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NEGLIGENCE, REGULATIONS AND THE ROAD CODE

Dewes v W P Martin & Co Ltd [1974] 2 NZLR 139 is a recent appeal with some unusual features. The plaintiff and the defendant were driving along a main highway in the same direction. The defendant commenced a right hand turn into a side road, just as the plaintiff was attempting to overtake him, and a collision occurred. It was night time; the defendant had seen the plaintiff in his rear vision mirror but thought he had time to turn; the plaintiff saw the defendant's right-hand blinker on but thought the latter was stationary on the left. As to the defendant's speed, the Magistrate had said: "55 to 60 mph albeit on an unlighted highway, can hardly be regarded as careless in this day and age. I therefore reject the allegation of excessive speed." The learned Magistrate found wholly for the plaintiff (the overtaking motorist) on both claim and counterclaim.

The defendant appealed and Chilwell J found that the plaintiff was in breach of the Traffic Regulations 1956, reg 8 (1)—passing on a no-overtaking line, and also reg 9 (1)—overtaking or attempting to overtake at or within 30 ft before an intersection. The point of impact was 36 ft short of the intersection so it was clear that the overtaking manoeuvre could not have been completed within the limit. Chilwell J found that the defendant too was in breach of a regulation—viz 6 (1)—failing to keep as close as practicable to the left. The learned Judge went on to say:

> "It is clear from the decision of the Court of Appeal in *Algie v D. H. Brown & Son Ltd* [1932] NZLR 779 that while *a breach of a traffic regulation raises a presumption of negligence,* it is still a question for the Court as to whether, in all the circumstances, there was negligence." (Italics supplied.)

While holding that the plaintiff's breach of reg 8 (1) was not causative, but nonetheless indicated a poor lookout, the learned Judge appears to have then apportioned the liability on the basis of the other two breaches of regulations (ie, one by each party), then adjusted it for the speed of the plaintiff, and found that the latter (the over-taking motorist) was 60 percent to blame and that the turning motorist was 40 percent to blame. He apportioned the damages on both claim and counterclaim accordingly.

No regard seems to have been given to (or at least no emphasis was placed by the learned Judge on) the defendant's breach of the heavy duty of care resting upon him as the turning motorist, to ensure that the way was clear—although the learned Judge did agree with the learned Magistrate that the defendant was negligent in making the turn with knowledge of the vehicle approaching from his rear. Even that negligence does not seem to have been weighed in the scales.

It is respectfully suggested that in these circumstances, and especially on a main highway, the turning motorist must take the greater portion of the blame. A typical apportionment of liability in such cases is 75 percent against the turning motorist and 25 percent against the overtaking motorist. That, in my respectful view, makes far more "road sense" than the assessment either of the learned Magistrate or of the learned Judge.

As for the citation from *Algie v D H Brown & Sons Ltd* quoted above, it is to be found not in the leading judgment of Myers CJ but in a short supplementary judgment of the rest of the Court. It was a case of a plaintiff cyclist shelter-

ing on the left-hand side of a tram, when the defendant came suddenly from the right; the tram made an emergency stop, the plaintiff overshot and a collision occurred. The relevant passage in the judgment actually reads: "Although no doubt a breach of the regulation raises a presumption of negligence, it is still a question for the jury as to whether, in all the circumstances, there was negligence." ("The regulation" of course, referred to the right-hand rule.) It may be true that a breach of the right-hand rule generally does have the effect of raising a presumption of negligence, but there can be no doubt that if the dictum in *Algie v D H Brown & Son Ltd* is advanced as a general proposition then it is wrong, because the breach of a traffic regulation constitutes no more than evidence from which negligence may be inferred—not presumed.

To be fair, Chilwell J did remind himself that the test is "What should the ordinary prudent motorist have done in all the circumstances". With respect he misapplied that test, by concentrating on the statutory breaches.

It is to be regretted that his Honour's attention was not drawn to *Gardiner v McManus* [1971] NZLR 475 where Quilliam J, holding that the breach of traffic regulations gives no right of action per se, followed Smith J in *Black v McFarlane* [1929] GLR 524 where he said (again in reference to the right-hand rule): ". . . it is a statutory traffic regulation. It is clear, I think, that a breach of it can give no right of action to the person aggrieved, by virtue merely of the breach. The effect of the regulation depends upon the intention of the statute."

The High Court of Australia in 1967 (in *Sibley v Kais* [1968] ALR 158) over-ruled some older cases, to arrive at the conclusion that the driver with a traffic rule in his favour can no longer rely on its observance by another and said (p 159):

> "But they (the regulations) are not definitive of the respective duties of the drivers of such vehicles to each other or in respect of themselves; nor is the breach of such regulations conclusive as to the performance of the duty owed to one another or in respect of themselves. The common law duty to act reasonably in all the circumstances is paramount . . . . . for there is no general rule that in all circumstances a driver can rely upon the performance by others of their duties, whether derived from statutory sources or from the common law."

This was applied by the full Court of the Supreme Court of Victoria in *Taylor v Miller* [1969] VR 987, where there is an interesting account by Gillard J of how the Judges used to direct juries on this subject contrary to, and notwithstanding, earlier High Court cases which apparently held that a failure to exercise reasonable care *was* constituted by the non-observance of a regulation. (Incidentally, for those few cases remaining, *Taylor v Miller* has some sound pointers on the dangers of actuarial evidence for economic loss.)

Let us leave the regulations for a glance at the Road Code, a spendidly printed booklet for fast-driving practitioners who have not seen it lately.

Yet to be determined in New Zealand is the effect, in a civil case, of a breach of our Road Code. I have myself pleaded against a hapless pedestrian his own failure to carry a white object (para 16.0 of the Code) but I am not aware of any Court's finding on such a plea. In England, s 74 (5) of the Road Traffic Act 1960 expressly provides that a breach of the Highway Code may be relied on, in civil or criminal proceedings, as tending to establish or to negative liability. In *Powell v Phillips* [1972] 3 All ER 864 the Court of Appeal considered the plight of a 19 year old girl who was struck down while she was walking on the roadway just off the edge of the footpath which was impassable because of snow and slush. She suffered appalling injuries and it was alleged against her that she was in breach of the provisions of the Code which said (in effect): "use the footpath; or if there is none, walk on the right-hand side of the road; wear or carry something white or reflective." Stephenson LJ said (p 868 c):

> "It is, however, clear that a breach creates no presumption of negligence calling for an explanation, still less a presumption of negligence making a real contribution to causing an accident or injury. The breach is just one of the circumstances upon which one party is entitled to rely in establishing the negligence of the other and its contribution to causing accident or injury. . . . The perfect pedestrian would I suppose have rushed to the other side every time he found the left-hand pavement uncomfortable . . . but the question is not what was ideal but what was required by common sense; was the common sense codified in these three rules for pedestrians applicable to the conduct of this particular road user on foot, the Plaintiff, at this time and place?"

With the tightening up of testing for drivers' licences, perhaps the time has come for the Minister of Transport to give the Road Code some legal teeth—in both criminal and civil cases. It should be added that claims for the ever-increasing cost of smash repairs will keep the law of negligence at least simmering when the past personal injury plaintiff gives up the ghost. A dose of the Road Code may be an aid to simplicity and avoid over-refinements which can so easily be allowed to creep back into these cases. See, for example, *Rouse v Squires & Others* [1973] 2 All ER 903 (CA) where a driver causing an obstruction on the highway as a result of negligent driving was held liable to motorists becoming involved with that obstruction even though the latter were themselves careless, but not if they were reckless. Thus Cairns LJ (at p 910):

> "If a driver so negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper lookout, but not those who deliberately or recklessly drive into the obstruction, then the first driver's negligence may be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction collides with it or with some other vehicle or some other person."

Both there and in *Dewes'* case the Court has not really succeeded in sorting out the priorities of the truly contributing factors. If the Road Code had been admissible in the Court in *Dewes'* case, all parties would have understood para 4.2.3 which reads:

> "Right turn:
> "(a) 30 m.p.h. Areas .....
> "(b) Other Areas: If the road is clear turn directly to the right but if this might endanger or inconvenience other traffic pull right over to the left (on to the shoulder if there is one) and wait there for a gap in the traffic."

Counsel could have pointed to the comment, printed on a red background, at the end of para 4.2.3 as follows:

> "Right turns on high-speed roads result in very serious accidents. It is therefore even more important that you should check that the way is clear before turning."

A G KEESING

NZ SUPERANNUATION SCHEME HELP FOR EMPLOYERS

As from 1 April 1975, it is superannuation for most of the work force of New Zealand. From that date employers will be required to make deductions from the earnings of liable employees and pay them to either the New Zealand Superannuation Scheme or to an approved private scheme.

Employers will be required to contribute the same minimum amount payable by their employees. It is the responsibility of the employer to deduct and to pay to the Inland Revenue Department each month both the employee's and their own New Zealand Superannuation contributions.

Inland revenue collecting agent—The Inland Revenue Department is the collecting agent for the New Zealand Superannuation Board. Existing procedures for payment of PAYE tax deductions have been extended to include the payment of contributions to the New Zealand Scheme. Forms already in use for tax deductions have been redesigned to include accounting for payments of the contributions and for their annual reconciliation.

Help for employers—A pamphlet setting out the new procedures has been issued to employers and in March a more detailed pamphlet "Inland Revenue Guide for Employers" will be issued. Inland Revenue Officers will also be calling on many employers to help explain the new procedures. Any employer who does not receive the Inland Revenue Guides or is unsure of what to do should get in touch with the nearest Inland Revenue Office.

Bar reluctance colouring image—Most lawyers are unwilling to handle criminal cases and the reputation of criminal law consequently suffers, Chief Justice Samuel Freedman of the Manitoba Court of Appeal recently told the inaugural conference of the Canadian Association of Provincial Court Judges. The result is a distorted public image of the criminal lawyer, coloured by Hollywood and cheap fiction. The Chief Justice called on practising lawyers as a whole to "have the humility" to appreciate "the minorities" of the profession, such as criminal lawyers and the professional law teachers.

CASE AND COMMENT

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

Negligence—Breach of contract—Relationship of contract to tort

The recent judgment of Moller J in *Gabolinscy and Anor v The Mayor etc of Hamilton* (the judgment was delivered on 19 September 1974, No A 116/72) raised a number of interesting questions of law.

The basic facts were not in dispute. From about 1926 onwards the Hamilton City Council had owned an area of land in Hamilton East; the land had first been used by the Council for a gravel pit and a sandpit but by 1946 this particular use had ended, and the land was then used for temporary transit housing. In about 1957 or 1958 the Council subdivided the land into 14 lots, which were offered for lease by members of the public upon certain terms which included these:

> "(a) that the lease should be for twenty-one years from 1st October 1958 'with a perpetual right of renewal for further terms of twentyone years', and (b) that the lessee would 'not later than two years after the commencement of the term ... at his own expense erect on the said land and complete in all respects a dwellinghouse to the value of not less than $2,500'."

The plaintiffs applied for and were allotted lot 4, the lease of which (signed on 15 July 1959) contained those two terms set out. The following November the plaintiffs applied to the Council for a building permit which was issued the next month (in December). Building then began and was finished by July 1960, at which time the plaintiffs went into possession.

Ten years later in 1970 certain fractures in the building became apparent and there was beginning to be a considerable amount of settlement. The plaintiffs employed consulting engineers and as a result of their advice, repairs were effected at a cost of $2958.45.

The plaintiffs claimed that sum together with other sums by way of special damages and also general damages. The plaintiffs' first cause of action was based on an alleged breach of contract, in respect of the implied warranty that the land was suitable for the erection of a dwelling-house. In contract, however, the damages would be limited to the special damages only, so that if possible it was clearly more expedient to proceed in tort, where the damages would not be so limited.

The alternative cause of action was in tort, and this became the main basis of the claim, the allegation being that the Council was negligent in a way that caused damage to the plaintiffs' house. The allegations were that in effect the Council owed a duty of care to the plaintiffs arising out of two characteristics which could be attributed to it. The first arose out of the Council's position as owner-subdivider-lessor, and the second arose out of its character as the local authority having the power to control the building of houses in its area.

The learned Judge after hearing the evidence found, as a fact, that in the crucial area where the extensive settlement of the house occurred:

> "(a) for a distance of about three feet below the surface there was good soil that was generally sound, (b) this layer was clearly identifiable as 'fill' once one knew what was underneath it, (c) what was underneath it was poor quality fill which could be described as rubbish, (d) these poor materials gradually decomposed and settled, and (e) as a result the surface material dropped and the house dropped with it, causing the damage which had had to be repaired."

He also found that

> "the only proper inference from all the evidence, taking into account matters of creditworthiness, is that both the good filling near the surface and the poor filling below it reached their respective positions during the Council's ownership, and between the time when the subdivision was completed and the sections offered to the public. Consequently the Council 'either put the filling there itself, or knew, or ought to have known, that they were there and what were their nature and quality'."

The learned Judge was presented with argument based on *Donoghue v Stevenson* [1932] AC 560, and the effect of *Dutton v Bognor Regis UDC* [1972] 1 QB 373 which clearly bore some similarities to the present. In that case on appeal, the submission was made that *Donoghue v Stevenson* had no application to realty but applied only to defective goods.

Lord Denning MR and Sachs LJ rejected that argument as far as a builder-owner was concerned (although Stamp LJ was a little more cautious). As a result Moller J was able to find that the owner-subdivider (as well as the builder) must owe a duty of care sufficient to found liability if he has been negligent in the preparation of the area for subdivision (see p 9 of the unreported judgment).

It was suggested by counsel for the defendant that in the present case there had been an opportunity for an intermediate examination (which in *Dutton's* case had not been possible). The learned Judge found, however, that in the particular circumstances a purchaser would, and was entitled to, rely on the apparently solid surface layer, that that was a "normal" intermediate examination, and such an examination "would not have disclosed the latent defects below".

Moller J therefore found the duty situation to be that the City Council owed a duty of care to the plaintiffs to take all reasonable care to use suitable filling in development of the section and also to compact or consolidate the land properly before offering it for lease for housing purposes. This the Council had failed to do and was therefore liable (see p 12 of the unreported judgment).

Whilst *Dutton's* case has been looked upon with disfavour by some academics, it is a logical progression from *Donoghue v Stevenson*. The instant case is another in the logical chain coming from *Donoghue v Stevenson*. It is suggested that it may be one of the more important cases in New Zealand tort law in 1974, and, like *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741, shows that New Zealand Courts are prepared to extend the law of negligence given appropriate fact situations.

Two other important questions also arose in this case which the learned Judge had to consider. The first was in respect of the effect of the Limitation Act 1950, the other was in respect of the cause of action in contract for breach of the implied warranty.

Proceedings had been commenced on 15 May 1972; the defendants' argument was to the effect that the claim was statute barred (although the limitation may be postponed as a result of s 28 of the Limitation Act if fraud is involved). Moller J, however, reached the conclusion that where damage is the cause of action, or part of the cause of action as it must be in a claim for this type of negligence, the statute runs from the date of the damage and not from the act which causes the damage, so that, in his view, the proceedings were commenced in time (since the earliest period at which the damage could have started to occur was in 1967). In any event, he found that s 28 could be called in aid to prevent any possibility of the claim being statute barred. He found support for a view that "fraud" in the section is not used in the common law sense, but in the *equitable* sense from the judgment of Lord Denning MR in *King v Victor Parsons & Co* [1973] 1 All ER 206, 209, in which it was said:

> "The word 'fraud' ... is used in the equitable sense to denote conduct by the defendant ... such that it would be 'against conscience' for him to avail himself of the lapse of time. The cases show that if a man *knowingly* commits a wrong ... in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on the Statutes of Limitations as a bar to the claim:"

(see p 18 of the unreported judgment). Therefore the Council's action had amounted to fraud within the meaning of the section.

The learned Judge's views as to the effect of the time from which the period of limitation begins to run will be of considerable importance in all those actions where the damage seems to be separated in time from the damaging event.

As far as the action arising out of contract was concerned, the learned Judge found that, although it would not always be the case and should not lightly be implied, that in this case there was a breach of an implied warranty as to the quality of the land. In contract, since the limitation period would usually run from the date of the breach (which had been in 1959), the action would appear to have been brought out of time, but here again, Moller J was able to impute "fraud" to the Council's actions so that s 28 could be called in aid, and that it would be unconscionable for the Council to take advantage of the primary period of limitation. It must be remembered, however, that any damages for breach of contract would be limited to the special damages, whereas in a tort claim there is also room for general damages, so that the learned Judge gave his judgment in respect of the cause of action in tort.

The case is, also, of interest in that the learned Judge awarded damages for something in the nature of upset and humiliation suffered by both the plaintiffs over the period of time after the damage became apparent.

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

Negligent rape

One of the most controversial issues of general principle in modern criminal law is whether a defendant is entitled to be acquitted of an offence requiring mens rea simply because he mistakenly believed that some circumstance essential to the actus reus was absent, and notwithstanding that he had no reasonable grounds for this belief. Academic opinion generally favours the view that it should suffice that the defendant was honestly mistaken, and any suggestion that there must also be reasonable grounds for the mistake can be dismissed as "hoary error." (Glanville Williams (1951) 14 MLR 485; and see, eg, Campbell, in *Essays on Criminal Law in New Zealand* 1, 7 et seq; Smith and Hogan, *Criminal Law* (3rd ed), 148-151). The reason for this view is that any requirement of reasonableness would be inconsistent with the need for mens rea. For there to be mens rea as to a particular circumstance the defendant must at least be aware that that circumstance might exist, but such a state of mind is negatived by any honest belief that it does not exist, regardless of how foolish or unreasonable that belief might be. To disallow a defence of unreasonable mistake is to convict a person who has been merely negligent as to an essential circumstance, but that would be inconsistent with the general rule that negligence does not suffice to constitute mens rea (eg *R v Walker* [1958] NZLR 810, 816). Notwithstanding this argument there are numerous cases where Judges have assumed that a mistake excludes mens rea only if it is honest *and* reasonable (there is a comprehensive citation of authority in *Handmer v Taylor* [1971] VR 308, 312-315); moreover, the absence of reasonable grounds for a mistake was the ground upon which a conviction for bigamy was affirmed in *R v King* [1963] 3 All ER 561, and in *Sweet v Parsley* [1969] 1 All ER 347, 363, Lord Diplock expressly approved a general rule to the effect that a mistaken belief should provide a defence only if based on reasonable grounds.

This rather fundamental issue had to be considered by the English Court of Appeal in *R v Morgan* [1975] 1 All ER 8. At the invitation of Morgan, and allegedly with his assistance, three young men had sexual intercourse with Morgan's wife. Subsequently these three were convicted of rape, and Morgan of aiding and abetting them. Mrs Morgan testified that she had struggled and screamed, but the defendants claimed that she had manifested consent. Furthermore, there was evidence that Morgan had told his friends that although his wife would consent they could expect some show of resistance, but that this was "a mere pretence whereby she stimulated her own sexual excitement". Thus, there was some suggestion in the evidence that the defendants might have mistakenly believed that the victim was consenting. The trial Judge directed the jury that the Crown had the burden of negativing not only actual consent, but also a mistaken belief in consent, but he added that an honest belief was no defence unless it was also a reasonable belief: "such a belief as a reasonable man would entertain if he applied his mind and thought about the matter."

The Court of Appeal held that this was a correct direction, and expressly rejected the argument that the presence or absence of reasonable grounds for a mistake was no more than an important evidential factor for the jury to consider in deciding whether there in fact might have been an honest mistake. In coming to this conclusion the Court distinguished between two classes of offence: those where the definition of the crime "includes as one of its express ingredients a specific mental element", and those where "the definition of the crime includes no specific mental element beyond the intention to do the prohibited act". The Court was of the view that the rules relating to mistake varied according to which of these two classes a particular offence belonged.

The first class includes those offences where the definition of the offence includes a term which expressly refers to the offenders' state of mind, such as "dishonestly", "fraudulently", "knowingly" or "wilfully". In the case of such offences there will be no case to answer until there is evidence from which the jury can infer the specified mental element, and, furthermore that mental element can be negatived by an honest mistake even though there were no reasonable grounds for it—that factor is only of evidential importance. On this basis the Court of Appeal was able to explain the well known decision in *Wilson v Inyang* [1951] 2 All ER 237; the New Zealand decisions in *Donnelly v IRC* [1960] NZLR 469, and *R v Conrad* [1974] 2 NZLR 626 could be similarly explained.

The Court in *Morgan* concluded that the position was quite different when an offence

of the second type was charged, where "the definition of the crime includes no specific mental element beyond the intention to do the prohibited act". In such a case, once an intentional act is proved, the Crown has no burden of negativing the possibility of a mistaken belief in the absence of essential circumstances until there is some evidence sufficient to raise that issue, and furthermore such a mistake can only provide a defence if there is evidence that the defendant had reasonable grounds for it. The Court explained that:

> "The rationale of requiring reasonable grounds for the mistaken belief must lie in the law's consideration that a bald assertion of belief for which the accused can indicate no reasonable ground is evidence of insufficient substance to raise any issue requiring the jury's consideration." [1975] 1 All ER 8, 14, per Bridge J.

The Court then concluded that the definition of rape (and in England this has to be extracted from the common law) does not require knowledge as to lack of consent, and so the rule relating to the second class of offence applied. It is noteworthy that there is no reference to knowledge in the definition of rape in s 128 of the Crimes Act 1961.

All this suggests a number of comments. Firstly, the distinction between the two types of offence drawn in *Morgan* is in substance the same as that drawn by the New Zealand Court of Appeal in *R v Strawbridge* [1970] NZLR 909, 915, and both Courts agree on the rules relating to the evidential and persuasive burdens of proof, which rules seem to be unexceptionable. Secondly, at first sight the Court in *Strawbridge* also seems of the view that where the definition of an offence does not include some word such as "knowingly", then an honest mistake can only be a defence if it was based on reasonable grounds. That is clearly implied in the way the Court finally answered the question of law submitted to it, but in this respect the judgment in *Strawbridge* is unsatisfactorily obscure. In the last paragraph of the judgment the Court requires reasonable grounds for a mistaken belief which is raised as a defence, but this is the first time in the judgment that such an objective requirement is recognised and no explanation is offered for it; earlier on the very same page of the report the Court had twice said that it was a defence if the defendant "did not know" that the plant in question was a prohibited one, and had said that it was "unthinkable" that Parliament had intended otherwise: [1970] NZLR 909, 916. Furthermore, the Court had quoted two passages from the judgments of Williams and Edwards JJ in *Ewart* (1905) 25 NZLR 709, which appear to have been approved except for the propositions relating to the burden of proof. Neither of these passages suggest that a mistake must be reasonable, but simply assert that the defendant had a defence if he acted without a "guilty mind", without a "tainted mind", "unwittingly", or in "honest ignorance". (see [1970] NZLR at 913-914). Thus, it seems that *Strawbridge* does not provide unambiguous support for the propositions concerning mistake which have been stated in *Morgan*.

The question then arises whether *Morgan* should be accepted in New Zealand, and it is submitted that it should not. If these principles were applied in New Zealand it would mean that the fault requirement (if any) in any particular case would be either actual awareness (recklessness) or mere negligence, but this would depend entirely on whether the statutory definition of the particular offence happened to include an express reference to the offender's state of mind. It is doubtful whether it is reasonable to assume that Parliament, or even the draughtsman, has this kind of distinction in mind when defining offences. The words which Parliament uses are, of course, always of prime importance, but in deciding whether or not an offence is one of strict liability the Courts also have regard to other factors, and in particular they consider whether an offence is "truly criminal". Such an approach is equally appropriate when the Court has to consider whether negligence is or is not sufficient for liability. Also, the "rationale" provided by the Court in *Morgan* does not seem convincing: the defendant may be a credulous fool or he may have been drunk, in which case there seems to be little justification for "the law's consideration" that there is no issue fit for the jury's consideration unless there were "reasonable grounds" for the defendant's mistake. It might be added that if the legal presumption suggested by the "rationale" is acceptable at all, it is difficult to see why it should not also apply when the definition of an offence happens to include some word such as "wilfully": the definition of an offence can have no bearing on what is factually possible in any particular case. In England the heresy suggested by passages in the judgment in *D P P v Smith* [1960] 3 All ER 161 has now been disavowed in that there is now a statutory rule to the effect that a defendant is not to be presumed

to have forseen a consequence merely because a reasonable man would have forseen it (Criminal Justice Act 1967, s 58). It can hardly be doubted that this is also the law in New Zealand, but there seems to be no justification for treating circumstances differently so that a defendant is presumed to have been aware of these provided only that a reasonable man would have been aware of them. No doubt an issue of mistake will very rarely arise in rape cases, but the principle in *Morgan* is of general application and would effectively result in negligence being sufficient fault for criminal liability; this is no doubt acceptable in the context of regulatory offences, but it is submitted that it is unsound when the offence in question is "truly criminal".

G. F. O.

CONFIDENTIALITY OF MEDICAL DISCLOSURES—LOOKING AHEAD

An address given by the HON DR A M FINLAY, *to the Medico-Legal Society of Hawke's Bay.*

The confidentiality of medical disclosures has recently been the subject of much concern. In large part this was prompted by events that took place at the Auckland Medical Aid Centre. Such protection as exists is, of course, to be found in the law relating to privileged documents. As it happened the Torts and General Law Reform Committee has for some time been considering professional privilege generally and had commissioned a series of background papers canvassing the whole spectrum, including the legal profession, patent attornies, legal advice bureaux, medical practitioners, psychologists, accountants and bankers, school teachers, journalists, clergymen and social workers. At my request, made in response to cries of public alarm, I asked the committee to give special priority to medical privilege and I have now received its report.

It makes the initial assertion that the public at large believes there is, and ought to be, total confidentiality in the doctor/patient relationship and that this is to some extent supported by the law. To disclose a confidence may invite action and to divulge information resulting in mental shock to the patient, may involve the doctor in a claim for damages; but total confidentiality does not prevail in the relation to evidence of doctors in Court. At most there is a limited evidentiary privilege.

As a general rule there should be no limitation of matters to be placed before the Court. Every bit of information in any way (however remotely) related to the issues before it must have some probative value and should be excluded only if there is substantial ground for doing so. One may add that there is a growing belief that the present rules of evidence as a whole, are too rigid and complex and withhold from the Court much that ordinary citizens regard as relevant. For example, the hearsay rule, which itself excludes many doctor/patient communications, now largely irrelevant with the advent of accident compensation, but still pertinent to, for example, family protection or maintenance and custody cases.

The existence of medical privilege, it is claimed, encourages people to consult their doctors and to be perfectly frank with them in all medical matters and the committee say this will generally be of practical significance where:

(a) the doctor and/or patient are involved in criminal activity:

(b) disclosure of the truth would prejudice the patient's position in civil litigation:

(c) disclosure of the patient's condition could affect chances of promotion or public office (eg alcoholism):

(d) disclosure could attract a moral stigma (eg, VD).

For my part I am far from convinced that these categories are exhaustive and suspect that most people believe that anything they say to their doctors should remain between themselves, and should be covered by some principle of privacy and not confined merely to restricting what may be said in a Court of law.

Historically and comparatively the subject may be dealt with briefly. Many United States jurisdictions protect from disclosure a wide range of professional communications. By contrast, in the United Kingdom, demands for statutory privilege have been continually rejected. In New Zealand an intermediary position has been adopted. Indeed when first induced to move we moved far and fast, but then pulled back. The Evidence Further Amendment Act 1885 protected communica-

tions to a physician or a surgeon in both civil and criminal proceedings, but in 1895 this was restricted to civil proceedings and with minor linguistic variations, remains to this day, as s 8 of the Evidence Act 1908. The relevant parts of this section are:

> "(2) A physician or surgeon shall not, without the consent of his patient, divulge in any civil proceedings (unless the sanity of the patient is the matter in dispute) any communication made to him in his professional character by such patient, and necessary to enable him to prescribe or act for such patient.
>
> (3) Nothing in this section shall protect any communication made for any criminal purpose, or prejudice the right to give in evidence any statement or representation at any time to or by a physician or surgeon in or about the effecting by any person of an insurance on the life of himself or any other person."

The Committee comments on some points emerging from these words. The phrase, "physician or surgeon", is of course, archaic and should be replaced by the modern term, medical practitioner. "Communication" is confined to one made *to* the doctor but includes signs etc as well as words. Privilege is confined to "medical" disclosures, and being that of the patient, is waivable by him. A contractual relationship is not necessary to establish the status of a patient and it covers, for instance, an accident victim receiving emergency treatment.

Any change must necessarily be in the direction of extending, limiting, abolishing or modifying the terms of the section and the committee dismissed the first three possibilities. In general terms it thought it went far enough but not too far, though some clarification was desirable. Mostly of verbal nature. The words "necessary to enable the medical practitioner to prescribe or act" they found obscure. This could be interpreted either subjectively or objectively and while the authorities point in the direction of the former, the committee thought this should be put beyond doubt and ought to cover matters on which the patient, with his lay understanding of his own complaint, can be expected to reveal if he is to put the doctor in the picture. They thought disclosures made "for the purpose of enabling" treatment to be given would be better. I agree that this is as far as it goes, but question whether it goes far enough, as I will say later.

Linking the disclosures to matters necessary "prescribe or act" is archaic, and proper treatment may or may not involve prescribing. They recommend substituting the words "for the purpose of enabling him to examine, treat or act for such patient".

"Unless the sanity of the patient is in dispute." Again authority seems to suggest a broad construction of the word sanity as being used in a generalised sense, meaning mental fitness. This, however, they thought should be made plain and such situations as arise in cases of testamentary cases specifically covered. They propose adding to the word "sanity", the words "or testamentary or other legal capacity" as well as making this operate wherever such questions were *an* issue and not just the issue.

Although privilege may be waived by a patient, what happens after his death is now far from clear, and the committee recommend that this right be vested in his personal representative.

Special considerations derive from the practice of psychiatry, a discipline that hardly existed when the present statute was framed. The committee feel that this is met by the substitution of "registered medical practitioner" for the existing words "physician or surgeon" but I believe this is inadequate. I have already mentioned the emphasis they placed on the subjective nature of the communication, extending it to anything the *patient* feels should be communicated and presumably this involves some conscious exercise of judgment by him, however ill-informed it may be, or beyond the range of information really required by the doctor. I feel the committee has fallen into fundamental error here, or perhaps I should say misdirected itself as to the nature of psychiatric practice. Essentially it probes below the level of consciousness. Surely if what a patient knows he is saying is to be protected there is an even greater ground for shielding what he either half knows (by virtue of some association induced by the psychiatrist) or still more of which he is totally unaware. For example, words used under hypnosis or the influence of the so called "truth drug".

Clinical psychologists and social workers in my judgment fall into something of the same category and will again call for special treatment. In the meantime, however, the committee refrains from making any recommendation as to them on the ground that having no statutory professional recognition, they are not readily definable. Para-medical personnel like

nurses, physiotherapists, pharmacists etc, they feel call for no special provision in respect of themselves but should be covered when "acting on behalf of" medical practitioners.

So much for evidence in civil proceedings. Criminal cases involve more sensitive issues and I think you will be interested in the verbatim remarks:

"Medical privilige is designed to eliminate any reluctance to speak frankly to a doctor induced by the fear of involvement in legal proceedings. The Legislature, however, has singled out civil proceedings only as deserving of privilege. On one view this distinction is not only unwarranted but illogical, as the strongest case for a privilege can be advanced in the criminal context. A person is more likely to be deterred from seeking medical assistance where criminal rather than civil repercussions are involved. Conversely, there is a stronger public interest than in civil proceedings in ensuring that any determination in the criminal sphere is made with complete knowledge of all the relevant facts. The rationale for excluding the privilege from criminal proceedings is the overriding importance of the proper administration of justice in such cases. Not only does society have a prime interest in protecting itself against such wrongs but the accused should not be denied the right to put forward all evidence which may be relevant to his defence. Medical privilege may work for or against an accused.

"From a reform viewpoint the operation or otherwise of a privilege in the criminal sphere needs to be examined at two levels. The first is where the communication is designed to advance a criminal purpose, while the other occurs where the communication is subsequently rendered relevant to criminal proceedings.

"The first level is catered for by s 8 (3); the statutory denial of a privilege corresponds with that of the common law where disclosure to a lawyer designed to further a criminal purpose is not privileged. The committee strongly affirms this approach.

"The role of privilege at the second level does not permit of the same clear-cut treatment. It is essential at the outset to identify the potential scope of privilege in the criminal sphere in order to gain a practical perspective. Significant admissions are rarely necessary for treatment, and hence the lack of a medical privilege does not generally deter people from seeking medical treatment. In a nutshell, the possibility of disclosure in criminal proceedings of a relevant and admissible communication is rare, and where this does occur the element of public interest outweighs the individual interest in confidentiality. For instance, a physical characteristic or an injury received in the course of a crime may become known to a doctor and serve as a means of identification. On the other side of the coin, where the doctor himself is the accused in criminal proceedings he should be able to adduce evidence of the communication in his defence. For example, on a charge of unlawfully performing an abortion the nature of the woman's communication relating to her reasons for seeking an abortion will be relevant to the doctor's defence.

"One area of criminal proceedings however calls for a different assessment. This is where the medical consultation is itself an alternative to the criminal process. Just as the interests of justice demand that there be no general extension of medical privilege into the criminal sphere, so too in this area the public interest in securing due compliance with the law is achieved by successful medical treatment. This area primarily consists of the problem of drug abuse and addiction. Where society has determined that treatment is merited rather than punishment, a privilege applicable in criminal proceedings is essential to achieve the social objective.

"Drug addiction necessarily involves criminal activity. The addict is in the unfortunate position of being caught between two worlds, the legal and the medical. While his use of drugs outside of medical prescription is illegal, the rigours of the criminal law cannot cure his problem: only medical treatment can. Thus, while society may have a legitimate interest in preventing drug abuse, there is little point in effecting such a policy by the imposition of legal sanctions on those who are beyond legal persuasion. Public policy demands the addict's cure: the alleviation of an individual's medical plight, his re-integration as a valuable member of society, and the avoidance of illegal activities both by the addict and those that stand to benefit from his addiction. An evidentiary privilege protecting the addict's medical confidences from the criminal law would therefore actually promote public policy.

"Apart from the compulsory committal provisions of the alcoholism and Drug Addiction Act 1966, which are of significance in only a few cases, the treatment of addicts is, as it should be, on a voluntary basis. It can be argued that an evidentiary privilege would be of value in fostering voluntary recourse to medical treatment.

"There are two disincentives to an addict seeking medical treatment that might be overcome by an evidentiary privilege: the legal sanction against using or possessing narcotics, and the illegal activities that may have sustained the supply of drugs.

"The law governing narcotics is currently under review and the committee suggests that the Drugs (Prevention of Misuse) Bill may have a gap to the extent that it does not confer any form of evidentiary privilege. While the committee does not claim any expertise in the area, it does recognise the force of the arguments of those who advocate attaching medical privilege to communications made to a registered medical practitioner (including, of course, psychiatrists who are so registered) by the person seeking help with his addiction problem. The committee, therefore, suggests that a privilege available in criminal proceedings be enacted in respect of treatment for narcotic addiction. This suggestion may be implemented by inserting in s 8 (2) the following words: '[a medical practitioner shall not divulge] in any proceedings if the patient is being treated for drug dependency. . . .'

"Moving on to problems other than drug addiction, the committee thinks that to the extent that the cure for certain types of criminal activity lies in the medical sphere, so there is a stronger case for demanding that medical privilege be attached. Such activities include the activities of various sexual deviants, kleptomania, and 'baby-bashing'.

"Many such conditions permit of psychiatric treatment and the committee feels that this avenue should not be closed for fear of subsequent disclosure of communications in criminal proceedings. The committee supports a medical privilege in criminal proceedings covering damaging communications by a patient to a doctor while in the course of treatment for behaviour that constitutes a criminal offence."

PROFESSIONAL INDEMNITY INSURANCE — THE SHAPE OF THINGS TO COME

An abbreviated version of an address delivered by MR D. L. DONALD, *Deputy Managing Director of C T Bowring and Burgess Holdings Limited, to the Canterbury District Law Society, Ashburton Seminar.*

You will all be aware of the question in the proposal form which asks whether any of the partners are aware of any circumstances likely to give rise to any claim against the firm. One solicitor replied, "The continual deterioration in the quality of the staff, the increasing complexity of the law, the general bloody-mindedness of the public and my own advancing years make it more and more likely that a claim will be made against us!" That comment is a succinct precis of my opinion of the shape of things to come.

We have made an assessment that 15 percent of legal firms are now uninsured. This is taken over a substantial area in the country, where we have fairly complete statistics. The survey covered 311 firms. Of these we do not know the circumstances of 13, but we do know that 48 are not insured, 200 are insured through C T Bowring & Burgess Ltd, and 60 have their own insurance elsewhere.

This survey was done earlier last year, and since then a few of those not insured, and some of those insured elsewhere, have since come into the scheme. This is a continuing process, and we expect further developments as a result of the new and attractive terms which are being offered this year. The information we have comes from over 60 percent of the firms practising in New Zealand.

A study of the proposal forms on a statistical basis disclosed that about 30 percent of the members of the scheme reported claims records. These claims circumstances did not necessarily arise only in the previous year activities, but they do demonstrate the frequency of "inevitable negligence"!

Since our scheme commenced in 1964, and over an average membership of 300 firms, in the vicinity of 200 claims have been registered and the last 5 years counts for 150 of them.

Of course the actual number of claims notified does not really tell the whole story. A great many will ultimately fall by the wayside, some will be paid, and some will require legal expenses only. Quite frankly it is impossible to convey the whole picture. This is a study in itself. For example, my most recent assessment indicates that of the 200 or so claims notified since 1964 about 25 percent are unresolved, admittedly the oldest dating back to 1967.

The cost of claims will fluctuate wildly. At times underwriters have had reserves of in excess of $100,000 for various claims, while at the same time having no reserve for others. We can point to examples where the reserve of $100,000 has been finally written off, but something without a reserve has been activated after a dormant period of three years or so. A most recent example requires an estimate in excess of $20.000 for a claim thought to have been dead for about two years.

There are claims floating around in the vicinity of $70,000 to $100,000. Whether they will come to anything will depend upon the vagaries of negotiations.

The first $1,000,000 professional indemnity claim has now arrived in our office, and while this is not for a member of the legal profession, all I can say is that it might have been. It is important that we do not put our head in the sand, while we certainly feel that New Zealand conditions are markedly safer for the practitioner than those currently overseas, the evidence is there, and I can assure you that the practitioner has suffered quite a few worrying nights after the writ was served on him.

We are often asked for guidance on the level of indemnity which should be taken. Quite frankly, only the practitioner can measure this. He must look at his overall exposure, the most common guide at present is an indemnity of no less than $100,000, and on the claims paid on our records, this would have been a safe amount. On the claims outstanding for the actual damages claimed, one could not be quite so positive.

While this guideline has been established, in practice the indemnities taken by firms fluctuate according to their assessment of ability to pay premium. The averages for 1972 showed that firms up to 5 staff were taking $50,000, 6 to 10 staff $70,000, 11-15 staff $90,000, 16-25 staff $100,000.

Bearing in mind that rates have gone down since 1972, and inflation has reduced the value of the indemnities by nearly 20 percent, I would expect the averages to increase substantially this year.

Much has been said about the cost of professional indemnity insurance. I am satisfied that taken over the period of 10 years, the scheme has only just covered itself. And you must remember that the period of 10 years took in almost nominal premiums at the beginning to dramatically increased premiums required in 1971 in the face of a worldwide insurance adjustment. This is levelling out, and the insurance market has returned to a competitive situation, and using this competitive base we have been able to make tangible improvements reflecting the bulk buying power of the scheme.

There is no typical firm, and there really has been no typical policy. You might be interested, however, in the following comparisons:

	Premiums		
Staff	1972	1973	1974
5	481	457	311
9	578	535	383
13	715	540	473

The above includes the automatic extensions now included in the 1974 terms, loss of documents, libel and slander, retroactive liability and liability of outgoing partners. All of these extensions are now included without cost, as our experience has shown that between 60 percent—100 percent of our clients opt to take some or all of the individual extensions.

A major worry in many practices is the failing health of partners. In one case a partner reported his concern for potential claims which might arise and in his advice to the insurers he referred in particular to his fear of delays in registration of filing of documents, loss of documents and unprocessed estates.

Casual conversations can so often result in claims. One solicitor made a casual observation to a client on the character of a fellow professional! This observation was repeated by the client in writing and resulted in a claim for defamation.

Much of this information has been gained over the last 10 years and does provide some experience to plan for the future. There is a need to protect yourself as a practitioner, your partners and employees, and to protect the public against the financial consequences of a wrong act or decision.

We have accepted that negligence is inevitable, so what can be done about it?

Industry and commerce is widely adopting a systematic technique of "risk management". These techniques are becoming more sophisticated, and more people are being involved as professional risk managers. The basic steps followed in risk management are:

(1) Analysis and identification of risks.
(2) Measurement of the financial consequences of such risks.

(3) The means of reducing or avoiding the risks.
(4) The financial ability to retain risks within the firm.
(5) The means of transferring the risks to other parties by insurance or by other means.

It may be helpful to consider professional negligence in relation to this risk management procedure. Firstly, analysis and identification of risks. This must be a continuing process in the light of changing law and experience.

An investigation of claims circumstances over the period 1966 to 1973 has brought forward an interesting analysis. Of the total number of claims surveyed (approximately 150), 16.1 percent were in respect of claims not brought within the prescribed limitation period. I would have liked to have been able to tell you how many of these would have involved personal injury. This will obviously be affected by the Accident Compensation Act. All I can say is that a great many of the claims did *not* involve personal injury. A quick check of the last 64 claims which have been notified disclosed that 7 are in respect of personal injury.

Inadequate drafting of documents accounts for 8.7 percent of the circumstances, and conveyancing mistakes 5 percent. Land Transfer Act involving searches, caveats, easements, mortgages and leases calculate at 14 percent. The liability of solicitors tendering advice as company directors accounted for 1.5 percent of the claims; 6.6 percent are in respect of securities for investments and poor investment advice, 2.2 percent arising out of the Moneylenders Act, 5.8 percent bankruptcy and 2.2 percent for divorce.

A major area could be entitled "mismanagement of practice". This covers areas such as failure to consult clients or to supervise properly, inadequate filing systems and breach of confidence. This section of the analysis accounts for 15.3 percent. Of course, it could be said that claims not brought within the prescribed limitation period are basically mismanagement as distinct from advice mistakes, involving as they do, diary systems, etc.

Another area of concern relates to property and business being the sale, purchase and financing arrangements and including subdivisions. This has accounted for 12.5 percent of the circumstances. Finally, the sundry areas such as debt collecting, copyright and theft account for 9.5 percent.

The second step in the risk management programme is the measurement of the financial consequences of the risks. I briefly mentioned this in discussing the level of indemnity required for the professional indemnity policy, and frankly it can only be assessed by the practitioner having regard to the type of work and deals that he undertakes. For example, the arrangement of a $100,000 or $200,000 mortgage has the potential to cause a loss of that nature. The sale of a business for $1,00,000, some legal inadequacy, an audit mistake, and where do you stand? It must be remembered that it is the simple mistake which can so often totally invalidate a substantial deal. However if you look at the various causes of loss, and relate them to the size of transactions with which you are involved you have some chance of measuring the financial consequences of risk.

Thirdly the risk manager seeks means of reducing or avoiding risks. We outlined ideas in a brochure we prepared regarding professional indemnity insurance, and these included reference to efficient diary systems, bold marking on files (which should be regularly checked), detailed notes of attendances and conversations, the ascertaining of time limits relating to various classes of legislation, the need not to delegate further than is capable of supervision, anticipation of conflicts of interest when acting for more than one party, and ensuring that you always advise clients of material information.

These ideas have stemmed from studies made by underwriters over many years, and I am sure you will recognise them as completely practical suggestions which only really need reviewing from time to time. Other specific steps of reducing the risk might be

(a) Defining the scope of the engagement between the professional man and his client.
(b) Introducing a monetary limitation in the contract with your client. This hardly seems practicable for the legal profession, but it is interesting to note that the New Zealand Institution of Engineers have recently introduced a clause in their conditions of engagement.

The clause states:

"The maximum aggregate amount for which the consulting engineer shall be liable to the principal adviser or to the client in respect of any claim or claims arising out of the engagement of the consulting engineer and the services performed, or to be performed, by the consulting engineer pursuant to, or arising out of, such engagements shall be the sum of $200,000

in respect of either the principal or the client. Such limitations shall apply to every claim whether it arises from contract or tort or otherwise."

The next clause goes on to say:

"At the express request of the client at the cost of the client in all respects, the consulting engineer will endeavour to obtain professional indemnity insurance cover for a sum in excess of $200,000 to be nominated by the client in writing at the time these conditions of engagement are accepted by the principal adviser and in respect of the work which is the subject matter of the consulting engineer's engagement."

This is a new development, and perhaps there are dangers, in now assuming that every liability will arise under contract. What will be the position of the consulting engineer who gives casual advice, etc? I do not propose to comment on this, but I feel sure the idea will be of interest to you.

Another means of reducing risk is the introduction of disclaimers. The New Zealand Society of Accountants has made a recommendation to its members regarding a form of disclaimer and a number of firms are using this. Once again, the problem which has arisen is the possibility of the disclaimer being omitted, or work being done unprotected by the disclaimer.

The liability of individual partners can be reduced by the introduction of limited liability incorporations. This is being widely considered by most professions, and I believe the engineers and the architects are now permitted to practise within the framework of limited liability companies. Of course, it is understood that this does not relieve or diminish personal responsibility for individual acts. Furthermore, it does not reduce the amount of a potential claim or protect the public, but it does at least protect the assets of innocent partners.

Fourthly, the risk manager will consider the financial ability of the organisation to retain risks. This will either be the first part of a claim (the deductible), or the tail end, the uninsured area. In professional practice, the excess is the first part considered, and normally the arbitrary guideline is $1,000 times each partner, or maybe $500 per partner. I say again that this is arbitrary and can only be considered in relation to the financial capacity of the practice and partners to pay. We could have a lengthy discussion on the scientific means by which industry assesses its capacity to stand financial risk having regard to such matters as cash flow, assets, and maintenance of dividends. I imagine that many professional practices would have regard to such criteria themselves.

Finally, the means of transferring the risks to other parties by insurance or other procedures must be considered.

"Other procedures" applies to the imposition of greater responsibilities on consultants such as agents, and by various contractual rearrangements. Nearly all the steps suggested have the effect of protecting the partnership but not the public.

Some societies (notably engineers, doctors, dentists, and architects) have established active professional indemnity societies with a limited form of funding. We have raised similar proposals with the accountants and law societies on various occasions, as we recognise our responsibility to offer advice and to assist our clients in every way possible so as to meet their wishes. This brings us to a controversial field in which I hope my comments may be seen as helpful, and not coloured by self interest.

On all occasions, the strong feeling has come forward from the practitioners that the Society should not involve itself as deeply in the domestic affairs of individual members. This represents the reservations which have been expressed also by a number of overseas societies and organisations representing lawyers and accountants. Additional objections are contained in the opinions that the system must tend to create a monopoly situation unprotected by the competitive pressure inherent in commercial insurance.

There are the extreme uncertainies, particularly with accountants and lawyers, of high claims, and the considerable delays in the settlement which would make the limited base of a specialist fund highly vulnerable, even protected by reinsurance as it could be.

Assessing losses arising from theft or embezzlement is simple compared to the jungle of doubt surrounding responsibility for negligence and alleged losses arising, and I do not believe any great comfort should be taken from the results of the fidelity fund.

Practitioners will have to ask themselves if they wish to develop an ultimate monopoly in professional indemnity insurance, and the extent of interference and compulsion they are prepared to put up within their overall domestic procedures.

There is no doubt that special problems and passions arise for the members of negligence funds over the assessment of premiums having

regard to the records of individual firms and in particular the type of work and risk they undertake. This has already proved to be the Achilles heel of one professional scheme where a substantial section has withdrawn its support.

Equitable decisions are arrived at by insurers who are independent, can assess the situation rather more dispassionately, and have undoubted capital resources to meet problems with a greater degree of equanimity than might otherwise apply.

This leads on to the compulsory insurance schemes being introduced in some parts of the world, notably the United Kingdom Law Society, which has introduced legislation providing for a minimum compulsory cover of about $50,000 on an agreed standard form of policy. This is intended to be protection for the partnership and the public, and will leave the independent arbitration of the underwriters to assess premiums. It will also provide for the choice of insurer thus permitting competitive pressures which exist amongst insurers and brokers to restrain costs. The provision of compulsory insurance will ensure that an adequate statistical base is developed to iron out the humps and hollows of experience, and their officially backed scheme will provide the Society with sufficient information and bulk buying power to maintain a strong watching brief.

I am very pleased to say that for 1974 premium rates have been renegotiated on a more favourable basis. This is brought about by the competitive pressures I mentioned, which we have been able to use to the advantage of New Zealand practitioners. Likewise it does reflect the growing knowledge of the work being undertaken in New Zealand and the risks being run.

The capacity of the Scheme enables coverage up to $2,000,000 to be available rapidly, proposal forms are being simplified and a new policy wording has been introduced. But briefly, for some time we have felt that the old form of policy is somewhat limiting, and does not adequately cater for the rapid changes in professional life to which we previously referred.

The new wording provides for automatic inclusion of the extensions, loss of documents, libel and slander, retroactive liability, outgoing partners' previous business.

In addition, the basic wording provides a wider definition of professional services, deleting reference to specific personal appointments and so on, provides for *Hedley Byrne* and agency liabilities, gratuitous work, employees of the insured, estates and/or legal representatives of partners or employees, recovery of fees and makes provision for any specialist company in which partners are involved (eg, service companies etc).

The term "professional services" shall mean all advice given or services of whatsoever nature provided by or on behalf of the assured provided that the assured shall be entitled to all fees accruing from such services, unless gratuitously provided.

The policy will also include "failure unintentionally, and in good faith to account for monies had and received during the conduct of any professional services as defined herein, by or on behalf of the assured". This covers a "grey" area of interpretation of the current form.

This extension covering recovery of fees indemnifies the assured to the extent of 75 percent of all costs incurred by the assured in connection with legal proceedings taken by them for the recovery of fees outstanding for professional services performed by or on behalf of the assured.

The clause requires prior notice of the intention to take legal proceedings and at first sight it must be thought that actions by the assured against his clients are of no concern to professional indemnity insurers. It is simply a private dispute between assured and client. In a great many cases, however, the refusal to pay the assured his professional fee will be because the client is in some way dissatisfied with the service provided by the assured, either justifiably or otherwise.

On many occasions, therefore, the refusal to pay forces the assured to sue for his fee and this often brings forth a counter claim from the client for breach of professional duty.

The incoming partners extension (covering partners' previous business) remains as an optional extension to the new wording as does dishonesty of employees. However, this latter clause is a combination of the previous fidelity and dishonesty extension, thus tidying up all the loose ends and doubts which existed regarding the interpretation of each section. A further optional extension is in respect of reinstatement of the amount of insurance following notification of a claim.

Most practitioners have great difficulty in deciding what to disclose and not to disclose to underwriters. I don't want to embark on a detailed discussion in this company. The whole

matter surely hinges around the law of contract and common law, with particular regard to what can be defined as material facts. In addition it involves the good will and intention that exists between the parties.

To my knowledge, of all the claims we have processed for accountants and solicitors in the last 10 years, only one claim has been declined as a result of non-disclosure of previous material facts. The background to the case was to say the least unsavoury, and I am sure most of you would recognise the type of situation involved.

Nevertheless, where large sums of money are involved, one can expect the contract law to be carefully studied before any admission of liability is made.

This is a particular area of professional negligence insurance which has given concern to everyone over many years. I believe the techniques evolving will gradually minimise this concern.

The latest innovation which we have been able to introduce for the first time to the New Zealand market are the following clauses:

"Underwriters will not exercise their right to avoid this policy where it is alleged that there has been non-disclosure or misrepresentation of facts or untrue statements in the proposal form provided always that the assured shall establish to underwriters' satisfaction that such alleged non-disclosure, misrepresentation or untrue statement was innocent and free of any fraudulent conduct or intent to deceive. Where the assured's breach or non-compliance with any condition of this policy has resulted in prejudice to the handling or the settlement of any claim or claims, the indemnity afforded by this policy in respect o fsuch claim or claims (including costs and expenses) shall be reduced to such sum as in underwriters' opinion would have been payable by them in the absence of such prejudice."

I believe that these clauses have really only built into contract what has been happening in fact, but I would hope that it does give some measure of reassurance to the assured.

An interesting addition to these clauses which has been negotiated in the United Kingdom for the accounts provides for arbitration by the president of the society concerned. We have not been able to introduce that here, and it is questionable whether it would be wanted. However the idea will be kept under review.

Thus after many years of negotiations, ups and downs, the continuity and accumulation of experience has enabled us to negotiate improved rates and policy conditions this year. We are confident that this will continue, and if there is a change in rating structure, you can rest assured that it will fairly reflect the impact of experience over a long time, and not just on a panic measure basis.

In conclusion I feel I can do no better than to quote a paragraph from a report on professional liability prepared by the New Zealand Society of Accountants.

"While the above are but some of the measures by which a member can seek to minimise his exposure to liability, there is no substitute for the maintenance of high standards of practice at all times. This is the most positive form of protection."

CORRESPONDENCE

Direct Action

Sir,

The extract published at [1974] NZLJ 431 from an address by the Hon Dr A M Finlay sets forth his views on direct action, injunctions, and the situation of unions in the industrial and public areas.

He says, after analysing the situation in Britain where industrial issues are at least as sensitive as here, that "If it were concluded that some specialised tribunal were better fitted to deal with material of this kind than the traditional Courts of law, this would not be to set such a group apart from and above the law". By the "group" he means trade unions, and he proceeds to justify this statement by pointing out that doctors have rights of taking liberties with the body, and government officials have powers of entry and search, all of which the ordinary citizen does not have. He concludes therefore that industrial relations may justify having its own special code of behaviour.

Whether that conclusion is justified many would doubt, but Dr Finlay must realise that setting up a special tribunal may have two products—(a) the introduction of special laws for the industrial area, and (b) the introduction of new ways of enforcing them. It is with (b) that most lawyers will take issue, since Dr Finlay's careful examples of doctors and customs officials only justify (a).

Surely there can never be justification for the enforcement of law to differ from one citizen to another, even though the particular laws each is subject to may not be the same. I find it however inescapable from Dr Finlay's general thesis that less stringent methods of enforcement will bear on unions than the processes of injunction which bear on the rest of us in respect of our own duties.

I think he should not forget what the Court said in the Andersen case, "Distributive justice bears the hallmark of despotism." But distributive justice is what the unions want, and it is surely the duty of the Minister of Justice to see that they do not get it.

Yours faithfuly

JOHN BURN
Christchurch

CONTROLLING WATER POLLUTION

New Zealand possesses a wide range of natural resources, perhaps the most important and abundant being water. Modern society depends on a reliable supply of potable water more than any other single factor. Industry and our pastoral economy could not continue to function without access to an adequate supply of pure water. But water also has important recreational and aesthetic value, and New Zealand is fortunate indeed that there remains an opportunity to preserve areas of existing high quality if decisive action is taken to control water pollution.

If the importance of New Zealand's water resources is to be recognised, the nature and functioning of the legislative controls that govern the use of water must be subjected to careful scrutiny. The Water and Soil Conservation Act 1967 was enacted with the aim of both encouraging conservation of the nation's water resources, and ensuring that they are wisely managed and used in a manner that best serves the public interest. The National Water and Soil Conservation Authority, together with the Water Resources Council and Regional Water Boards have been charged with the administration of the Act. Their record in this field is not exemplary and it is unfortunate that too often where foresight and vigorous action have been required, expedient solutions have been sought and readily adopted.

It is a truism that competent administration of a statute does not automatically follow the enactment of legislation. The administration of the National Water and Soil Conservation Act by the Ministry of Works and Development illustrates this point, since the department's approach sometimes lacks the logical framework or the breadth of vision that the public might expect. The public may not be entitled to exemplary administration of the Act, but the Act itself should at the very least lay down clear policies and provide the means whereby existing pollution can be combated and water quality protected. New Zealand's existing legislation is both vague and deficient in this regard and the Environmental Defence Society has provided extensive documentation to support this view in the form of submissions that were prepared for the review of the Act.

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The National Water and Soil Conservation Authority has recently established a committee to consider submissions made for the review of the legislation, and to bring forward recommendations concerning the form an amended and consolidated Water and Soil Conservation Act should take. It is disturbing to note that the selection of membership of the committee indicates a desire on the part of the Authority to do little other than to execute a few minor revisions to the statute.

Of the 12 members of the committee, four are present or former members of the staff of the Water and Soil division of the Ministry of Works and Development, six are present or former engineers or officers of catchment boards, and one is a former waterworks engineer. Only one is a solicitor.

There is no member representing the Town and Country Planning Appeal Board, the statutory appeal authority under the Act: nor are the disciplines of the biological sciences, planning or law adequately represented.

If a serious attempt is to be made to review the Water and Soil Conservation Act, there is a clear need to enlarge the membership of the review committee to include a sufficiently wide range of skills and experience to permit a fundamental and searching reappraisal of the aims and intentions of the Act to be made.

One of the first tasks that might be considered by such an expanded committee is whether in today's more enlightened environment, the Ministry of Works and Development remains the most appropriate body to administer the Act.

The time may well have arrived when the administration of the nation's two major environmental statutes, the Town and Country Planning Act and the Water and Soil Conservation Act, should be relocated to greener pastures, where the planning ethic and biological realism might receive the same attention as

engineering logic and administrative expediency. An englarged Commission for the Environment that would include the Water and Soil Division and Town and Country Planning Division of the Ministry of Works and Development, as well as relevant sections from other Departments could be one solution to the problem.

SOME THOUGHTS ON ACCESS DISPUTES

Access disputes are undoubtedly the most frustrating area of a family lawyer's work. The legal principles upon which access is granted or refused are simple and straight forward. Access is the child's right. Unless there is strong evidence that it is not in the interests of the child for it to have contact with the parent who does not have custody, the Court will grant access.

Yet access difficulties persist. From my own experience in this field, I would postulate seven common causes of access difficulties.

1 The invisible man syndrome

Some spouses consciously or subconsciously pretend to themselves and their children that as from the time of breakdown of the marriage the other parent has disappeared or ceased to exist. The child is told, "Mummy does not care about us and has gone away" or "You don't have a daddy any more". The appearance of the other spouse would give a lie to this assertion and access is vehemently opposed.

2 The hand grenade syndrome

The child is used as an offensive weapon, and is tossed backwards and forwards between one camp and the other. The child is suitably primed before the access period, and used to cause trouble in the other household. Often the child is encouraged to cause friction between the other parent and the person with whom he or she is living. The motives may be jealousy or vindictiveness, but sometimes a wife who desires a reconciliation and feels that her husband is merely infatuated with another woman may encourage the child to criticise the other woman to her father.

3 The sugar daddy syndrome

The parent who does not have custody very often lavishes money and affection on the child, providing interesting outings, expensive gifts, sweets and ice creams. This may be a deliberate ploy to win the child's affection or may be a substitute for the parent's inability to build or maintain a close relationship with the child. A mother who has the child six days a week often sees this as bribery and feels that the other spouse is taking unfair advantage in providing luxuries for the child when she is struggling to meet the child's needs.

4 The secret agent syndrome

The child is expected to play the role of spy in the other camp. A child may be specifically briefed to report back information which may be valuable to the other parent; information which might help to have maintenance increased or reduced; information about an association which might indicate that divorce evidence could be obtained. More commonly the child is pumped after the access period, sometimes in an attempt to gain useful information; at others out of mere idle curiosity. Children after an access period will naturally chatter about what they have done and heard.

5 The tug of war syndrome

Each parent tries to win the child's sympathy and support explaining and interpreting past actions and events. It is natural for a parent who believes that the other parent was responsible for the break-up of the marriage to influence consciously or unconsciously the child towards his or her point of view. The child is pulled in different directions.

6 The foot-in-the-door syndrome

Quite commonly a father uses his right of access not as a means to maintain a relationship with his child but rather as an entrée to his wife's household. He may want to try to persuade her to become reconciled. He may wish to belabour her or heap recrimination on her. He may just want to keep an eye on her and to see how she is getting on without him. His access right is his admission ticket to her home.

7 The white rabbit syndrome

Like the white rabbit in *Alice through the Looking Glass,* some parents exercising rights of access are always "late for that very important date". The children are dressed up and keyed up in anticipation and are disappointed. At the end of the period the children are returned late

and the other parent is worried. Arrangements are always being altered or cancelled at the last minute.

These are just a few of the problems that dog access arrangements. It is extremely difficult to arrange and maintain good working arrangements for access. Usually the problem is that there is no remaining channel of communication between the father and the mother, except the children themselves. If one may be so bold as to formulate some basic rules:

(1) A mature appreciation by both parents that the *interests of the child are of first importance* is necessary if access is to work satisfactorily.
(2) The child's relationship with each parent should be *encouraged to continue to grow* to the fullest extent despite the separation.
(3) The child should *not be forced to take sides* and neither parent should criticise the other parent (nor his new partner).
(4) A parent should *never "pump" a child for information* about the other parent, should not repeat to other any information obtained and should think very carefully before using any information obtained in this way against the other parent.
(5) Access arrangements should be organised on a basis of a *fixed routine.* Great care should be taken by both parents to ensure that the times and arrangements agreed are strictly adhered to.
(6) Where one or both parents have remarried or have formed another stable relationship, care should be taken that the *child is not confused about its real parent.* The "third person" must take great pains not to influence the child's feelings towards his real parents.
(7) If difficulties should arise over access, the parties should have some *independent and neutral channel of communication.*

The adversary system is totally unsatisfactory for resolving access disputes. Problems arise over access because small matters become magnified through lack of adequate communication or because negative attitudes that were formed during the marriage or at the time of separation persist. These attitudes militate against satisfactory access arrangements. The adversary system serves only to exacerbate differences which are usually quite petty. The parties are forced to take extreme attitudes. It is my view that access disputes should be brought before the Courts only as a last resort. Three practical suggestions are:

(1) At the time that a separation agreement is prepared there should be included in the agreement, or in a supplementary access agreement, a far more detailed "access charter" than the usual brief reference to "reasonable access" which is common practice at present. This is commonly done in the United States. A suggested form of "access charter" follows this article in Appendix I.

(2) Information sheets should be available to be handed to clients who have just separated. Two such sheets are set out in Appendix II. They have been adapted from a booklet "Parents are Forever" devised by the Los Angeles Family Court.

(3) The Court should be given statutory power to refer access disputes to a "conciliator". Such person might be a trained social worker or a marriage guidance counsellor. Court conciliators appointed pursuant to s 16 of the Domestic Proceedings Act might even be willing to extend their work to include conciliation in access disputes. The parties need to be reminded that it is the children who suffer most as a result of access disputes and helped to see each other's point of view.

Since this note was prepared I have seen the "Family Law Bill 1974" at present under consideration by the Parliament of the Commonwealth of Australia. Section 41 gives the Court power in custody or access proceedings "to make an order directing the parties to attend a conference with a welfare officer to discuss the welfare of the child and, if there are any differences between the parties as to matters affecting the welfare of the child, to endeavour to resolve those differences". I believe a similar section should be introduced into our Domestic Proceedings Act.

Appendix 1

CUSTODY AND ACCESS AGREEMENT made this

..... day of 197

BETWEEN ..... (the mother)

AND ..... (the father)

the parents of [*full names of children*].

The father and the mother desire that despite the breakdown of their marriage each should maintain and develop a good and meaningful relationship with the children.

The father and mother have made this agreement concerning custody and access in the hope that it will assist them in achieving this objective.

AND WHEREFORE it is agreed as follows:

1. The mother shall have the right to possession and care of the children of the marriage: ..... born

2. The father shall have reasonable access to the children and in particular:

(a) The father shall have visiting access to each child under the age of two years on one day each week for a period not exceeding 3 hours.

(b) The father shall have daily access to each child between the ages of two and five years on Saturday of each week between the hours of 10 a.m. and 5 p.m.

(c) The father shall have access to each child over the age of five years as follows:

(i) Daily access on every first and second Saturday in each month.

(ii) Overnight access (10 a.m. Saturday to 5 p.m. Sunday) on every third Saturday in each month except in any month where staying access has been requested and granted under (iii).

(iii) After giving six weeks' prior notice staying access for one week during May and August school holidays and two weeks during Christmas holidays.

(iv) The children shall spend alternate Christmas days with the father and the mother and the father shall always be entitled to access to each child for at least one hour on the child's birthday.

3. The mother will keep the father informed as to the child's educational progress and will let the father know promptly of any serious illness or accident suffered by any child and will consult with the father before making any change in the present arrangements as to accommodation, residence or education of the children.

4. Neither the father nor the mother will discuss with the children the circumstances surrounding the breakdown of the marriage nor in the presence of any child criticise or belittle the other parent or any person with whom either has formed a new relationship.

5. The father will keep the mother informed as to the children's whereabouts during periods of access.

6. Each party will strictly keep to the times for picking up and returning the children provided in this agreement and if for some unavoidable reason the children cannot be picked up or returned at the specified time, the father will inform the mother as soon as possible.

7. If either parent wishes to alter the provisions for access or the times specified in this agreement then that parent will immediately give written notification to the other of the proposed change and the other will reply promptly advising whether the proposed change is acceptable. If the parties cannot agree on a proposed change, the matter will be resolved in accordance with cl 9 below.

8. Neither party will remove any of the children from New Zealand without the consent of the other.

9. Should any differences arise between the parties over access or the arrangements as set out in this agreement, the parties agree to refer such differences to a counsellor or social worker nominated by the President of the local branch of the Social Workers' Association, and each parent agrees to abide by the decision of such counsellor or social worker.

Appendix 2

MAKING ACCESS WORK

(1) Access is the child's right—not the the parent's right. But it should be pleasant for the *parents* as well as the child. Each parent should help the child maintain a good and meaningful relationship with the other parent.

(2) A father often asks, "Why should I visit?" He is hurt and he feels because his wife has the home and the children, he is not needed any more. Even though the parents have not been able to get along, the children still need the love of both parents if they are to grow up in a normal way.

(3) It is usually convenient for access visits to a very young child to be made in its home. But as the child grows older, it is easier to establish and maintain a good relationship if the child spends longer periods with the other parent. The child can be taken out for the day and eventually stay overnight.

(4) Keep strictly to the time agreed for collecting and returning the children. Tell the other parent immediately if you can't keep an appointment. If you don't turn up and don't give any explanation, children can be very disappointed and may feel you don't care about them.

(5) Often a father doesn't know where to take the children or what to do with them. Planned activities may add to the pleasure of

a visit, but more important is the father's involvement with the children. Giving of himself is more important than any material things he may give them.

(6) Visits should not be used to check up on the other parent. Children should not be pumped for information, nor be used as little spies. The child may sense the tension between his parents and feel uncomfortable during access visits. He may be afraid that if he does anything to please one parent, the other parent will reject him. In his mind, he has already lost one parent and is frightened of losing the other. For this reason parents should show mutual respect for each other.

(7) A child may be upset or difficult to handle after access visits. This is distressing but should not be used as grounds for discontinuing access. Both parents should make every effort to discuss the problems and to agree on ways of dealing with them.

(8) The parent with custody should always consult the other before making decisions that affect the child such as the child's discipline, education, career. In this way, the parents can avoid undermining the other parent's efforts.

(9) If one or both parents has formed a new relationship or has married again problems often arise. It is usually inadvisable for the child to be encouraged to call the new partner "mum" or "dad". The child is entitled to know who its real parent is. Where a father has access, it is natural that he would want the child to meet his new wife or girlfriend. But a child may feel jealous of the new woman in his father's life and may feel the father cannot care much for him if the father is not prepared to give his undivided attention during access visits.

(10) If disagreements which the parents cannot resolve arise it is advisable for them to enlist the help of a trained counsellor.

HELPING CHILDREN COPE WITH SEPARATION

Guidelines for Parents

(1) Allow yourself and your children time to get used to the new situation in order to recover from the emotional upset which inevitably accompanies separation. It takes a while for things to settle down—but time is a great healer.

(2) Remember the best parts of your marriage and share them with your children so that painful memories can be balanced against happier ones.

(3) Assure your children that they are not to blame for the break-up and that they are not being rejected or abandoned. Children, especially young ones, often mistakenly feel they have done something wrong and that the problems are the result of their misbehaviour. Small children may feel that some action or secret wish of theirs has caused the trouble between their parents.

(4) Continuing anger and bitterness towards the other parent can upset and injure your children far more than the actual separation itself. Children are very sensitive to their parents' feelings, even if they do not show it. The feelings you show are just as important as the things you say.

(5) Try not to criticise or belittle the other parent. This is difficult—but absolutely necessary. For a child to have a healthy and balanced development it is important for him to respect both parents.

(6) Do not make your child take sides.

(7) Try not to upset a child's routine too suddenly. Children need security and it is very confusing and upsetting for them if they must cope with too many changes at once.

(8) Separation often leads to financial pressures on both parents. When there are financial difficulties a parent's first impulse may be to keep the children from feeling it. Often a parent will make sacrifices rather than ask a child to do so. It is better to be frank with the children and to expect them to play their part in economising to make ends meet.

(9) Marriage breakdown is always hard on the children. They may not fully understand, at first, just what is happening. Parents should tell children directly and simply what is happening and why. If a child can understand, it will help him cope with the situation. Don't try to hush things up and make a child feel he must not talk or even think about what he feels is going on. Unpleasant happenings need an explanation, which should be brief, prompt, direct and honest.

(10) You may need to re-tell the story of your separation after the child gets older and has a greater understanding. Try not to present the separation as a tragedy with one party as the victim, or pretend there are no regrets or that separation is so common it hardly matters.

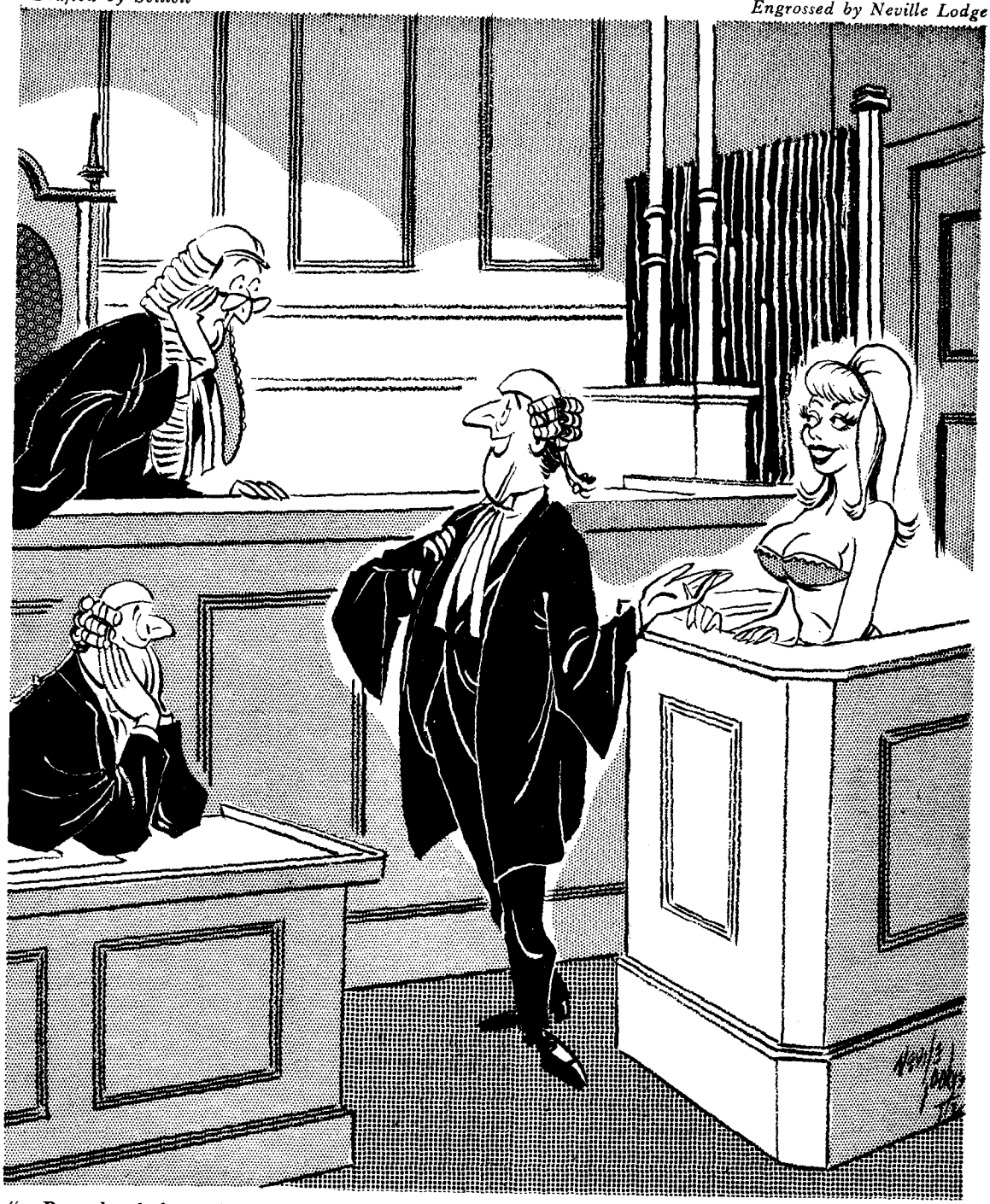
ROBERT LUDBROOK

Decision pending—A spy from the waterfront tells of a watersider nicknamed "Le Judge". It seems he's always sitting on a big case.

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING": 14

Drafted by Scilicit

Engrossed by Neville Lodge



"—But the lady defendant, if it pleases m'lud, was served by solicitors for the plaintiff, an order for discovery which she has fulfilled."

DOMICILE OF MINOR CHILDREN AFTER DIVORCE

It is the aim of this article to pose the question: What is the domicile of minor children after their parents' divorce? It is the hope of the writers to proffer an answer to this conundrum.

In *Hanmon v Gisler* [1955] 1 DLR 183, 188 Coyne JA in the Manitoba Court of Appeal stated, "On the change of custody, the domicile of the children was Texas(*a*), even if previously it might have been Manitoba(*b*), which in my opinion it was not, as a child's domicile is that of the father, at least until he permanently loses custody".

In *Shanks v Shanks* 1965 SLT 330, 332, it has been held that the general rule that a pupil child's domicile is derived from its father "does not suffer exception, even where the child is in the custody of his mother after the parents have been divorced". Lord Fraser said in the course of his judgment, "In cases where children of very tender years are involved, the custody is often awarded to the mother because she is the natural person to look after them; but I think it would be surprising, and often inconvenient, if such an award were liable to affect the children's domicile: one result would be that, in a case when the divorced parents were domiciled in different countries, any variation in an order for custody of the children would effect a change in the children's domicile. Again if some children of a family were in the custody of the mother and derived their domicile from her, while others were in the custody of the father and derived their domicile from him, their rights of succession to property inter se might be different" (at p 331).

A learned writer has criticised the decision with these words: "It would follow that, when a father has been divorced on the ground that he has deserted his wife in Scotland, his children, although remaining with their mother, will nevertheless be domiciled wherever the father has chosen to establish his domicile. This widens the gap between the popular and the legal concepts of domicile and is likely to lead to hardship"(*c*).

In *Hope v Hope* [1968] NI 1, 4, Lord MacDermott LCJ held that the rule that a minor's domicile follows any change which may occur in the father's domicile is based on the authority and responsibility that a father has to act for his child. When a father abjures his responsibility by conduct which results in the marriage being dissolved by a competent Court and the custody is given to the mother, it is accordingly the mother who has the authority and responsibility to act for the minor, and a change in the mother's domicile will effect a corresponding change in the domicile of the infant"(*d*).

There is no New Zealand authority directly in point, but mention must be made of *Duncan v Duncan* [1963] NZLR 510. A mother, whom it was agreed "was domiciled in Australia"(*e*) was seeking a maintenance order in respect of the child of her first marriage to a man domiciled in New Zealand. This marriage had been previously dissolved by the New Zealand Supreme Court and the custody of the child had been awarded to the mother, who was living with her husband and the child in Australia. After holding that he had jurisdiction to make the order sought, Barrowclough CJ observed that ". . . the child's domicile of origin was presumably a New Zealand domicile and there is insufficient evidence before me to show that he has acquired any other domicile"(*f*). This seems to follow the Scottish view.

In England, but not in New Zealand, there has been legislation which has cleared up this vexed point. In the first place, a child who has attained the age of 16 or married under that

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(*a*) Where the father was domiciled.

(*b*) Where the mother was domiciled. In this case the father had been awarded custody of his children and took them with him to the United States. The mother appealed, the order was reversed, and she was awarded custody. It was eventually held that there was no jurisdiction to hear the appeal and that the order in favour of the mother must be set aside.

(*c*) Anton, *Private International Law: A Treatise from the Standpoint of Scots Law* (1967), p 171. See also Cheshire, *Private International Law* (8th ed, 1970) p 177.

(*d*) "This is the preferable view" according to Dicey & Morris, *Conflict of Laws* (9th ed, 1973), p 119.

(*e*) Sic. The State in which the domicile was is not stated.

(*f*) At p 512. The father sought to strike out the application on the ground that the child was neither resident nor domiciled in New Zealand.

age is capable of having an independent domicile(*g*). It has also been provided that the domicile of a dependent child(*h*) whose parents are alive but living apart is that of his mother if (i) he has his home with her and no home with his father or (ii) he has at any time had her domicile by virtue of (i) supra and has not since had a home with his father(*i*).

In New Zealand law, "custody" is defined as meaning "the right to possession and care of a child(*j*). "Guardianship" is defined as meaning "the custody of the child (except in the case of a testamentary guardian and subject to any custody order made by the Court) and the right of control over the upbringing(*k*) of a child, and includes all rights, powers, and duties in respect of the person and upbringing of a child that were at the commencement of this Act vested by any enactment or rule of law in the sole guardian of a child"; and "guardian" has a corresponding meaning(*l*).

These definitions do not assist greatly in determining the domicile of a child whose parents are divorced.

It is submitted that, to find a logical solution to the present problem, it would be helpful to consider the policies upon which the concepts of domicile and the minor's domicile of dependence are based.

The law of the domicile governs, inter alia, matters of succession to movable property, capacity to make a will and to marry, and liability to tax. These are matters of special concern to the legal system with which an individual has his closest connection.

If one disregards the argument that an unmarried minor lacks the capacity to form a proper intent as regards domicile there are two possible bases for the doctrine of the minor's domicile of dependence(*m*): (i) the parental authority to act in matters of domicile for the welfare of the child(*n*); (ii) the need for a single domicile within a family unit.

When either or both parents have abandoned the child and, therefore, their rights over and responsibilities towards the child, or the family unit has been destroyed by separation or divorce these reasons no longer support the automatic dependence of the legitimate unmarried minor's domicile on the domicile of his father. If the domicile of the minor is to be the place with which he has the closest connection and dependent upon the domicile of the person who is part of the place with which he has the closest connection, then positive answers must be given to these questions.

P R H WEBB
PAULINE F VAVER

(*g*) Domicile and Matrimonial Proceedings Act 1973 (UK), s 3 (1).

(*h*) Sc a child under 16 who has not married.

(*i*) Domicile and Matrimonial Proceedings Act 1973 (UK), s 4 (1), (2).

(*j*) Guardianship Act 1968, s. 3.

(*k*) "'Upbringing' includes education and religion": Guardianship Act 1968, s 2.

(*l*) Guardianship Act 1968, s 3.

(*m*) Duncan, "Domicile of Infants", 4 Irish Jurist 36, 1969: "The Power to Change the Domicile of Infants and of Persons Non Compos Mentis", 30 Col L Rev 703; Selections from Beale's *Treatise on The Conflicts of Laws*, 1935, 210.

"The identity of the domicile of father and child is inescapably connected with their mutual legal obligations, namely, the parental government of the child and the discharge of all the father's duties on one hand and the rendition on the other hand of the services which the child owes the father."

(*n*) *Hope v Hope* [1968] NI 1, 4-5; *Re Beaumont* [1893] 3 Ch 490; *Re G* [1966] NZLR 1028.

McCARTHY P AT PRIVY COUNCIL

Mr Justice McCarthy is presently sitting on the Privy Council in London. This marks the start of a new practice under which the Government is to send a member of the Court of Appeal to London at two-yearly intervals to sit for two months. The previous practice of Judges sitting in their sabbatical and at their own expense has been discontinued.

While he is in London, Sir Thaddeus will be admitted as an Honorary Bencher of the Middle Temple, sponsored by Lord Diplock, currently Treasurer of the Inn. He may be the first New Zealander to be accorded such an honour. The Chief Justice, Sir Richard Wild, is an Honorary Bencher of the Inner Temple and Sir Alfred North and Sir John Marshall are both Honorary Benchers of Grays Inn.

Correction—[1975] NZLJ 27, right-hand column, line 26. The sentence should be corrected to read as follows: "I can also see the force of his submission that s 18 (4) is really designed to meet a case where the parent whose consent is required has been deprived of guardianship prior to any consent being given by that parent."