The New Zealand
LAW JOURNAL

17 JUNE 1975 1975 No 11

JUSTICE IN THE DARK

On 3 April, a traffic prosecution was heard in Wellington. Owing to a misunderstanding the defendant did not appear. She wanted to defend the case, but was convicted in her absence, was fined $10 and was ordered to pay Court costs of $5. She now has a conviction recorded against her, has paid a penalty of $15, yet her case has not in the true sense been "heard", and it is wholly uneconomic for her to engage a solicitor to set aside the conviction and conduct a defended hearing. She has no real option but to live with what has happened.

Her case is unexceptional. Daily, scores of defendants either plead guilty by letter or simply fail to appear on charges on which they should be heard if justice is to be done—let alone be seen to be done. The situation is, if anything, aggravated by the Summary Proceedings Amendment Act 1974, as that probably encourages defendants to stay away.

Plainly there is something fundamentally wrong with a system of justice which effectively inflicts a greater penalty on those who appear than it does on those who do not. The more so as those who are sufficiently concerned as to appear are probably the more conscientious and so the less in need of penalty.

Not only do legal costs deter appearances, but the cost of time off work, often coupled with the need to explain an absence to an employer, works further to undermine the adversary process. The unseen defendant is surely in an even worse position than the unrepresented.

One way out would perhaps be a massive scaling-up of penalties so that the enormity of the consequences would revive the economics of appearances.

Once this is rejected, something more basic is called for. I would suggest that a pilot scheme for night Courts be implemented. These would be Courts where defendants could appear out of work hours and have their cases heard.

Once this is thought through, numerous advantages follow:

—less disruption of employment and lower production losses (a Dunedin newspaper recently showed that jury service costs more in these terms than do industrial stoppages, at least in its area);

—a better use of capital investment (it would effectively reduce the need to build more Courtrooms and the Minister of Justice recently remarked that more may be needed);

—better use being made of day-time sittings (when Bench and counsel alike would not begin under the handicap of scores of cases involving unrepresented defendants);

—Commissioners (lawyers in private practice) could sit in the evenings, with defendants given the option of a hearing by a Magistrate (and their performance as Commissioners might well serve as a guide for future appointments to the Magistracy);

—last, and by no means least, a feeling of being dealt with by a process which actually cares might be engendered in defendants, and this in times when depersonalisation (eg as exemplified by the thinking behind the Summary Proceedings Amendment Act) is leading increasingly to alienation.

The night Court would not be one for lengthy defended cases, nor would it be one where counsel would normally appear—for them the days open up invitingly, relatively free of the 10 am rush that can clog a Court until lunchtime or worse.

In all, our Magistrates' Courts would operate not just more efficiently, but more effectively.

JEREMY POPE

COPING WITH CRIME

A statement by Chief Justice SIR RICHARD WILD *at Palmerston North on 30 April 1975 provoked considerable reaction. We here set out the full text of what was there said, together with some of the replies.*

SIR RICHARD WILD: I have come to Palmerston North between two sittings of the Court of Appeal to devote three days to civil non-jury cases which have been awaiting hearing. Though the Court has sat here for four weeks this year there have been so many criminal trials that hardly any civil cases have been heard. Another sitting is to begin next Monday but, once again, criminal trials will occupy most of the fortnight.

This reflects the situation throughout the country. In Auckland, for example, there were, at the end of last September, 19 prosecutions awaiting trial. Though criminal cases are tried in that city every week, that number had risen at the beginning of this year to 38. And now, though the Judges have completed 55 cases this year, the number awaiting trial at Auckland had swelled to 61 at the end of last week. In Wellington there are now three times as many preliminary hearings as at this time last year.

There are two principal causes. One is simply the increase in crime. The other is that because of the ready availability of legal aid many persons charged with minor offences who, even two years ago, would have accepted a Magistrate's decision, now elect trial by jury. For Supreme Court trials at Auckland alone the payments to defending counsel are now averaging over $1,000 a week.

Over two years ago the Judges foresaw this trend and urged action to prevent the prompt administration of criminal justice being jeopardised. From their daily experience they know that what is required is not more Judges in the Supreme Court but a new Court to conduct trial by jury of the lesser charges, similar to the Courts found necessary and now working so successfully in Britain and the Australian States.

In the meantime, and despite their best endeavours the Judges are losing ground. Until changes are made the situation will steadily worsen. In comparison with other trial Courts round the world this Court's record of dealing expeditiously with criminal prosecutions is second to none. Criminal trials have traditionally been given priority. But civil litigants are also entitled to prompt justice. The time has come to say, as I do now, that henceforth, where necessary in the light of all relevant circumstances, criminal cases will have no automatic priority and may have to await the disposal of other work.

The NZ Law Society replies—Court structures should not be substantially changed until there is an in-depth inquiry by an independent commission, the President of the New Zealand Law Society, Mr L J Castle, said by way of comment.

The commission should include not only Judges, lawyers in practice, and public servants, but also other members of the community, said Mr Castle. Without such an investigation, any change such as establishing an intermediate Court would be precipitate. A year ago the New Zealand Law Society made recommendations on what should be done in the short term to relieve pressure on the Courts, but the Society is still waiting for Government action. Admittedly two more Judges have been appointed, but the Society also favoured:

All matrimonial matters being heard in either the Magistrate's Court or the Supreme Court. At present divorce proceedings take place solely in the higher Court.

The establishment of a Small Claims Court.

The shorthand reporting or tape-recording of proceedings in the Supreme Court instead of typewriting as at present.

A study of possible improvements in court procedures in commercial disputes.

Because the effect of these measures on the workload of the Supreme Court should be considerable, the Society wants them to be tried first, and then a decision made on whether a full representative Commission of Inquiry should be convened, Mr Castle said. The New Zealand Law Society will co-operate fully with any inquiry, indeed is keen to be involved in constructive discussion of the issues, he added.

Dr Finlay responds—"I am conscious of the gravity of the situation outlined by the Chief Justice, and there are signs that it is deepening," said the Attorney-General, Dr Finlay QC, when asked to comment on the Chief Justice's remarks.

Dr Finlay said that the Judges' warning of two years ago had resulted in the setting up of a committee under the chairmanship of Mr Justice Speight, and this committee had already made recommendations as to the structure of the criminal Courts.

"Unfortunately, these recommendations did not meet with universal acceptance and the Law Society

in particular claimed that there were certain areas of misunderstanding that required further resolution," Dr Finlay said. "I have been informed that these are now virtually, if not entirely, settled and I propose to bring the parties together again, and even if there is complete agreement among the parties directly involved on the best course to remedy the situation, it would not be possible to give effect to it immediately and some fairly controversial legislation would be called for."

From the logistics point of view, some new buildings might also be needed.

Dr Finlay said that he had noted the suggestion that legal aid was a factor in the increased workload, and that disproportionate resort to it was being made in different centres. "I have asked for inquiries to be made as to whether this implies any improper or unwarranted use of legal aid," he said.

"More Judges" say Canterbury—Growing pressure on the Courts can be met by increasing the number of Supreme Court Judges—at least as an interim measure, said the president of the Canterbury Law Society (Mr A Hearn).

"The New Zealand Law Society accepts the need to have a good look into the Court structure," Mr Hearn said today.

"However, in the meantime it is felt that the pressure can be met by increasing the number of Supreme Court Judges."

Mr Hearn said that he did not agree necessarily that legal aid was a contributing cause to the increased volume of business—which was not as great in Christchurch as in some other centres. Legal aid was a factor, but it was unfair to suggest that just because of legal aid, the work of the Courts had increased.

"If there is more work because of legal assistance, that is a good thing, because it is helping people to do what they are entitled to do," he said.

There was some tendency, as Sir Richard had said, for civil work to be left to make way for criminal proceedings.

"I would welcome the prospect of civil work getting done more quickly but at the same time I would not welcome the possibility of someone waiting a long time for a criminal trial," Mr Hearn said.

Opposition from the NZ Legal Association—No change in procedure affecting the administration of criminal justice should be made without a full and thorough review of the whole Court structure, said the chairman of the New Zealand Legal Association (Mr A J Forbes).

"The Chief Justice has expressed similar views before," said Mr Forbes. "In 1973, he criticised the number of 'lesser criminal cases' which were increasingly occupying the Courts' time. The Chief Justice said then, as he did at Palmerston North this week, that this situation was being caused to a large degree by the availability of legal aid to people charged with criminal offences.

"In 1973, the Chief Justice called for an urgent review of the time being occupied by criminal cases in the Supreme Court. The review was made by the Committee on Court Business last year and recommended substantially what the Chief Justice wants—that a special Crown Court jurisdiction be established to deal with all, or at least most, criminal cases, and that the right of accused persons to trial by Judge and jury accordingly be abolished or limited.

"The Minister of Justice (Dr Finlay) has not seen fit to accept these recommendations to date, no doubt due in part to the strong opposition with which they have been met by the legal profession," Mr Forbes said.

"Several other suggestions had been made by the legal profession to help relieve the administration of criminal cases in the Supreme Court, including the appointment of additional Judges (two have since been appointed), streamlining of preliminary hearings, an increase in the civil jurisdiction of the Magistrate's Court, and more speedy methods of recording evidence.

"But the main concern of the legal profession has been that the administration of criminal justice was the most important part of the judicial system.

"No change such as that called for by the Committee on Court Business and the Chief Justice should be made without a full and thorough review of the whole Court structure in New Zealand by an independent and broadly-based Commission of Inquiry.

"It might be irksome to the Chief Justice that nothing much had been done yet, but his stated intention of arranging the business of the Supreme Court in the future in such a way that the existing backlog of criminal cases was likely to be increased—by no longer giving them priority over civil matters—was a matter of concern to the association.

"We do not for a moment doubt that the Chief Justice believes that his views are in the best interests of the administration of justice in New Zealand and, as New Zealand's senior judicial officer, his views are entitled to the greatest respect.

"But what he is saying now suggests that he is determined to get his way, whether or not the Government or other interested parties such as the legal profession agree.

"It is true that undue delays in the hearing of cases, whether criminal or civil, are to be deplored, but the injustice which is caused by unavoidable delays is clearly going to be much more serious in the case of criminal than civil cases," he said.

CORRESPONDENCE

Criminal Legal Aid

Sir,

The Chief Justice recently stated his concern that grants of legal aid in criminal cases are cluttering the Supreme Court's list. From the tenor of his remarks, while he thinks a third Court is the ultimate answer to the congestion of the Supreme Court, he also appears to consider that legal aid should not be as readily available as it is at present. While I, as a practitioner who suffers from the increased burden of this kind of work, especially in the Magistrate's Court, agree that there *is* a problem, I believe the solutions which he proposes are undesirable for a variety of reasons.

When the Magistrate's Court was originally set up it was intended to hand out speedy justice in small disputes. We now have a Small Claims Court proposed to achieve what the Magistrate's Court signally fails to do. In my view setting up a further intermediate Court between the Magistrates' and Supreme Courts will be borrowing some of the worst features

of the English legal system. It will increase confusion of the layman, who attempts to understand a legal system which seems increasingly to be a closed book while contributing to a greater complexity of procedure and, increasingly these days, judicial discussion of the powers of a particular Court in relation to an offence or proceeding of some sort. The English law reports are full of cases about the powers of one court as opposed to another, and what sentence may be passed by whom. To add to the bargain, the history of the Magistrate's Court shows that it is the tendency of Parliament (with, in many cases, the concurrence of the judicial officers themselves) to load further functions and duties onto it so that in no time at all, it too began to suffer from the very problems which led to its creation.

Even if it retains a solely criminal jurisdiction, the Court proposed by the Chief Justice needs a Judge with a lively sympathy for the human beings that he must deal with. As the work is some of the most boring and repetitious to be found in our Courts, the office of Judge may not attract the best available. Even if the standing of the judicial officer were such as to attract the highest calibre of person, in my view it would not take many years of such unrelieved drudgery to reduce that officer to an equivalent of the Continental Investigator who is often little more than a rubber stamp for the police. Even our Magistrates get some relief.

In my view our Courts are far too hierarchical and already too distant from the purview of the ordinary citizen. These disadvantages would increase, especially in relation to the Supreme Court. To my mind this is no small problem. The ordinary citizen dreads contact with this strange and unreal world, loaded as it is with medieval trappings. Business men go there because they must, not because they have confidence in a place where as one put it to me "grown men supposedly of judgment and responsibility are lectured like schoolboys". It continually astounds me that the servility of procedure symbolised by the "handing down" of judgments has not produced a servility in substance. The lay person understands only the procedure and form; on that alone he must judge the substance of our judicial system. Increasingly he finds the formal and stultifying atmosphere withdrawn and irrelevant to the world. For instance, my own disdain for the idiotic garb that we preserve in no way matches the scorn of the intellectual for this display of pusillanimity, the amusement of the ordinary middle-class litigant at its condescension, and the resentment of the ignorant accused to its elitism.

I would find Sir Richard's proposals a little more acceptable if carried to their logical conclusion and the Court he proposes be made equal to the Supreme Court—which then be renamed the Commercial Court since it will be little else. However I do not think that will occur nor does it seem anyone gives any serious thought to the idea that emerged at the Wellington District Law Society's Masterton seminar —the amalgamation of the Magistrates' and Supreme Courts. This suggestion seems to have been cast into the limbo reserved for those too sensible to answer and too unpalatable to implement.

The problem with the legal aid system, especially as it applies in criminal cases, is its rigidity. In criminal cases the provision of aid is decided by the Court, and the person who will act for the accused is selected by the Registrar from a list. Accordingly, if an accused goes direct to a solicitor there is no guarantee whatever that that solicitor will be appointed and indeed, in Wellington, the opposite is more likely to be the case. Although not necessarily welcomed by him, the solicitor does not like refusing work he is competent to do. Yet he must do this or extract an amount from a person too poor to pay it—and which amount is still likely to be inadequate for the work done.

Once assigned, counsel is not permitted to have employees or partners do some of the appearing, although it might be appropriate because of the importance of the work (eg listening to depositions) or necessary because of other commitments.

Simply relaxing these now meaningless rules would improve the quality of the service and the readiness of practitioners to take part.

The Chief Justice points out that the Crown is paying large sums of money to barristers for work done in the Supreme Court ($1,000 per week in Auckland). This problem also occurs in the Magistrate's Court where counsel find themselves without the ultimate whip to sensible decision-making that they have in most civil cases (even with civil legal aid), namely it is going to cost the litigant more money to make an extended fight of the matter. I understand one proposal is to have the Registrars assign legal aid rather than Magistrates or Judges. I cannot see how the Registrar would be in a better position than the solicitor acting for the accused person to decide whether or not a case should be defended or what a person's means are. There may be a great variety of reasons why a case should be defended, and many will apply even though the solicitor is sure his client will be found guilty. In my view no-one but the solicitor for the defendant can really make the necessary decision. We do not want clients on legal aid—privately they are worth more. Our system has always operated on the basis that it is the right of the accused to decide whether or not to defend, and I think the financial whip should be one wielded by his adviser and not by the proverbial faceless bureaucrat who may know nothing of the facts for the accused. Inevitably the Court staff will decide on some rigid rules which will be arbitrary and therefore irrelevant. Incidentally, I would have thought $50,000 per annum for Supreme Court trials in Auckland to be excellent value for money.

In my view solicitors should be free to seek payment from accused persons to such level as they believe that person can and should pay, and to then seek recompense from the Crown for any further amounts that they consider necessary. No doubt at that stage the solicitor will be overwhelmed with a variety of forms which must be completed (at further expense to the community) in order to recover what is at the moment at best a modest fee. This would leave the solicitor in the position to apply pressure to the accused to do what the solicitor thought proper, while the pressure would not be so great or so indiscriminate as to completely negative the right which we are so fond of talking about.

The Magistrate's Court has a very expensive system of allocating legal aid on a purely individual basis. It is not uncommon for as many as half a dozen counsel to be waiting in the Magistrate's Court at Wellington on any day of the week for an hour or more in order to each present one plea in mitigation on behalf of one defendant. Even if the lawyer is lucky enough to tickle the fancy of the Magistrate sufficiently to obtain a scale one award in his favour, the amount paid is not a fair return for the time in-

volved.

In my view in each large centre there should be a panel of barristers and solicitors selected by the Law Society for their ability to present pleas in mitigation who are prepared to accept the duty of attending Magistrates' Courts on a rostered basis in order to present pleas in mitigation. Although the individual assignment of legal aid could continue as it is at present, the solicitor seeing a defendant could well be satisfied that a member of the panel could present the necessary plea in mitigation as effectively as he might. There would thus be the position that one solicitor would do the pleas at present done by several, and would receive a payment sufficient to encourage him to continue with the work and the inconvenience that must attend upon it with the occasional remand as will no doubt be necessary. The fees at present paid could be shared by the solicitors to their mutual satisfaction. With profitability up it would create the opportunity for the State to keep the fees down.

A "public defender" is spoken of in dark corners as one of the two prongs of "creeping socialism" (the other being a State Conveyancing Office). Unless the private sector so arranges matters that it can efficiently ensure that the rights of accused persons are in fact preserved, then the only answer will be a Public Defender. I fear a Public Defenders office will either become hopelessly bureaucratic or being staffed by idealistic young men with no broad view of the world and an urge to tilt at windmills for precedent purposes to the detriment of its clients.

The adjustment that I suggest is one whereby we sacrifice some of our capitalistic competition in order to preserve one of our few fields of work still bring us into contact with people in their everyday lives and problems. I fear that the tendency of the remarks of the Chief Justice on this point would sacrifice the substance of some of those rights while appearing to preserve them in the name of efficiency.

The above remarks were prompted by seeing the Chief Justice's statement and then being required to attend the Magistrate's Court, where I had been assigned to make a plea in mitigation on a charge of obscene language. My plea was so successful that the Magistrate doubled the usual fine. I should get scale three for that!

Yours faithfully,

J J CLEARY
Wellington

"MAIL-ORDER JUSTICE"

In Parliament Mr G F GAIR (North Shore) asked the Minister of Justice:

"(1) Since the provision in the Summary Proceedings Amendment Act providing for what has become known as 'mail-order justice' has been in operation now for more than 3 months, can he advise what has been the result of this change, and whether there has been any reduction in the delays previously applying:

"(2) does he believe the public is adequately aware of its rights and responsibilities under this new provision;

"(3) what proportion of those receiving notices to prosecute apply to the registrars of the courts for summonses; and

"(4) is the reaction fairly general throughout the country, and, if not, what local peculiarities has the reaction shown?"

DR A M FINLAY (Minister of Justice) replied on 29 April:

"(1) Although the legislation giving effect to the minor offence scheme has been in force for three months, it is as yet too early for an accurate assessment of its full effect, as Court lists still contain prosecutions initiated prior to 1 January. However I can say that in some Courts lists for formal Court sittings have been reduced dramatically. This must result in significant savings in time to all those involved in the legal process and assist in avoiding the delays of the past.

"(2) For the first time defendants are being given quite detailed information about their obligations and rights and are invited to inquire of the Registrar of the Court if they need any further explanation. I understand that public reaction to this progressive move has been most favourable. The term 'mail-order justice' is unwarranted and derogatory.

"(3) Because of the limited time that the scheme has been operating and the fact that a defendant is given at least 28 days to take any step he may wish to take, it is as yet too early to say with certainty how many people will ask that a summons be issued for a formal Court hearing. Preliminary surveys in the Auckland, Wellington and Christchurch Courts indicate that the percentage varies between 2 percent and 4.5 percent.

"(4) As far as I am aware the reaction of the public to the scheme has been general throughout the country and any differences have been of a minor nature only."

Worth quoting: "The common law ought never to produce an wholly unreasonable result."—LORD REID in *Cartlêdge v Topling* [1963] AC 772.

SEX DISCRIMINATION AND THE LAW

In International Women's Year, PHILLIDA BUNKLE, *of Victoria University, looks at the possibilities and potential of legal revolution.*

Submissions made to the Parliamentary Select Committee on Women's Rights over the last year have detailed the pervasiveness of sex discrimination throughout New Zealand society, but few submissions have contained any clear proposals for possible legislative remedies. Many recommendations assume that because the problem is one of social attitudes, it is beyond the influence of legislation. That discrimination is caused by personal or social attitudes does not, however, mean that the law has no obligation to protect equality. The reason for unequal treatment should be irrelevant to its illegality. Most recommendations assume that men and women are equal before the law if no distinction is made between male and female; yet it is clear that if a law is neutral between unequals, it preserves that inequality. Law is the means by which dominant groups legitimise their interests and hence protect their power. At present New Zealand law protects the imbalance of power between men and women. Because law defines the structure of power and therefore ultimately of authority, it is a major determinant of social attitudes. If there is to be a commitment to sex equality in this society we shall need a concept of law as an instrument for the achievement of equality.

The United States provides the most extensive precedents of legal action to counter prejudice. In the twenty years since the famous desegregation case, *Brown v Board of Education of Topeka* a revolution has taken place in Federal law. Not only has the meaning of the Constitutional guarantee of equality before the law undergone revolutionary reinterpretation, but as the Courts have taken upon themselves the responsibility for the implementation of that equality the concept of the law itself has undergone a subtle but extremely important change. The growing body of civil rights cases and the involvement of the Court in desegregation plans have changed the law into an active instrument for the achievement of equality for disadvantaged groups.

When feminism emerged from the civil rights movement in the late sixties it inherited not just a political analysis of the position of minorities and the nature of discrimination, but the legal revolution as well. The Women's Movement provides a dramatic example of the reciprocal effect of the law and the development of a major social movement. The backing of the power of the Federal Government, which the legal revolution made possible, has been a major cause of the rapid progress of the movement in America.

The Women's Movement which emerged in the 1960s had two sources, both closely related to the Civil Rights Movement. One form of feminism emerged when women of the radical culture which had developed around the civil rights peace campaign began to draw an analogy between their position in the movement and the discrimination against the blacks for whom they were working. Some of these women began to characterise themselves as the "niggers" of the counter culture and to apply the same radical political perceptions to their own situation. Some had experience in the voter registration drive, and all knew that the blacks' major gains had been made through the Courts(*a*). The evolution of the other wing of the movement was even more closely related to the Federal campaign against discrimination. The National Organisation of Women, (NOW) was formed in 1966 to protest the failure of agencies enforcing equal opportunity legislation to take sex discrimination as seriously as race discrimination. NOW's prestigeous initial membership, which included a number of lawyers, had been closely associated with development of the Government's desegregation programme. NOW was followed by Women's Equity Action League (WEAL), which was formed specifically to force the application to women of anti-discrimination legislation. From the beginning NOW, WEAL and similar groups have focussed on legal action(*b*).

(a) A version of this paper was published in *Broadsheet: The Feminist Magazine,* September 1974 pp 8-9.

(b) For an account of how the white female civil rights worker became the butt of sexual tension, crystallising society's hostility to women, see Alvin F Poussaint "The Stresses of the White Female Worker in the Civil Rights Movement in the South", *The American Journal of Psychiatry,* 123, 4 October 1966.

By raising the issue in the powerful institutions that define and control women, the legacy of the legal revolution has broadened the visible scope and seriousness of the movement. With the possibility of legal action the dimensions of discrimination surfaced for the first time; lawyers began to accept sex discrimination cases, and, with some protection against recrimination, victims began to make their complaints public. Through the massive documentation it has prompted, the law has clearly established the existence of a massive social problem. Since women at the highest levels have been involved, this legal action has identified "respectable" women, who in New Zealand continue to remain aloof, with the struggle for equality. Most importantly the legal revolution has changed (at least potentially) the power relation between women and the institutions which discriminate against them. When, for example, discrimination cost the university system of Southern Michigan $25 million in Federal funds, the relation between women and university administrations everywhere changed; when the hand on the wall started writing dollar signs, the issue sudenly became serious. In America the Women's Movement is no longer a joke or a term of abuse. Action against discrimination is based on either State or National Constitutions, Civil Rights legislation, or Executive Order.

The Constitution

The different application of the law to men and women has a long history, despite the guarantees of equality in the Federal constitution, especially the "due process" and "equal protection of the laws" clauses of the 5th and 14th amendments. This difference has traditionally been justified by the classification of ALL females as a class defined by the reproductive function of some of its members. The legal classification of women as a peculiar kind of servant class was premised upon women's "weakness", which necessitated their special protection for the good of themselves and society. The proscriptive elements in these judgments were justified by society's interest in maintaining the primacy of women's reproductive role. In 1908, in *Muller v Oregon*(*d*), protective labour legislation was found constitutional for women, despite having been found unconstitutional for men(*e*). The Supreme Court found that women's biology necessitated paternalistic protection:

> ". . . differentiated in these matters from the othersex, she is properly in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him . . ."(*f*).

After *Muller v Oregon,* sex as a valid basis for classification became a shibboleth of judicial interpretation preventing the application of the 14th amendment guarantee of equal application of the laws to women.

Sex as a valid classification was analogous to the separate but equal principle justifying the differential application of the law to blacks. After the Supreme Court denied the validity of the separate but equal principle, it evolved, in a series of cases in the sixties, much more stringent tests for the constitutionality of racial distinctions. The existence of some rational basis was not enough to justify the classification; rather the State had to show "compelling interest" in enforcing or making a distinction. The most important feature of these interpetations was that the onus was no longer on the complainant to show that the classification was unreasonable, but on the State to show compelling reason why it was necessary. While the "reasonableness" of racial distinctions was no longer assumed, that of sex distinction was. In effect, throughout the 1960s there were two criteria for the application of "due process" and "equal protection" —one for white and black men, and one for women(*g*). The division of human beings into paid and unpaid workers tends somehow to seem more "reasonable" than the division into black and white, especially to those who get their more unpalatable work done free.

In 1961, years after the constitutional validity of racial distinctions had been eroded, the Supreme Court again upheld the "reasonableness' of classification by sex. The grounds of

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(c) Betty Friedan, "NOW: How it all began", *Women Speaking,* April 1967. See especially, Jo Freeman, "The Origins of the Women's Liberation Movement", *American Journal of Sociology,* Vol 78, No 4, January 1973. Also Judith Hole and Ellen Levine, *The Rebirth of Feminism* (New York, 1971).

(d) 208 U S 412 (1908). For summaries of the most important cases involving sex discrimination see *The President's Commission on the Status of Women, Report of the Civil and Political Rights Committee,* Appendix B (1963).

(e) Lockner v New York 198 U S 45 (1905).

(f) Muller v Oregon 208 U S 412, 422.

(g) Mary O Eastwood, "The Double Standard of Justice: Women's Rights under the Constitution", *University of Valparaiso Law Review,* Vol V (1971) p 281.

the judgment were precisely the same as those used in the nineteenth century. The Supreme Court argued "Women are still regarded as the centre of Home and Family life"(*h*), and that therefore they have a "special responsibility" to social welfare. The idea that women have special responsibilities to the general(!) welfare that men do not justifies subjecting them to greater social regulation. Laws in many countries limit the places women may frequent, the language they may hear, the work they may do, the hours in which they may do it, and particularly when and how and under what conditions they may have sex(*i*). The idea that women's role must be determined by reference to the collective welfare while men's is legitimately determined only by reference to personal interest underlies unequal legal attempts to control female sexuality. The attempt to make women's familial responsibilities justify limiting their freedom and opportunity in other public roles has consistently been upheld by the Supreme Court using the *Muller* doctrine. Feminists had campaigned since the nineteenth century for the Equal Rights Amendment (ERA) which would eliminate this differential criteria for Constitutional protection. In 1963 however, the *President's Report on the Status of Women* argued that since provision for equality already existed in the Constitution priority should be given to the removal of the double standard of judicial interpretation. In a famous 1965 article Government counsels Pauli Murry and Mary Eastwood argued that the Court should apply the same tests for the constitutionality of distinctions made in the law between women and men as those made between blacks and whites(*j*).

Feminist pressure to include women in the civil rights drive continued to mount. The next year in *White v Crook*(*k*) a Federal Court moved gingerly away from the dual criteria for constitutionality in striking down an Alabaman restriction on jury registration for women, on the grounds of the equal applicability of the 14th amendment:

> "The plain effect of this constitutional provision is to prohibit prejudicial disparities before the law. This means prejudicial disparities for all citizens—including women" (*l*).

In 1968 in *Robinson v York* 281 F Supp 8 (D Conn 1968) a Federal District Court moved toward the use of a single criteria for the validity of making any distinction constitutional:

> "While the Supreme Court has not explicitly determined whether equal protection rights of women should be tested by this rigid standard, it is difficult to find any reason why adult women, as one of the specific groups that compose humanity, should have a lesser measure of protection than racial groups"(*m*).

Faced however with a clear conflict between the use of a single criteria for the constitutionality of sexual classifications and what the public will accept the Court is capable of reverting to some quaint nostalgia. In *US v St Clair* the Military Service Act was found constitutional despite its different treatment of men and women, on the grounds that:

> "Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defence while women keep the home fires burning."(*n*)

The hearthmaids, unimpressed by the consistency of male reason, or their knowledge of history, continued to press the passage of the ERA, which now remains only to be ratified.

The Court has proved reluctant to make a direct judgment on the constitutionality of anti-discrimination legislation which prohibits sex as a basis for job classification, because application of the *Muller* doctrine would quite clearly read sex out of civil rights laws. A test case took five years to reach the Supreme Court; but it is clear that following *Robinson v York* and *White v Crook* the way is clear for the abolition of sex as a valid basis of classification, although it is probable that the passage of the ERA will relieve the Court of this embarrassment.

Appeal to the Constitution through the Federal Courts is slow and expensive, although as the abortion example shows it can be effective. The implications of these decisions are slow to take effect because there are no specific agencies concerned with implementation. The

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(h) Hoyt v Florida 368 U S 57 at 62 (1961).

(i) Leo Kanowitz, "Sex-based discrimination in American Law: Law and the Single Girl, *"Saint Louis University Law Journal,* Vol 2, No 3 (Spring 1967), pp 293-330.

(j) Pauli Murray and Mary Eastwood, "Jane Crow and the Law: Sex Discrimination and Title", *The George Washington University Law Review,* Vol 34, No 1 (October 1965) pp 232-56.

(k) White v Crook, 251 F supp 401 (M D Ala 1966). The text of the case is reprinted in Leo Kanowitz's *Women and the Law: The Unfinished Revolution,* Albuquerque 1969, Appendix C.

(l) Kanowitz, Ibid p 236.

(m) Kanowitz, Ibid pp 241. The full text of the case is given in Appendix D.

(n) United States v St Clair, 291 F Supp 122 at 124-5 (S D N Y 1968).

American Council for Civil Liberties has found it necessary to devote the energies of the full time task force on Reproductive Freedom to persuading hospitals to change their abortion procedure. Some countries have however been sufficiently impressed by these actions of the Supreme Court to initiate the introduction of similar provisions. Canada is moving toward a constitutional amendment which deliberately incorporates "due process" and "equal protection" clauses in frank imitation of the American example(*o*). The Australian Federal Government has also copied many of these ideas for countering discrimination in its Human Rights Bill(*p*). The effectiveness of the American action depends however on the process of judicial review. In New Zealand in the absence of a written constitution and judicial review it would be very unlikely to prove effective(*q*).

Legislation

While the "due process" and "equal protection" clauses of the Constitution were undergoing substantive reinterpretation, the most important opposition to discrimination in the 1960s was the 1964 Civil Rights Act.

In 1961 President Kennedy signed an Executive Order establishing the President's Commission on the Status of Women. In 1963 the Commission and its seven committees produced their report, and the Interdepartmental Committee and Citizens Advisory Council was established to implement its recommendations. State Commissions were established in all states to follow up the work of the Commission at the local level. In the same year the Fair Labor Standards Act was amended by the Equal Pay Act. As an amendment to the Fair Labor Standards Act it was ensured effective and rapid enforcement.

Following Kennedy's assassination, Johnson was able to engineer the passage of the 1964 Civil Rights Act(*r*). The Act was one of the most ambitious attempts to restructure society through legislation. While the optimism which sustained the Great Society legislation has since been dissipated, the Act has had an extraordinary impact upon American consciousness. The Act prohibited discrimination over a wide range of fields, but the most important section for women was Title VII prohibiting discrimination in employment. The Act made it an offence to "discriminate against any individual, with respect to his compensation, terms, conditions, or priviliges of employment, because of such individual's race, color, religion, sex or national origin"(*s*). The primary target of the Act was racial prejudice; sex was added by amendment on the last day of debate without extensive committee hearings. Since it was introduced by men who had opposed the passage of the Equal Pay Act the year before, Representative Edith Green was probably right in thinking that the intention was to obstruct the passage of the Act. The amendment prohibiting sex discrimination had therefore the unique support of both the friends and foes of sex equality.

The Bill created the Equal Employment Opportunity Commission (EEOC) to implement its aims(*t*). Like the New Zealand Race Relations Conciliator the EEOC was initially charged with investigating complaints and negotiating voluntary redress. If conciliation failed however the complainant could bring a civil action himself. This provision is important because it helps to prevent the possibility that the bureaucracy charged with enforcement will effectively nullify strong legislation, as appears to be happening with, for example, the New Zealand Rent Appeals Act. In 1972 the Act was however amended by the Equal Employment Opportunity Act giving EEOC wide powers to seek enforcement through the civil Courts. Since then most Court actions have been prosecuted directly by EEOC.

Despite the fact that 11,000, or one quarter of the cases brought to the EEOC in the first year were from women, the Commission made it clear that it did not regard sex discrimination as seriously as racial discrimination. For example, the Act prohibited discrimination in advertising, but while this was rigidly enforced for racial qualifications, newspapers continued to be allowed to publish sex classified job advertisements so long as they were accompanied by a disclaimer of any discriminatory intent. It was not until 1970 that the clear prohibition of sex classified advertisements was enforced.

In 1966 frustration with this inactivity precipitated the formation of NOW. On the last

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(*o*) Pierre Trudeau, *A Canadian Charter of Human Rights*, Ottawa 1968 pp 15-27.

(*p*) G Whitlam, "Speech of Human Rights Day, 10 December 1973, Canberra", *Australian Foreign Affairs Record*, December 1973. And see also William Birttles, "A Model Bill against Sex-Discrimination", Council of Civil Liberties, Great Britain.

(*q*) See however, "The Constitutional Society", *A Bill of Rights for New Zealand*, Auckland 1965.

(*r*) Civil Rights Act of 1964, 42 U S C p 2000e et seq (1964).

(*s*) 42 U S C 2000e 2 The text of Title VII is reprinted in Kanowitz Ibid Appendix A.

(*t*) 42 US C 2000e 4.

day of the third National Conference of the State Commissions on the Status of Women officials refused to allow a motion urging EEOC to give equal enforcement to the sex provision of Title VII. By that evening NOW was formed as a Civil Rights organisation for women(*u*). The application of the Civil Rights Act to discrimination against women remained a major goal of feminist action throughout the sixties. By 1970 the new EEOC guidelines of compliance extended to women and the years 1971-74 have seen vigorous action on a spate of major cases on sex discrimination.

In practice the possibility of class action suits gives the EEOC much greater power than the New Zealand Race Relations Conciliator. There are many instances where, if an individual tried to gain redress for discrimination, (back pay for example) the legal costs of the case would be greater than the sum recovered. In the United States, an individual can bring an action on behalf of herself and all others similarly situated. The other members of the class do not have to give specific consent although they are free to join the suit. A Supreme Court decision in 1974 restricted class action suits in Federal Courts, but they are still very effective in tackling the effects of widespread public prejudice. Some states award treble damages in public interest cases to encourage vigilance and the Equal Pay Act awards double damages for some violations.

When a complaint is made to the EEOC it can investigate and if necessary demand changes in the whole "pattern of practice" of the employer. Discrimination can not be eliminated on an individual basis, for it arises from perjorative assumptions about a whole class of persons. The core of job discrimination is the classification of jobs on the basis of sex stereotypes and therefore only collective action will be effective in ending it. Perhaps the most important section of Title VII for women makes it unlawful to:

> "limit, segregate, or classify his employees or applicants for employment in any way which could deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin"(*v*).

In all the numerous cases seeking compliance with the Act, the Courts have been unequivocal in interpreting this section of Title VII as prohibiting the entire spectrum of disparate treatment resulting from sex, race, or ethnic stereotypes.

In *Willingham v Macon Telegraph* (1973) 482 F 2d 535, and particularly the important 1971 *Sprogis v United Air Lines* 444 F 2d 1194, the Courts held that Congress intended Title VII to apply not only to cases where the discriminatory employment practice was based solely on sex, but to ALL differences in the treatment of men and women resulting from sex role stereotypes. These interpretations allow EEOC to negotiate for the elimination of all job classifications based on sexual stereotypes to the extent of demanding major changes in the whole employment structure of certain industries and corporations.

While Nixon urged the establishment of affirmative action programmes to end discrimination he reduced the funding for enforcement agencies, including EEOC. This may have encouraged EEOC to direct its major effort to achieving collective industrywide agreements with the major employers of women. The Commission's most important action against discrimination is the negotiation of an agreement with the country's biggest employer of women, Bell Telephone. The head of the all-male team who negotiated this agreement said that "this case makes it clear that the Government can and will crack down on large companies that discriminate."(*w*)

When the EEOC began its investigation of Bell in 1970 it found that the whole structure of the company was sex-segregated. The Commission's report, *Unique Competence,* found that women occupied almost all the lower paid operators and secretarial jobs, but were virtually excluded from the higher paid craft and management positions. Sexism was a fundamental principle of the entire company. Therefore any woman, whether or not she had complained was, the Commission argued, a victim of sex prejudice. Women who did not apply for promotion or complain will share in the 15 million dollars back pay, including delayed restitution payable to the first 10,000 women who move to craft jobs. The fact that they had not applied did not mean that Bell did not discriminate. To the EEOC it was evidence rather of just how consistently they did discriminate. The most important provisions in the agreement are those aimed at eliminating entirely "men's jobs" and "women's jobs" from

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(u) Jo Freeman Ibid.
(v) 42 U S C 2000e 2.
(w) Lisa Cronin Wohl, "Liberating Ma Bell", *M s* November 1973 pp 52-97.

the employment structure of the company. For example, 37.5 percent of all new clerical workers hired must be male.

As the *Bell* case makes clear, the Civil Rights Act recognises that discrimination can occur whether or not it is explicitly intended. The EEOC is therefore able to take action against the widspread patterns of inequality that result from unconscious prejudice or accepted social attitudes. In numerous cases the Federal Courts have held that it is the consequences of an action or policy, not its intention which determines its legality. Court opinion has consistently held that Congress had in mind the discriminatory EFFECT of employment policies regardless of whether they were motivated solely or even partially by conscious prejudice(*x*). The complainant does not therefore have to prove that the employer had a positive intention to discriminate; if a consistent pattern of exclusion is found, it constitutes de facto discrimination and the onus is on the employer or institution to prove that it is not discriminatory. For example, if the Act operated in New Zealand, the removal of the second named owner of joint owned properties in Wellington from certain limited municipal franchises would have been illegal because it resulted in an almost exclusive male electorate, regardless of the electoral officers claim that the action was not discriminatory because that had not been its intention.

This interpretation is extremely important to the effective functioning of the Act. Discrimination usually arises from the operation of prejudicial assumptions about the "real" nature or appropriate role of a class of persons. As discriminatory decisions are rarely the result of explicitly stated conscious prejudice, it is pointless to make the complainant prove the positive intention to discriminate. To be effective the law must recognise how prejudice operates in practice. Even in cases where the prejudice is conscious it is rarely made explicit. The only result of a Bill which placed the onus on the complainant to prove that discrimination was the result of conscious intention would be to ensure that expressions of prejudice would be reserved for the lavatory or bar where they would be unlikely to emerge as legal evidence.

Title VII contained a clause allowing sex distinctions in employment where sex was a bone fide job qualification. In practice this has been strictly interpreted, and no Court has yet found a job in this category. The Court insists that physical requirements should be physical and not sex restrictions. Since the existence of prejudice does not justify discrimination customer preference does not constitute a bone fide reason for employment differences. This provision has had some limited success in preventing the peculiarly exploitative use of female sexuality for sales promotions—service with a smile must be unisex. This provision would also prohibit the practice (common in some New Zealand businesses) of denying women prominent positions which would involve dealing directly with the public or customers in a professional or authoritative capacity. Similarly the lack of facilities for women employees is interpreted as itself discriminatory rather than justifying exclusion. If for example the Act applied here, the exclusion of women from lucrative jobs as Wellington bus drivers because there are no women's lavatories would be illegal.

The EEOC's guidelines on compliance have accumulated a significant body of administrative law. The guidelines require that employees treat pregnancy and pregnancy related disabilities like all other temporary disabilities for pay, leave, re-employment, seniority, insurance etc. Encouraged by a law suit claiming unequal treatment New York Board of Education has even permitted male parents to take child care leave on equal terms with female parents. Further since it is unfair to penalise women for their physical strengths as well as their liabilities EEOC also prohibits pension plans that pay women less per week on the grounds that they live longer (as the New Zealand Superannuation proposes to do) and insists that life insurance premiums reflect the full difference in life expectancy. At present a wide range of discriminatory provisions in private insurance and other financial institutions are being challenged. Employers and financial institutions have no business making female biology a liability.

The effectiveness of American civil rights legislation depends upon the ability to enforce collective agreements. Given the limited possibility of class actions in New Zealand it is doubtful that such legislation would be really effective here. This is illustrated by the difficulty of gaining compliance with the Equal Pay Act. When each woman must sue individually for compliance the case will be difficult to

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(x) See Spurlock v United Airlines Inc C A Colo 1972 475 F 2d 216. *Sims v Sheet Metal Workers* Intern Assn Local Union No 65, D C Chic 1972, 353 F Supp 22 *Boles v Union Camp Corp*, D C Ga 1972, 57 F R D 46 and others.

prove in isolation and the sum recovered would be unlikely to cover the cost of the suit. She may also fear retaliation from the employer. It is particularly difficult to take individual action against the discriminatory job reclassification which the Act tacitly allowed. The only group with the collective power to enforce compliance is the unions but they condoned the weakness of the Act at its inception. A major strength of Title VII is its direct applicability to union practice. A union which negotiating a wage award which treats women and men unequally is held as liable as the employer.

If effective enforcement were provided for, that would almost automatically guarantee its failure of passage through the male dominated New Zealand legislature. The most common objection is that such legislation would limit the employer's freedom of decision over selection and promotion. To its advocates this is of course the aim of such legislation. The goal is to prevent the use of economic power to enforce prejudice against less powerful groups. The achievement of equality for the disadvantaged must necessarily limit the freedom of the powerful to control and define them. For example the Attorney-General of New South Wales opposed the Australian Human Rights Bill because he wondered; "What will happen to one of the husband's last bastions—the right to determine where the matrimonial home is to be?"(*y*). Such outraged objections are less protest against the loss of freedom to discriminate than against the achievement of equality by minorities.

A marginally more sophisticated objection is that, action to prevent sex steoreotyping in job classification will lead to the appointment and promotion of inferior applicants. The unemployment of large numbers of persons who would not otherwise be hired is of course the intention of such legislation. While the assertion that these people will necessarily be inferior is obviously prejudicial, it is simply another way of denying the reality of discrimination by asserting that the "best" people are currently hired; the corollary of which is of course the belief that the "best" are therefore normally white males. The aim of equal opportunity legislation is precisely to allow the best to be hired whatever their social group. This objection is usually a defensive against the consequences of more equal competition and the loss of automatic privilege. This fear is simply a restatement of the prejudicial resistance women always encountered.

Even if it passed, the enforcement of such legislation would require so many changes in legal practice that we are unlikely to get effective action by the route. More possible in New Zealand would be action equivalent to the Executive Order.

Executive order

An executive order is a directive from the President to agencies of Government instructing them to carry out a particular policy in their own dealings. It does not involve the legislature at all, since it concerns only what the administration should do in areas already within its power. This may sound limited but in fact the National Government, through its contracts as well as direct spending, affects almost every major institution in the country from the army to the universities.

In 1965 LBJ signed Executive Order 11246, stating that recipients of public funds "shall not discriminate against any employee or applicant because of race, color, religion, sex, or national origin"(*z*). Enforcement was the responsibility of the Labor Department, through the office of Federal Contract Compliance. Section 206 gave the department very wide powers of investigation. It can ask institutions accepting public funds of ANY KIND to review and report on the status of its female and minority employees. If the report shows that they occupy predominately low status positions, the institution is asked to set goals rectifying the situation, and to draw up plans to achieve them. If the plans do not conform to the department's compliance standards, set out in the Federal guidelines, then the department can not only withdraw or refuse a contract, but can ban the company from subsequent contracts, and recommend prosecution under Title VII. Section 207 ensures that unions accepting work on Government contracts are subjected to similar scrutiny.

The original order was directed towards integrating the construction companies and unions in order to open highly paid unskilled jobs to blacks, but in fact the greatest number of complaints have been against educational institutions, which were initially excluded from Title VII. For educational institutions enforcement was sub-delegated to the Department of Health, Education and Welfare. By January 1970 HEW was dealing with 350 cases against the universities and by 1974 had over

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(y) K M McCaw, "The Human Rights Bill is a Takeover Bid", *Sydney Morning Mercury* 14 October 1974.

(z) 42 U S C 2000e at p 281.

2,000 on its books. When HEW scrutinied the University of Michigan a report showed that throughout the university system women were predominately in low paying service occupations. Before it received more research money from the Federal Government the university was asked to show how it would change its structure to comply with an extensive series of HEW guidelines which included not only increasing the representation of women at ALL academic levels, but with the achievement of salary equity in EVERY JOB CATEGORY (including back pay and compensation), and the ELIMINATION OF ALL MALE AND FEMALE JOB CLASSIFICATIONS throughout the whole university structure. When after negotiation the university had not complied satisfactorily with these demands 25 million dollars of research grants and development funds were impounded(*a*). So far eleven major educational institutions, including Columbia, Harvard, New York, Pittsburg and Duke have all had funds withdrawn or impounded.

HEW has developed some interesting techniques for overcoming the universities' claim that they are unable to find qualified job applicants. To ensure compliance departments with low minority representation must demonstrate that they have made sincere efforts to locate suitable minority applicants. At the University of Iowa, for example Department chairmen had to record their conversations and correspondence with leading graduate schools that might have had suitable candidates. If such a candidate was found the fate of her application was monitored and the onus was on the university to show that the person eventually appointed had substantially superior qualifications(*b*).

These policies promoting equal opportunity apply also to the Federal Government as an employer. In 1971 President Nixon signed Executive Order 11478, stating that:

> "It is the policy of the Government of the US to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realisation of equal opportunity through a continuing affirmative action program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the federal government"(*c*).

The Civil Service Commission was charged with directing this effort to make the Government a model employer. Department heads had the responsibility of developing affirmative action programmes which would not only redress the balance of minority employment but actively initiate means of extending the talent pool from which the Government could recruit.

> "It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; ensure that recruitment activities reach all sources of job candidates; utilise to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to ensure their understanding and implementation of the policy expressed in this Order; ensure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability . . ."(*d*)

The Order recognised that qualified candidates will not be available unless opportunity exists. Affirmative action was intended to put the onus on the Government to break the cycle of defeat which discrimination causes. Most women knowing that whatever their qualifications priority will be given to their service role, and that they will never escape their position as members of a peculiar servant class will not develop their skills. Why qualify for two unsatisfactory jobs when you can get away with one? If this latent talent is to be realised incentive must be provided. The civil service is peculiarly suited to implement this type of policy.

This type of action against the effects of social prejudice is feasible in New Zealand. Public spending is particularly powerful, and it is therefore especially important that it should

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(a) Science, Vol 170, 1970 p 834. See also Alan Miles Ruben and Betty J Willis, "Discrimination Against Women in Higher Education", *Cleveland State Law Review,* Vol 20, No 1, January 1971 p 472.

(b) Private communication from a visiting Professor in the life sciences.

(c) 42 U S 2000e at p 286.

(d) Ibid.

be spent to encourage the equality of all citizens, not for the exclusive benefit of particular interest groups. The Select Committee could recommend that all institutions, firms, schools, government agencies, sporting bodies, etc, that receive public funds fulfill basic criteria for representational procedures and policies promoting equality. The principle is simply that public funds should not be spent to support institutions that pursue inequitable policies. Government should make sure that public money is spent for the good of all, never encouraging undemocratic discriminatory practices in the institutions it patronises. For example, firms receiving public contracts should be asked to show not only how they are desegregating positions of power but how they are setting about removing sex classifications from all job categories.

That Government feels no such obligation reflects the myth that women's labour is less "real" than men's and that therefore women are somehow economic parasites who are "given" subsistence by men who "provide for them". It is one of the ways women are penalised in the public sphere for the fact that they work for free. Women's powerlessness is closely related to the fact that although their work is hailed as essential it is nevertheless regarded as valueless, because they produce no saleable product and have poor prospects of collective action. I see no reason why my taxes and those of other women should be spent to encourage and support institutions which exclude us from all but the menial tasks, any more than they should be used to support sporting bodies that use undemocratic procedures to exclude players from their controlling bodies.

A responsible policy of public expenditure is feasible in New Zealand. It is within the immediate power of Government, and could be implemented without legislation as a powerful and effective means of achieving equality for all groups in society. If the Government is committed to equality for all its citizens it could begin tomorow. That is *if it is committed* . . . .

SOME KIWI KITE-FLYING

MARGARET VENNELL *looks at gaps left by the Accident Compensation Act 1972.*

Prior to the coming into force of the Accident Compensation Act 1972 on 1 April 1974, a large amount of the work of so-called "common law" lawyers involved claims for damages arising out of "personal injury". Section 5 of the Accident Compensation Act 1972 (as amended by the Accident Compensation Amendment Act (No 2) 1973 states:

"(1) Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

"(2) Without limiting the generality of subsection (1) of this section, the action for loss of services (known as the action per quod servitium amisit) and the cause of action for loss of consortium (known as the action per quod consortium amisit) are hereby abolished.

"(3) Nothing in this section shall affect—

"(a) Any action which lies in accordance with section 131 of this Act; or

"(b) Any action for damages by the injured person or his administrator or any other person for breach of a contract of insurance; or

"(c) Any proceedings for damages arising out of personal injury by accident or death resulting therefrom, if the accident occurred before the 1st day of April 1974.

"(4) No person shall have cover under this Act in respect of personal injury by accident if the accident occurred before the 1st day of April 1974.

"(5) Where in any proceedings before a Court a question arises as to whether any

person has cover under this Act, the Court shall refer the question to the Accident Compensation Commission for decision, and the Commission shall have exclusive jurisdiction to determine the question.

"(6) The Commission may, on the application of any person who is a party to any proceedings or contemplated proceedings before a Court, determine any such question.

"(7) Subject to Part VII of this Act, a subsisting decision of the Commission under subsections (5) and (6) of this section shall be conclusive evidence as to whether or not the person to whom the decision relates had cover under this Act."

The section appeared to remove most of this sort of work from the hands of lawyers (apart from that for which the period of limitation has not yet run)(*a*).

Section 5 is a section with wide implications since it looks at the nature of the harm (that is, "personal injury") rather than in the more conventional way of "how harm is caused". In effect this means that not only is the claim for damages in respect of personal injury caused by a breach of duty of care in the tort of negligence, abolished but also (at first sight) the claim for damages in respect of injury caused by intentional torts, or that arising out of a breach of contract. It is the contention of this writer that whilst the law of torts may never have operated as a deterrent in the case of acts of negligence it may have been a deterrent where intentional torts (forms of trespass) were involved. Similarly, liability under the law of contract may have operated as a deterrent in respect of a breach of an implied warranty(*b*). It is not clear how far the Royal Commission intended legislation to go, but fairly close reading of the Commission's Report(*c*) shows that all the criticism and discussion are directed towards the claim in negligence, whereas the actions in respect of intentional torts and breach of contract are not considered at all.

Apart from the claim in tort for the so-called intentional torts, a deterrent may be available in the form of a criminal prosecution (or a private prosecution), and in respect of a breach of an implied warranty in contract a deterrent may be available by way of prosecution for breach of a safety or health standard(*d*). In respect of these means of deterrence an aggrieved individual is dependent on action being taken by a quasi-public body. (If there is considerable attendant publicity it will be an effective deterrent, without that the effectiveness may diminish).

The theory which will be put forward in this article is based on the view that in some circumstances the law of torts and the law of contract do act as a deterrent, that this is important, and that in any event claims may still be available in spite of the wording of s 5 of the Act. The central premise on which the theory is based is that s 5 does not abolish any cause of action, it merely abolishes a claim for damages in certain circumstances(*e*). In other words (since a *cause* of action can be said to be the legal recognition that a certain type or category of fact situation will, in the circumstances that an event from which damage has flowed has occurred, or if it is actionable per se, give rise to the right to bring a legal action) the head of damage is removed, not the cause of action. One can therefore argue that if the *cause of action* is either actionable per se or if more than one head of damages (for example personal injury and some other type of damage, such as humiliation or injury to reputation) flows from the damaging event, then since the Act does not purport to abolish any cause of action, a claim will still be available for that other head of damage apart from that arising out of personal injury.

It is true to say that damages are "once and for all", and that if further damage of the same kind flows from the damaging event a second claim based on the same cause of action cannot be brought, even though the damages being claimed for in the second action may have materialised after the first claim has been heard and satisfied(*f*). This is surely what *directly or indirectly* in s 5 means. Since the coming into force of the Accident Compensation Act the only claim in respect of damage flowing from personal injury is one to the Commission.

(a) Whilst it is possible for claimants to be assisted by lawyers in the prosecution of their claim through the Accident Compensation Commission it is not envisaged that legal advice will be required by the "average" claimant.

(b) This is pure supposition since no statistical evidence on this question is available.

(c) Compensation for Personal Injury in New Zealand—Report of the Royal Commission of Inquiry, Wellington, December 1967.

(d) See, for example, Food and Drug Act 1969.

(e) Section 5 (1) declares that ". . . no proceedings for damages arising *directly* or *indirectly* out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person and whether under any rule of law or any enactment."

(f) The rule in *Fetter v Beal* (1699) 1 Ld Raym 339.

On the other hand there is a line of cases (some relating to the effect of Statutes of Limitation) which suggest that where a single act not actionable per se causes separate damage on more than one occasion, each occasion can form the basis of an entirely separate action(*g*). What this means is that the cause of action does not become available until the damage occurs, so that if there is more than one head of damage, there may be more than one cause of action whether the injury is actionable per se or not, and the rule that damages are "once and for all" does not apply.

In his judgment in *Darley Main Colliery Company v Mitchell* (1886) 11 App Cas 127, 132-133, Lord Halsbury said:

> "No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever . . ."
>
> "But the words 'cause of action' are somewhat ambiguously used in reasoning upon this subject; what the plaintiff has a right to complain of in a Court of Law in this case is the damage to his land, and by *the* damage I mean the damage which had in fact occurred, and if this is all that a plaintiff can complain of, I do not see why he may not recover toties quoties fresh damage is inflicted."

The other Lords of Appeal were to a similar effect, and it seems clear that there has to be first an injury (or damaging event) coupled with legal damage. Therefore there may be two (or more) quite distinct types of legal damage flowing from the one injury, so as to permit two (or more) causes of action in respect of the single injury. The tort of assault is a classic example of this, since traditionally it has afforded protection not only from personal physical injury but also from the injury to reputation, insult, or humiliation, which may arise from the interference with the person(*h*). This seems to be a recognition by the Courts that even though there may be physical injury with consequent damage, another head of damage (which might also include aggravated or exemplary damages) may well flow from the damaging event. It would be somewhat ironical if the victim of an assault who happened to suffer *no personal injury* could claim in the Courts, whereas the victim of a similar assault who suffered personal injury could only claim from the Commission.

The tort actions in assault and battery clearly would be the ones in which it would be easiest to separate the damaging event from the damage so as to see that more than one head of damage had flowed from the damaging event. Since s 5 of the Act only supplants the common law claim for damages flowing from personal injuries, the cause of action giving rise to a claim in damages remains intact so long as a particular kind of damages, namely, that resulting from personal injury, is not included in the claim.

In respect of other areas of tort liability, such as, in particular, negligence and in actions for breach of contract (both of which also appear to be covered by the Act if they result in personal injury), it may be that in the majority of cases only one kind of damage in fact occurs, and in any event it may be more difficult to separate the damaging event from the damage, in order to show that more than one kind of damage has occurred. There will be cases from time to time (albeit rarely) when more than one kind of damage will flow, and these will surely remain actionable(*i*).

Consideration will need to be given to the question of aggravated and exemplary damages. It has been argued that these are in fact "parasitic" and depend for their existence on another head of damages being available. This is arguable at least in the case of aggravated damages which may in fact be compensatory(*j*). If these types of damage are not dependent on other damage (such as, for present purposes, damages for personal injuries), then provided a cause of action is present a claim may lie for the aggravation or the exemplary nature of the damage. The extent to which exemplary damages are available in New Zealand is not clear since the decisions in *Rookes v Barnard* [1964] AC 1129 and *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590(*k*).

(g) The tort of nuisance can give clear examples.

(h) See for example the discussion in *Fogg v McKnight* [1968] NZLR 330. In the recent case of *Gabolinscy v City of Hamilton* [1975] 1 NZLR 150 Moller J allowed one of the plaintiffs, in a negligence claim in respect of property damage, additional damages for something in the nature of upset and humiliation.

(i) Gabolinscy v City of Hamilton (supra n (*h*)) and *Jarvis v Swan Tours Ltd* [1973] 1 QB 233 illustrate the possibility.

(j) Huljich v Hall [1973] 2 NZLR 279, McCarthy J at 287.

(k) See the decision of the Court of Appeal in *Huljich v Hall* (supra), particularly the judgment of McCarthy J for a consideration of this point and the unreported judgment of Cooke J in *Superior Homes Ltd v Upjohn* (SC, Wellington, judgment 26 July 1973).

In general aggravated or exemplary damages are not available in contract(*l*) although there is some suggestion in recent decisions that this strict rule may no longer be adhered to(*m*). It may be possible to argue that, at least in those situations where there is breach of an implied warranty (albeit resulting in personal injury) non-pecuniary damages will be available to cover humiliation and loss of other benefits. It can be argued that such damages are quite distinct from those which flow from the personal injury.

In addition there are causes of action which whilst they may give rise to an action for damages also give the right to ask the Court to exercise its equitable jurisdiction and grant an injunction. At that point of time damage may not necessarily have occurred at all. The damage which could occur might be damage flowing from personal injury, but presumably s 5 of the Act will not affect the right to ask the Court to exercise its equitable jurisdiction. The Court can then, under its powers, if it thinks it more appropriate, make an equitable award of damages in lieu of granting an injunction, under the provisions of Lord Cairn's Act (21 & 22 Vict. c27) which is in force in New Zealand. Section 5 of the Act would appear not to have undermined the equitable jurisdiction of the Court.

One of the main obstacles in the way of bringing any test action in respect of the considerations raised in this article may arise out of the effect of s 5 (5) of the Act which leaves in doubt the question of whether a Court would have jurisdiction before the question of the extent of compensation has first been considered by the Commission(*n*). It is certainly to be hoped that before too long the matter will be judicially tested, since whilst it is true that the scheme of the Accident Compensation Act will benefit the community as a whole, there are likely to be some victims of accidents who, unless they retain their right to claim at common law and in equity, will be inequably treated in relation to some other members of the community.

(l) Addis v Gramophone Co [1909] AC 488.

(m) See in particular *Jarvis v Swan Tours Ltd* (supra n *(i)*) and *Jackson v Horizon Holidays Ltd* (Court of Appeal, *The Times, London,* 5 February 1974).

(*n*) Rights of appeal from decisions of the Commission are severely limited and cumbersome. See ss 153, 155, 168 and 169.

FAMILY LAW FOR MEDICAL SOCIAL WORKERS

PAM RINGWOOD, *BA, LLM, DipSocSci, of Auckland, found shortcomings when she reviewed hospital procedures and social workers.*

"Justice must not only be done but must be seen to be done" is a maxim that is readily accepted in relation to trial procedures. Our welfare society, however, is also heavily oriented towards the administration of the law, and in this area the maxim is by no means as obviously enforced.

The reason for this is obvious. Lawyers, and frequently lawyers of outstanding skill and attribute, have control of litigation. The vast majority of people who are responsible for interpreting and carrying out the law are often not even partially qualified in understanding it. What is applied, then, is their view of what the law says and it then depends on their client's initiative or knowledge or the other advice available to him, whether or not he is bound by any limitations in their view. This is particularly difficult, eg with social workers and Social Security staff who are dealing often with clients disadvantaged in relation to legal understanding and who are not likely to seek a solicitor's confirmation.

Over the past five years, I had occasion to deal either on my own behalf or other people's with administrative officers who had not always a clear or correct view of the law they were administering. This directed my attention to the help people in advisory positions were given in understanding the legal situation they interpret to clients. I chose hospital social workers as an area of research, not because I thought they were worse than any other group but simply because it was a small homogeneous group within my resources to research. I thought that some direct and indirect legal problems arise in connection with their work, including battered children, rights of discharge (particularly over children), advice on marital affairs or any legal matter that was affecting the patient's recovery. When I was working in a terminal cancer ward in a social work

capacity, I was struck by the number of people who were dying intestate. This was not seen as a legal problem, probably because many of the doctors did not want to advise even patients in the terminal ward that they might die, and probably because the hospital staff did not realise the difficulties this often created for moderately sized estates. Or that it added legal and financial complications for a widow who had sustained a husband through a long and painful illness, and who had children to support on her own.

A letter was sent to the 29 hospital boards and 19 replied, most of them fully and promptly. No names are given as I did not obtain permission to disclose them.

Fourteen boards had no provision for training at all. Three had social workers who had had formal training in social work which had included family law. Two had in-service instruction and/or had made provision for social workers to attend courses. Asked whether they thought training was desirable, three did not answer, two thought not and fourteen thought it was. Of the opposing boards, one gave no reason and the other said that "because of the great complexity of the subject, it is not thought advisable to go into great detail".

Of those agreeing with the need for training, reasons given include:

—"Social workers are often in a position where their clients look to them for guidance as to their rights and ways of obtaining them."

—"(referred to Victoria University course) . . . . Other than this, social workers consult with the solicitors for the client's benefit. Both the legal and social work disciplines have strong allegiance to confidentiality and with some solicitors and social workers, consultation without the client being present, can only result in an impasse. Further training and reference material would be most useful."

The capacity to identify a problem as having legal connotations is important, as every legal referral service knows. With this in mind, I asked about the availability of a legal department in the hospital, advising on day-to-day legal issues. None had a day-to-day service, but all had some legal advice. The Chief Executive of one hospital was a lawyer; another had a lawyer in the office as well as an outside firm, and in other cases boards described access to their outside solicitor as ranging from "easy" to "when necessary". One said the social workers made little use of the solicitor. In two cases, legal questions were dealt with either through the Medical Superintendent or Board Secretary, and in one of these, custody questions were dealt with either through the Medical Superintendent or Board Secretary, and in one of these, custody questions were referred to the Social Welfare Department.

Knowing that some social workers refer clients to a short list of solicitors, I asked the boards about this method of referral. Four had no short list. Two had no mechanism of referral at all. Two never referred clients to solicitors. Two referred them to the boards' solicitors. One referred them to the Law Society or to a social agency such as Citizens Advice Bureaux, and similarly one referred them to free legal services. One suggested that they ask relatives for a recommendation.

There was a very wide range here and similarity in the next question which related to the legal problems they found.

Conclusions

Some hospitals seem much more involved than others in community problems, and there tend to be hospitals who have mechanisms and policies for legal consultation and referral. This survey is not of itself enough to warrant any hard and fast conclusion but it would give rise to the assumption that to the extent that when a Board sees itself as dealing with more than the purely clinical aspects of health problems, it becomes more involved in the social and legal worries of its patients and develops machinery to help them. There are enough Boards doing this to warrant consideration of these suggestions:

(i) A more systematic advice of legal aid and other legal services by Citizens Advice Bureaux and Law Societies.

(ii) In-service training on the recognition of legal problems and of some elements of law as it affects the hospital and staff—a part of it could include the law as included by one board in in-service training—"the provisions of the Health Act and Hospitals Act, and the principles of the law as it relates to trespass, assault, negligence, etc, and the limitations of their own powers and duties."

(iii) Some matters which combine legal, social and administrative aspects such as discharge would appear to merit systematic interprofessional and interdepartmental investigation and consultation.

This survey was instituted primarily to find out topics for a textbook on family law for

social workers and having in mind also some areas of difficulty that had come to my knowledge. Although it covered every Hospital Board in the country, it was not an intensive survey in terms of the subjects covered by the answers and in particular the thoughtful answers of most of the boards, show that there is an important field here for practical research and co-operation, in the interests both of the patient and the concerned and sympathetic staff.

CHIEF PARLIAMENTARY COUNSEL RETIRES

John Patrick McVeagh, CMG, LLM, well-known lawyer and author, retired at the end of April from the office of Chief Parliamentary Counsel. He had held the office for almost 5 years, and ended a period of 28 years in the Parliamentary Counsel Office, though he will continue to perform certain selected drafting activities.

Paying tribute to Mr McVeagh, the Attorney-General, Dr A M Finlay QC said that his task has been one of the most demanding and delicate in the Public Service—that of translating the express policy of the Government of the day into legal terms. "Our standard of draftsmanship ranks high in the Commonwealth," he said, "and Mr McVeagh has added to New Zealand's reputation in this field. It has been well said that the art of drafting an Act of Parliament involves writing it in such a form that not only must persons reading it in good faith be able to understand it, but persons reading it in bad faith must not be able to misunderstand it. This standard is easier to set than to attain but Mr McVeagh has proved himself a notable exponent of this difficult art.

"Mr McVeagh absorbed himself in his work, but did not let it stifle his other interests, both professional and sporting. He is author of *McVeagh's Land Valuation Law,* the standard work on the law relating to land valuation in New Zealand, now in its sixth edition. He is also well known in local government circles as the editor of *Jolliffe's Local Government in Boroughs and Counties,* and the author of a new work *,McVeagh's Local Government Law in New Zealand",* Dr Finlay continued.

Born in Cambridge, Mr McVeagh was educated at Auckland's Sacred Heart College —he was dux and the winner of a University Entrance Scholarship in 1927—before attending Auckland University where he gained his LLM with first class honours. He was admitted as a barrister and solicitor in Auckland in 1933. After 10 years with the well-known Auckland legal firm of Russell, McVeagh & Co, he joined the Public Trust Office in 1938, served with the Legal Division of the Royal New Zealand Air Force, and took the post of Assistant Law Draftsman in 1947. He has been a member of the Torts and General Law Reform Committee since 1968, and is also an honorary member of the New Zealand Institute of Valuers. Earlier this year he was honoured by the Queen by being made a Commander of the Most Excellent Order of St Michael and St George. His main sporting interests have been rugby and cricket. He represented both Auckland University (1931 to 1937) and Victoria University (1938 to 1941), as well as touring with the New Zealand Universities rugby teams to Australia in 1931 and Japan in 1936. He is also a keen tramper.

His successor as Chief Parliamentary Counsel is Walter Iles, LLB, who has been Mr McVeagh's deputy for some years. Mr Iles, who was educated at Nelson College and the Victoria University of Wellington, joined the Parliamentary Counsel Office in 1959.

Soliciting—"Lots of people regard lawyers and tarts with just about equal doses of suspicion. And come to think of it, we don't make strange bedfellows—not all that strange, anyway. I mean, clients only come to either of us when they have to. And they'd rather not have to for a start. Second, and this applies especially in our early days of practice, we both rely on mystique rather than expertise. Third, we are both inclined to over-value our services, and since we can neither of us guarantee complete satisfaction, we both find it wiser to ask for the money first". *The Spectator* as quoted in the *Northern Newsletter.*

THE LAWYER AND THE COMMUNITY
X—Summary and Recommendations

ROBERT LUDBROOK *concludes his series of articles. Earlier parts appeared at* [1974] NZLJ 374, 396, 439, 523; [1975] NZLJ 40, 65, 127, 187 and 204.

In England, the United States, Canada and Australia there is now acceptance that the private law firm can no longer meet the needs of the Community. The breakdown of legal services in South Auckland has forced upon us recognition that the same is true in some New Zealand cities.

We can no longer allow the provision and distribution of legal services in the community to be reliant on market forces and the charity of the legal profession. We must look for new ways of meeting the needs of the community for legal services.

Looking at developments overseas, we can see that there are three possible alternative approaches:

The first or conservative approach is to work through the private law firm—encouraging lawyers to set up practice in the deprived areas by offering capital grants, rent rebates, income subsidies or a guaranteed income. Finance could be channelled through government, local authorities or local law societies. The profit motive would remain the guiding force in the distribution of legal services but grants and subsidies would increase the profitability of legal practices in less affluent suburban areas.

One drawback of this approach is that it could create a vicious circle. The number of lawyers is limited and generous financial rewards would be necessary to get lawyers to set up practice in deprived areas. Private law firms would have to offer even better salaries pushing up legal fees and exacerbating the original problem.

Whilst the young lawyer with a social conscience might be attracted to this type of work for two or three years, it is most likely that he would eventually move back to the lawyers' traditional hunting grounds—not necessarily because of the superior financial rewards—maybe because of the frustrations and the wear and tear of working in a deprived area, or through ambition to move ahead in the profession.

From the point of view of the community, such a solution would tend to be expensive; in America, as we have already seen, on a "cost per case" basis the neighbourhood law offices can provide services at about half the cost of the Judicare scheme which pays fees of private law firms.

The second or radical approach involves complete restructuring of legal services. In its most extreme form, it would involve the nationalisation of all legal services or the introduction of a state legal service on similar lines to our health service. A less far reaching step would be the creation of a Public Solicitor's office complementary to and in competition with private legal firms. This could operate along similar lines as the Public Trust Office. It might offer a full range of legal services or might accept only a limited range of clients.

Those who believe that legal services are so important to the individual and of such a personal nature that a government department is a quite unsuitable means of providing such services will not favour this solution. The legal profession have demonstrated that they are willing to enter into the spirit of any new venture but a government-organised scheme would be a threat to their independence and would undoubtedly meet strong resistance.

The third approach is the one which has found favour in England and America. It retains in the private enterprise structure and does not diminish the importance of the private law firm but aims to provide a complementary service to cater for those areas in which the financial rewards have not attracted private law firms. Community law offices would be developed in areas where a need was evident. They would be based on the 'neighbourhood' concept and would have a considerable degree of autonomy.

In New Zealand, as in England and the United States, the neighbourhood law office seems to be the most acceptable means of grappling with the problem. We are fortunate in that we can draw on the knowledge and experience gained from experimental ventures overseas.

The funds for such a neighbourhood law office should be provided by government. Be-

cause of economies of size, routinisation of function, use of voluntary helpers and law students, standardisation of documentation and a greater use of para legal personnel, a neighbourhood law office should be able to process work more efficiently than the private law firm. The cost to Government would not be great.

There would be significant savings in legal aid payments and could be a considerable saving of public funds due to more speedy pursuit of maintenance cases.

Immediate steps should be taken by the New Zealand Government to open several state-funded neighbourhood law offices on an experimental basis. Otara, Mangere, Glen Innes, Te Atatu and Ponsonby in Auckland; Porirua and Newtown in Wellington are areas in which the need is evident. There are doubtless others.

Considerable thought will have to be given to the financial and administrative structure of the NLOs. Certainly they should not be just another Government Department. Possible alternatives might be:

(1) *Local Law Societies* employing the personnel and supervising and administering the NLOs drawing on funds supplied by Government through the Justice Department.

(2) *A local charitable trust* being formed to set up the NLOs relying for finance on funds made available through Government. There is a precedent for financial support being made available to assist voluntary bodies. The National Marriage Guidance Council receives an annual grant from Government through Justice Department to pay the salaries of Directors and support personnel.

(3) *Some local authorities* are beginning to show an interest in the welfare of the people within their areas. Many local authorities now employ social workers or social administrators in the capacity of Community advisers or Social services officers. Funds could be made available through Government to local authorities willing to set up and support Neighbourhood Law Offices. Local authorities have the administrative expertise and local knowledge and the NLOs could be integrated with other community welfare services such as Citizens' Advice Bureaux, transit housing, etc.

Whatever the structure be, the programme should be a joint venture of Government and the Law Society. Representatives of the local community should be represented on the managements committee. Ideally the neighbourhood law offices would be integrated with other community services on the group practice principle.

At the same time steps should be taken:

To extend the Legal aid scheme to cover legal advice along the lines of the English Legal Aid and Assistance Act 1972.

To organise seminars and workshops for lawyers and law students to enable them to acquire a better understanding of legal problems of the disadvantaged and to equip them to deal more effectively with such problems.

To devise and distribute information sheets on legal and allied matters eg details of social welfare benefits available to deserted wives and single parents.

To instigate and assist in public education and preventative law programmes.

To ensure that personnel assisting in the new neighbourhood law firms whether as paid employees or volunteers should receive comprehensive training in common legal problems, interviewing skills, public relations techniques.

To encourage University Law Schools to offer optional courses in Community Law.

To facilitate a far greater cross-flow of information and exchange of ideas between the Department of Social Welfare, voluntary social service organizations and the legal profession.

To implement without delay the proposed Duty Solicitor scheme so that NLOs and Duty Solicitors can work together to provide a comprehensive service to persons appearing on criminal charges.

To give some recognition to those firms that are at the present time carrying a disproportionately heavy load of this type of work.

Action is urgently needed because every day people in New Zealand are failing to get the legal advice and assistance they need. The signposts are clear. All we have to do is follow them.

Iron Bar—I have never been able to understand why so many Counsel in New Zealand find it too much trouble to keep a morning coat in their robing locker for use in Court. They appear sometimes in a dark blue or brown sac suit. That is bad. But infinitely worse is the slovenly habit one notices in some Courts of compromising with the colour convention by wearing a black alpaca coat under their gowns. I often wonder why the Law Societies in New Zealand cannot persuade their barrister members not to appear in Court in the attire of an ironmonger's assistant.—From *Cheerful Yesterdays* by O T J Alpers.

ASSAULT AND CONTRIBUTORY NEGLIGENCE

In *Hoebergen v Koppens* [1974] 2 NZLR 597 Moller J was asked two questions: (1) In assault, should provocation reduce the damages? (2) In assault, should contributory "fault" reduce the damages? He replied "no" to the first question on the ample authority of *Lane v Holloway* [1968] 1 QB 379 relying on *Fontin v Katapodis* (1968) 108 CLR 177*(a)* decided in the High Court of Australia.

He answered "yes" to the second question holding that "... in a proper case, it is open to a defendant in an action based on an assault to call in aid the provisions of the Contributory Negligence Act". In support Moller J said of Salmon L J and Winn L J in *Lane*'s case that "both ... seem to have accepted that the defence (of contributory negligence) *is* available in such a case" (ie. of assault).

Earlier in his judgment Moller J quotes authors whose utterances lend him support for the decision he comes to. Thus *"Salmond on the Law of Torts* (16th ed) at 129: 'Contributory negligence is generally assumed to be a defence to assault ... but there is no clear decision on the point'." And again, "Munkman's *Damages for Personal Injuries* (4th ed), after accepting the decision in *Fontin*'s case that provocation, *as such,* cannot be used in a case of assault to reduce purely compensatory damages, goes on, at page 41, to say: 'but of course provocation could amount to contributory negligence, and so reduce the liability and the damages with it'."

Moller J then had to determine whether the instant case was, in his terms, "a proper case". He found it was. He distinguished *Lane v Holloway* (where there had been no previous threats of violence) and found that here, where there had been such threats, the respondent "failed to take such care for his own safety as the ordinary reasonable man would have taken". He concluded, "I think therefore that the damages to which the respondent would otherwise have been entitled must be reduced in accordance with the provisions of s 3 (i) of the Contributory Negligence Act".

The question arises, however, how this can be squared with the Contributory Negligence Act. It is in conflict with several authors and seemingly with the Act itself. For example, *"Clerk and Lindsell on Torts* (13th ed) para 982 has 'Contributory negligence is not an answer to intentional wrongdoing ...' Professor Glanville Williams in his *Joint Torts and Contributory Negligence* in a footnote at 318 has: '... the Act does not apply to torts of wrongful intention for in such torts contributory negligence was no defence at common law ... negligence is not covered if apart from the Act it would not have amounted to contributory negligence ...' Professor Fleming, *The Law of Torts* (4th ed), page 227 has: '... contributory negligence was not a defence to all torts. Thus it did not apply to intended injury'. And at 228 he has: 'The second requirement (of the definition of fault) exempts from apportionment all cases where contributory negligence was not a defence at common law, like torts of wrongful intent'."

These authors on what they have written must hold Moller J to be wrong. With respect, I submit he was right.

He is right, not because Salmond supports him. Salmond says "Contributory negligence is generally assumed to be a defence to assault". The generality of that assumption is at least doubtful if Clerk and Lindsell, Williams and Fleming do not assume it and in fact reject it.

He is right not because Munkman supports him. Munkman says "... provocation could amount to contributory negligence ..." "could" implies a condition. Until the condition is fulfilled that which is conditional remains merely a future possible.

He is right because he is a Judge doing what Judges do, ie, making the law. If that appears unnecessarily cryptic and perhaps special pleading I hasten to support it with argumentation.

The definition of "fault" reads "'Fault' means negligence, breach of statutory duty or other act or omission which ... would, apart from this Act, give rise to the defence of contributory negligence"*(b)*. Both Williams and Fleming give what I submit is a faulty exegesis of that definition. They are interpreting it as

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(a) Both *Lane v Holloway* and *Fontin v Katapodis* allow provocation to eliminate exemplary or aggravated damages but cannot reduce compensatory damages. Exemplary or aggravated damages were not at issue in the instant case and therefore were not further considered.

(b) Contributory Negligence Act 1947, s 2.

if it read "..... would, apart from this Act *have given* rise to the defence of contributory negligence". Or again, as if it read: "Fault means negligence etc ... which *once upon a time before the passing of this act, gave* rise to the defence of contributory negligence".

They are interpreting it as though all development of the law ceased at the passing of the Act; as though we are for ever dependent on what was accepted as contributory negligence before and up to the passage of the Act; as though the Act froze for ever the number of situations in which contributory negligence was admissible.

But the Act does not read that way at all. The Act reads:

> " 'Fault' means negligence, breach of statutory duty or other act or omission which ... would apart from this Act, give rise to the defence of contributory negligence."

There is nothing in that definition to prevent development of the law and, in suitable cases, for Judges to declare that "It is open to a defendant in an action based on an assault to call in aid the provisions of the Contributory Negligence Act".

Interpreted as Williams and Fleming interpret them, the words "apart from this Act" are more simply and clearly rendered by "before this Act". Indeed, so imbued with this interpretation is Professor Fleming that quoting, as he thinks, the Act, he unwittingly imports into the quotation, words which should not be there but which render his idea of what the definition section means. The Act reads. "... which would, apart from this Act, give rise to the defence of contributory negligence". Professor Fleming's quotation of that extract reads:

> "... would, apart from the Act, *have given* rise to the defence of contributory negligence". (Emphasis added) *(c)*.

To interpret the words "apart from this Act" as meaning "before this Act" is actually to be in conflict with the Act because the words read "*apart* from this Act". To limit one's considerations *because* of the Act to matters as they existed up to the passage of the Act is not to proceed *"apart from this Act"* at all but to *invoke* the Act to prohibit any development of the law after the passage of the Act. I submit that that is not what the Act intends and is certainly not what it says. Moller J's judgment is conformable to the Act.

The question now arises however, why should the interpretation section be phrased the way it is? According to the argumentation above, the section would have been more simply rendered by the following: "Fault means negligence etc ... which gives rise to a liability in tort or which gives rise to the defence of contributory negligence".

What function, it may be asked, is served by the word "would" and the words "apart from this Act"?

Three lines of inquiry suggest themselves.

First—Does "apart from this Act" simply mean "elsewhere", ie in law to be found elsewhere? As though the section read: "Fault means negligence etc ... which would, according to law found elsewhere, ie not in this Act, give rise to the defence of contributory negligence".

In other words, it is suggested that the words "apart from this Act" are merely an indication that one is not to look in and to the Act for what may constitute contributory negligence. I think this explanation to be more likely than any other. After all, one would expect to find something about contributory negligence in an Act entitled "Contributory Negligence Act". One would confidently expect to find in the interpretation section, s 2, an interpretation of the words "Contributory" and "negligence". That there is no such interpretation indicates that the terms bear the meaning given them in Common Law and that when, in s 2, "fault" is interpreted as meaning "negligence ... which would, apart from this Act, give rise to the defence of contributory negligence" the words "apart from this Act" function as a species of signpost pointing to the Common Law. The Common Law of course is not rendered static by the Contributory Negligence Act and will develop along its own lines and according to its own principles.

However, if the words "apart from this Act" do mean no more than "elsewhere" the objection advanced above viz: that it would be sufficient to have the interpretation section read: "Fault means negligence etc ... which gives rise to the defence of contributory negligence" becomes again relevant, since such a rendering perfectly covers the meaning "elsewhere". I note however that the objection is not of such a kind as positively to destroy the argument against which it is directed. The mere fact that a phrase could be the use of other words, render more simply a meaning ascribed to it, does not force the conclusion that that meaning has been mistakenly ascribed

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(c) Fleming, *The Law of Torts* (4th ed) 228.

to it. It may mean simply that there are two ways of saying substantially similar things.

Second—Perhaps the words "apart from this Act" mean "in addition to anything found in this Act" in which case we would expect to find in the Act something in the nature of contributory negligence to which contributory negligence as known and recognized elsewhere can be added. If there is something like that in the Act I have been unable to find it.

Third—The words "would, apart from this Act" suggest that somewhere in the Act there is a provision, one of the effects of which is to stop what would otherwise give rise to a defence of contributory negligence from giving rise to that defence. This effect however is nullified by the interpretation section's words "apart from this Act", since these words allow that defence.

The provision which meets the above description seems to be s 4 (1) which reads:

> "Where, within the time limited for the taking of proceedings under the Workers' Compensation Act 1956, an action is brought to recover damages independently of that Act in respect of an injury or disease giving rise to a claim for compensation under that Act, and it is determined in that action that—
>
> "(a) Damages are recoverable independently of that Act subject to such reduction as is mentioned in subsection one of section three of this Act; and
>
> "(b) The employer would have been liable to pay compensation under the Workers' Compensation Act 1956,
>
> section one hundred and twenty-six of the Workers' Compensation Act 1956 (which enables the Court, on the dismissal of an action to recover damages independently of that Act, to assess and award compensation under that Act) shall apply in all respects as if the action had been dismissed, and, if the claimant chooses to have compensation assessed and awarded in accordance with the said section one hundred and twenty-six, no damages shall be recoverable in the action."

By s 4, the Contributory Negligence Act adapts to its own purposes s 126 of the Workers' Compensation Act making it, as adapted, a part of the Contributory Negligence Act. Since contributory negligence is irrelevant in a Workers' Compensation Act context it could be argued that apportionment did not apply to the situation involving s 126 as adapted. Since however the interpretation section describes "fault" as "negligence etc ... which would *apart from this Act* give rise to the defence of contributory negligence" and since s 126 as adapted and incorporated into the Contributory Negligence Act is by that adaptation and incorporation made part of the Contributory Negligence Act, "fault", ie contributory "fault" will be relevant and apportionment, as per s 3 (1), allowed, given entree by the words "apart from this Act".

Whatever the explanation of the words "apart from this Act" they do not, I submit, mean what they are seemingly almost universally and uncritically understood to mean viz: "before this Act". It is clear that Moller J does not so interpret them. Some revelation of his Honour's reasoning would have been welcome but, in the event, though welcome is not necessary as the route from his decision back to the terms of the Contributory Negligence Act itself seems clearly signposted and points to the words of the interpretation section having the unstrained meaning that those same words normally bear though, for reasons that are nowhere revealed and perhaps never even adverted to, the normal meaning seems, outside his Honour's Court, to have been overlooked.

P D MEULI

NEW MAGISTRATE APPOINTED

Mr Bruce Alan Palmer has been appointed a Stipendiary Magistrate. At the time of his appointment he was a partner in the Wellington law firm of Bell, Gully and Company.

Mr Palmer was born in 1935 and admitted as a barrister and solicitor in 1958. Appointed as Crown Counsel in Fiji in 1962 he became Senior Crown Counsel three years later. In 1969 he returned to New Zealand.

Actively interested in education, Mr Palmer is a former Chairman of the Island Bay School Committee and currently a member of the Erskine College Board of Governors. He is married and has six children ranging in age from one to 13 years.

Mr Palmer has taken up his duties in Christchurch.