

The Privy Council reported at [1971] AC 793, was divided on this question. By a majority decision the judgment of the High Court was reversed. The majority held that two alternative factors must be present before the duty of care can arise.

(i) The advice must be given in the course of carrying on a business or profession which calls for special skill or competence in respect of the kind of advice given.

(ii) If the advice is not given in the course of such a business or profession the adviser must claim in some other way to possess skill and competence in the subject matter of the advice comparable to those who carry on the business or profession of advising on such a matter. In particular the adviser may hold himself out as possessing skill and competence in the subject matter of the particular enquiry comparable to those who do carry on the business of giving such advice.

The majority judgment presents the odd spectacle of three Judges (only one of whom sat on the House in *Hedley Byrne*) telling Lords Reid and Morris, the two dissenting Judges, what they meant by statements in their judgments in *Hedley Byrne*. Lords Reid and Morris in their joint dissenting judgment for their part protest that they have been misrepresented by the majority.

MLC Assurance Co v Evatt was a case where investment advice was given by an officer of the defendant company to Mr Evatt. The case turned on the system of common law pleading current in New South Wales. The defendant argued that even were all the facts in the statement of claim true, they gave no right to relief. Mr Evatt had not alleged in the statement of facts in his statement of claim that the defendant company to his knowledge carried on the business of giving investment advice or in some other way claimed to possess the skill and competence of an investment adviser. The majority of the Privy Council held that these facts were necessary to establish a duty of care, and Mr Evatt's action therefore failed. It should be noted that the majority in their judgments do not go so far as to hold that the adviser must possess some special qualification, or be a member of some calling or profession. It is sufficient if he claims or holds himself out to have skill or competence in the subject matter of the advice, but the holding out must relate to some recognised kind of business in which advice of the kind in question is given. It would appear for example that a life insurance salesman who claims some expertise in the area of life insurance could not be held liable to a person to whom he gives erroneous advice since there is no recognised business or profession of giving advice on life insurance matters.

It appears further that the advice must be of the kind that the adviser professes to be competent to give. For example a solicitor who gives investment advice would not be liable merely because he gave advice in the course of his practice as a solicitor. It would have to be shown that he claimed in some way to possess the skill or competence of an investment adviser. Certain types of advisers merit special consideration.

(*d*) Later cases have declined to make any firm distinction for the purposes of liability between "information" and "advice". Both the selection and communication of facts and the forming of a judgment on these facts may give rise to liability: *MLC v Evatt* (1968) 122 CLR 556, 572 per Barwick CJ; [1971] AC 793, 802-803 (JC), *Presser v Caldwell Estates Pty Ltd* [1971] 2 NSWLR 471, 491.

(*e*) At p 486.

(*f*) Ibid, 486; majority judgment in *MLC v Evatt* [1971] AC 793, 806; dissenting judgment at 811; *Presser v Caldwell Estates Pty Ltd* [1971] 2 NSWLR 471, 479.

(i) *Real estate agents*

Does the business of a real estate agent involve the giving of advice which calls for special skill or competence?

Recent cases suggest that it is such a business, but that the advice must relate to matters on which a real estate agent might reasonably be expected to possess particular expertise. In a recent New South Wales decision, *Presser v Caldwell Estates Pty Ltd* [1971] NSWLR 471, 491, Mason JA was careful not to restrict the duty of care to professional men in the strict sense:

> "Clearly this is not limited to the skill or competence of those whose ocupation is a profession according to the narrow and traditional sense of that word. It extends as well to those who carry on or pursue a business or profession which involves skill or competence of a special kind in a particular field . . . which exceeds the level of attainment of the ordinary man in that field."

A real estate agent might therefore be expected to exercise care with respect to statements regarding the particular amenities of a property(*g*), its age and ordinary description(*h*), but not the geological composition of the subsoil on which the property is built(*i*) or the legal effect of the contract proposed to be entered into by the parties(*j*).

(ii) *Motor vehicle dealers*

No reported case has yet been given on the status of the motor vehicle dealer. By analogy with the real estate agent it is arguable that in giving information or advice on motor vehicles such as the age, description, or model of a vehicle a dealer is expected to have some degree of competence and expertise and is more than simply a person who brings buyers and sellers together. Some special claim to competence and skill would, however, be required to hold a dealer liable in respect to statements made concerning the mechanical soundness of a vehicle. It is doubtful whether a dealer as such professes to have the skill of a motor mechanic.

(iii) *Company promoters and directors*

Derry v Peek (supra) concerned statements made by directors in a prospectus. Although the House of Lords in *Hedley Byrne* (at pp 484, 502, 508 and 532) distinguished *Derry v Peek* it is not clear whether if a case of similar facts came up for decision today and negligence were pleaded that the necessary relationship would be found to exist. Only one Judge in *Hedley Byrne* had been clearly of the view that *Derry v Peek* would be decided differently today (Lord Devlin at p 516).

Two of their Lordships appear to take the view that the necessary relationship giving rise to a duty of care was not present between the promoter and the subscribers to a prospectus.

This was also the view earlier taken by Denning LJ who in *Candler's* case (at pp 179-180) distinuished between persons whose profession and occupation require them to exercise some special skill and persons such as promoters or trustees "who do not bring and are not expected to bring an professional knowledge or skill into the preparation of their statements".

A broader approach was taken by the majority of the High Court in *MLC v Evatt* and a special relationship would arise in terms of the majority judgments between a shareholder and a director or any other officer of the company who gave advice to shareholders relating to the financial stability of the company. Statements in directors' reports and prospectuses were on the basis of that decision, potential sources of liability. The judgment of the Privy Council may, however, have the result that directors and promoters escape the net of liability. In the ordinary case such persons do not profess to have any particular skill or competence in giving advice on the financial stability of their company. Furthermore it would be difficult to say that directors or promoters are in the business of giving advice of the kind put forward in a prospectus or director's report. Underwriting brokers may be in such a business, but the prospectus would ordinarily be issued by the company and not by the underwriters.

It is to be hoped that an adventurous litigant will seek to test this question before the Courts at an early date.

(iv) *Financial interest*

Existence of a financial interest on the part of the adviser is mentioned as an exception to the "special competence and skill" requirement by the majority in *MLC v Evatt* (supra). Reference was made in their judgment to *W B Anderson v Rhodes* [1967] 2 All ER 850. In this case a commission agent in the potato market was asked in accordance with the custom of the trade, by one of its customers

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(*g*) *Barrett v J R West Ltd* [1970] NZLR 789.

(*h*) *Dodds and Dodds v Millman* (1964) 45 DLR (2d) 472.

(*i*) *Presser v Caldwell Estates* at 480 per Asprey J A.

(*j*) *Jones v Still* [1965] NZLR 1017.

whether another customer to whom the plaintiff proposed to sell was creditworthy. The plaintiff was assured that this buyer was a good payer. The transaction was concluded on which the defendant received a commission. The Court held that the defendant owed the plaintiff a duty of care. Advice was given on facts which should have been within the defendant's knowledge. If the possession of a financial interest means that a profession of special skill or competence on the part of the adviser need not be shown it is important to determine how wide a meaning the Courts are willing to give to the "financial interest". Every real estate agent and motor vehicle dealer stands to benefit from the advice which he gives and it is not difficult to find a financial interest in many other business transactions. Is this exception the Achilles heel of *MLC v Evatt*, as one writer has *claimed?*(*k*) The approach taken by the Court in *Presser v Caldwell Estates Ltd*, pp 482-484 (supra) would dampen such enthusiasm. In this case Asprey JA limited the exception in *Anderson v Rhodes* to those cases where the adviser was personally qualified to give advice because of the knowledge gained on his own financial transactions. To constitute an exception to the ordinary requirements that there be some profession of special skill or competence, the "financial interest" must be such as to qualify the defendant to pronounce on the matter in question. It is difficult to see that the financial interest of the adviser in a particular transaction has much significance outside the credit reference situation if the authority in *Presser v Caldwell Estates* is accepted. Asprey JA's approach also appears to have been taken by Mason JA (at p 493) after a less full examination of the authorities. It is difficult to dispute the force of Asprey JA's argument. To adopt a wider view of "financial interest" would be to undermine the strength of the majority principle in *MLC v Evatt* and allow the recovery of damages in cases where possession of the financial interest was quite unrelated to the knowledge or ability possessed by the defendant(*l*).

The decision of Cooke J in *Day v Ost* [1973] 2 NZLR 385 must here be treated with some reserve. Cooke J was prepared to hold that an architect who advised a subcontractor that there were ample funds in hand to cover payment of his subcontract had a sufficient financial interest in the transaction to give rise to a duty of care. *Presser's* case was not cited to the Court and Cooke J had not been assisted by any argument advanced on behalf of the defendant, who had failed to appear. In any event Cooke J's observations on the nature of the financial interest could be treated as obiter since he was prepared to hold that the architect professed to have the necessary skill and competence to give the advice in question and thus came under the first limb of the majority judgment in *MLC v Evatt*.

2 To whom is the duty owed?

Cardozo CJ in a land-mark United States decision held that it would be going too far to make an accountant liable to any person in the land who chose to rely on carelessly prepared accounts for that would expose him to "liability in an indeterminate amount for an indeterminate time to an indeterminate class"(*m*).

Bearing in mind Cardozo CJ's warning Denning LJ in *Candler's* case was careful to limit the duty to persons the adviser actually knows are going to rely on his advice and for whom the advice is given. As an example he gave the insurance doctor who examined the insured for insurance purposes and considered that such a doctor owed no duty to the insured. In the same way Denning LJ limits the duty to the actual transaction of which the adviser knows and for the purposes of which he gives his advice. The marine hydrographer, for example, owes no duty to his readers for careless statements in his published works. "He publishes his work simply for the purpose of giving information, and not with any particular transaction in mind."

In *Hedley Byrne* this question was not in issue and only Lord Pearce (at pp 538-539) deals with it at any length. He adopts Denning LJ's approach. From the tenor of the judgments in *Hedley Byrne* it is clear that the reasonable foreseeability test laid down in *Donoghue v Stevenson* [1932] AC 562 is not the appropriate one to apply to cases of careless words as distinguished from careless acts.

The clearest application of this principle since *Hedley Byrne* is in a judgment of the New Zealand Court of Appeal in *Dimond*

(*k*) Phegan, "*Hedley Byrne v Heller* in the Privy Council—the Continuing Story" (1971) 45 ALJ 20.

(*l*) Cf however Lord Devlin in *Hedley Byrne* who referred in broad terms to the relevance of a financial interest at p 529: "It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form." Lord Devlin was not, however, fettered by any notions limiting the relationship to those who claimed to possess some special competence or skill. See p 531.

(*m*) *Ultramares v Touche* 255 NY 170, 180; 174 NE 441, 444 (1931).

Manufacturing Co Ltd v Hamilton [1969] NZLR 609. North P and Turner J both held that an accountant who prepared a balance sheet for a private company was under no duty of care to prospective purchasers of the company's shares unless there were special circumstances bringing possible purchasers into his reasonable contemplation as persons who will read and rely upon the balance sheet. In that case the accountant actually showed the balance sheet himself to purchasers and thereby brought them into relationship as recipients of a duty and care. Barwick CJ in *MLC v Evatt* although not called on to do so discussed this aspect of the duty of care and stated:

> "The information or advice will be sought or accepted by a person on his own behalf of another identified or identifiable person on behalf of an identified or identifiable class of persons. The person giving the information or advice must do so willingly and knowingly in the sense that he is aware of the circumstances which create the relevant relationship. He must give the information or advice to some identified or identifiable person in the given circumstances of the implications of which he is, or ought to be, aware. The identity and position of the recipient of the utterance form part of the relevant circumstances."

In this statement Barwick CJ views the duty as being owed not only to persons actually in the knowledge of the adviser at the time the statement is made, but also to those persons of whose identity he ought to be aware given his knowledge of the circumstances which give rise to the relationship. This was put more shortly in *Hedley Byrne* itself in terms of those whom the adviser "knows or should know will rely on the statement (at pp 503, 514) Barwick CJ's statement makes it clear that the words "ought to know" are narrower in scope than those who come within the circle of reasonable foreseeability in *Donoghue v Stevenson*. For example, an auditor who audits the accounts of a company knows that they will be relied on by the management and knows also that being prepared for the purposes of 166(1) of the Companies Act 1955 the report will be received by members, ie shareholders of the company. Although the identity of the individual shareholder who relies is not known to the auditor he is a person who comes within the class of those whom the auditor ought in the circumstances of the relationship to be aware will rely on the report. It may be reasonably foreseeable that potential investors in the company will see a copy of the accounts and will rely on them in purchasing shares, but it is clear from *Dimond Manufacturing v Hamilton* (supra) that no duty is owed to that class of person.

A case which is difficult to reconcile with the earlier authorities is *Gordon v Moen & Capt Dunsford Ltd* [1971] NZLR 526. In this case a survey report on a launch was shown to purchasers who in reliance on the report purchased the launch. A report had been prepared for the purpose of borrowing against the launch by the vendors. Roper J after reciting the dicta of Barwick CJ referred to earlier, held that it might reasonably be contemplated that a report of this kind would be used for the purpose of sale. It is submitted that in this case Roper J crossed the line between the identified or identifiable class to whom a duty was owed and the wider class of persons whom it was reasonable to foresee would rely on the report but for whom it was not prepared.

3 Reliance

Until the decision of the Court of Appeal in *Dutton v Bognor Regis UDC* [1972] 1 QB 373 it had been assumed by the Courts that reliance by the recipient of the advice was a necessary element in the special relationship. This proposition was unquestioned so long as the duty of care with respect to the giving of careless advice was viewed in the context of misrepresentation(*n*). Reliance is a necessary element if liability is to be established in misrepresentation. Here there is some transaction or intercourse between the parties in the course of which a statement is made. As a matter of causation a party cannot claim to have suffered damage as a result of the careless statement unless he can show that he relied on it. The issue first arose in *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 233, where the Court of Appeal allowed recovery of damages by the plaintiff Ministry against the employers of a search clerk who carelessly omitted the Ministry's charge from a certificate of charges issued to a purchaser of the land. The certificate was conclusive in favour of the purchaser who took free of the charge. The Ministry had not relied on the certificate but recovered on the basis that it was reasonably foreseeable that the Ministry would suffer damage if its charge was omitted from the certificate. The conceptual basis for reaching this decision was not explored in *Sharp's* case, but in *Dutton v Bognor Regis U.D.C.* the necessity

(*n*) See Spencer Bower and Turner, *Actionable Misrepresentation* (3rd ed, 1974), para 409.

to establish reliance by the plaintiff was asserted in argument and required determination by the Court.

Dutton's case showed clearly for the first time that the duty of care with respect to the making of a careless statement is wider in scope than was at first thought and is not limited to cases of misrepresentation. In this case the defendant council was held liable for loss arising from a careless inspection of the foundations of a house conducted by its inspector and the careless issue of a certificate. The house was later sold to a purchaser who had never relied on the certificate and did not know at the time he purchased of the careless inspection. The negligence of the Council was only revealed later when the foundations of the house subsided and it was discovered that it had been built over a rubbish dump. The Judge who dealt most clearly with the issue in question was Stamp LJ. It had been argued that no duty was owed by the council since the purchaser could not establishe that she had relied on the certificate given by the council. Stamp LJ (at p 413) distinguished *Hedley Byrne* as a case where there could be no damage except to a person who relied. Here, however, the council could contemplate that as a result of their careless inspection and report persons would be injured who had not relied on the report. Reliance need not therefore be shown and it was sufficient that the purchaser came within the *Donoghue v Stevenson* circle of reasonable foreseeability.

Lord Denning in his judgment (at p 395) distinguished between cases involving advice with respect to a financial matter such as advice given by solicitors and accountants and advice given with respect to the composition or safety of property, for example advice given by surveyors, engineers, or analysts. In the former reliance is a necessary element, but not in the later group of cases. With respect, Lord Denning's classification appears to be no more than an application of the basic principle advanced by Stamp LJ.

Although in *Sharp's* and *Dutton's* cases the duty has been phrased in terms of the reasonably foreseeable plaintiff, it is doubtful, whether consistently with *Hedley Byrne* the duty should extend as far as the Atkinian neighbour. Proximity in terms of *Hedley Byrne* arises only where the plaintiff comes within the identifiable class of persons for whose benefit the report or certificate has been given or who the defendant should contemplate will be affected by it if the report is used for the purpose for which it was prepared.

It appears therefore that the Courts have reached the place where liability has been recognised as flowing from statements giving careless information or advice whether made in the context of misrepresentation or given for some wider purposes which establishes a continuing state of affairs, such as the construction of a building, manufacture of a product, or public certificate which may foreseeably cause loss to persons in the future.

4 Relationship with contract

It is not clear from the judgments in *Hedley Byrne* whether liability in that case was seen as arising in tort or in contract. Lords Morris, Hodson and Pearson appear to have taken the view that liability arose in tort whereas Lord Reid's judgment is ambivalent on this point and Lord Devlin appears to suggest that liability arises on a basis analogous to contract. Later cases, however, have emphasised the tortious nature of the liability(*o*).

Soon after the decision was given some textwriters prematurely assumed that tortious liability under *Hedley Byrne* displaced the old doctrine that damages were not available for an innocent misrepresentation. It was argued that since *Hedley Byrne* damages were available for an innocent misrepresentation. It was argued that since *Hedley Byrne* damages were available for an innocent misrepresentation which was negligent(*p*). The Courts have been more cautious, and have, it is submitted, arrived at a result which is not only more satisfactory than the position advanced by these writers but may well provide a more practical formula to that adopted in England by the Misrepresentation Act 1967.

McNair J in the first case to refer to this issue, *Oleificio Zucchi S.p.a. v Northern Sales Ltd* [1965] 2 Lloyd's Rep 496, 507, stated that *Hedley Byrne* had no application to representations in a contractual context. Recent cases show a more flexible approach. In *Dillingham v Downs* [1972] 2 NSWLR 49 the New South Wales Government had advertised tenders for a contract to deepen Newcastle harbour. Detailed plans and specifications were published. The plaintiff who was the successful tenderer commenced work under the contract and discovered that there were mine workings below

(*o*) *Smith v Auckland Hospital Board* [1965] NZLR 191.

(*p*) *Anson's Law of Contract* (22nd ed, 1964) ed Guest 216-219; Milner, *Negligence in Modern Law*, Butterworths 1967, 40-41.

the harbour which made the blasting technique conducted ineffective. The existence of these mine workings was known all along to the Government. The plaintiff brought an action for damages and inter alia alleged negligent misstatement on the part of the Government in putting forward the information in its tender documents. The Court held that although in the ordinary case no duty of care would arise with respect to pre-contractual representations there may be special circumstances in which a party undertakes responsibility to assemble information with care. On the facts of the case before him Hardy J did not find such an undertaking.

The view taken by the Court in this case would accord with that of the majority judgment in *MLC v Evatt* [1971] AC 793 which requires some particular claim to exercise skill and competence before finding a duty of care. It is not in every case where statements are made in the course of pre-contractual negotiations that a duty of care will arise.

A similar approach was taken by the Court of Appeal of British Columbia in *Sealand of the Pacific Ltd v Ocean Cement Ltd*(*q*) where the Court expressly referred to *MLC v Evatt* in holding that in this case the salesman who made the statement professed a particular degree of skill and competence in the subject matter of the statement.

Dual liability in contract and in tort

If, as recent cases indicate, liability under the *Hedley Byrne* principle arises in tort, can a defendant be sued independently in contract and in tort in respect of the same careless misstatement? As far as professional men are concerned the Court has leaned firmly against any such dual liability. Although some criticism has been expressed of the approach taken by the English Courts(*r*) this question has been determined for us in New Zealand by the Court of Appeal in *McLaren Maycroft & Co v Fletcher Development Co Ltd*(*s*). In that case the plaintiff, who was barred from suing in contract by the Limitation Act 1950 sought to recover against the defendant firm of engineers in tort. The Court held that the defendant's duty to the plaintiff in carrying out its professional engagement arose in contract only and there could be no independent recovery in tort. This principle has been applied to other professional men(*t*) but it is open to doubt whether it is of wider application. It would however be difficult to justify treating non-professionals differently. Why should the builder be exposed to dual liability when the architect or engineer is not? The common duty set out in *MLC v Evatt* is applicable to all who profess to exercise a particular skill and competence does not distinguish between the true professional and the quasi-professional, and there would similarly appear to be no justification for making such a distinction here.

Also unresolved is the question whether this principle applies to the pre-contractual misrepresentation. Cases such as *Dillingham v Downs* and *Sealand v Ocean Cement* were clearly decided on the basis that no such principle is applicable in this area. In *Presser v Caldwell Estates* Mason JA referred to this question and left the point open.

5 Economic loss

Hedley Byrne was concerned with the use of negligent words in connection with a financial matter. For the first time the Courts were willing to allow the recovery of damages for a purely economic loss which was not directly consequential on injury to person or property. It had previously been thought that damages for economic loss could only be recovered if the loss was directly consequential on injury to person or property(*u*). If *Hedley Byrne* had overturned that rule a vast area of liability would be opened up. Widespread economic loss can be caused by negligent interruption of services such as telephone, electricity, and water. Transport accidents involve economic loss not only to the immediate parties but to others relying on the delivery of goods and provision of services.

It was not long before this question came before the Courts in *Weller v Foot and Mouth Disease Research Institute* [1966] 1 QB 569. Widgery J rejected the claim for purely economic loss brought by auctioneers at a cattle market whose business was interrupted because of the closure of the market after an outbreak of foot and mouth disease caused by the carelessness of the defendants. Widgery J dis-

(*q*) (1973) 33 DLR (3d) 625. See also *Esso Petroleum Co Ltd v Mardon, The Times* 1 August 1974, where Lawson J referred to *Dillingham v Downs* with approval. This case is also interesting in that Lawson J preferred the minority judgments in *MLC v Evatt* to those of the majority. The Privy Council was not, of course, binding on him.

(*r*) *Greig*, "Misrepresentations and Sales of Goods" (1971) 87 LQR 179.

(*s*) [1973] 2 NZLR 100; *Bevan v Blackhall & Struthers (No. 2)* [1973] 2 NZLR 45.

(*t*) A solicitor: *Clark v Kirby Smith* [1964] Ch 506; an architect: *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197 applying an earlier decision concerning a stockbroker: *Jarvis v Moy, Davies, Smith Vandervell & Co* [1936] 1 KB 399.

tinguished *Hedley Byrne* as a case where the Court was prepared to find the duty in respect to the giving of advice. He held that no general duty lay in the absence of injury to person or property. The result of this decision has led some commentators to allege that negligent mis-statement has leapfrogged liability for negligent acts(*u*). This would be a strange result in view of the traditional reserve with which the Courts have approached liability for words as distinct from acts. A more acceptable ground for distinguishing *Hedley Byrne* was made by the Court of Appeal in *SCM v W J Whittall & Co Ltd* [1971] 1 QB 337 where Lord Denning and Winn LJ pointed out that *Hedley Byrne* was concerned with financial advice about a financial matter. As this was the very type of loss in issue when the advice was given recovery for such loss must necessarily be allowed once the Court holds that a duty is owed. On this basis it appears that not all cases of negligent words will give rise to recovery of economic loss. It is only where a duty is owed with respect to advice on an economic or financial matter that such a loss can be recovered. The classification made by the Courts in earlier cases between negligent acts and negligent words would now appear to be too simplistic.

The most recent authoritative pronouncement on recovery of economic loss is in the judgments of the Court of Appeal in *Spartan Steel & Co Ltd v Martin* [1973] QB 27. In this case the majority of the Court refused recovery of loss of profits which was not consequential on damage to property but did so on different grounds. Whereas Lawton LJ refused recovery on the basis of earlier authority Lord Denning decided the question on the basis of policy. He dismissed previous formulae in terms of the absence of duty or of remoteness as being no more than forms of words concealing what is in reality a policy determination. In his judgment he set out a number of policy grounds for refusing recovery on the facts of this case. His judgment is significant in that it leaves the door ajar for the Court in a later case to allow recovery of purely economic losses. One such group of cases may well be those involving loss arising from defective manufacture of products or construction of buildings. The Court was prepared to allow recovery of such loss in *Dutton v Bognor Regis UDC*. It is difficult to reconcile that case with *Spartan Steel & Co Ltd v Martin* unless it is allowed as a particular exception on the basis of policy.

Edmund Davies LJ dissented in the *Spartan* Steel case and put forward a principle which would allow the recovery of all economic loss which was both reasonably foreseeable and the direct consequence of the careless act. The Courts may well hesitate before accepting this widening of the area of liability(*v*). The "floodgates of litigation" spectre may in the past have been invoked to excuse judicial conservatism, but in this area such fears are not groundless. There is much to commend Lord Denning's view that insurance is a better means of protecting the injured business in these cases than the provision of a remedy in tort. Edmund Davies LJ possibly saw his dissenting judgment in this case as playing the same kind of formative role as did Denning LJ's dissent in *Candler v Christmas Crane & Co.* It remains to be seen whether the House of Lords will once again admit an errant knight into the halls of respectability.

(*u*) *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453, 557. See Atiyah, "Negligence and Economic Loss" (1967) 83 LQR 248.

(*v*) A wider view was, however, taken by the Supreme Court of Canada in *Rivtow Marine Ltd v Washington Iron Works* (1973) 6 WWR 692 where Ritchie J delivering the majority judgment puts forward a formula of liability similar to that of Edmund Davies LJ. Laskin J was prepared to go further and allow recovery of the cost of repairing a negligently designed and manufactured product.

AUCKLAND ADMISSIONS

The following were admitted as barristers and solicitors of the Supreme Court of New Zealand by the Hon Mr Justice Perry on 18 October 1974:

Abernethy, S C
Avery, J R
Blackmore, J H
Cagney, J L
Cann, R D
Carter, R M
Collis, R J
Cooke, N G
Coupe, A C
Fong, D
Hardie, M J
Horner, K A
Kumar, R
Lyon, C K
Mackey, W
Maffey, T R
Radley, J K
Roscoe, P
Thwaite, S G S
Tylor, R W
Vennell, J A
Walmsley, M J

RECENT ADMISSIONS

Mr John Steward Halls was on 4 October 1974 admitted as a Barrister and Solicitor by Mr Justice Cooke in the Supreme Court at Nelson.

Mr David Islwyn Jones was admitted as a Barrister and Solicitor of the Supreme Court at Christchurch on 30 October 1974.

LEGAL LITERATURE

Australian and New Zealand Commentary on Halsbury's Laws of England (4th Edition) (Butterworths). Reviewed by Mr Justice Mahon.

The publication by chapters of an Australian and New Zealand Commentary on Halsbury's Laws of England (4th edition) has now commenced with the issue by Butterworths of the first chapter under the heading "Arbitration". A first reading of the chapter is sufficient to show that the magnitude of the concept is being matched by masterly execution.

As is well known, the purpose of the Commentary is to present in relation to each paragraph in Halsbury a comparative statement of the law of Australia and New Zealand in respect of that paragraph. Thus an Australasian lawyer consulting a particular passage in the Halsbury text is able by reference to the corresponding paragraph in the Commentary to see at a glance the extent of any alteration or substitution in his own jurisdiction of the relevant statement of English law. Further, he will see in the Commentary, not only footnotes of the Australian and New Zealand cases which support the text, but also, where applicable, a reference to the appropriate section of the New Zealand statute and of each of the Australian statutes. Where there seems to be justification for adding to the Australasian text a special statement referable to the law of New Zealand, then such statement appears at the end of the Commentary under an appropriate sub-heading.

The citation of cases in the Commentary is subject to a cautionary note, more particularly in the case of Australia, in that only the leading cases have been selected. For a full survey of the case law on a selected topic, the appropriate digests must be studied. As with Halsbury itself, the object is not to present an exhaustive collection of cases but rather the statement in concise form of the principles illustrated by the relevant authorities.

There will be many areas in which the text of the Commentary will be in general accord with the corresponding statement in Halsbury, and many other areas in which the Halsbury text will merely be stated to apply without further comment to Australia and New Zealand. But one will also see, from time to time, an illustration in the Commentary of divergence of judicial opinion between England and Australia, or New Zealand, on a common law point. An independent New Zealand development in the field of criminal law will be found in *R v Strawbridge* [1970] NZLR 909 (CA). Then there will be some cases in which the joint opinion of Australian and New Zealand Courts is at variance with the English view, as illustrated by the following reference to a recent New Zealand case. Paragraph 184 of 3 Halsbury (3rd ed), dealing with affiliation proceedings, contains a statement of the English law relating to corroboration of the evidence of the complainant. One sentence in para 184 reads:

> "The complainant is a competent witness to prove that a letter containing an admission of paternity is in the handwriting of the defendant."

Then a footnote refers to *Jeffery v Johnson* [1952] 2 QB 8 upon which the quoted statement is based. In the latter case the Court of Appeal judgments, which included that of Lord Denning, appear to reflect a closely reasoned result, yet it almost seems as if a kindly sentiment may lie behind the decision. The forlorn factory girl, tearfully tendering in evidence the letter from her faithless lover. Let right be done. But in this part of the Commonwealth a sterner view prevails. It was thought by Chilwell J in *Saka v Augalu*, 8 July 1974 (Auckland Registry) as yet unreported, that this ruling was wrong, and that where the complainant alone identifies the author of the written admission then production of that admission cannot be independent corroborative testimony as required by statute. Chilwell J therefore declined to follow *Jeffery v Johnson*, citing in support of his view two Australian cases in which the same misgivings had been expressed. So one may expect to find, on publication of the relevant section of the Commentary, a statement citing the Australian cases and *Saka v Augalu* in which the Australasian Courts disapproved of the English Court of Appeal decision.

Apart altogether from comparison between English and Australasian law on a related topic, the Commentary provides an incidental but valuable service in that it enables a lawyer in either Australia or New Zealand to locate at a glance the relevant statutory provisions and judicial decisions applicable in each of those

countries. Referring for a moment to the published chapter on "Arbitration", a New Zealand lawyer looking at para C 555, which refers to para 555 of Halsbury dealing with the statutory jurisdiction to stay arbitration proceedings, will see not only the reference to s 5 (1) of the New Zealand Arbitration Act 1908 but an accompanying reference to every Australian statutory provision. Thus the Commentary provides, not only a comparison between English law and Australian and New Zealand law respectively, but also a comparison between Australian and New Zealand case law and statute law.

The commentators in Australia and New Zealand are named, as in Halsbury itself, at the commencement of the chapter which they have jointly compiled, and in a separately published preface to the Commentary the publishers have printed a list of the commentators selected for most of the Chapters yet to be published. All the New Zealand commentators so far named are known to this reviewer, and there can be no doubt that the New Zealand text of the Commentary, as well as the Australian text, will be in skilful hands. It is clear, however, that in the combined interests of accuracy and condensation, the editing of the material supplied will require close and meticulous attention, and the already published chapter on "Arbitration" bears witness to the successful employment of editorial skill. The Editor-in-Chief is the Right Honourable Sir Garfield Barwick. The General Editors are the Honourable Sir Gordon Wallace, formerly President of the New South Wales Court of Appeal, and the Right Honourable Sir Alexander Turner, formerly President of the New Zealand Court of Appeal. The profession on both sides of the Tasman is fortunate in the acquisition by the publishers of an editorial panel of this status, particularly having regard to the exacting duties which must necessarily fall on the General Editors.

The common law of England is the source and foundation of the common law principles applied in the Courts of Australia and New Zealand, and the extent of statutory abrogation or modification of those principles may be broadly parallel in all three countries. But in many fields of case law and statute law there has been a degree of local independent development which requires not merely a means of cross reference to Halsbury but an independent textual statement of a substantive kind. This is the aim which the present publication sets out to achieve and the launching of this encyclopaedic commentary is a momentous step towards the ultimate establishment of a comprehensive and living statement of the combined laws of Australia and New Zealand.

CORRESPONDENCE

Sir,

Hurrah for Finlay

I write to dissociate myself most strenuously from the reported statement that the Otago District Law Society Council deplores the statement made by Dr Finlay relative to the case of Dr Sutch.

Anyone, including a Judge or an Attorney-General, is perfectly within his rights to criticise a law if he is of the opinion that it is bad, oppressive or ridiculous; which the Official Secrets Act certainly is. A law must be upheld while it exists; but it does not have to be admired or approved of simply because it does exist. Surely the Attorney-General has a better right than most people to criticise the Act; he has the burden of deciding whether or not prosecutions will be taken under it.

The revealed facts of the Sutch case justify Dr Finlay's strictures. What had been demonstrated thus far? Simply that Dr Sutch had talked to some Russians. He was not charged with actually communicating or imparting information. He was charged with obtaining information and then not substantively, but only in the sense that s 4 says (in effect) that if you talk to Russians you are deemed to have obtained information prejudicial to the safety or interest of the State irrespective of the actual facts. You have to prove your innocence.

Just to show that others beside Dr Finlay do not feel inhibited by their office from being critical of laws, I quote Mr Justice Caulfield, the presiding Judge of the Old Bailey in the 1971 case of *R v Cairns, Aitken and Roberts*, brought under the United Kingdom Official Secrets Act. Section 2 referred to by the Judge is the equivalent of s 4 of the New Zealand Act.

"It may well be that prosecutions under this Act can serve as a convenient and reasonable substitute for a political trial, with the added advantage of achieving the same end without incurring the implied odium. . . . This case, if it does nothing more, may well alert those who govern us at least to consider, if they have the time, whether or not section 2 of this Act has reached retirement age and should be pensioned off. . . ."

I recommend that the Otago Council read the book *Officially Secret* by Jonathan Aitken (Weidenfeld & Nicholson 1971) one of the defendants in the abovementioned case.

J K POOLE,
Balclutha.

A foreign concept?—The newly created Commission for the Environment would seem to embody concepts totally alien to the New Zealand way of life. What else could explain its being serviced by a secretariat provided by the Department of Foreign Affairs?