The New Zealand
LAW JOURNAL

21 JANUARY 1975 No. 1

THE JOINT BUT EQUAL FAMILY HOME

On 8 November 1974 the Joint Family Homes Amendment Act slipped quietly through Parliament and on to the statute book. By s 7 it adds yet another chapter to the piecemeal development of the law as to family assets and yet another element to the state of statutory confusion so cogently described more than three years ago by North P and Turner J in *E v E* [1971] NZLR 859 (the principle in which has since been unanimously reaffirmed by the Court of Appeal in the still unreported case of *Aitken v Aitken*, 30 November 1973).

Drafted in fashionable convoluted style, s 7 (replacing s 11 of the principal Act) is not altogether easy to follow, but what it seems to lay down is this:

If a joint family home is sold, or if a settlement is cancelled, during the parties' lifetime, the net proceeds of the sale, or the property on the cancellation of the settlement, vest in the husband and wife in equal shares.

On the face of it, this reverses the scheme of the original s 11, which was that on cancellation of the settlement the property reverted to the original settlor or settlors as if no settlement had been made.

But at this point clarity ends, for the general rule already stated is qualified in a manner that can only lead to confusion. Subsection (3) of the new section deals with the situation when the joint family home is sold, and there is an exactly similar qualification (by subs (4)) in cases where the settlement is cancelled. The provision as to sale conveniently exemplifies both situations:

> ". . . if—
>
> "(a) The husband and wife on whom property is settled under this Act are both living and have sold, transferred, or otherwise disposed of the settled property; *and*
>
> "(b) Only the husband or the wife was the settlor of the property; *or*
>
> "(c) The husband and the wife were the settlors of the property as tenants in common in unequal shares; *and*
>
> "(d) A notice of consent in a form prescribed by regulations made under this Act is signed by both the husband and the wife—
>
> the net proceeds (if any) from the sale . . . shall vest in the settlor or, as the case may require, vest in the settlors in the same proportions as were their respective interests in the property immediately before it was settled."

The emphasis is added in the above quotation to draw attention to the two conflicting interpretations that can plainly be placed on this provision.

On the first interpretation, "notice of consent" is required only when the settlors were tenants in common in unequal shares, and that "notice of consent" is *not* required where only the husband or wife was the settlor. That interpretation involves reading paras (a) and (b) together, as a true alternative to what is provided in paras (a), (c) and (d), read together.

The second interpretation involves the proposition that a "notice of consent" is required in *both* cases; but this means reading paras (b) and (c) together as if they had been drafted in quite a different form, ie:

> "(b) Either—
>
> "(i) only the husband or the wife was the settlor of the property; or
>
> "(ii) the husband and the wife were the settlors of the property as tenants in common in unequal shares;
>
> and . . ."

An exactly similar argument arises in regard to the similarly drafted subs (4), dealing with vesting the property on the cancellation of settlements.

Tempting though it is to speculate on what Parliament's true intention can possibly have been, it is best to leave that to higher authority. The remainder of this note will be based on the assumption (for the purposes of argument only) that the effect of the new section is that, unless there is a "notice of consent" in *both* types of case contemplated by subs (3) and (4), the proceeds or the property will be divided equally between the spouses.

A passing word should be said about the "notice of consent", which is required if the husband and wife wish to avoid equality of shares on the sale or cancellation. The "notice of consent" is specified as being "in a form prescribed by regulations made under this Act". Those who have, since 8 November 1974, sold their joint family home or cancelled the joint family home settlement will no doubt be heartened to learn that by the end of November 1974 no regulations had apparently been promulgated prescribing the "prescribed form".

But to revert to the substance of the new section: just what is the point of this change in the law? Why should what were originally either one party's sole interest or both parties' unequal shares be converted automatically into equal shares unless the parties expressly agree to the contrary?

The reason for what seems an irritatingly arbitrary change in the law can hardly be said to emerge from the special nature of a joint family home. Certainly, on sale or cancellation, both parties lose the "benefits of security and survivorship, and uninterrupted life-long use and enjoyment" (*Dryden v Dryden* [1973] 1 NZLR 440, 446, per Turner P and Richmond J). But why should the loss of these benefits necessarily be compensated by a *half* share where the settlors started with *unequal* shares or where one of them started with no share at all? And if a spouse with originally an unequal share is to be compensated with an equal share, why should a spouse who originally had no share be given, under the new scheme, a half share?

And take the case of the wife who put in one-tenth of the capital and, before settlement, had become a tenant in common as to one-tenth. Or take the case of the wife who has put in nine-tenths and, prior to settlement, had a nine-tenths interest as tenant in common. Why should a wife or husband with originally a one-tenth interest as tenant in common suddenly get an automatic bonanza when the joint family home is sold or the settlement cancelled?

It really has to be admitted that the scheme of this new section makes very little sense. It would surely have been more sensible and realistic simply to leave parties to a joint family home settlement with their remedies under the Matrimonial Property Act, untrammelled by any arbitrary and apparently aimless statutory adjustment of their respective shares.

But it is curious that the need was felt to enact this weird amendment at a time when a general overhaul of our matrimonial property legislation has become long overdue. Yet this kind of approach has become almost typical: a tinkering round with matters of detail, and a lack of motivation to get on and deal decisively with the really important central issues.

The worst mistake any law reformer can make is to assume that matters of matrimonial property can be dealt with adequately and justly by specific and minutely worked out general formulae. For this is an area where each case contains infinitely variable elements. What may be a just solution to matrimonial property difficulties in a marriage that has lasted 30 years may be totally inappropriate to a matrimonial property problem in a marriage that has lasted only 3 years. It is a matter in each case of balancing and weighing up an infinite variety of factors and circumstances: the fact that the property has been settled as a joint family home may be only one of a number of factors which have to be put into the balance. Each case has to be judged on its own.

This points clearly enough to the need for broad general principles—clear enough to give lay people a general idea of how they stand legally, but not so detailed as to lead to possible injustice in cases which the Legislature has overlooked.

And one of the most important underlying factors which is often forgotten in thinking about the spouses' rights in matrimonial property is this: when a husband and wife establish a home, it can normally be inferred that they are doing so for their joint benefit and for the benefit of their children. When each in his or her own way makes an individual contribution to the home it is a contribution to the welfare and advancement of the whole family. Why, then, when a marriage breaks down, should it be assumed that a spouse then becomes

entitled to trace and identify his or her individual contribution and to extract that contribution from the matrimonial pool, regardless of the consequences? There may, of course, be individual cases where that kind of approach is perfectly proper, but there are many more where an approach of this kind needs to be questioned.

The Matrimonial Property Act 1963, as it originally stood before its subsequent direct and indirect amendments, was a reasonably workable piece of legislation. It is something of a pity that a difficult area of the law such as this, having been stabilised by legislation, could not have been left for the Courts to develop in the light of specific individual situations requiring decision. All that has really resulted from the legislative tampering in the nine years since the Act came into force is uncertainty. As the Act now stands it is certainly difficult, if not impossible, to discern any one thread of consistent policy. What s 7 of the Joint Family Homes Amendment Act 1974 has done is to add a further tangled thread to an already tangled skein.

B D INGLIS

CASE AND COMMENT

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

Domestic Proceedings Act 1968 and Bestowing Care in Compiling a Budget

The moral of *Lane v Lane* (the oral judgment of Mahon J was delivered on 20 September last) is that care and thought should be brought to bear when compiling a budget for the purposes of domestic proceedings.

The appellant husband was appealing against a Magisterial maintenance order made on 20 May 1974 in favour of the respondent wife. The Magistrate relied on a budget produced by her which demonstrated total outgoings of $55 per week. He concluded that she should be deemed to be able to earn $25 weekly in part-time employment and held there was a weekly deficit of $30 in her budget. He therefore awarded $7 weekly for the maintenance of the child and $23 in favour of the wife. The appeal was directed at the latter order only.

It appeared in the Court below that "the respondent, up until the date of the first hearing on 29 March 1974, had been living with her mother in premises which included a dairy of which her mother was the proprietor. The respondent had been living there with her small child. She said she had no proprietary interest in the business but did not deny that she worked from time to time in the dairy and thereby assisted her mother in the running of the business. It was also suggested that the provision of free board and lodging by the respondent's mother was adequate consideration for such hours of work as the respondent was able to perform in the dairy. But as at the first hearing on 29 March 1974 the dairy was in the course of being sold and on the date of the adjourned hearing on 20 May 1974 the dairy business had in fact been sold and settlement was to take place in the following month. The respondent deposed that she had bought a house property in her own name, subject to assistance being given by her mother by way of a gift of money, and that she expected to move into this property with her mother and the child provided that the contract for purchase became unconditional. It was on this basis, of the projected move to a newly-purchased property, that the respondent prepared the budget showing estimated expenditure of $55 weekly".

Counsel for the husband attacked the order on two grounds. "He first of all submitted that having regard to the requirements of the Domestic Proceedings Act 1968 the applicant for a maintenance order must show a need for maintenance, that no order ought to have been made on 20 May 1974. Alternatively under the same submission, he contended that there should have been an adjournment of the application for a maintenance order or, by way of further alternative, an interim order for a much smaller sum than the $23.00 per week. It was his argument that by one or other of such means the future development of the respondent's circumstances could more accurately be assessed and that it was not appropriate as at 20 May 1974 to make the final order which the learned Magistrate in fact made".

His second submission was that "assuming it was a case for the making of an order for

maintenance as at 20 May 1974, nevertheless the budget of expenditure produced by the respondent was uncertain in more than one material particular. [He] drew attention to the absence from that budget of any receipt from the respondent's mother of a weekly sum of money by way of board or by way of contribution to the specified outgoings on the property which was in the course of purchase. He further pointed to an absence of any information as to whether the household expenses, apart from property outgoings, were to be treated as applicable to the entire household in contemplation, which included the respondent's mother, or whether they had been confined to the household expenses estimated to be incurred in relation to the respondent and the child alone. It was therefore contended . . . on the second of [the] two main submissions that the amount of $23 per week which the Magistrate had ordered was far too high, having regard to the uncertainties which were inherent in the budget produced."

It was contended for the respondent wife "that she had sufficiently demonstrated in the Court below the likelihood of not receiving proper maintenance and support, and that she had further demonstrated a specified need for future maintenance. He therefore answered the first of the two submissions of counsel for the appellant by arguing that jurisdiction to make a final order had existed as at 20 May 1974. In relation to the second of the submissions of counsel for the appellant, it was argued . . . that the budget produced on 20 May 1974 had been carefully examined by the learned Magistrate and had not been found to be over-stated and that, while [it was] acknowledged that further attention might have been paid to the extent (if any) of monetary contributions to be received from the respondent's mother, nevertheless in general terms the learned Magistrate had correctly assessed the needs of the respondent as they were at that time known to the respondent herself."

Mahon J dealt with the first submission advanced by the husband's counsel as follows: "I am disposed to accept the argument of [counsel for the wife] that there were sufficient facts adduced before the learned Magistrate on 20 May 1974 to warrant the making of an order for maintenance. It was not, as I see it, a case for adjourning the application. On the other hand, there is considerable force in the submission of [counsel for the husband] that a final order should not have been made and in this regard the dominant consideration, as relied upon by [counsel for the husband], is of course the overall uncertainty of the future financial position of the respondent in relation to her economic needs. But having said that, I think that the Magistrate was right in deciding to make a maintenance order on 20 May 1974 in some amount or other."

His Honour then turned to the second submission of counsel for the husband with the observation that the budget reflected contingent expenses only. He continued thus: "Some of those expenses were obviously going to be incurred in the very sums specified in that budget if the contemplated purchase of the property was effected. I am referring here more particularly to the amount of weekly outgoings on the property. Again, certain household expenses could no doubt be predicted with accuracy but as [counsel] has pointed out, the budget is inconclusive in its terms as to whether the total household expenses include a provision for the respondent's mother. But perhaps the most important consideration on this branch of the case is the absence of any allowance on the credit side of the budget for a monetary contribution by the respondent's mother either by way of board or by way of specified contribution towards the outgoings on the property. It was at one point suggested in the Court below that the mother intended to make a gift of moneys to the respondent in order to assist her to pay for her equity in the new house, but it appeared on the hearing of today's appeal that a cash sum has been lent by the respondent's mother to the respondent. Even if the cash so paid over had represented a gift from the respondent's mother, I think I would have been obliged to consider the relationship of that transaction to the proved past services of the respondent in the dairy which has now been sold. There seem to have been no accounts produced in the Court below in relation to the operations of that business, but the learned Magistrate appeared to accept that the respondent had obtained some monetary benefit from the business because he declined to make an order for past maintenance. However, as events now turn out, it seems unnecessary for any inquiry of that kind to be made because the disposition of money between the respondent and her mother appears to be by way of loan."

The learned Judge accordingly concluded that "an allowance ought to have been made in the Court below for the possibility that there would be a monetary weekly contribution by

the respondent's mother towards the general household expenses. The other point in the budget refers to $3.50 per week said to be spent by the respondent in running the motorcar belonging to her mother, the respondent's case being that she used that vehicle to a far greater extent than her mother. This occurred to the learned Magistrate as a doubtful item and I agree with this view. Looking at the matter overall, I am satisfied that [counsel for the husband] is right in his fundamental point, that the financial position of the respondent was only presented on a contingent basis and that an allowance ought to have been made for future weekly contributions either to be made or, alternatively, to be treated by a Court as payable by the respondent's mother, in respect of her accommodation in her daughter's house. I am further satisfied that the budget, even as presented, must be reduced by a slight extent having regard to the car-running expenses to which I have referred."

In his Honour's view "an allowance ought to be made in the sum of $12 per week to allow for those contributions by the respondent's mother which in my view are reasonably to be expected, and a further allowance should be made of $1 per week in relation to the car-running expenses overstated. It follows from this that, in my opinion, the maintenance order should be reduced by the total of these weekly payments so that instead of being $23 per week the order in favour of the respondent should be $10 per week."

His Honour emphasised in conclusion the point that to vary the order as he had was merely to recognise the inherent uncertainty as to the position of the wife as at the date of the adjourned hearing. He noted that it might be in the future that a fresh investigation of her position, bearing particularly in mind the mother's presence in her household, could warrant a variation of the present order. It might, the Judge added, equally be possible that a reappraisal of the wife's earning ability would show her to be capable of earning more than the $25 weekly as estimated in the Court below. In either case, the party concerned "is, of course, entitled to proceed in the Magistrate's Court for variation of the order being made today". It is respectfully submitted that the learned Judge was right to allow the appeal, thus reducing the wife's maintenance from $23 to $10 weekly.

PRHW

CONFERENCE CORNER

Michael Houston to entertain—On Conference Saturday night, 5 April 1975, the distinguished young New Zealand pianist, Michael Houston, is to play with the NZBC Symphony Orchestra at a special Conference Concert. Mr Houston is being flown back to New Zealand from the USA as guest artist. After works by New Zealand composers, and after a champagne reception while the orchestra is rearranged, the orchestra plans to perform an adaptation of *Trial by Jury*. The concert will be an option to practitioners when registering, and seats not sold then will later be offered to the public.

ESP

Heughan Rennie, that champion of causes publicity, advises that the 1975 Conference secretaries, John McGrath and Michael Shanahan, conscious of the occult, have been thinking for weeks of the need to register early—and as medium for a successful conference have succumbed to the silent powers by hiring a computer (reputed to be a small elderly chap of good habits) who is noting and cheerfully confirming registrations.

Expo architect for Conference decorations—Discussions for floral decorations for the 1975 Conference are well in hand, and the architect responsible for much of the New Zealand display at Expo 1970 has been retained to prepare preliminary sketch plans for a theme and for the actual decorations. Bush lawyer is not expected to feature in the final scheme of things.

RECENT ADMISSIONS

The following Barristers and Solicitors were admitted recently at Auckland: Alan Charles Sorrell (1 November 1974) and Andrew Addison Walter (28 November 1974).

Roger Dennisfield Slade was admitted as a Barrister and Solicitor at Christchurch on 21 November 1974.

AN ANALYSIS OF SOCIAL WELFARE BENEFITS

An edited address given to a Young Lawyers group at Wellington by Mr N P WILLIAMSON, *of the Department of Social Welfare.*

I will assume that you know as much about welfare legislation as I did after my years in private practice—almost nothing. I came to the Social Welfare Department about three years ago in the formative stages of the new department and after running the gamut of private legal practice, from junior law clerk to a senior partner in a modest firm. Because welfare legislation is of prime importance in its impact on the daily lives of ordinary individuals, it is a pity that little attention has been paid to it by lawyers, legal writers or teachers of law.

The department

The department has four sections or divisions:

(1) *Social Work Division*—This deals with general counselling and child welfare, juvenile offenders, children's Courts, adoptions and state wards (about 5,500 at the moment). Currently, this division is trying to aid the birth of the Children and Young Persons Bill. My client in this division is the Director-General.

(2) *Benefits Division*—This is concerned with monetary benefits under the Social Security Act and the Family Benefits Capitalisation provisions. In this case, my client is the Social Security Commission.

(3) *Pensions Division* is concerned with monetary and economic assistance under the War Pensions Act and the rehabilitation of servicemen. My clients here are the Secretary for War Pensions, the War Pensions Board and the Rehabilitation Board.

(4) *Administrative Division.* This is concerned with organisation, staffing, salaries, accommodation, accounting, inspection and also maintenance enforcement under the Domestic Proceedings Act. Here my client is the Director-General through his Administrative Deputy.

The department has 3,000 staff spread over 29 districts. The department's organisation is highly decentralised, that is, very wide authorities are given to local people. The estimated expenditure for 1974-75 is $698 million—almost 30 percent of total Consolidated Revenue Account expenditure. For every five minutes that its offices are open, the department spends about $35,000.

Both the Social Security Act and the Accident Compensation Act are welfare Acts based on the same principle—community responsibility for members in need. The application of this principle in the accident field is new, but the principle itself is not.

Budgets—I understand the Accident Compensation Commission expects it might handle about 70 million this year. Social Security Commission is likely to handle about 700 million.

Cost of administration—The Woodhouse Report said of the Workers' Compensation Scheme that insurers retained for administration costs and profits "approximately 40 percent of the aggregate sum needed for compensation". The report contrasted this with the Ontario Board's 10 percent. The Social Security Scheme last year had an administration cost of fractionally over 2 percent, so that, depending on your vantage point, you could describe it as either efficient or as cheap.

Benefits—Under the Accident Compensation Act the benefits are income-related, taxable, and are not subject to property or income tests. Under the Social Security Act the benefits are flat rate, non-taxable, and are not subject to property tests, but most types of benefit are subject to income tests. The flat rates are variable according to dependants and special individual needs are met by supplementary assistance additions.

Both systems have advantages and disadvantages. Both can work well if they are kept properly adjusted to current economic conditions. These adjustments are dependent upon political decisions, balancing the interests of the payee and the payer. The Woodhouse Report described uniform flat-rate benefits and income-testing as "administrative devices applied to diminish the size of the aggregate amount to be expended". The McCarthy Report, commenting on world-wide systems, said, "Social Security administrators are everywhere prisoners of history, tradition and political will." The McCarthy Commission considered

the advantages and disadvantages of earnings-related social security benefits, but favoured retention of a scheme of selective flat-rate benefits and allowances for the reasons given in chapter 18 of its report.

Types of benefit

Benefits fall into two groups: statutory and emergency. A statutory benefit is one where the applicant has an absolute and enforceable right to the benefit, providing that he or she meets the conditions laid down in the statute (eg, superannuation, age, widows, domestic purposes, orphans, invalids, sickness, unemployment and family benefits). An emergency benefit is one which depends on the discretion of the Commission. So too does supplementary assistance.

Provision for emergency benefits is contained in s 61 of the Social Security Act, which is quite breathtaking in its width and scope. Roughly paraphrased, it says that—providing the applicant is not entitled to a statutory benefit and providing the Commission does not exceed the maximum of benefit rates—the Commission may pay anybody in need any amount on any conditions. That section is actually the cornerstone of the social security scheme, giving it great flexibility.

No statutory benefit is subject to a "property test" and generally speaking no property test is applied to an emergency benefit (although it may be in certain circumstances). However, all benefits, except Superannuation, Miners and Family benefit, are subject to income tests. In simple terms this means it does not matter what property you own you will get a benefit (if you qualify otherwise). However, the benefit will be reduced if your income exceeds certain limits.

Certain benefits are also described as "maintenance-related". They include deserted wives benefits, some categories of domestic purposes benefits and certain emergency benefits. These benefits are required because an applicant does not have the support of either a husband or the father of her child, as the case may be. A normal condition of the grant of benefit is that the benefciary takes such steps as are open to her to obtain maintenance both for herself and her children. With this type of benefit, maintenance received is treated as a direct deduction and not as "other income". An example may help to explain this distinction. A deserted wife who receives $5 per week in maintenance will have the full $5 deducted from her benefit whereas if she also earns $12 per week, the earnings (being "other income" of less than $21 per week) will not affect her benefit. On the other hand an age beneficiary who receives $5 per week maintenance and earns $12 per week will have the whole $17 treated as "other income", and no deduction will be made from the benefit. The distinction lies in the nature of the qualification for the benefit.

In chapter 35 the McCarthy Report discusses maintenance and social security benefits thus:

"The appropriate income support the social security system should give to wives living apart from their husbands and to unmarried mothers cannot be determined without first considering the husband's or father's liability for maintaining them. Our society has always taken the stand that a husband has the primary liability for supporting his wife and children, and in some circumstances the wife must support her husband. Our statute law reflects this by variously enabling the Court to compel the discharge of these obligations. In the same way, our law places the primary liability for the support of an illegitimate child on the parents. Hence it has been accepted throughout the history of social security administration that it is only when these primary liabilities are not fulfilled that the system can rightly be called upon to give income support.

"Some submissions on wives living apart from their husbands, and unmarried mothers, failed to accept this attitude and its reflection in the law. They questioned the propriety of the department insisting, as a condition of granting a benefit, that steps be taken to ensure that the man concerned carried out his responsibilities. Thus it was argued that a wife should be free to refuse to take proceedings against her husband, and to make a personal choice that the state support her and her children. It was also argued that the department's past practice of requiring an unmarried mother to name the father and issue proceedings for maintenance was an unwarranted intrusion into the personal privacy of the mother. In these and other ways, a challenge was made to the stand which has always been taken that any applicant for a benefit should co-operate by ensuring that the primary liability for support is discharged, either by taking action for a maintenance order or by helping enforce an order already made.

Our view is that when the primary liability for the support of an applicant for a benefit

for herself (or himself) or her children is placed by the law on someone else, the department should be entitled to insist that that liability be enforced as a condition of the grant of a benefit. We recognise that there may be the exceptional case where, for example, to help a reconciliation, proceedings should be deferred or perhaps even waived; and we would like to see the department have a discretion to allow that. We do not accept, however, that the issue of proceedings by a wife is as destructive of the chances of reconciliation as some submissions argued. On the contrary, the issue of proceedings is often the step which makes married people face up to the realities of their situation. Moreover, it is not usually until proceedings are issued that the conciliation machinery of the Courts is brought into operation. Nor do we accept that the invasion of the privacy of an unmarried mother which occurs when she is asked to give the name of the father and take proceedings is as serious as contended, especially having regard to the manner in which hearings under the Domestic Proceedings Act are now held.

"In short, we believe that anyone who asks that the taxpayer should support her or her children should be prepared in return to help enforce the primary obligation of the husband or father. . . . If income support is given too readily and without regard to the obligations of other people, husbands, wives, and parents will, in their own interests, seek to throw those obligations on to the taxpayer . . .

"We are aware that there is today a disposition to regard any attempt to enforce marital or paternity responsibilities as attempts to punish the man concerned, or to enforce the observance of moral standards by financial sanctions. Indeed, some submissions to us had this flavour. We wish to make it quite clear that we have not been concerned—and it has not been our place to be concerned—to punish anyone or to enforce any moral standards. But we have been concerned with equity as between social security beneficiaries and the people who provide the money for the benefits. The whole case for adequate benefits rests on the obligation which the community owes towards those who are dependent on it. We are concerned to ensure that the community discharges this obligation. We must be equally concerned to ensure that those who claim on the community discharge theirs.

"It must be emphasised, however, that while it is important that the State should be able to enforce the obligations which men (or women) may have to their dependants, and should have a right to expect the co-operation of those dependants in so doing, nevertheless we regard it as even more important that those dependants should not be left in want. We have made it quite clear (in chapter 22) that "assistance should not be withheld because the man concerned *should* be supporting the family. If the need exists, the community's responsibility is established, and the matter of the man's contribution becomes a separate issue."

Domestic Purposes Benefits

The only statutory benefit to which most wives involved in domestic proceedings may be entitled is a Domestic Purposes Benefit. This is a flat rate, income-tested, maintenance-related benefit. In its statutory form this is a very new benefit. It was enacted as part of the 1973 Social Security Amendment Act passed on 14 November 1973. The general purpose of the amendment may be roughly described as to grant certain categories of persons a benefit similar to that granted to a widow. Section 27B has categories for separated wives, unmarried mothers, divorced women and wives of prisoners and long-term mental patients. It also has a category for men who have lost their wives. Note that applicants under each of these categories must have one or more dependent children. Note also that inability to work is not required so that a woman or man who is able to work may choose to receive a benefit instead. Residential qualifications are contained in s 27A and that section also defines "dependent child" and "husband" in fairly wide terms. De facto relationships are included and the child need not be the child of either of the spouses.

A wife's qualification would come under s 27B (1) (a): "Any woman who is the mother of one or more dependent children and who is living apart from, and has lost the support of or is being inadequately maintained by, her husband".

Note that under s 27B (4) the Commission may refuse a statutory benefit unless a woman has either a maintenance order or an acceptable agreement. Note also the provision of s 61C (1973 Amendment, s 9) whereby the Commission may challenge a consent order or an agreement and is not bound to prove change of circumstances. In March 1973 the Commission sent to the New Zealand Law Society a statement of its general policy and practices

in these matters and this statement was circularised to all practitioners.

The present flat rate benefit (as varied by the 1974 Budget) for a woman caring for three dependent children is $45.95 per week; there is no property test and the first $21 per week of earnings is exempt under income test. Maintenance paid by a husband, either for a wife or her children is taken by the Commission. If, over a period of time, the maintenance paid exceeds $45.95 per week, the excess is paid to the wife. If the wife's personal earnings increase, or if she has income from investments, the income test provisions may affect the amount of benefit. The first $21 per week of other income is exempt. There is a deduction of $1 from benefit for every $2 of other weekly income between $21 and $25 and over $25 there is a deduction of $3 for every $4 earned. It is also relevant to note that the income exemption for statutory Domestic Purposes Benefit is an annual one so that a wife can work full-time for part of the year and then cease work for the rest of the year. So long as her annual income does not exceed $1092 her benefit is not affected. She is entitled to a reduced benefit if her other income is more than $1092 per year and less than about $4250 per year.

Once a woman has been granted a benefit, the provisions of s 27F become operative. The Commission will give notice under s 27F (4) to divert payment of maintenance to the Consolidated Revenue Account. Note the provisions of s 27F (6) under which the Commission is "deemed to be the person to whom and for whose benefit the money is payable pursuant to the order". Note also the provisions of s 27F (8) requiring the Commisson to be served with a copy of any proceedings in relation to the order. Note, too, that the provisions of section 27F apply to maintenance orders under the Matrimonial Proceedings Act 1963. I suspect that some of these provisions are more honoured in the breach than the observance, and that there may be a number of current orders made without jurisdiction.

Supposing a wife takes her three children, leaves her husband, finds temporary accommodation and turns up at one of our district offices. One of our officers or social workers will take an application for a Domestic Purposes Benefit. If she needs cash at once she will probably be given an "immediate needs grant". A social worker will call to see her at her accommodation shortly afterwards. Depending on circumstances, she will probably be encouraged to consider a reconciliation. If she is adamant that she will not return to her husband and agrees to see her solicitor about maintenance, she will probably be granted an emergency benefit. The decision on grant will probably be something like this:

"On the basis that maintenance for the applicant and her three children is being sought, by acceptable agreement or Court order, emergency benefit granted from the date the parties are apart at up to a maximum rate of $45.95 per week. Maintenance payments from the husband from the husband a direct deduction. $21 per week income allowed. D.P.B. to be determined when maintenance matters finalised. Any agreement to be first approved by the Department in relation to quantum of maintenance."

Note that the amount of the weekly benefit is the same as the statutory benefit, but that there is a weekly rather than an annual income exemption. The department will probably confirm from her solicitor that he has been instructed, and check progress from time to time. The wife will get weekly payments and will be asked to sign a certificate weekly as to the amount of her earnings and the amount received from her husband. The following week's payment will be adjusted accordingly.

Future action will then depend upon circumstances. The following are the more usual possibilities:

(1) If the parties reconcile, the Commission will cancel the emergency benefit and probably will not seek a refund of any emergency payments.

(2) If the parties do not reconcile, and the Court makes a maintenance order, then a statutory Domestic Purposes Benefit will be granted.

(3) If the Court refuses an order under s 29 of the Domestic Proceedings Act, the Commission may cancel the grant or it may decide to continue the emregency benefit depending upon the circumstances. The woman's ability to work will be a continuing relevant factor in emergency benefit. As we have noted, such a consideration is not relevant to the statutory benefit.

(4) If the parties do not reconcile and enter into a maintenance agreement on terms acceptable to the Commission, the Commission will grant a statutory benefit.

What sort of terms are acceptable to the Commission? Generally speaking, any terms

which the Commission thinks a Court would be likely to make if siezed of the problem. The Commission does not generally favour a generous property settlement for the wife in exchange for niggardly maintenance provisions to the advantage of the husband. It does not regard principal repayments of the husband's mortgage as wife's maintenance. It considers that the maintenance needs of wife and children have priority over the claims of creditors and over the husband's excessive accumulation of assets or excessively comfortable living standards for himself. These things may be good but are not to be provided by the taxpayer. If the husband seeks a discount for wife's conduct the case should go to the Court since a sound assessment is almost impossible without a hearing. (For further details see the Commission's statement of March 1973.)

According to the Labour Department's half-yearly survey, the average wage for a male in October 1973 was $90 per week gross. The sort of case in which the Commission is frequently involved is that of a couple with several children living in a rented house, or with an S.A.C. mortgage and Family Benefit capitalisation, and a husband's earnings of about $75 per week. In such a case the Commission allows a reasonable standard of living for the husband as a first charge on his wages, and takes the balance in partial repayment of the benefit expended. This is in line with the *Comp-Gaspar-Newton-Taylor* series of cases.

May I now move from a consideration of individual cases to a New Zealand wide perspective. How many State-maintained women are there in New Zealand? The answer is—distressingly large numbers, and increasing rapidly. The number in round figures of maintenance-related benefits in force as at 31 March in each year is as follows:

1968	1,700
1969	3,600
1970	4,300
1971	5,600
1972	7,300
1973	10,300
1974	14,000

You will notice from these figures that:

(a) The numbers have almost doubled in the last two years.

(b) The numbers have more than trebled in the last four years.

(c) The annual increase in the last year is greater than the total number for 1969.

Obviously these figures reflect a rapidly developing social problem of major proportions, whose harvest we shall reap in the years to come. Though there are no statistics on the point, I understand from discussions with senior district officers that the proportion of single women is increasing and that it is approximately equal to the proportion of married women whereas there has been a preponderance of married women in years past.

The figures I have given you do not tell the whole story by any means. They show the net increase. To get a clearer picture we need to look at the number of new benefits granted each year. In round figures, the numbers for recent years ended 31 March are:

1971	4,300
1972	5,500
1973	7,800
1974	9,800

In other words, the net increase of 3,700 in 1974 represents 9,800 new benefits granted less 6,100 existing benefits cancelled or lapsed. In addition, 2,400 applications were declined for one reason or another. Putting this into day to day practical terms, it means that every week the department is keeping about 14,000 maintenance-related benefits going; receives 230 new applications every week of which 190 are granted; and processes the cancellation or lapsing of 110 every week. The most common reasons for cancellation are reconciliations, new husbands, de facto husbands or full time work.

How much do they cost the taxpayer? For the year ended 31 March 1973 the department paid out between $15.5 million and $16 million in maintenance-related benefits and supplementary assistance to those beneficiaries. In that year the department recovered $2 million from husbands and fathers so that for every $8 the taxpayer expended he got $1 back. To the net expenditure of $14 million must be added administration costs which are higher in this area than the overall departmental average of 2 percent, though the work is done as cheaply as possible. For the year ended 31 March 1974 expenditure is likely to have exceeded $20 million and recoveries about $3 million. I predict that in the year 31 March 1975 the expenditure will probably exceed $30 million.

As the department's legal adviser, I am not happy about the comparatively low amount being recovered from husbands and fathers. As I see the situation, wives and mothers are

happy to accept the benefits and reluctant to push maintenance proceedings; their solicitors are not highly active in matters which do not benefit their clients personally or yield particularly attractive remuneration; departmental officers do not have adequate professional help and are swamped with attending to the primary needs of this rapidly increasing group of beneficiaries and their dependants.

To go on benefit or not?

There is a certain amount of misunderstanding about the functions of the department's Maintenance Officers. They are part of the Administrative Division and, although they may act for the Benefits Division in particular cases, they are not part of the Benefits Division. They keep a trust account and pay to their clients only such amounts as are actually received into that trust account. If the woman is on benefit then the client is the Consolidated Revenue Account. If she is not on benefit then the woman herself is the client. In those cases the woman will receive only such amounts as the man actually pays. The most common case where misunderstandings occur is that of a remarried woman entitled to payments of child's maintenance from her first husband for children of the first marriage. The department does not anticipate such payments nor does it guarantee them. The woman will receive only such amounts as the father actually pays. The same is true where a woman, not married or not remarried, is working part time and supporting herself from her earnings and maintenance. Such an arrangement may prove satisfactory if the earnings are good and the maintenance paid regularly. If maintenance payments are irregular the woman may be wiser to go on benefit even though the reduced benefit is lower than the maintenance ordered. She is sure of a regular income and will still receive any maintenance in excess of benefit. If the need arises later, she may also become entitled to supplementary assistance either continuing or lump sum (for things like school clothing) or for advances for minor house repairs.

Direct maintenance

If your client wife decides not to use the free Maintenance Officer service, please advise her to keep an accurate and detailed record of all maintenance paid direct to her by her husband. Otherwise, if the arrangement breaks down, as many seem to, it will probably become another of the incredible messes brought to us far too frequently—and your client will probably lose some, or all, of the arrears to which she is entitled.

Decree absolute

If maintenance is under a registered agreement, please watch out for "self-destruct" clauses. The taxpayer has paid heavily for counsel's shortcomings in this matter.

Supreme Court maintenance orders

Register these promptly under the Domestic Proceedings Act even if enforcement is not required immediately. The Supreme Court office does not give advice to the lower Court or the Maintenance Officer of the making of such an order. I have seen more than one case where a Magistrate, in good faith, has varied or taken other action on an order earlier discharged under s 80 or s 88 of the Domestic Proceedings Act. Maintenance Officers are likewise taking action to enforce discharged orders.

Sex life

The department is sometimes accused of snooping to uncover titillating sexual encounters. It does not. We are not interested in the slightest in women's sex lives. We are interested in their continued eligibility for benefit, which is quite a different matter. The relevant legislation is s 63 Social Security Act which provides that ". . . the Commission may in its discretion . . . regard as husband and wife any man or woman who, not being legally married, are in the opinion of the Commission, living together on a domestic basis as husband and wife . . .". If they join someone in bed after a party or have boyfriends stay overnight, it is no concern of ours. If they commence to live together with boyfriends on a domestic basis as husbands and wives then it does become our concern. If that happens, the Commission will cancel benefits irrespective of the financial contribution made or able to be made by the boyfriends.

Appeal rights

The 1973 Social Security Amendment Act has introduced another important innovation, a right of appeal from almost all decisions of the Commission, including its exercising of discretions. The provisions of s 4 of the Amendment Act came into force on 1 May 1974. Hopefully, only a very small proportion will be appealed of the hundreds of thousands of decisions made every year. The appeal procedure is set out in the amendment. Generally speaking, decisions made in districts under de-

legated authority must be reviewed by the Commission before going to the Appeal Authority. Legal aid is available under the Legal Aid Act. Welfare legislation is of prime importance in the everyday lives of so many people. For a variety of reasons the Courts, and lawyers, have not been much concerned with the administration of welfare laws. I am hopeful that the provision of an Appeal Authority will provide a forum where principles and discretionary policies may be examined and argued. I am sure the Commission will welcome any help it can get from the legal profession in the exercise of its difficult and important functions.

Q—Why are wives allowed to draw benefits without working, with dependent children, when the children will be at school for most of the day? One would think it was a matter of economic policy as much as anything else that they should be encouraged to work. *A*—The answer is because the government has so decided. The reason advanced is, I think, that the community has accepted that it is in the community's interest that a woman who is prepared to stay home and look after her child gives a desirable service to the child and the community and therefore the community pays; I think that's the reasoning behind it. We do not force a widow to take work, and the same conditions have been applied to solo parents. A discussion of the problem is contained in Chapter 22 of the McCarthy Report.

Q—You talked about the "income test" and the "property test", contrasting those two. Could you perhaps tell us exactly what they are and where the contrast lies? *A*—The difference between them is almost identical with the difference between capital and income. Take a practical example—if I fall sick and have no sickness insurance or sick leave entitlement, I apply for sickness benefit. I may have a house, a car, $2,000 in a savings account, some shares plus director's fees from a family company. I will not be required to spend my cash or sell my car or shares or to mortgage my house. My sickness benefit will not be reduced in any way by my possession of these capital assets. If it was so reduced, then that would be a property test. No statutory benefit is subject to a property test.

However, my income will be taken into account, ie, the interest on my savings account, the dividends on my shares and my continuing director's fees. If such income exceeds the allowable limits then my sickness benefit will be reduced accordingly. That is an income test. All benefits are subject to an income test, except family benefit, miner's benefit and superannuation. Benefits subject to income tests are sometimes called "means tested benefits", but I think the term "income-tested" is more accurate.

There is a discussion of this topic in Chapter 15 of the McCarthy Report.

Q—I get the impression now that if it wasn't so easy for women to get a Domestic Purposes Benefit that a large number of marriages would be saved; in other words, that the woman would be forced to go back home and to sort out her differences with her husband. Have you any comments? *A*—That is a delightfully thorny question. I think it's a fair one. The system used to be that way. Again the change is a matter of government policy. The argument for the change is that by and large money alone is quite unlikely to influence a woman to separate; it may possibly tip the scales a bit, but how far no-one really knows. The woman's need is immediate and the community meets that need. The butcher is not concerned whether the dollar proffered is hard earned or worthily received. On more philosophical grounds—is it fair to use an economic weapon to force a woman to continue an arrangement which has become quite unacceptable to her? I suppose the point at issue is whether it is for Society's advantage to have a few cases where separation may have been unwisely facilitated by the readiness of cash as against cases where unwisely separated women and their children are destitute or where women are being kept in a state of near bondage because of financial pressures. Perhaps it is fair to add that a reasonable number of reconciliations do occur where the woman is on an emergency benefit. Sometimes even later still in the proceedings. I wonder if there are large numbers of cases where availability of money has broken up a marriage which would not otherwise have broken up. If so, are the children worse off than they would have been in a partnership held together only by the mother's fear of abject poverty?

Q—May I ask another question which might be called the "loaves and fishes" situation, where there is, say, an income of $60 a week? I was surprised to hear you say $90. It seems that $60 to $70 is much more common; if you have a wife and three children you would say she is entitled to about $46 plus the Family

Benefit (whether you can take it into account or not). There is not enough money to go round. How much do you expect (or how much should a solicitor say, well, it's fair to allow) the husband to have to look after himself? $20? $25? before he would be criticised by your department for negotiating an agreement. There is some artificiality in the way it's done at the present. *A*—To my way of thinking this is really a three-way agreement situation. The department used to refuse to sanction agreements and would insist that the matter be settled by the Court and expect the Court to protect the taxpayer. Largely on my advice the Commission changed its policy: it will now consider approving an agreement. The $90 I mentioned is not the usual figure; that is what the Labour Department says was the average earnings of a male last October. We get a greater proportion of the lower income groups, so I quite agree with you that $60 to $70 is the sort of figure we have to consider frequently. We are concerned to get something round about what we think the Court might award. This varies a bit round the country because Magistrates have different ideas. But I think basically we would look at something like this —out of the $60 allow, say, $35 for the husband's own expenses and divide the balance of $25 between wife and children. Now in that sort of situation we are quite happy to agree to $25. We accept, through bitter experience, that this sort of income can't fully provide for two separated spouses and their dependants. If the husband is ground down to the hopeless stage, then he may cease work or otherwise evade payment entirely. We consider that maintenance should be fair and reasonable and that payment of such fair and reasonable maintenance should be enforced. We try to be quite realistic about de facto situations too.

We try to get a reasonable figure on the particular facts of any case. Where solicitors and the department tend to clash is where the solicitor for the wife says—"Well look, any amount under $46 doesn't benefit my client so I don't care what the figure is." Perhaps he tries to gain some advantage for his client on the property side or over custody at the expense of the taxpayer's weekly maintenance.

Q—When we are writing to other solicitors making offers and saying on what basis we will negotiate, would you like to see us say this offer is subject to approval of the Social Welfare Department? *A*—Yes. This is now not uncommon. I have seen agreements drawn up—"subject to the approval of Social Welfare Department". Personally I don't like them too much. I would prefer to be involved at the negotiating stage.

Q—When you are examining or looking at an agreement, how far are you prepared to go behind the face of the agreement? *A*—We certainly will look at the whole bargain. We are not prepared to agree to the taxpayer's maintenance supplement being increased so that part of the husband's proper maintenance is diverted for other purposes. The taxpayer is the third party involved in these situations and we consider he is best served by a deal which is fair to all three parties. Any of the three who is dissatisfied has the right to have the dispute settled by the Court. We are also practical enough to realise that the break up of a low income family, or even an average income family, is likely to lead to the need for an income supplement somewhere. For example, where a husband has formed a de facto relationship and has children of that relationship we accept that a reduction of his contribution to his wife and children may well be inevitable. If the community insisted upon him meeting in full his prior responsibilities then the community could well end up supporting both women and their children. Similarly the department regards imprisonment for default as a useful sanction but very much a last resort, to be avoided if possible. Where it has been used, periodic detention has proved most effective.

Q—I think it is sufficient, and should be sufficient, and it should be something that should be able to be left to the wife's solicitor to negotiate on behalf of the wife and on behalf of the Social Welfare Department because the interests are really the same. *A*—I wish it were so. Let us be quite realistic in this matter. Wives and unmarried mothers are often extremely reluctant to take maintenance action. Most would probably prefer to take the benefit and avoid proceedings. If the possible maintenance is clearly lower than benefit then there is no personal advantage to the woman. It is only human nature for a busy solicitor to avoid work which does not benefit his client.

Compare a similar situation. When I was in private practice putting forward a claim for damages arising from a motor vehicle accident I found myself negotiating with, and appearing against, the insurance company solicitors. I would liked to have been dealing with an insured who would not be meeting the bill. I am sure he would have been more generous with

the insurance company's money. When I was acting for a client in defending a professional negligence claim my client's insurers instructed their own solicitors and I found myself urging settlement at a reasonably generous figure to protect my client. The situations are similar because the Social Security Fund is really an indemnifier. It meets the woman's basic living costs when the man does not, even though he should meet them wholly or partially.

May I put you to a test? I do not want you to answer other than privately to yourselves. It is usually months after a separation before a maintenance dispute can be heard in the Court and an order made. An order for full past maintenance is usually impractical. How many of you seek an order for interim maintenance in appropriate cases where your client wife is on benefit? There are two Wellington Magistrates listening to me now. I invite contradiction in saying that interim orders are rarely sought in Wellington and, in cases where benefit is being paid, almost never sought. Of course, Wellington is not unique in this respect—the malaise is widespread. I estimate that the taxpayer lost at least $500,000 in the last 12 months because interim orders were not sought in appropriate cases. In most of those cases the solicitor's costs were also being met by the taxpayer from the Legal Aid Fund. Leaving a separated husband with a bachelor income for six to nine months creates social evils. I suggest it is also much more likely to prevent reconciliations than any money too readily supplied to a separated wife.

Again, it is significant that in a fair proportion of cases where agreements are submitted to the Commission for approval, the husband's earnings are understated. I am sure this is not done deliberately. I think that the solicitors for both parties are too ready to accept a husband's stated earnings without adequate verification. Since the department has sought verification under the amendment to s 12 of the Social Security Act the position is showing signs of improvement.

The department has power under the 1973 Amendment to initiate originating proceedings but it would much prefer to have these handled by the woman's own solicitor. The questioner suggested that the woman's solicitor should protect the taxpayer as well as his client. This is obviously the ideal solution, if it works. I consider that it is not working well at present and unless it improves in the future, the department is going to be forced to consider some alternatives or improvements.

Q—If a solicitor was acting for a wife and he suspected the wife was living in a de facto situation, would you expect the solicitor to tell the department? *A*—No. His client is the wife and I don't think he has any legal or moral duty to take action which would deprive her of a benefit even though she is not properly entitled to it. I think his action should be to point out to her that she is not entitled to this benefit, that she is liable to prosecution and that she would be wise to disclose the facts or finish the relationship, one or the other.

CORRESPONDENCE

Adoption consents

Sir,

I share the concern expressed by your correspondent Mr P L Thomas at [1974] NZLJ 509 at the common misapprehension by ladies signing adoption consents that they could have the right to review their decision before the final order is made.

I take the consents to the adoption of their babies of approximately 200 girls a year, and the first point I make is that once they sign, the chances of them withdrawing their consent or changing their mind are virtually nil.

I have, however, noticed that a lot of them come to me with the idea implanted in them by some other well meaning person that their decision need not be irrevocable and there is the six months trial period. I believe it is incumbent upon any solicitor to make it quite clear that the six months period gives the adopting parents the right to change their minds, but certainly does not give this same privilege to the natural mother of the child.

I believe it is essential that the printed explanation on the rear of the standard consent form should commence with a clear statement that what is being signed is virtually an irrevocable document.

BRIAN K. SHENKIN,
Auckland.

ADMINISTRATIVE DIVISION APPOINTMENT

Mr Robert James Maclachlan, of Wellington, a retired Public Servant and former Director-General of the Department of Lands and Survey, has been appointed to the Administrative Division of the Supreme Court, the Minister of Justice has announced.

Mr Maclachlan, who succeeds Mr W H Hartnell, was the Valuer-General from 1957 to 1959 before being appointed Director-General of Lands. He holds a diploma in urban valuation from the University of Auckland and is a registered valuer and a past President and life member of the New Zealand Institute of Valuers.

ACCIDENT COMPENSATION — AIRCRAFT MISHAPS

The provisions of the Carriage by Air Act 1967 and of s 23 (3)-(6) of the Civil Aviation Act 1964—and many other rules of law and enactments—have been materially affected by the provisions of the Accident Compensation Act 1972(*a*). According to s 5 (1) of the Act, which is to be a "code", no proceedings for damages arising (i) out of personal injury by accident(*b*) in New Zealand or death caused by accident in New Zealand, or (ii) out of personal injury by accident or death outside New Zealand for which the victim has cover(*b*) under the Act, may be brought in any Court in New Zealand independently of this Act, whether under any rule of law or any enactment. Only eight enactments have been singled out in the Third Schedule to the Act for specific amendment, among them s 22 of the Carriage by Air Act, which established the liability of the carrier for damage sustained by reason of the death or injury of a passenger resulting from an aircraft accident(*c*). A proviso has been added to s 22 "that such liability shall not extend to nor include any passenger who at the time of the accident has cover in respect of the accident under" the Act.

Section 22 of the Carriage by Air Act is included in Part II of this Act, dealing with domestic carriage by air. There is another reference to the Carriage by Air Act in s 131 (2) of the Act, dealing with claims for damages or compensation(*b*) in the case of personal injury by accident suffered by passengers on international carriage by air within the meaning of the Carriage by Air Act; the rules applicable to international carriage by air are included in Part I of the Carriage by Air Act.

The Act has provided cover for the victims of accidents under three schemes: the earners' scheme(*b*) (Part III of the Act), the supplementary scheme(*b*) (Part IVA of the Act) and the motor vehicle accident scheme(*b*) (Part IV of the Act). The last-mentioned scheme is of no interest for the purposes of these notes.

Subject to the provisions of the Act, all persons have cover under this Act in respect of personal injury by accident in New Zealand (s 4 (2)) and only in the cases and to the extent specified in ss 60, 61 and 63 have persons cover in respect of personal injury by accident outside New Zealand (s 4 (3)).

The earners' scheme provides for the compensation of earners(*b*) who become incapacitated(*b*) as a result of personal injury by accident, and for the compensation of certain dependants(*b*) of earners who have died as a result of personal injury by accident, if the earners had cover under the scheme in respect of the injury (s 54).

In general, only persons ordinarily resident in New Zealand have cover under this scheme, though the provision of s 57 (1) of the Act which specifically referred to this qualification for "continuous cover" has been repealed. Section 2 (9) and (10) and the title of s 60 mention New Zealand residents and s 64 extends, as a special exception, cover under the earners' scheme to persons who are not permanently resident in New Zealand and who are present in New Zealand as members of the staff of diplomatic missions or consular posts, or as officials of another Government or of an international organisation(*b*) or as representatives at a conference convened in New Zealand by an international organisation.

The supplementary scheme provides cover for all persons in respect of personal injury by accident in New Zealand(*d*) if they do not have cover in respect thereof under either of the other two schemes (s 102B of the Act). Persons who are not ordinarily resident in New Zealand and who are entering New Zealand from any place outside New Zealand have cover under the supplementary scheme from the completion of the operation of disembarking on entering New Zealand until they commence embarking on leaving New Zealand for an overseas destination (s 102C). It should be noted

(*a*) As amended by the Accident Compensation Amendment Act 1973 and the Accident Compensation Amendment Act (No. 2) 1973—in the following referred to as the Act.

(*b*) This term is defined in s 2 (1) of the Act.

(*c*) As to the meaning of "injury" and "accident" under the Warsaw Convention and the Carriage by Air Act, see Heller, "Notes on Part II of the Carriage by Air Act 1967" [1968] Recent Law 115-116, and Heller, "Notes on the Revision of Art 17 of the Warsaw Convention" [1971] 20 ICLQ 143.

(*d*) The provision of s 105A of the Act will be discussed later.

that there is a reference to "operations of embarking or disembarking" in s 22 of the Carriage by Air Act which adopted this wording from art 17 of the Warsaw Convention(*e*). This wording has led to litigation overseas(*f*) and it is submitted that the wording adopted in s 102c fails to remove all possible doubts as to the commencement and termination of cover under the supplementary scheme. Does a passenger complete disembarking when he first steps on the gangway from the ship or when he steps from the gangway on land? Does he commence embarking when he passes through the security check at the airport, when he steps on the tarmac outside the terminal building, or when he starts climbing up the steps leading to the aircraft?

The supplementary scheme provides (s 102A of the Act) for the compensation of injured persons and of certain dependants of persons who have died as a result of personal injury by accident, being persons who have cover under this scheme in respect of the injury.

The primary purpose of these notes is to explain how the victims of air accidents and how air carriers are affected by the Act. It is not intended to deal in any detail with the provisions of the Carriage by Air Act or with all the provisions of the Act.

People can be injured or killed by aircraft accidents either as passengers or as members of the crew of an aircraft, or they may, while "on land or water" be injured or killed by an aircraft, or by any person or article falling from an aircraft(*g*). Passengers may be carried on either a domestic or an international flight, and passengers and crew members may be injured or killed either in or beyond New Zealand. The victims may, or may not, be ordinarily resident in New Zealand.

Different rules apply to the various categories of victims.

Accident compensation for passengers on domestic flights

Up to now the rules of Part II of the Carriage by Air Act applied to any carriage by air (not being international carriage(*h*)) performed by a carrier(*h*) as part of an air transport service(*h*) in which, according to the contract(*h*) between the parties, the place of departure and the place of destination are both situated in New Zealand and there is no agreed stopping place outside New Zealand (s 19 (1)). This Act does not distinguish whether or not the accident occurred on or above New Zealand territory (including the territorial sea). According to s 19 (2) of this Act, which is in force in the Cook Island, the Tokelau Islands and Niue, every island in the Cook Islands, Niue, and every island in the Tokelau Islands is deemed part of New Zealand and any carriage between any such islands or between New Zealand and any such island is deemed to be carriage within New Zealand(*i*). In the event of death or personal injury suffered by a passenger resulting from an accident which took place on board an aircraft or in the course of any operations of embarking and disembarking, the carrier is liable up to $42,000, unless he proves that he and his servants and agents had taken all such measures as were necessary to avoid the damage or that it was not possible for him and them to have taken those measures (ss 22, 26 and 28). As mentioned before, a proviso has been added to s 22, relieving the carrier of this liability in respect of any passenger who at the time of the accident has cover in respect of the accident under the Act.

In cases where domestic carriage by air is not subject to the provisions of Part II of the Carriage by Air Act, the rights and obligations of the parties depend on the terms of the contract made, if any, subject to any applicable statutory provisions, such as—if the carrier is a common carrier—the Carriers Act 1948, and if the carriage is not for reward, the Occupiers Liability Act 1962, and on the rules of the common law. Now the provisions of the Act, in particular s 5, have to be added to the aforementioned statutory rules, and persons who have cover under that Act who suffer personal injury by accident or die as a result of such injury, and their dependants cannot institute proceedings for damages arising directly or indirectly out of the injury or death in any Court in New Zealand independently of that Act, and whether under any rule of law or any enactment.

Carriage by air not subject to Part II of the Carriage by Air Act includes carriage in private aircraft, not performed as part of an air transport service; carriage in aero club aircraft if the passenger is carried as a club member and for the purpose of carrying out a function related to his membership; carriage of a person for the sole purpose of receiving or giving instruction in the control or navigation of air-

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(*e*) First Schedule to the Carriage by Air Act.
(*f*) See Heller, Note 3 [1968] Recent Law, p 116, and Heler (1971) 20 ICLQ 146.
(*g*) Section 23 (3)-(6) of the Civil Aviation Act 1964.
(*h*) As defined in s 18 (1) of this Act.
(*i*) See Heller [1968] Recent Law, pp 68-72.

craft in flight; carriage of a guest invited by a passenger, if there is no contract between the carrier and the guest; carriage of a passenger on a helicopter from or to a point in New Zealand to or from a point beyond the territorial sea of New Zealand (eg, a ship on the high seas).

Under s 4 (2) of the Act (see also s 55 (1)) passengers have cover if the accident occurred in New Zealand(*j*). As on many domestic flights the aircraft flies above the high seas beyond the three-mile limit of the territorial sea(*k*), s 105A of the Act provides inter alia that where a person embarks in New Zealand on an aircraft(*l*) to travel from one place in New Zealand to another place in New Zealand, or to return to his place of embarkation without disembarking at any other place, and in either case goes beyond the territorial sea of New Zealand but does not go beyond a limit of 300 nautical miles from any point or points in the territorial sea of New Zealand that person is deemed to have remained in New Zealand. Though this provision establishes a presumption only as to the presence in New Zealand of persons (deemed to have remained in New Zealand), it is submitted that it is meant to include also a presumption that if an accident occurs under the circumstances mentioned in this section within the 300-mile limit, such accident is deemed to have occurred in New Zealand.

Though the Chatham Islands are more than 300 nautical miles from the limit of the territorial sea surrounding the North and South Islands of New Zealand, it is submitted that s 105A of the Act allows the distance of 300 miles to be calculated from the limit of the territorial sea surrounding the North and South Islands in the direction of the Chatham Islands, and in the opposite direction from the limit of the territorial sea surrounding the Chatham Islands. As the Chatham Islands are only some 500 miles distant from Christchurch and Wellington, an aircraft on a domestic flight to and from the Chatham Islands does not go beyond the limit of 300 miles from the North and South Islands and the limit of 300 miles from the Chatham Islands, and, consequently, an accident which occurs on a flight between New Zealand and the Chatham Islands (in both directions) is deemed to have occurred in New Zealand.

Another problem arising both under the Carriage by Air Act and the Act must be noted: a flight in a helicopter of a passenger from or to a point in New Zealand to or from a point beyond the three-mile limit of the territorial sea (eg, to or from a ship) is—as mentioned before—neither a domestic flight under s 19 of the Carriage by Air Act (because the places of departure and destination are not both in New Zealand) nor a flight from and to a place in New Zealand without disembarking at another place (s 105A of the Act). The passenger, consequently, cannot claim, in the event of an accident over the high seas, under Part II of the Carriage by Air Act, and he can claim under the Act only if ss 60, 61 or 63 apply and if he is entitled to cover under the earners' scheme; the supplementary scheme applies only in respect of personal injury by accident in New Zealand.

The Act has taken care of certain accidents which may occur in flight between New Zealand and a point in, on or above the continental shelf(*b*). Persons who are ordinarily resident in New Zealand and who work in the course of their employment(*b*) under a contract of service or apprenticeship in, on or above the continental shelf in connection with the exploration of the continental shelf, or in connection with the exploitation of the mineral or other natural non-living resources of the continental shelf, are deemed to work in New Zealand, if such persons suffer personal injury by accident in the course of that work or while travelling for the purpose of that work from New Zealand to any point over the continental shelf, or from one point over the continental shelf to another point over the continental shelf, or from one point over the continental shelf to New Zealand; that accident is deemed to have occurred in New Zealand (s 3 (9) of the Act). Cover has also been extended for the benefit of persons, being ordinarily resident in New Zealand, who carry on business(*b*) in connection with the exploration or exploitation of the mineral or other natural non-living resources of the continental shelf and suffer personal injury by accident under the circumstances mentioned before (s 3 (10) of the Act). It is clear that accidents above the continental shelf by persons engaged in other activities (eg, fishing) are not covered under these provisions, unless they are entitled to cover under the earners' scheme for accidents beyond the limits of the land areas and the territorial sea

(*j*) As defined in s 4 of the Acts Interpretation Act 1924.
(*k*) See the Territorial Sea and Fishing Zone Act 1965, s 3.
(*l*) "Aircraft" has not been defined in the Act—see a definition in s 2 of the Civil Aviation Act 1964.

of New Zealand (ss 60, 61 and 63 of the Act) or if the provision of s 105A is applicable.

Carriage between New Zealand and any place in the Cook Islands and Niue (there is, at present, no airport in the Tokelau Islands) is classified as domestic (not as international) carriage in s 19 (2) of the Carriage by Air Act(*m*) and up to the coming into force of the Act the carrier was liable under ss 22 and 28 of this Act for injury or death of a passenger to be carried only between these places up to an amount of $42,000. Under the Act, the following distinction has to be made regarding compensation claims of those passengers injured or killed who, under their contract of carriage, are to be carried between (not beyond) these points:

On a flight from or to New Zealand to or from the Cook Islands or Niue: All persons entitled to cover under the earners' scheme have cover under this scheme if the accident happens over New Zealand land areas or territorial sea. The same applies to persons entitled to cover under the supplementary scheme provided they are ordinarily resident in New Zealand (s 120B of the Act). If the accident happens beyond the limits of the territorial sea of New Zealand, only those persons are entitled to cover under the earners' scheme who qualify under ss 4 (3), 55 (2), 60, 61 and 63 of the Act (these provisions will be discussed below in connection with accidents occurring on international carriage by air). Persons entitled to cover under the supplementary scheme, whether ordinarily resident in New Zealand or not, are not covered under this scheme in the event of an accident beyond the limits of the territorial sea of New Zealand (over the high seas or over or in the territory of any of these islands or over or on any other territory).

The cover under the supplementary scheme of persons who are not ordinarily resident in New Zealand and who are leaving New Zealand for the Cook Islands or Niue ceases when they commence to embark on the aircraft in New Zealand; and the cover under this scheme of persons who are travelling to New Zealand from these islands commences only with the completion of the operation of disembarkation from the aircraft in New Zealand. In respect of all persons not covered on this flight under the earners' or the supplementary scheme the legal position under s 5 (1) of the Act is as follows:

Passengers entitled to cover under the earners' scheme in New Zealand, but not covered by the provisions of ss 60, 61 or 63, can claim under the Act for an accident which occurs on or over New Zealand territory, but they are not entitled to claim under the Carriage by Air Act, under the contract of carriage or under any other rule of law or any other enactment. In the event of an accident outside New Zealand land territory or territorial sea these persons (who are not covered under ss 60, 61 or 63) can claim under Part II of the Carriage by Air Act and under any other applicable contractual or statutory provisions and rules of law.

Passengers not entitled under the earners' scheme, but only under the supplementary scheme, can claim under this scheme, but not under the Carriage by Air Act in respect of personal injury by accident in New Zealand, provided they are ordinarily resident in New Zealand. In the event of an accident outside New Zealand land territory and territorial sea they are entitled to claim under Part II of the Carriage by Air Act and under any other applicable contractual or statutory provision or rule of law, but not under the Act.

Passengers entitled to cover under the supplementary scheme under the provision of s 102c of the Act can claim under this Scheme, as mentioned before, only between the time when they have completed disembarking in New Zealand and until they commence embarking in New Zealand. If an accident happens over or on New Zealand land territory or territorial sea before disembarkation or after embarkation, these passengers who are not ordinarily resident in New Zealand cannot claim under the supplementary scheme, but under s 5 (1) they are also precluded from bringing action in any Court in New Zealand under any rule of law or any enactment. It is submitted that no other conclusion can be drawn from the wording of s 5 (1), because the words "accident in respect of which he has cover under this Act" refer only to accidents outside New Zealand. If this interpretation would be adopted by the Accident Compensation Commission(*b*), these passengers ought to obtain compensation and rehabilitation assistances by way of ex gratia payments under the provision of s 179A of the Act.

(*m*) Under s 24A of the International Air Services Licensing Act 1947, an air service between New Zealand and any such island, or between any such islands shall be deemed to be an international air service within the meaning of that Act.

Accident compensation for passengers carried on international flights

Part I of the Carriage by Air Act 1967 gives effect to the provisions of the Convention for the unification of certain rules relating to international carriage by air, opened for signature at Warsaw in 1929, as amended by a Protocol opened for signature at The Hague in 1955, and supplemented by a Convention for the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier, opened for signature at Guadalajara in 1961; the Warsaw Convention with the amendments made by The Hague Protocol is set out in the First Schedule to the Carriage by Air Act and the Guadalajara Convention is set out in the Second Schedule to this Act. Under certain circumstances the provisions of the Carriage by Air Act 1940 are still applicable (see s 15 of the Carriage by Air Act 1967). The provisions of the amended Warsaw Convention and of the Guadalajara Convention, as far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors and consignees, and other persons, and subject to the provisions of Part I of the Carriage by Air Act, have the force of law in New Zealand in relation to any carriage to which the amended Warsaw Convention or the Guadalajara Convention applies, irrespective of the nationality of the aircraft performing that carriage (s 7 of the Carriage by Air Act 1967; see also s 2 of the Carriage by Air Act 1940).

The amended Warsaw Convention applies, according to art 1, to all international carriage of persons, baggage or cargo performed by aircraft for reward; it also applies to gratuitous carriage by aircraft performed by an air transport undertaking. For the purposes of the Convention, the expression "international carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

Article 17 of this Convention provides that the carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. Article 22 (1) and (5) limits this liability for each passenger to the sum of 250,000 francs, meaning a currency unit consisting of 65.5 milligrammes of gold of millesimal fineness 900. This sum may be converted into national currencies in round figures and this conversion into national currencies other than gold is to be made, in case of judicial proceedings, according to the gold value of such currencies at the date of the judgment. According to s 10 (4) of the Carriage by Air Act 1967, the Minister of Finance may specify, by notice in the *Gazette*, the respective amounts which for the purposes of art 22 of the Convention, and in particular para 5 of this article, are to be taken as equivalent to the sum expressed in francs in that article(*n*).

According to s 5 (3) of the Accident Compensation Act, the provision of subs (1), which precludes actions for damages arising out of injury or death in respect of which a person has cover under this Act, does not affect any action which lies in accordance with s 131 of this Act.

Section 131 deals in subs (1) with accidents resulting in personal injury or death occurring outside New Zealand, if the person has cover under this Act in respect of the injury and if under the law of the country in which he

(*n*) The question whether the sum expressed in francs is to be converted into national currencies according to the official value of the US dollar in terms of gold (US$42.2222 per fine ounce) or according to the free market value (recently exceeding US$170 on the London market) has been discussed by Heller, "The Warsaw Convention and the 'Two-Tier' Gold Market" (1973) 7 Journal of World Trade Law 126; see also Allan I Mendelsohn, "The value of the Poincaré Gold Franc in Limitation of Liability Conventions" (1973) 5 Journal of Maritime Law and Commerce, 125. A *Gazette* notice under s 10 (4) of the Carriage by Air Act has not been issued.

suffers the injury, or under the law of any other country (except New Zealand), or pursuant to any international convention or agreement or protocol, a claim for damages or compensation in respect of the injury or death lies on behalf of the person or on behalf of the administrator(*b*) or the widow or widower or a child or dependant of the person.

Subsection (2) of s 131 refers specifically to personal injury or death by accident, either within or outside New Zealand, of passenegers on international carriage within the meaning of the Carriage by Air Act 1967(*o*), if the passenger has cover under the Act in respect of the injury, and if a claim for damages or compensation in regard of the injury or death lies on behalf of the passenger, the administrator or the widow or widower or a child or dependant of the passenger:

(i) Under the law of the country outside New Zealand having jurisdiction in respect of the accident—it is submitted that this covers contractual arrangements made which do not conflict with the provisions of the Convention, such as the standard conditions of contract and of carriage adopted by members of the International Air Transport Association; it is also submitted that it covers statutory and contractual rules applicable under the law of a country in instances of international carriage which is not subject to the provisions of the Warsaw Convention; or

(ii) Pursuant to any international agreement or convention or protocol—this refers to the Warsaw Convention, The Hague Protocol and the Guadalajara Convention; or

(iii) Pursuant to any agreement between carriers in respect of international carriage by air —it is assumed that this refers to the carriage of passengers by an "actual" carrier who by virtue of authority from the carrier who made an agreement for carriage governed by the Warsaw Convention with a passenger, performs the whole or part of the carriage; under the Guadalajara Convention, an action for damages may be brought against the actual carrier in relation to the carriage performed by him.

Subsection (3) of s 131 provides that in the circumstances specified in subss (1) and (2), the Accident Compensation Commission may:

(i) Deduct from the compensation payable under the Act any amount recovered by the enforcement of a claim under subss (1) or (2) or as compensation or otherwise in respect of the injury or death;

(ii) Recover from any person to whom any compensation has been paid under the Act any amount that is in excess of the amount properly payable to that person having regard to the provision of the preceding para (i);

(iii) Require, as a condition precedent to the grant of all or any of the compensation payable under this Act, that all reasonable steps be taken by the injured person (or by the administrator or by the widow or the widower or a child or dependant of the deceased person, or by assignment of rights to the Crown(*b*) to pursue the claim for damages or compensation or any other rights in respect of the injury or death or to enable the claim or rights to be pursued;

(iv) Meet the whole or part of the costs and expenses incurred in pursuing that claim.

The principle on which s 131 is based cannot be challenged: a person should not be allowed to be indemnified twice for the same injury under the Act in New Zealand and by recovering compensation under the law of another country overseas. The application of the doctrine of subrogation appears equitable. It should, however, be noted that the requirement outlined in (iii) above as "a condition precedent to the grant of all or any compensation payable" goes beyond the corresponding provision of s 71 of the Social Security Act 1964. Under the latter provision, the Social Security Commission may refuse the grant of a benefit only where a person has recovered compensation or damages, and the Commission may grant a benefit subject to the condition that it be repaid to the Commission out of any compensation or damages that may be thereafter recovered.

It is hoped that the Accident Compensation Commission will not withhold the payment of compensation on the ground that steps to pursue a claim for damages or compensation, as required by the Commission, were not taken, if this could have an adverse effect on the rehabilitation or restoration of the injured person to "the fullest physical, mental, social, vocational, and economic usefulness" (s 4 (1) (b) of the Act).

This review of the Act reveals that it preserves the rights which passenegers or their de-

(*o*) It should be noted that the definition of "international carriage" in s 18 (1) of the Carriage by Air Act differs from the definition of "international carriage" in art 1 (2) of the amended Warsaw Convention; the former definition does not refer to territories of "High Contracting Parties" but to territories of "countries"; reference to international carriage in s 131 (2) of the Act consequently covers also such carriage which is not subject to the provisions of the Convention.

pendants have under the amended Warsaw and Guadalajara Conventions and under Part I of the Carriage by Air Act in the case of international carriage, whether the accident occurs within or outside New Zealand. In addition to these rights, certain passengers carried under a contract of international carriage have also cover under the Act.

In the event of accidents within New Zealand, all persons who have cover under the earners' scheme or under the supplementary scheme, and who are ordinarily resident in New scheme who are ordinarily resident in New Zealand. In addition to persons ordinarily resident, certain members of diplomatic missions and consular posts have cover under the earners' scheme according to the provision of s 64 of the Act (more fully quoted earlier). Provided a passenger is carried under a contract of international carriage, the aircraft in which he travels or on which he has travelled or is about to travel may be scheduled to make a domestic flight or a flight to or from a place outside New Zealand.

For a person who is not ordinarily resident in New Zealand and who is entering New Zealand from the Cook Island, the Tokelau Islands or Niue, or from any other place outside New Zealand, the cover under the supplementary scheme commences only when the passenger has completed the operation of disembarkation from the aircraft by which he entered New Zealand, and this cover ceases when he commences to embark on the aircraft by which he is to leave New Zealand for an overseas destination. This person cannot claim under the Act if the accident occurs on or over New Zealand territory and if he is still in the aircraft or has not completed disembarkation, and he cannot claim under this Act in the event of an accident after he has commenced embarkation. He can claim, however, under Part I of the Carriage by Air Act in view of the provision of s 131 (2) of the Act.

In the event of accidents outside New Zealand, passengers have cover in respct of personal injury by accident only in the cases and to the extent specified in ss 60 and 63 of the Act (see ss 4 (3) and 55 (2)).

Section 60 (2) provides cover under certain circumstances for accidents outside New Zealand for a period of 12 months for the benefit of persons who are leaving New Zealand and who were entitled to cover under the earners' scheme immediately before leaving New Zealand. If the person leaving is an employee(*b*), the journey must have been undertaken for the purposes of his employment in New Zealand and he must continue to derive earnings from his employment while overseas. If that person is self-employed(*b*), the journey must have been made for the purpose of any business in relation to which this person is a self-employed person. This provision applies to persons intending to be absent from New Zealand only temporarily.

Under s 60 (3) persons leaving New Zealand who were entitled to cover under the earners' scheme immediately before leaving may retain the cover for a period to be approved by the Accident Compensation Commission, if they are employees of the Crown, of a Government Department(*b*) or of a person(*b*) who carries on a business or undertaking conducted in or controlled from New Zealand, or of any other person who carries on a business or an undertaking in New Zealand and to whom the Commission has declared that this provision shall apply. This cover is retained only if the services in respect of which the cover has been approved remain wholly subject to and at the discretion and under the control of the Crown, the Department or the other person.

Section 63 of the Act declares that for the purposes of this Act members of the Armed Forces of New Zealand(*b*) are, as such, employees employed by the Crown and that the provisions of this Act apply, subject to certain exceptions and amendments. This section is included in Part III of the Act which deals with the earners' scheme, and members of the Armed Forces are consequently entitled to cover under this scheme in respect of personal injury by accident in New Zealand, and subject to s 60 of this Act also in respect of personal injury by accident outside New Zealand. Special reference to service "whether in New Zealand or elsewhere" has, however, been made only in para (c) of s 63 (1), dealing with service in a war or emergency.

The provisions of Part I of the Carriage by Air Act, and the international conventions, would apply only if members of the Armed Forces are carried under a contract of carriage made with a carrier (see also ss 2, 13 and 19 (3) of the Carriage by Air Act, Art XXVI of The Hague Protocol of 1955, and s 79 of the Defence Act 1971(*p*).

(*p*) See Heller, "Armed Forces performing public services—comment on s 79 of the Defence Bill" [1971] Recent Law 219.

Accident compensation for airmen

"Airmen" means, according to the definition in s 2 (1) of the Act, an earner who is employed as the captain or an officer or member of the crew of an aircraft by the owner or charterer thereof; and includes any person employed to do work on an aircraft which will involve his being on the aircraft while it is airborne. It is submitted that this definition is wide enough to include earners "engaged" (not necessarily "employed") in work on aircraft which will involve them being on the aircraft while it is airborne, eg, representatives of the aircraft manufacturer or of the manufacturer of equipment engaged in checking duties, civil aviation or other inspectors, persons carried for the purpose of receiving or giving instruction in the control or navigation of aircraft in flight (see the definition of "passenger" in s 18 (1) of the Carriage by Air Act).

Section 61 (1) provides that while any New Zealand airman(*b*) has cover under the earners' scheme in accordance with this section, the cover extends to personal injury by accident outside New Zealand (cover for accidents in New Zealand has been provided by s 55 (1)). The rule applies according to subs (4) to every New Zealand airman while he is engaged or employed as such by the Crown(*q*) or by a corporation or company that is incorporated in New Zealand, or by a person who is ordinarily resident in New Zealand. It also applies to every New Zealand airman while he is employed as captain or officer or member of the crew of an aircraft that, at the time of the accident, is being operated or flown between points wholly within New Zealand. This provision is believed to mean that New Zealand airmen who are employed by an overseas employer are entitled to cover under the earners' scheme only if at the time of the accident the aircraft is being operated and flown between points wholly within New Zealand. As an example, a pilot employed by the Australian airline Qantas who happens to be permanently stationed and ordinarily resident in New Zealand does not have cover under the earners' scheme if his aircraft, at the time of the accident, is flown over the high seas, or over New Zealand territory on a flight between Sydney and Auckland. He would have cover only if his aircraft at the time of the accident is operated or flown between two points wholly within New Zealand, such as on a positioning flight between Auckland and Wellington, without regard to the fact whether the accident which caused the injury occurred on this flight whilst the aircraft was over the high seas or over New Zealand territory.

Section 61 (5) provides that except as set out in subss (1) and (4), no person has cover under the earners' scheme in respect of paid employment as an airman, whether in New Zealand or elsewhere. It is submitted that this provision would not preclude an airman from cover for accidents in New Zealand under the supplementary scheme, if he qualifies for such cover either as a person who is ordinarily resident in New Zealand (under s 102B, eg, the Qantas pilot referred to before, if an accident happens over or on New Zealand territory) or under the provision of s 102C (eg, if the Qantas pilot has an accident after he has completed disembarkation from the aircraft or prior to commencing embarkation on an aircraft by which he is to leave New Zealand for an overseas destination).

Section 61 (6) provides that nothing in this section restricts s 59 of the Act, dealing with extension of cover under the earners' scheme beyond the period during which persons are earners (eg, after termination of their employment), and that nothing restricts the application of s 63 of this Act, applicable to members of the Armed Forces of New Zealand. Nothing restricts any cover which a person may be entitled to under s 60 otherwise than in respect of work in paid employment as an airman (eg, if a pilot is sent overseas on airline business other than piloting an aircraft) or during any period for which his cover is deemed to have continued under s 59 (beyond the period of his employment).

Accident compensation for injury to persons on the ground

Section 23 (3) of the Civil Aviation Act 1964(*r*) provides that "where material damage or loss is caused by an aircraft in flight, taking off, landing, or alighting, or by any person in any such aircraft, or by any article or person falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of the damage or loss, without proof

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(*q*) Section 61 (4) refers to the Crown "in respect of the Government of New Zealand". The words under quotation should have been deleted when a definition of "The Crown" was included in s 2 (1) by the Accident Compensation Amendment Act (No. 2) 1973.

(*r*) See Heller, "Trespass, Nuisance and Responsibility for Damage by Military Aviation Activities" [1971] NZLJ 39.

of negligence or intention or other cause of action, as if the damage or loss had been caused by his fault, except when the damage or loss was caused by or contributed to by the fault of the person by whom the same was suffered . . .". Subsection (4) deals with damage or loss caused by a person descending from an aircraft by parachute, and subs (5) establishes the liability of the aircraft operator in place of the owner under certain circumstances.

Section 5 (1) of the Act abolishes this right of action under s 23 of the Civil Aviation Act, and persons who suffer in New Zealand personal injury by accident under the circumstances set out in s 23, or who die as a result of such injury, can claim only under the Act to the extent provided under the earners' scheme or the supplementary scheme.

Insurance(*s*)

According to s 22 of the Air Services Licensing Act 1951 any applicant for an air service licence must furnish proof to the satisfaction of the Air Services Licensing Authority that his liability which may arise in connection with the operation of the service in respect of death or bodily injury to any person and in respect of damage to any property is covered by insurance or otherwise to such extent as the Authority deems reasonable. Under the provisions of s 29 of the Carriage by Air Act every carrier must insure against liability for any damage sustained in respect of which he is liable under s 22 of this Act, or such amount as will provide adequate insurance cover in respect of any such liability.

To the extent that the liability under s 23 of the Civil Aviation Act and under s 22 of the Carriage by Air Act had been covered by insurance, and to the extent that the right of action under these provisions has been abolished by s 5 of the Act in respect of passengers and persons on the ground, carriers will from now on be relieved from the obligation to arrange for insurance cover or for other adequate cover. Considering that s 23 of the Civil Aviation Act provided for absolute and unlimited liability of aircraft owners, and that the Carriage by Air Act (ss 26, 27 and 28) provided for liability of the carrier up to $42,000 in respect of each passenger, it is hoped that the saving of considerable amounts of insurance premiums will enable carriers to arrange for some reduction in air fares.

Passengers to be carried in aircraft, on the other hand, and also all persons who may consider that they are exposed on the ground to the risk of injury or death due to aircraft accidents, or to the risk of articles falling from aircraft (including the risk of articles falling or being sprayed from aircraft engaged in agricultural aviation activities) would be well advised to ascertain whether the extent of compensation for which they have cover under the Act is adequate, considering their personal circumstances. It could well be that many persons will consider that it would be a wise precaution to arrange for their own private accident insurance cover in order to supplement the compensation to which they are entitled under the Act. Section 5 (3) (b) of the Act expressly provides that nothing in this section affects any action for damages by an insured person or his administrator or by any other person for breach of a contract of insurance.

Government departments and private organisations interested in promoting our tourist industry will also have to consider the question whether visitors to New Zealand should not be advised about the effect of s 5 of the Act on claims for damages they may have in the event of injury by accident during their sojourn in New Zealand. It could well be considered advisable for tour organisers to arrange accident insurance cover for the benefit of the tourists who are members of a group visiting New Zealand.

Investigation of accidents

Section 175 of the Act authorises the injured person and certain other persons (including officers, employees and agents of the Accident Compensation Commission and officials of workers' unions(*t*)) to view or photograph the scene of an accident and any plant or equipment connected with the accident. Any person who refuses to allow any authorised person to view or photograph the scene of an accident and any plant or equipment, or who obstructs any such person while he is attempting to do so, commits an offence and is liable to a fine not exceeding $100.

It is regretted that no provision was added to this section in order to safeguard the special duties and functions of the Chief Inspector of Air Accidents under s 18 of the Civil Aviation Act 1964. According to s 19 and regs 7 and 8 of the Civil Aviation (Investigation of Accidents) Regulations (SR 1953/152) access to,

(*s*) Heller, loc cit Note 3, p 122 et seq.
(*t*) Workers' representatives have been entitled to view the scene of an accident under s 133 of the Workers' Compensation Act 1956.

or interference with, aircraft to which an accident has occurred is prohibited. Only persons authorised by the Minister of Civil Aviation, members of the Police Force, officers of Customs or authorised officers of the Department of Agriculture have access to the aircraft, until the aircraft, its parts or contents are released under authority of the Minister to the owner of the aircraft, or, in the case of an aircraft other than a New Zealand aircraft, to the person or persons duly authorised in that behalf by the State or registration.

P P HELLER

STUDY FAVOURS ADOPTION

Adoption is good and may be the best thing for a child born out of wedlock, according to the first longitudinal study of adopted children done in Britain.

The report, by the National Children's Bureau, is a study of a representative group of adopted children, and their parents, since their birth in 1958.

"Growing Up Adopted" covers only seven years of life, and so cannot attempt to cover the problems that might ensue in adolescence, but its conclusions should enhance the attractiveness of adoption to parents without children.

Perhaps the most arresting conclusion for parents is the waiving of the "bad blood" theory, which maintains that "bad blood in an adopted child could at any time triumph over the effects of a loving home".

The report found the whole weight of evidence against this view, which envisages children from "bad" stock reverting to type despite the good social effects of their home life. But if parents fear that this will happen, it could become a self-fulfilling prophecy because children tend to live up to good expectations or down to bad ones, says the report.

Two basic problems are answered by the report, which covers some 180 adopted children. First, how do adopted children compare, at the age of seven, with their peers in the population as a whole? Secondly, since the majority of children available for adoption are born illegitimate, how do those who remain with their natural mothers compare with those adopted in early life?

Here the survey obviously finds 'nurture triumphing over nature. The adopted children at seven are doing as well as, and sometimes better than, other children surveyed, and certainly a lot beter than those who had remained with their natural mother.

Using as their yardsticks the study of emotional stability and educational achievement, the researchers found that of those children who were born illegitimate but adopted, 33 percent had above-average general knowledge compared with 28 percent of the legitimate children studied. And while many were rated higher than the legitimate children on the achievement scale, those children who remained with their natural mother fell low on the scale. Only 10 percent of these were rated above average and 45 percent were judged below average.

Social class within these groups did not alone account for the differences. Of the adopted children living in manual-class homes, twice as many achieved above-average rating in general knowledge as those legitimate children from the same social-class background.

The remarkable part about this picture of stability in adopted children is that generally the adopted child starts life with many disadvantages.

Ninety percent of the adopted group in the survey were born illegitimate. They are likely to have been born to very young mothers, twice as likely to be underweight, not to receive prenatal care, and to be first-borns. Their mothers are more likely to suffer pregnancy stress during the first week of the baby's life which would reflect back to the baby, and then in addition there is the added stress of adoption.

Yet, shows the report, the generally favourable environment of adopted homes outweighed these factors.

Similarly, in tests on oral ability, level of creativity, reading, and arithmetic the adopted children did well. They had better oral ability, were better readers, and had comparable arithmetical and creative abilities as legitimate children. The children who remained with their single mother did worse in all these respects.

JDP