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INTER ALIA

Voting inside

The fundamental right in a democracy is the right to vote—the right to express one's views and to defend one's rights and freedoms by actively participating in the electoral process. This right is denied in some countries whose electoral process we tend to view with disfavour.

However we, for our part, have practised the denial of democracy by refusing prison inmates the right to vote.

In repealing this prohibition, Parliament is acting logically and sensibly. Prisoners they may be, but they still have rights and responsibilities, and if giving them the vote is to increase parliamentary appreciation of the prisoners' existence it can be no bad thing. Certainly an awareness that they *are* members of society is the very attitude our penal system is working to engender.

Criticism that, by restoring the prisoners' right to vote, the Government is being "soft on law and order" is an argument as specious as it is facile. None of the critics has yet claimed to know an individual who would have offended but for the provisions of s 42 (1) (b) of the Electoral Act 1956. Nor has any suggested that the ostracising of a prisoner from the electoral process in any way serves as a punishment or contributes to his rehabilitation.

Democracy is too precious to be treated flippantly. Such critics would serve us better if they argued from fact instead of simply waving flags.

Aspects of insurance

The report of the Contracts and Commercial Law Reform Committee, *Aspects of Insurance Law*, considers the ability of the insurer to avoid liability where wrong answers have been given innocently and to questions immaterial to the assessment of the relevant risk.

The Committee quotes Mr Justice Swift: "I am extremely sorry for the plaintiff in this case. I think he has been very badly treated—shockingly badly treated. They have taken his premium. They have not been in the least misled by the answers which he has made. They would never have refused to give him his policy if they had known everything which they know now. But they have seized upon this opportunity in order to turn him down. . . . But I cannot help the position. Sorry as I am for him there is nothing that I can do to help him. The law is quite plain." (*Mackay v London General Insurance Company Limited* (1935) 51 Ll LR 201, 202.)

The Committee, Swift J notwithstanding, was equally divided. Those in favour of reform pointed out the present lack of logic; and those opposed suggested that immaterial false answers may lull an insurer into a state of mind where he does not pursue inquiries into matters which may turn out to be very material.

In striking a balance, perhaps the first duty is to protect the innocent and if such a charge is to marginally increase the risk overall, such a measure of added protection would be ample reward for the added element of cover.

As Fletcher Moulton LJ said (in *Joel v Law Union & Crown Insurance Company* [1908] 2 KB 863, 885): "One of the commonest of such questions is 'Have you any disease?' Not even the most skilled doctor, after the most prolonged scientific examination, could answer such a question with certainty, and a layman can only give his honest opinion on it. . . . I wish I could adequately warn the public against such practices on the part of insurance offices."

Arbitration

Such a warning against amoral insurers, the Committee concluded, is in some cases denied by compulsory arbitration clauses. The customer and prospective customers of an insurer are entitled to know how that insurer behaves towards claimants, and whether it habitually invokes technicalities to defeat meritorious claims. The Committee accepted the merits of arbitration but questioned motive. It recommended that by statute arbitration clauses should not bind the insured. Time limits, too, should only be binding where the insurer has been prejudiced; insurance agents should be treated as the agent of the insurer, not of the insured; and insurers should not be permitted to decline to accept a claim where the loss arises from an event unrelated to the circumstance relied on as a ground for denying liability (eg the "unsafe" vehicle which is struck from behind due in no part to its own want of safety).

The Committee's report and draft Bill has been promised prompt attention from Parliament. In the meantime we must wait for a later report which, the Committee says, may suggest that the Courts be given power to strike out clauses in insurance contracts that are unjust or inequitable, or for Parliament to lay down standard contract forms with a prohibition of the use of any other form which is "less favourable to the insured".

JEREMY POPE

CASE AND COMMENT

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

Warranty of fitness of building site

The decision of Moller J in *Gabolinscy v Hamilton City Corporation* [1975] 1 NZLR 150 is of considerable interest to practitioners involved in developing and selling sections for building.

The facts are as follows. In 1926 the Hamilton City Council acquired an area of land which it used first as a gravel-pit and sand-pit and later as a site for transit housing. Approximately 30 years later, the Council subdivided the land and offered the sections for lease to the public. The terms on which these leases were offered, which were set out in the "particulars and conditions of lease by public application", included, inter alia, a perpetual right of renewal and a requirement that the lessee erect a dwellinghouse at a minimum value within two years of the commencement of the term of the lease. Mr and Mrs Gabolinscy were successful in an application for a lease of one of the sections. The lease which they entered into included a covenant on their part to erect a dwellinghouse at a minimum value within a period of two years of the date of the commencement of the term. They obtained a building permit, the house was completed in 1960, and Mr and Mrs Gabolinscy went into possession.

Ten years later, in 1970, certain fractures appeared in one corner of the house and subsequently a considerable amount of settlement took place in that corner. Mr and Mrs Gabolinscy employed consulting engineers and as a result of their advice carried out repairs to the house. His Honour's findings of fact were that in the area where settlement occurred there was a depth of three feet of good soil, which was generally sound but which was clearly identifiable as fill once one knew what was below it, that below that was poor quality fill which could be described as rubbish, that these poor quality materials gradually decomposed and settled, and that, as a result, the surface material subsided and the house dropped with it causing the damage which had to be repaired. He further found that both the good filling near the surface and the poor filling below it had reached their respective positions during the Council's ownership, between the time that the area ceased being used as a gravel or sand pit and the time when the subdivision was completed and the sections offered to the public, and that consequently the Council either put the fillings there itself, or knew, or ought to have known that they were there and what were their nature and quality.

Mr and Mrs Gabolinscy claimed from the Council special damages amounting to $3,615.49 representing the cost of repairs and engineering and legal fees and the sum of $1,000 by way of general damages.

The plaintiffs relied on two alternative courses of action, one of which was based on breach of contract and the other on the Council's alleged negligence.

As far as the Council's contractual liability was concerned, the plaintiffs alleged a breach by the defendant of an express or implied war-

ranty on its part collateral to the lease that the section leased by them was suitable for the erection of a dwellinghouse. Council for the plaintiffs relied particularly on the term of the lease which required the lessees to build a house on the section within two years. On this cause of action His Honour decided that no express warranty existed, but that such a warranty could be implied and that the Council was in breach of that warranty.

It may appear, at first sight, that the decision on this point is authority for the proposition that a warranty as to fitness for building will be implied whenever a housing section is sold by a developer. However a closer examination of the judgment shows that this is not so. His Honour states (at p 162, lines 48-51) "it is no doubt true that warranties of quality such as ones as to the suitability of a property for housing purposes are not readily implied in contracts for the sale or lease of lands", and again (at p 103, lines 13-17) "although warranties as to the quality of any land which is the subject of a contract of sale or lease are not in general to be implied the totality of the circumstances of any particular case may lead the Court to a decision that such a warranty should be implied". The circumstances which existed in this particular case and which appear to have carried most weight in the decision that a warranty was implied were first of all the fact that the council knew that the plaintiffs were purchasing the section for building purposes, and secondly the term in the particulars and conditions of lease and the covenant in the lease itself both of which specifically required the plaintiffs to use the land for the erection of a dwellinghouse within two years. In view of the particular facts of this case it may well be, therefore, that the scope of the decision on this point is narrower than is apparent at a first reading. It will be interesting to see in what other circumstances Courts which are called on to make decisions on this point will hold that a warranty is implied.

The plaintiffs' second course of action was based on negligence. It was alleged that the Council had been negligent in two rôles, first as the owner-subdivider-lessor of the land in failing to properly compact and consolidate the land and in using unsuitable filling and secondly in its rôle as the local authority concerned. In his submissions on the question of the Council's negligence in its rôle as owner-subdivider-lessor counsel for the plaintiffs relied on the principle in *Donoghue v Stevenson* [1932] AC 562. He contended that this applied to realty as well as to defective goods and in this contention relied on the recent decision of the English Court of Appeal in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373; [1972] 1 All ER 462.

His Honour concluded that the defendant had been negligent in failing properly to compact and consolidate the land and in using unsuitable fill, and, following the decision in *Dutton's* case, the principles laid down in *Donoghue v Stevenson* could be applied in this case.

Dutton's case and *McCrea v City of White Rock* (1972) 34 DLR (3d) 227 were relied on by counsel in his argument in support of the allegations of negligence against the defendant in its rôle as local authority for its failure to properly inspect the foundations. His Honour found that on the basis of the allegations contained in the statement of claim the evidence called was not sufficient to support this part of the plaintiffs' cause of action.

The plaintiffs, therefore succeeded in both causes of action and were able to establish a tortious as well as a contractual liability on the part of the defendant, so that even though the circumstances of any future case may be such that a warranty as to suitability for building will not be implied, it may be that a developer-vendor will still find himself held liable for any negligence in the preparation of sections for sale as sites for housing.

JCV and JAB O'K

RECENT ADMISSIONS

Barristers and Solicitors

Barlow, R M	Wellington	17 June 1975
Breaden, D V	Wellington	30 May 1975
Casson, N S	Wellington	30 May 1975
Connard, C R	Auckland	13 June 1975
Hanna, R M	Wellington	29 May 1975
Jobanputra, M V	Wellington	17 June 1975
Lowe, J E	Wellington	17 June 1975
Luscombe, R G	Wellington	13 June 1975
Montague, R G	Wellington	17 June 1975
Sissons, N E	Wellington	17 June 1975
Williams, D V	Auckland	13 June 1975

The knockout—A passing policeman candidly observed that, as Ali and Frazier have placed a $1 million bet on the outcome of their world heavyweight title fight in Manila, the bout now cannot be transferred to New Zealand. To do so would be to incur the displeasure of s 26 of the Gaming Act 1908 and with it liability to a swingeing $40 fine for betting on a sports ground.

COMPENSATING CRIMINALS

PROFESSOR GEOFFREY PALMER *of Victoria University has had a long association with the Accident Compensation concept and is currently a consultant to the Australian Government and the New Zealand Accident Compensation Commission.*

The Accident Compensation Act 1972 is based on a principle of comprehensive entitlement. That principle dictates that "whatever the cause of incapacity and wherever it might occur, society must no longer tolerate the grudging and artificial discriminations that until now have blemished the distribution of public moneys supplied by the community at large"(*a*). Eligibility for compensation of those injured in the course of carrying out activities proscribed by the law must be considered against that background.

Once the principle of comprehensive entitlement is departed from, finding convincing arguments for placing the threshold of disentitlement in one place rather than another is hard. The slope is slippery and if we proceed to the bottom of it we will be in much the same situation as we were with the law of negligence. One of the prime purposes of the Accident Compensation Act was to remove the doctrine of fault in determining eligibility for compensation. To deprive criminals of compensation is to bootleg fault back into the scheme in derogation of comprehensive entitlement. Many people with serious personal injuries would get nothing. Such discrimination would be socially unacceptable for the same reasons that negligence was discarded.

Understanding of the policy behind the Accident Compensation Act was not aided by remarks made by Mr Justice Mahon in sentencing a man for assault recently. The Judge had before him a Samoan who lost his right eye while attacking a policeman with a knife. Fining the man $200 his Honour is reported to have said:

> "The Accident Compensation Commission has apparently acknowledged that the prisoner is entitled to compensation. Thus a drunken illegal immigrant who is injured in the course of attacking a police officer with a knife becomes entitled to compensation.
>
> "Pausing only to express my wonderment that such a law could exist, I pass on to the question of penalty"(*b*).

The convicted man had apparently been drinking and got into a domestic brawl. The police were called and the man attacked a policeman with a knife. The policeman struck back with his baton causing the injury. The man had come to New Zealand on a work permit which had expired(*c*). The Judge is reported as saying that normally the man would have been sent to prison but in the circumstances it would be better to fine him and send him back to Samoa.

No doubt the Samoan cheerfully would have exchanged a term of imprisonment for restoration of his eye. And why should it be that a person whose crime does not warrant his imprisonment should nevertheless be deprived of accident compensation? The logical extension of that principle would be to deprive of compensation a person rendered paraplegic in circumstances where he was guilty of driving 35 mph in a built-up area.

1. Policy of the act

In broad terms the Accident Compensation Act takes the following approach compensating those injured in the course of criminal activity.

(a) No compensation to a spouse, a child or dependant by reason of the death of a person if the claimant has been convicted of the murder or manslaughter of the deceased(*d*). It should be noted that where a murderer is himself injured in carrying out a murder there is no exclusion.

(a) Report of the National Committee of Inquiry, *Compensation and Rehabilitation in Australia,* Vol 1, para 255 (July 1974). A similar statement appears in Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand,* para 57 (December 1967). The author is indebted to his colleagues Neil Cameron and Robert Moodie, both senior lecturers-in-law at the Victoria University of Wellington, for their comments on this article.

(b) Evening Post, 18 July 1975; *New Zealand Herald,* 19 July 1975. The Chairman of the Accident Compensation Commission, Mr K. L. Sandford is reported as saying that ". . . he personally did not think a criminal injured in the course of a serious crime should be entitled to compensation": *New Zealand Herald,* 21 July 1975.

(c) The entitlement of visitors to New Zealand to accident compensation has been criticised. The justifications for the policy will not be analysed here, although it must be understood that visitors and New Zealand residents alike have lost their right to sue for damages for personal injury, Accident Compensation Act 1972, s 5.

(b) The Commission has a discretion to waive where the conviction was for manslaughter and the Commission is satisfied that the convicted person had no intention of killing or causing grievous bodily harm to the deceased or anyone else(*e*).

(c) The Commission has discretion to reduce, postpone or cancel payments of earnings related compensation while the claimant is being maintained otherwise than at his own expense in any hospital, mental hospital or penal institution(*f*).

(d) No compensation is payable for injuries "that a person wilfully inflicts on himself or, with intent to injure himself, causes to be inflicted on himself"(*g*). The Commission has a discretion to pay the dependants of suicide victims. There is a presumption "in the absence of proof to the contrary, that the death of any person was not due to suicide".

The effect of these provisions is to pay full benefits except in the case of murder and manslaughter and self-inflicted injuries, with a flexible approach where the claimant is actually in jail. It is obvious that the circumstances of a prisoner's dependants will influence how the discretion in (c) is exercised.

2. Policy alternatives

The policy alternatives available to deal with the problem of compensating criminals would appear to be as follows:

(a) Exclude all people injured in the course of their criminal activity from all benefits.

(b) Select some of the more serious crimes only for exclusionary treatment.

(c) Reduce the level of benefits payable to some or all people injured in the course of their own criminal activity.

(d) Include all persons injured in the course of their criminal activity.

The rest of this paper will deal with each alternative in turn.

(d) Accident Compensation Act 1972, s 138.

(e) Ibid, s 138(1).

(f) Ibid, s 129. Section 179 of the Act gives power to reduce compensation by up to $200 where a claimant has not complied with the provisions of the Act in respect of levies. But this deduction cannot be made if the claimant has been convicted of an offence under the Act in regard to failure to comply.

(g) Accident Compensation Act 1972, s 137.

3. Total exclusion

Total exclusion from the provisions of the Accident Compensation Act of those injured in the course of carrying out an offence is the most obvious approach to take to the problem but it is also the approach with the most glaring weaknesses. Hundreds of offences are created by our statutes, regulations and bylaws. The catalogue of situations affected by such an exclusion would be endless:

- a man injured while failing to use a machine guard in breach of the Machinery Act 1950
- a farmer who is injured while using a tractor which is not fitted with a safety frame as required by the law
- a woman injured while driving a car in respect of which the warrant of fitness has expired
- a schoolboy who burns himself while experimenting with explosives in circumstances which would amount to an offence under the Explosives Act 1957
- a man who injures himself while installing a drain closer to his boundary than permitted by the local authority's bylaw
- a driver of an over-laden truck who is involved in an accident
- a duck shooter without a licence who is accidentally shot.

Total exclusion is unacceptable because it would:

(i) have the Draconian effect of filtering out a potentially large number of worthy claims (see the examples above);

(ii) reintroduce the doctrine of fault in another form when one of the main purposes of the scheme is to eliminate it;

(iii) add to the incidence of criminal disability, which is contrary to the trend of modern penal policy. It would introduce a double penalty. Deprivation of compensation affects the offender *after* his release when his punishment has finished;

(iv) provide a fertile field for argument. There would be difficult problems concerning the precise point that the criminal conduct ceased;

(v) have the indirect result of depriving families of their interest in the claimant's compensation and so punishing them;

(vi) intertwine in a messy fashion the objectives of civil and the criminal law—

something which the scheme gives a chance of unscrambling by taking out of tort law much of its emphasis on punishment.

4. Selective exclusion

It would be possible to select a clutch of the more serious crimes and exclude from accident compensation people injured in the course of committing them. One problem is to find a consistent and even-handed mode of selection. Then it would be important to ensure that the dependants of those deprived of compensation were not adversely affected by the exclusion.

The only obvious device for distinguishing between categories of criminal behavour in New Zealand appears to be the procedural distinction between summary and indictable offences. Use of this distinction for disentitling people to compensation would produce anomalies. Some offences, assault for example, can be charged either summarily or under indictment. A procedural choice by a prosecutor could not be permitted to have such dramatic consequences for the social welfare of the individual. And there is the point that some summary offences, drunk in charge of a motor vehicle for example, can be more serious than some indictable offences, such as minor thefts.

Another alternative within the selective approach would be to enumerate a range of specific offences where conviction would disentitle a person injured in the course of committing them. This approach commended itself to the Australian Committee of Inquiry(*h*). The Australian Report sought to exclude from compensation those injured when committing or attempting to commit serious crimes of violence which were enumerated—murder, piracy, hijacking, and wilfully doing grievous bodily harm. There is no exclusion where the personal injury results in death. As a practical matter that range of exclusions is only slightly more restrictive than the position in New Zealand.

The controversial nature of the exclusion problem is well illustrated by the recent report of the Australian Senate Committee on the clauses of the National Compensation Bill 1974. Three Senators thought that the clause making the exclusions mentioned above should be deleted. Two Senators thought it should be retained with the provision of adequate safeguards for the rights of dependants although a more comprehensive list of crimes should be used. A sixth Senator wanted to exclude from compensation all those injured while committing serious crimes, and their dependants(*i*). Such are the joys of the democratic process in Australia!

Another variant of the selective approach, and one which might remove Mahon J's sense of wonderment, could be the exclusion from compensation of those injured while committing certain types of crime—viz, resisting or obstructing the police, escaping from custody and assaulting prison officers. But like many other offences the circumstances in which these acts are committed can vary from the serious to the trivial. The mere fact of conviction as the disentitling event could clearly produce erratic and unfair results. Any separate inquiry into the circumstances of the crime independent of the criminal law process would be such a fertile source of dispute that it ought not to be embarked upon, for that reason alone. There is, too, something a little disturbing about singling out crimes against the police for special treatment. It may serve to add another element of tension to a relationship which by its very nature is not always relaxed.

5. Reduction of benefits

There are a number of ways in which benefits of those injured in the commission of a crime could be reduced:

(a) In the case of serious crimes removal of the right to lump sum compensation under ss 119 and 120 of the Accident Compensation Act.

(b) Substitute a flat rate benefit in place of earnings related payment.

(c) Reduce the payment of compensation on some scale related to the term of imprisonment imposed.

Any of the above solutions are open to criticism:

(i) The severely disabled criminal must still support himself and his family after serving his sentence;

(ii) To reduce benefits adds to the claimant's criminal disabilities in a way which ensures longer than the penalty imposed by the criminal law.

(iii) Reduction of benefits takes no account of the position in which the offender's

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(h) Report of the National Committee of Inquiry, *Compensation and Rehabilitation in Australia,* Vol. 1, para 364. National Compensation Bill 1974, cl 13 (Aust).

(i) Parliament of the Commonwealth of Australia, Report of the Senate Standing Committee on Constitutional and Legal Affairs, *Clauses of the National Compensation Bill 1974* 91-92 (July, 1975).

dependants are placed over the long term.

(iv) A fair method of selecting the offences to which reduction will apply is still required.

6. Conclusion

My view is that the policy implemented in the Accident Compensation Act 1972 in regard to compensating those injured in the course of committing an offence is the best policy. The choice is a bold one and it is not difficult to dream up a parade of horrible examples which make the policy look unpalatable in unusual cases.

The following arguments can be advanced in favour of the existing policy:

(i) It is for the criminal law process to determine and apply the appropriate penalty for anti-social behaviour. That process is easier to operate if consideration does not have to be given to what additional penalties may or may not be exacted by other agencies.

(ii) Adding to criminal disabilities is unsound.

(iii) Even criminals are afforded basic social and economic rights and compensation should be regarded as one of these. The 1967 Woodhouse Report pivots on the principle of community responsibility for accidental injury(*j*). Especially after his release, the prisoner should not be treated as less deserving compared with an ordinary citizen.

(iv) It cannot be asserted that the provision of compensation to criminals lessens the deterrence of the criminal law since that depends upon ascribing to the criminal the ability to foresee that he is likely to be injured in the course of his crime and that he is willing to undertake that risk because he knows he will be compensated. There is no evidence that criminals are any more willing to incur personal injury than the rest of the population or that their conduct will be altered by the availability of accident compensation any more or less than the rest of the population. Deterrence would seem to reside in the possibility of detection and conviction, not the risk of physical harm.

(v) In some instances, given appropriate circumstances, the criminal might have had a common law action(*k*). There is no reason why he should be deprived of compensation in any move toward a no-fault system.

(vi) A loss for which compensation is paid is as much a loss whether it occurs to a person committing a crime or someone else.

(vii) To exclude some categories of convicted persons from benefits will place strains on the criminal process with an incentive to plea bargaining for a lesser charge, since not all offences would lead to a deprivation of compensation.

(viii) There is no alternative policy available which is easily defensible in principle and administratively workable.

It might be prudent to provide for the automatic cancellation of earnings related benefits for the duration of a person's incarceration. Such a provision would be restricted to situations where the person was injured in the course of carrying out the crime for which he was incarcerated. This would be justified because:

(a) A claimant has no need of money while incarcerated at the Government's expense.

(b) A person who had suffered no injury before being jailed would lose his earnings and an injured prisoner should not be placed in a preferred position.

(c) The dependants of a jailed person who is injured should not be treated any better than the dependants of a criminal who is not injured.

(d) The permanent effects of an incarcerated person's injury would be compensated in the normal way upon his release.

(e) The qualification is simple and admits of no disputes in its application.

(f) It could meet the claimant's long term needs after he has been dealt with by the criminal law and allows him no advantage while he is being punished and rehabilitated.

(j) Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand*, paras 55-56 (December 1967).

(k) J G Fleming, *The Law of Torts* (4th ed, 1971), 232-235.

The reason why—"The late Colonel C H Weston, KC, used to say that lawyers made good soldiers because they knew how to charge."—SIR JOHN MARSHALL

WOMEN LAWYERS UNITE

At the United Women's Convention a group of women lawyers discussed a number of papers. Excerpts from some of the papers appear here. Those involved in research and papers were: HAZEL ARMSTRONG, CLARA MATHEWS, JANE LOVELL-SMITH, ELLEKE RASINK, DEBORAH SHELTON, ROSEMARY TOMLINSON, CORDELIA THOMAS, FRANCES STANTON, CAROLYN HENWOOD, NICOLA CRUTCHLEY, SHIRLEY SMITH, GLORIA DRURY *and* MEREDITH ROSS.

Women and the profession

It is fair to say that women have made little impact on the legal profession in New Zealand. The woman lawyer is indeed a rare bird most frequently found in the conveyancing department of some of the more enlightened law firms, Government Departments, Universities but rarely in the Courtroom, and she is never found as a Judge.

The law is traditionally a male profession and women are very much in the minority. Only 2.6 percent of lawyers in New Zealand are women. Every minority group has its problems and women lawyers are no exception. Every lawyer, male and female, would agree that each must work on an equal footing to the highest possible standard. But it is understandable if women lawyers feel that they are under constant pressure in order to gain respect and acceptance by the profession as a whole. This is not an easy task. Many women have over the years opted out of attending Law Society functions, dinners and seminars because they have found the whole minority situation overwhelming. In my view this is detrimental. It is essential to attend such functions in order to make the acquaintance of other lawyers and to give them a chance to know you. Only in this way and by practising to a high standard can a woman be accepted as a full member of the profession. If women do not become involved they cannot expect to be included in the decision making processes. With a growth in numbers of qualified women much can be done to overcome this problem but women within the profession must support each other and assist the younger women coming on. Equally, men in the profession must encourage women whenever possible.

Many women have found it difficult to find partnerships and in the past have often been forced to become sole practitioners. In Auckland it seems there are many more women in partnerships than Wellington but on the whole those who have obtained partnerships have obtained them in firms where another member of their family is practising. Another important factor that has contributed to the difficulties of obtaining partnerships is the question of the type of commitment that a woman can make. Many qualified women know that they will leave the law for a period of time in order to have children and bring up a family. They do not feel able to make the type of commitment expected of them even if they were asked. Male lawyers tend to assume that *all* women wish to do this and therefore do not even consider the question of a partnership—and indeed it is to their advantage if they do not have to share out the profits. It is my view that the whole approach to this problem is far too limited and narrow. Many of the problems can be overcome by the concept of more flexible working hours, with women working at home for part of the day. Very often more work can be achieved at home without the constant ringing of the telephone, and appointments can be planned ahead. There are certain economic disadvantages for the women concerned in the payment of wages for a house-keeper, but the burden of this could be shared with her husband and by the firm who could employ a house-keeper as part of their staff and perhaps reduce the income of a woman lawyer concerned. There could be some tax saving in this arrangement. Many men take overseas trips and other lengthy periods away from the office without having to forego partnerships and there is no reason why a more flexible approach could not work to the advantage of everyone.

To enable such schemes to get under way, men must be prepared to give women their chance and not to file them away in the Conveyancing Department and forget them. For their part, women must come to grips with the fact that they are lawyers and not allow themselves to slip into the role of a skilled clerk.

It is hoped that when some of these difficulties are overcome, more women will obtain positions of responsibility within the legal profession where they can gain the experience necessary to qualify them for positions as Magistrates and Judges.

From my own experience and from correspondence and discussions with other women

lawyers, few have experienced any difficulty with their clients because of their sex. A prospective client wishes to consult a competent lawyer who will provide a prompt and efficient service. If this service is provided the client is not concerned whether the lawyer is male or female. Some have suggested that television programmes such as "The Main Chance" which include women lawyers as characters, help to make the public aware that women can and do work efficiently in the profession. I have grave doubts however about the rather emotional image of the women as portrayed in some of these television programmes.

There is much women lawyers could do to assist in raising the status of women generally.

(1) Women lawyers could make a special point of researching the areas of law that are most inconsistent between men and women either in the content of the law or its application, and to make recommendations to the Law Society and the Government.

(2) Women lawyers could ensure that they protect their own women clients in all situations, by seeing that they are separately advised in marriage separations where property is involved by recommending that properties are put in the joint names of husband and wife where appropriate, by encouraging a wife to speak up and become involved when she visits a lawyer with her husband and perhaps by drawing the attention of the male lawyers with whom she works to these matters in the hope that he will do the same.

(3) Women lawyers could promote the idea of an educational programme for schools, to enable all pupils, and girls in particular, to become aware that they are part of the legal system and to draw attention to the fact that they may well be the owner or part owner of quite considerable assets which they must take responsibility for. They must know what a lawyer is and how to use a lawyer to protect their rights.

(4) They could make themselves available to other women's organisations striving to improve the status of women, to provide advice on legal matters and to support and promote their ideas.

(5) Women lawyers could assist and promote the status of other women staff in clerical and typing positions within law firms to promote more job satisfaction and a more flexible approach to financial remuneration.

The women lawyers can help the community at large:

(1) By striving to become a fully integrated member of the legal profession.

(2) By being aware of the needs of a changing community and doing everything possible to provide a relevant and efficient legal service.

(3) By offering support to the many community services being promoted by the New Zealand Law Society, such as the duty solicitor scheme, The Legal Advice Bureau, and the Neighbourhood Law Office *and* by offering new ideas in this field of community law.

Women lawyers are in privileged position in our society. We must commend those women who have in the past been so much in the minority and who have faced the difficult and arduous life of a sole practitioner. But with the growth in numbers of women lawyers and the urgent needs of our society this is no time for apathy. We must all pull our weight and try to improve our own status and the status of women in general.

CAROLYN HENWOOD

Women and their financial position

Enquiries have revealed that the Housing Corporation and most Building Societies appear to treat an application by a woman, regardless of marital status in exactly the same way as that of a man. So far as applications by married couples are concerned, some Societies will take account of the woman's earnings when they are first married but are less so inclined after a few years when applicants are considered more likely to be aspiring parents. Although many women consider it unreasonable, in the light of present contraceptive knowledge, not to take notice of a stated intention to delay beginning a family or not to have children at all, the other point to be considered is the fact that Societies must look to the interests of their investors who provide the funds as well as those who receive them.

Insurance Companies seem to be very much more conservative in their approach but their discrimination appears to be of marital status rather than sexual since the single man is under the same disadvantages.

In the allocation of *trust funds* every case is considered on its merits and the contribution of the wife by way of income is a consideration.

But in all these policy statements it is stated that each case is considered on its merits and so in practice it might be found that discrimination is still able to arise.

Is it rather that women have not asserted their rights and opportunities, combined with the fact that their earning capacity has been comparatively restricted? In order to protect their contribution to the matrimonial home or in fact to any property in which they have an interest, women need to understand the meanings of and consequences from the different ways in which property may be held by more than one person.

One anomaly in the acquisition of property is that women are required by the Inland Revenue Department to state their source of funds when buying a property, whether on their own or jointly with their husbands, as it is presumed that a woman has been made a gift of the funds which would therefore be dutiable, although if the occupation of the woman is shown on the documents this does not apply.

It is clear that there are two conflicting principles within the Price Tribunal. The first is that the manufacturer is concerned that the financial information used to substantiate the claim should not be publicised because publication could be prejudicial to his business. It has been thought that the Tribunal has been over zealous in its desire to protect manufacturers from disclosure to the extent of preventing the public from being able to dispute the decision made, because of lack of information. Against this understandable reluctance on the part of the manufacturer is the feeling by consumer groups and individuals that without rights to examine data, and adequate time in which to do so, combined with the rights to adduce evidence, cross-examine witnesses and make representations there is no way to ensure that justice is seen to be done.

The present law gives a great deal of discretion to the Tribunal as to how it will conduct its hearing and carry out its function of preventing unjustifiable price increases and protecting the public from exploitation. The present tribunal has chosen to exercise this discretion so that consumer groups are excluded from participating effectively in the hearings.

Recently the Minister of Trade and Industry invited the CSSO and FoL to apply to the Tribunal for Party Status in the Breweries Application for a price increase but this status would need to be protected by ensuring that the parties have full rights as set out above and sufficient time to prepare a case. It is highly unsatisfactory to have the right to participate based on political considerations and surely some change in the law is required to ensure that the Tribunal always has the interest of the Consumers put before it.

But before any change is made, and steps have already been taken to have the Tribunal replaced by a Commerce Tribunal, the role of the Tribunal must be examined. Is the question to be decided, between the Tribunal and the Applicant Manufacturer, or is the Tribunal a judicial body to hear arguments from both points of view and then, having heard all the evidence, to draw its conclusions?

Two further areas of consumer law seem to us to merit consideration, as areas which affect women more than men. The reason for this is not any discrimination or differentiation in the law itself, but because problems arise owing to the greater vulnerability of women. The first concerns door to door sales. Women are more vulnerable in this area, because it is principally housewives, and women who are at home during the day who find themselves facing the situation which the Door to Door Sales Act has been brought in to cover. This piece of legislation seems to us to be worthy of mention in this paper, by virtue of the fact that it attempts, and largely succeeds in setting right a situation, in which the majority of those who are at a disadvantage in the situation are women.

Another situation in which women make up the majority of those put at a disadvantage is where unsolicited goods are sent through the mail. Here legislation has been introduced, in the form of Unsolicited Goods and Services Bill. This Bill is designed to provide greater protection for the recipients of unsolicited goods or of invoices in respect of unordered goods or services.

The question arises whether this protective legislation is publicised sufficiently to ensure that the people for whom the protection is designed are aware of their rights. Is there a need for courses in schools regarding the law, and how are women to be made aware of their rights?

ROSEMARY TOMLINSON,
CORDELIA THOMAS,
GLORIA DRURY AND
MEREDITH ROSS

Maintenance

(a) *The Court system*—Maintenance is determined by an adversary procedure in which conduct is relevant. This procedure all too often entails the dredging up of unhappy details of the marriage which further embitters

the relationship between the parties and makes the harmonious settlement of any custody or property matters extremely difficult. Both parties are required to present budgets yet all too often a Court is asked to make an order on inadequate details which may result in one or other of the parties feeling that justice has not been done.

(b) *Insufficient money for two or more households*—A woman with a dependent child may apply to the Social welfare Department for a Domestic Purposes Benefit. Before she is granted a benefit the Department may require her to bring maintenance proceedings against anyone legally liable to maintain her or her children. If a wife is in receipt of a Domestic Purposes Benefit, any maintenance payments are diverted to the Consolidated Revenue Account. A woman is not eligible for a benefit if she is living with her husband or with a man on a domestic basis as husband and wife. Thus if a married man establishes a de facto relationship or a divorced man enters another relationship his "wife" will not be entitled to a Domestic Purposes Benefit. A man's primary maintenance responsibility is to his first wife and family. However, if he has insufficient funds to support both families without reducing the second below subsistence the present policy of the law is to support the second relationship where it is a stable one or where a child has been born.

(c) *Enforcement of maintenance orders*—In 1974 the Social Welfare Department paid 14,000 maintenance related benefits. The cost to the taxpayer was in excess of $20 million, recoveries from husbands and fathers were approximately $3 million. Studies show that default in payment of maintenance increases with the size of the order and the length of time it has been in effect. There is little difference in the percentage of arrears between maintenance orders for a wife and those for children.

(d) *Lump sum orders*—Both the Supreme and Magistrates' Courts have the power to order the payment of a capital sum. In determining the amount and type of maintenance the Magistrate's Court is directed to consider the ability of the wife to increase her earning capacity if, inter alia, she is assisted to undertake a period of education or training or to establish herself in business. Yet current judicial practice is only to award a capital sum if the wife has made some contribution (direct or indirect) to the husband's assets and can establish some special need for a capital sum.

Matrimonial property

The title to this paragraph is a misnomer. One of the deficiencies of the legislation, as administered by the Courts, is that it is not truly a system of *matrimonial* property. The majority of judges appear to regard a wife's application as a request for a share in the husband's property rather than a request for a share of matrimonial property. The legislation places the onus of proving her entitlement on the wife, she is thus put in an inferior bargaining position in negotiations. The law in this area is confused by the existence of several statutes. The Matrimonial Proceedings Act, part VIII, gives the Supreme Court power to deal with the matrimonial home as an ancillary application. Conduct is relevant and a wife must prove a substantial contribution to the property. Jurisdiction is granted to the Courts under the Matrimonial Property Act, 1963, during marriage and up to twelve months after decree absolute, to deal with any property dispute between husband and wife. The Court is empowered to make such order as it thinks just. In relation to the home it must have regard to contributions (whether in the form of money or ordinary household services) it may have regard to contributions in relation to other property. Conduct is not relevant to the amount of the order except in so far as it relates to the acquisition of property. The Court may not make an order which would defeat any expressed common intention which was intended to enure in the situation which has occurred. The fact that a home is a joint tenancy or a Joint Family Home does not entitle the wife to a half share on divorce.

Problems with the existing legislation—(a) It is necessary for the wife to prove a contribution to each individual identifiable item of property if she is to be granted a share in it. The Court is not entitled to make an order having regard to her overall contribution to the family welfare. This can be extremely difficult to prove when detailed records of household accounts have not been kept. The inquest into the details of the marriage required by this process can only embitter the relationship between the parties. If the property has been dissipated the wife will be unable to recover.

(b) Unless the wife has made some financial contribution to her husband's business she will be unable to claim a share of it unless she had

a real part in its running or can show she deliberately accepted a reduction in her standard of living in order to make more money available for the business with resulting growth of the assets.

(c) How are household services to be valued? Some Judges appear to be operating on a rule of thumb of 1% for every year of marriage.

(d) The right to apply under the Matrimonial Property Act does not give an interest sufficient to support a caveat.

(e) A wife can have no sense of security about her financial position in the event of the breakdown of the marriage since her rights are unknown until court order. The decision of the Court cannot be predicted with any certainty, not only because of the importance of the individual details of the case but because of the division of judicial opinion as to the policy of the legislation and the extent to which the Courts are able, under the terms of the Act, to implement it.

Suggested aims of any legislation dealing with financial provision—The legislation should: (a) Reflect the concept of marriage as a partnership in which the role of each spouse is of equal importance to the success of the family.

(b) Ensure economic justice between the parties. Divorced couples are too often unable to develop their individual lives beyond the breakup of the marriage because of bitterness and feelings of injustice brought about by the legal processes involved.

The procedures should be non-adversary. Any process requiring cross allegations and detailed accounting makes further harmonious relationship very difficult. Greater use should be made of conciliation procedures for the settlement of ancillary matters.

(c) Give certainty so that on entry into a relationship parties are aware of their legal position. Uncertainty leads to arguments, disappointment and feelings of injustice.

(d) Endeavour to determine the financial ties between the parties as soon as possible. Enabling "the parties to start afresh without relics of the past hanging like millstones round their necks."

(e) Ensure that the welfare of the children is protected as far as possible. To this end consideration should be given to the separate representation of children by Counsel (and to greater use being made of s 58 (5) of the Matrimonial Proceedings Act which gives power to settlement property on the children.

Alternatives available—The history of financial provision in matrimonial cases reflects the attitudes of society to the concept of marriage and the role of women. At common law a married woman was incapable of owning separate property until pressure for equality resulted in the Married Women's Property Act 1884. This legislation helped the wealthy wife but not the housewife. In civil law countries community property systems have been the norm. In their modern form systems of community property exist as a delicate balance of recognition of the equality and independence of the partners. In countries where a large proportion of married women work outside the home and where marriage is increasingly regarded as for a term rather than a lifetime there has recently been a trend towards separation of assets. In New Zealand in 1971 26.1% of married women were in the work force.

It is suggested that the Government should finance a research project to discover the views of New Zealanders as to how they manage their matrimonial finances and in what form they feel the law should be.

(a) Co-ownership of the matrimonial home with or without maintenance and a presumption of co-ownership of "family assets". "Family assets" have been defined as "those things intended to be a continuing provision for the parties during their joint lives . . . the working capital of the marriage relationship."

(b) The system recently adopted in Australia under which a Family Court is given jurisdiction to make maintenance and property orders taking into account a broad range of considerations (but excluding conduct) in such a fashion as to do economic justice between the parties and, so far as possible, to determine the economic relationship between the parties. Under such a system a wife has a right to apply for a share in the matrimonial assets rather than having to establish a right arising out of her incapacity. Such a scheme would enable the Court to make global orders of the type favoured by Woodhouse J and Wild CJ and suggested by the Report of the Special Committee on Matrimonial Property 1972 (NZ). This would not give the certainty of a community regime and would involve litigation but it would give the Courts a discretion to do justice in the individual case.

(c) Some form of community property with or without the power to award maintenance. The U.K. Law Commission in Working Paper

No 42 (1971) favoured a system of community property. They said:
Para 5.85—

"It is important not to forget the advantages of security and status which a community system would give to the spouse who is unable to acquire an interest in the assets by a financial contribution. Instead of being, as now, regarded as a dependent, who must apply to the Court, such a spouse would become an equal partner in marriage, entitled at the end of the marriage to claim an equal share in the net assets acquired during the marriage. The pattern of social development in the future may be that on the end of marriage an able-bodied spouse would be expected to become self-reliant and independent as soon as possible, rather than to look to the former marriage partner as a source of support for life."

Community property systems are widely used in Europe and the U.S.A. Briefly, there are three main types:

(i) Full community: all movable and all movables acquired after marriage are jointly owned and divided equally on termination of the relationship. During the marriage the community property is managed by one or both spouses.

(ii) Community of Acquests: the community consists of property acquired in contemplation of marriage or during marriage except by way of inheritance or gift. It is divided equally on termination of the relationship. Some systems provide for payment of maintenance if a joint share of the community is insufficient for the innocent party to subsist.

(iii) Deferred community or community of surplus: each spouse manages their own separate property during subsistence of the marriage, though there are some restraints on disposal. On termination of the relationship the increase in the value of each spouse's assets during the marriage is calculated and the spouse whose assets are less has an equalisation claim. The Court may have a discretion to alter the share of a spouse who has failed to perform the economic obligations of marriage. The working of such a system is very involved. Assuring the spouses of fixed rights on the termination of the marriage would eliminate the possibility of bargaining property against divorce or custody.

(d) Maintenance: If this is to remain as part of the right of consortium of both husband and wife or in cases of the inability of a spouse to provide for herself because of need to care for children, or because of ill health or age there must be more efficient non-adversary means of assessment and enforcement.

(e) A Family Court with specially trained Judges assisted by ancillary services (financial, medical, psychological and sociological counsellors). The proceedings should be informal and non-adversary.

PAULINE VAVER

Women as victims of crime

The most common situation in which women are victims is in the home, at the hands of their husbands. Matrimonial unity does not prevent a husband being charged with assault but it has to be a very bad case before the Police will charge the husband, except on the express request of the wife. The Police understandably have become rather disillusioned about helping assaulted wives, as all too often the wife, when her husband is in the dock, refuses to give evidence either from resurgent love or ever-present fear.

Rape is still a wrong only females can suffer. An essential ingredient, which has to be proved by the Crown, is consent. A wife can be raped by her husband only if a decree nisi of divorce or nullity or a decree of judicial separation or a separation order was in force at the time.

The recent English decision that honest belief that a woman has consented is a defence, has caused an uproar. It derives from the established doctrine of the criminal law that mens rea must be present in the accused; he must be shown to have intended to do all the acts which constitute the crime with which he is charged. If he intended to have intercourse with the woman, but not without her consent, and he honestly believed she consented, he would not have the necessary mens rea as to all the ingredients. The editor of *Garrow and Willis's Criminal Law in New Zealand,* however, believes that this defence "will comparatively infrequently be able to be raised with success"; and this seems right, because facts are obstinate and the jury is not going to believe in an honest but mistaken belief if the evidence is that the accused had scratches on his face or a shirt in tatters or that the complaintant was bruised and her clothes were torn, or even if the circumstances suggest she could not resist without fear of injury. The jury is not going to believe in an honest but mistaken

belief just because the accused asserts it—they will listen to the complainant and to all the evidence of the circumstances. If the Crown succeeds in proving lack of consent, the onus of which is on the Crown, it will normally be next to impossible for the accused to succeed in this defence. This view is now supported by the news report that in the English case in which the doctrine of honest but mistaken belief was stated, the defendants were in fact convicted. It is now being suggested that rape, as such, should be abolished as a crime, and replaced by "assault by a male on a female" with an increased penalty. This is already a crime, but the maximum penalty is only 2 years' imprisoment. (The maximum for rape is 14 years; an intermediate maximum of 10 years has been suggested). The intention is to eliminate the need for proof of embarrassing medical details and also the admissibility of evidence of the complainant's bad character.

SHIRLEY SMITH

Women as criminals

The female offending rate is steadily increasing in New Zealand and elsewhere, and moving up towards the male rate as indicated by following figures. The latest statistics available from the Justice Department are for 1971. In that year 21 female offenders were sentenced in the Supreme Court; compared with 282 males. In the Magistrates' Courts for that year 1,912 females were sentenced on all offences, including traffic, compared with 19,936 males. In the Children's Court that year 21.2 percent of the offenders were females.

The offence group which showed the most consistent rise in percentage of females to total over the 5 years 1966-70 in New Zealand was that covering offences against the licensing laws. The next most consistent rise in that time was in the burglary, theft and fraud group. Vagrancy offences showed a decline over the 3 years 1968-70.

Studies have indicated that in many highly developed countries female criminality in all categories is rising between three and five times faster than male criminality. Why is this? Some possible explanations for the differing rates and for the increase are listed below.

(1) "There is no reason to believe that women are any more honest than men. When they become bank presidents they are just as prone to temptation as men," said Gerhard Meuller, head of the Criminology Section, United Nations Department of Economic and Social Affairs. The suggestion that women are more law-abiding than men is pure speculation.

(2) Women may have less opportunity for illegal activity. This relates to the difference in rates and to the increase in the female rate. More women now hold responsible jobs, have access to other people's money and are in positions of temptation than used to be the case. They also have greater responsibilities of their own and heavier commitments to face. Perhaps they also receive less protection from men and the community generally today.

(3) Society's expectations of males and females. Children receive different training for different roles and expect different positions in society. Pressure is put on men to be aggressive and active and on women to be more gentle and passive. This is changing as women have an increasing economic role in society. Women are emerging from this sort of stereotyping and we come back to the idea that given the chance they are no more honest than men.

(4) Women may be less likely to be reported and prosecuted than men because of (a) their sex and/or (b) the nature of the offence. Women may commit more undetected offences. Shoplifting would have been the prime example of this, but today all big shops have shop-lifting detection arrangements and march those apprehended swiftly off to the police.

(5) Violent offences by women are also creeping up. More women have active lives with physical strength and contacts at work and socially which make possible more violent offences.

ANN WILSON and
JANE LOVELL-SMITH

Other papers discussed were "The Citizen as Town Planner", by Frances Stanton, "Suppression of Name" by Ann Wilson, "Community Legal Facilities" by Nicola Crutchley and "Consumer Law" by Clara Matthews.

Recommendations

1. *Town planning*

(a) That town planning information be given extensive publicity, and copies stationed in libraries, railways stations, schools, Post Offices, central shopping areas, and that public meetings be mandatory before the adoption of any plan.

(b) That a woman be immediately appointed to the planning committees for urban and rural areas, simply because of their expertise in family living. Rolleston provides a significant example.

(c) That a broader and emphasised curriculum of community living be introduced to schools.

(d) That experts in community living, eg doctors, nurses, public firemen, church officials, teachers from pre-school to tertiary education, etc, should be included as, of course, in the town planning process.

(e) That any corrective or rehabilitative centres, eg Children's Courts, Pre-release Centres, Psychiatric Hospitals, be established in populous centres in the community.

2. *Financial provision on marriage breakdown*

Matrimonial property—That there be a legal presumption of equal ownership of "family assets" provided that if because of substantially unequal contributions to the family unit such a presumption would result in manifest injustice, the Court shall have a discretion to make an order dividing the property having regard to the contribution of the spouses.

Effect of the presumption—(i) In so far as the family assets consist of property for which there is registration of title, the spouses shall be registered as joint owners of that property. (ii) There shall be equal divisions of the property on the termination of the marriage.

Definitions—(i) "Family assets" to exclude property owned before marriage, unless purchased in contemplation of marriage, and property acquired by way of inheritance or gift to one party. (NB. No agreement was reached on whether individual business assets should be included in "family assets".) (ii) "Marriage" includes a common law marriage.

Maintenance—(1) The state to pay a guaranteed maintenance allowance to solo parents (male or female) who are caring for children under the age of 5 years. The allowance to be continued after the youngest child attains 5 years only when the parent is unable to provide for herself because of illness of the parent or any child. The state to be entitled to recoup by an administrative procedure from the other parent such percentage of the guaranteed maintenance allowance as he is reasonably able to pay.

(2) Provision should be made for the older wife, and the wife who is unable to obtain suitable employment.

There was some thought that this should continue, gradually decreasing as the earning capacity of the person increased.

(3) That there should be a Government-funded Institute of Family Studies.

(4) That a booklet should be produced to be given to couples on marriage, telling them their rights and duties in marriage.

Women and their money—(a) Concern was felt that the protection of the Joint Family Homes Act does not apply to the farmhouse. A further concern was because the exemption from death duty could not apply, farmer's widows were often forced to sell the farm because of the death duty. (NB. Legislation has since been introduced to cover this anomaly.)

(b) It was felt that provision should be made to enable farm workers to purchase houses in the city for the time in the future when they would no longer have a house with the job. At present, they are unable to obtain low-interest loans when they wish to live in the house immediately.

(c) That provision should be made in the Superannuation Act for women who do not work for money, eg farmers' wives.

(d) It was recommended that greater attention be paid to the dissemination of legislation to ensure that people know their rights, as newspapers in general, do not give sufficient detail. A suggestion was to have a TV programme "YOUR LEGAL RIGHTS", similar to the gardening programme and Country Calendar, *NOT* to be shown in the daytime. That education be given as to legal rights in schools at third form level.

(e) Regarding the price tribunal, it was resolved that it is difficult to know if a price is excessive. It was recommended that Consumer groups be able to be parties to the hearings of the Price Tribunal as of right. It was felt that the Price Tribunal does not give sympathetic hearing to lay applicants.

(f) That women be encouraged to approach doctors, lawyers and ministers in their neighbourhood to set up voluntary welfare organisations to assist people in the lower socio-economic groups and in rural areas.

That application for loan finance be treated entirely on their merits and without regard to marital status.

That women should not be required to provide guarantors for hire purchase and other financial agreements.

Women in the profession—(1) Women solicitors should participate more in Law Society functions and endeavour to participate in the decision-making process.

(2) Some recognition is needed of the special position of women solicitors to enable them to obtain senior positions, and yet, by flexible working hours, be able to raise their families.

(3) Women lawyers should pay attention to areas of inconsistency between men and women and make recommendations to the Law Society and Government if necessary.

(4) Women lawyers should pay particular attention to their women clients, especially to ensure that they separately advised from their husbands, where necessary, and to ensure they are fully aware of their rights.

(5) They should make themselves available to assist women's groups striving to improve the status of women.

(6) Consideration should be paid to the need for a service such as the Public Defender and the introduction of neighbourhood law firms.

Criminal law—(1) Almost unanimous support for the new Bill regarding suppression of name —suppression until conviction.

(2) The group welcomed the recognition of the separate legal identity of married women but reached *no* agreement on whether this should be taken to its logical conclusion, eg so that a husband and wife could be compelled to give evidence against each other.

(3) (a) There was feeling that any special legal protection for the unity of the legal family should be extended to de facto and homosexual relationships. (b) Consenting sexual behaviour should not be a subject for criminal law reform, provided minors are protected, and exploitation of others for gain is prohibited.

(4) There was discussion of the increase in female crime rates and the reasons considered were: (a) Greater opportunities to offend; (b) Changing social expectations; (c) Education, including more strenuous physical development. Education was resolved to be very important in this area. The increased crime rate was accepted as inevitable, concomitant of increased female participation in society.

(5) Rape is a social problem, and amending the law (eg to substitute assault by a male on a female with 10 years' maximum imprisonment), would not meet the evidential difficulties, or change sexual attitudes.

LEGAL LITERATURE

Women and the law, edited by Kaye Turner and Pauline Vaver; 87 pp (Hicks Smith; $3.60).

Two Auckland lawyers have provided an essential preliminary manual for women with problems. Although not designed for the profession, those with a domestic proceedings practice would do well not only to read it but also to have it handy for reference and for clients. Topics from Accident Compensation and contraception to social welfare benefits and jury service are dealt with in a straightforward and uncomplicated way, the emphasis being on where to go for help—and warnings of what not to do, such as using stationers' forms for homemade wills.

At times oversimplification may be a fault—for example, the authors refer to the fact that "it is possible" to request that final adoption orders be set aside—which may be a ray of almost certainly unjustified hope for the biological parent, and a source of needless terror for the adopting parents (see s 20 of the Adoption Act 1908). At times, too, the book is a little detailed (when did a Judge last witness an adoption consent?)—but these observations are carping. The authors have attempted the impossible and cannot be criticised for a minimal failure to achieve it.

The book is to be welcomed as a further example of the profession reaching out to enlighten the public. No one calls a doctor if he never feels sick, but many fail to diagnose a problem as being a legal one. The authors serve both the public and the profession by bringing them closer together—and by using a simplicity of language their colleagues would do well to imitate.

The book is predominantly written by women and for women, but in an age of enlightenment no review can omit reference to a list of credits which includes Stephen Chan—for typing.

JDP

Anticipating a Crimes Amendment Bill—A practitioner reports that he rang home for a progress report on the Ali-Bugner title fight only to get his four-year-old daughter. "What's happening on television?" he asked. "I don't know," came the innocent reply, "Just two men cuddling each other . . ."

ANOTHER ASPECT OF FREEDOM OF THE PRESS

Introduction

The form of newspaper journalism which goes by the name of "investigative journalism" is not as widely known in New Zealand as it is overseas. In essence it is a form of reporting in which the newspaper makes thorough investigations into suspected malpractices, say within a financial institution or even in Government, and publishes its detailed findings to the world, perhaps exposing certain persons as having been guilty of various degrees of improper conduct. The *Washington Post's* Watergate investigation will go down in history as the most important and dramatic example of this sort of journalism.

Such journalism is highly charged with risk, for the newspaper is liable to be sued for defamation at any time by those whose names figure in the reports, and unless it can successfully plead justification or fair comment it is liable to have to pay heavy damages. The risk is substantial, for as every editor knows it is one thing to be sure that something is true, but quite another thing to be able to prove it true in a court of law by legally admissible evidence. So journalists often try to bolster their reports by publishing extracts from documents—departmental memoranda, letters and the like—which have been written by the principals in the matters under investigation, and which, having emanated from their own pens, they will find it difficult to refute. Such documents are obtained in various ways, most of which are encompassed by the expressive term "leak": they will normally have been "leaked", sometimes in return for money and sometimes not, by employees of the organisation concerned or by others who have been entrusted with them.

A group of recent cases in England has shown the British Courts grappling with the problem of how far such publications can be controlled by the law. In so doing the Courts have been faced with a conflict between the private interest in confidentiality and the public interest in freedom of the press. At the moment it may be said that freedom of the press is winning by a nose, but the reasons for this have not been presented in a very coherent way, and the fundamental issue of the position of the news media in our legal system has been sidestepped in a rather unsatisfactory way.

Recent criticism of the performance of the press in the field of investigative journalism prompts J F BURROWS *to examine the way in which the law hinders the press in the performance of this public duty. Dr Burrows is the author of* News Media Law in New Zealand.

The remedies

A person or organisation which wishes to stop publication of a document, or to claim redress in respect of its publication, would seem able to frame its cause of action in three ways: proceedings under the Official Secrets Act 1951, action for breach of copyright, and action for breach of confidence.

(1) *Official Secrets Act 1951*—The Government might be able to rely on this statute. Any Government employee who supplied to the press documents such as departmental memoranda, Cabinet minutes or letters from one Minister to another would undoubtedly commit a breach of the Act and so would a newspaper which received the document knowing it to have been communicated in breach of the Act (s 6). Likewise it would be an offence for the newspaper to publish such a document if it had been obtained in breach of the Act (ibid). Criminal proceedings could follow such a publication, and it is not beyond the bounds of possibility that if the matter were drawn to his attention in time, the Attorney-General might be able to obtain an injunction to stop the newspaper publishing at all; in certain circumstances the Attorney-General can sue to stop infringement of a statute. (Indeed there are even cases of private individuals successfully claiming an injunction to stop breach of a statute which would affect their special interests (eg *Argyll v Argyll* [1965] 1 All ER 611).

(2) *Breach of copyright*—However the private person who objects to publication of documents obviously cannot rely on the Official Secrets Act. He must rely on breach of copyright or breach of confidence. Copyright is an area of the law which is not particularly well adapted to cope with this situation. Its original rationale was to protect to an author the fruits of his creativity, and to stop others from making a profit by publishing his work without his con-

sent. But it is framed in terms which, read literally, are wide enough to cover publication of documents for "exposure" purposes. The Copyright Act 1962, s 7 (in terms identical with those in the English Copyright Act 1956) provides that copyright subsists in every original literary work whether published or unpublished; it is well established that any written work, whatever its style or quality, comes within this description provided it contains even a scintilla of originality. Further, two of the acts restricted by the copyright in a literary work are (a) reproducing the work in any material form and (b) publishing the work. For this purpose the word "work" includes any substantial part of the work (s 3 (1)). Thus, if a person finds that a document in which he has copyright has been, or is about to be, "exposed" in the press in whole or in part he could by injunction stop a publication which has not yet occurred, or obtain damages in respect of a publication which has occurred; there is statutory provision for additional damages if the breach is a flagrant one (s 24 (3)).

However there are certain defences to a copyright action which may be particularly relevant in this sort of case.

(a) The law of copyright protects only the form and not the content of a document. Copyings which are verbatim or nearly so are caught by it, but careful paraphrases may not be; in respect of them it is breach of confidence or nothing.

(b) The only persons who can sue for breach of copyright are the owner of the copyright and a person holding an exclusive licence of the copyright. It was on this ground alone that the plaintiff failed in *Beloff v Pressdram Ltd* [1973] 1 All ER 241. The magazine *Private Eye* published an article highly critical of the *Observer* political columnist Nora Beloff, and published, verbatim, the next of a confidential memorandum she had written to her editor; the text of the memorandum had been "leaked" to *Private Eye* by an employee of the *Observer*. Miss Beloff's action for breach of copyright failed solely because the *Observer*, and not Miss Beloff, were the owners of the copyright in the memorandum, she being employed by them under a contract of service. An attempted assignment of the copyright to her was void because the editor, who had executed the document of assignment, had no authority to enter into such transactions. It was made clear by Ungoed-Thomas J that had Miss Beloff had the copyright properly assigned to her her action would have been successful, and she would have been entitled to the statutory additional damages, for *Private Eye's* article was framed in a most insulting and objectionable way. (She was referred to throughout it as "Nora Ballsoff" and it was headed "The Ballsoff Memorandum").

(c) By s 19 (2) of the Copyright Act 1962 no fair dealing with a literary work is an infringement of copyright if it is for purposes of criticism or review of that work or another work, and is accompanied by a sufficient acknowledgment. It would seem that the publication of documents, or extracts from them, may be protected under this head if this publication is for the purpose of subjecting them to criticism and discussion in the article: it is established that the term "criticism" in the section refers to criticism of the content and underlying philosophy of the passages quoted as well as criticism of their style (*Hubbard v Vosper* [1972] 1 All ER 1023). However everything depends on what is meant by "fair dealing", an expression which is not defined in the statute. The proportion of quotation to comment is relevant for this purpose. As Lord Denning said in *Hubbard v Vosper* [1972] 1 All ER 1027:

> "You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? . . . Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair."

But this is not all. The newspaper which publishes a previously unpublished document seems to have a stiffer onus to satisfy than the one which publishes a document which has been before the public before, and from the very nature of the matter it is clear that most of the cases we are considering will be of the former kind. Despite earlier dicta to the effect that it can never be a fair dealing to publish previously unpublished work, a less stringent test was adopted in *Hubbard v Vosper* (supra). This was a case where a former member of the Scientology cult attempted to publish a book very critical of the cult; he used, among other things, extracts from bulletins and letters which were given to those who took courses in scientology, some of which were treated as confidential. Lord Denning thought that, although they were "unpublished" in a strict sense, these bulletins and letters had been circulated to a sufficiently wide group of people to make quotation a fair dealing; he compared them with a company circular sent to shareholders. There is obviously a difficult question of degree

here, but His Lordship appeared to recognise that a secret document which has had circulation among only a few people may be so protected that no publication can be a fair dealing. This was the situation which confronted Talbot J in *Distillers Co v Times Newspapers Ltd* [1975] 1 All ER 41. During the protracted litigation, and the attempts to settle it, which ensued when children born deformed as a result of the drug thalidomide sued the distributors of the drug, the Court made an order of discovery against the drug company in respect of over 100 documents in its possession. The infant plaintiffs gave these documents to a scientist for his analysis and opinion. The scientist sold them to the *Sunday Times* which proposed to publish extracts from them in a critical article. The drug company brought this copyright action against the *Sunday Times* which pleaded the "fair dealing" exception. Talbot J doubted "whether the plaintiff's documents could be said to have been circulated so widely that, though not published generally, it was fair dealing to criticise them." Likewise in the *Beloff* case Ungoed-Thomas J thought that the fair dealing defence was not open to *Private Eye*; he appeared to doubt whether publication of a document which has been "leaked" can ever be a fair dealing.

If these latter opinions are right—and in the *Hubbard* and *Distillers* cases they were ex-expressed only in the course of applications for interlocutory injunctions, and in the *Beloff* case were obiter—this "fair dealing" exception will not be of much benefit to the press. Most documents of the kind we are discussing, being highly confidential, have had little circulation, and many of them have been "leaked" (whatever the scope of that term may be).

(d) By virtue of the Copyright Act 1962, s 19 (3), no fair dealing with a literary work shall constitute an infringement of copyright if it is for the purpose of reporting current events in a newspaper, and is accompanied by a sufficient acknowledgment. This exception is in many ways the most uncertain of all in its scope, and has been subjected to little discussion. Taken at its widest it might be taken to authorise publication of any document of topical interest, provided it is of such public importance as to be newsworthy. At its narrowest, the same qualifications may apply as in (c), so that the publication of leaked material of limited circulation would be a breach. The defence was raised in the *Distillers* case (supra) but was rejected on the rather unsatisfactory ground that the thalidomide affair having happened some years before could no longer come under the rubric "current events". However it received a somewhat farmer reception in *Fraser v Evans* [1969] 1 All ER 8 where the *Sunday Times* were proposing to publish extracts from a written report made to the Greek Government by a British public relations consultant who had been engaged by them; the report had been surreptitiously obtained, apparently from sources within the Greek government. In discharging an interim injunction forbidding publication of the report, Lord Denning, with whom Davies and Widgery LJJ agreed, said:

> "If the 'Sunday Times' were going to print this report in full, thus taking the entire literary form, it might well be a case for an injunction to restrain the infringement of copyright. But the 'Sunday Times' say that they are going to do no such thing. They say that they are only going to print short extracts from it, followed up with some of the statements which Mr Fraser made to them and their comments on it. They say that would be a 'fair dealing' such as it permitted by [the English equivalent of s 19 (3)]."

Lord Denning felt that in the light of this explanation, he was not inclined to reject the defence out of hand. He clearly accepted that such a dealing as the defenders proposed might come within the compass of the section. However there is simply not enough authority on this defence for one to be able confidently to advise a newspaper on how far it may go.

(e) *Beloff v Pressdram Ltd* (supra) suggests a further defence for which there is no previous authority. Ungoed-Thomas J appears to have accepted that there may be cases where the public interest in publication will outweigh the individual's right in copyright material, and provide a defence to publication. There is no such defence in the Copyright Act 1962, and Ungoed-Thomas J's view seems to go beyond anything previously decided. There are, certainly, earlier cases holding that if written matter is contrary to public policy—eg if it is blasphemous, obscene or seditious—it is not protected by copyright, but this is based on something akin to the "clean hands" doctrine. It is to go a considerable distance further to argue that matter may be published, with impunity so far as the law of copyright is concerned, because it is in the public interest that it be known. Such a defence may well exist in actions for breach of confidence (see below) and it was authorities in that area on which Ungoed-Thomas J relied. Perhaps the clue is to be found in his statement that the action in that

case, although framed in copyright, was in substance one in respect of breach of confidence. In the event, although it was argued that it was in the public interest to know the contents of Miss Beloff's memorandum (it disclosed which ministers supported Mr Maudling as next Prime Minister and showed how a lobby correspondent like Miss Beloff got her information) Ungoed-Thomas J held otherwise. In so doing he framed a definition of "public interest" which is likely to be of more use in breach of confidence than copyright cases, and discussion of which will therefore be reserved till later.

(3) *Breach of confidence*—If the document, or extracts from it, have not been reproduced in the newspaper, but rather the content has been paraphrased, the only action by the person aggrieved will be one for breach of confidence. In fact, however, in most of the recent cases where extracts from the document have been published verbatim a claim for breach of confidence has been coupled with one for breach of copyright: that happened in *Hubbard v Vosper*, *Fraser v Evans*, and *Distillers Co v Times Newspapers Ltd*.

The law of breach of confidence has been blossoming lately. Most of its early development was in the employment field, and involved employees who had divulged their master's trade secrets. But it is now clear that the doctrine is not dependent on the existence of a contract of service, or indeed on the existence of any contract at all. All that is required is a relationship of confidence between two persons, the one receiving information of a confidential nature from the other. The former then owes a duty not to break the confidence by disclosing the information to another. If he attempts to he can be restrained by injunction. If he in fact does so, an action for damages may lie: that will clearly be so if the disclosure was in breach of a term, express or implied, of a contract, but apparently may be so even if there was no contract between the parties (eg *Seager v Copydex* [1967] 2 All ER 415; [1969] 2 All ER 718). What is more important for present purposes is that a newspaper may also be affected. If it has received information from a party to the relationship and proposes to publish it, knowing it to be confidential, an injunction will lie against it; damages may possibly lie also, although this is less certain in cases where there has been no inducement of breach of contract by the newspaper.

There are still many matters which need to be clarified in this area. In particular, what exactly is confidential information? (In *Fraser v Evans* (supra) Lord Denning was not able to state the principle any more clearly than this: "No person is permitted to divulge to the world information which he has received in confidence, *unless he has just cause or excuse for doing so.* Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence.") It is fairly clear, however, that in cases of the kind with which this article is dealing it will usually not be very difficult to establish that the document in question is within the category of "confidential information". This was accepted in *Fraser v Evans* (the report to the Greek Government was held to be confidential—there was an express clause in the consultant's contract that he would not divulge information learned by him), *Distillers Co v Times Newspapers Ltd* (the documents disclosed on an order for discovery were confidential), and *Hubbard v Vosper* (the bulletins issued to members of scientology courses were confidential, the members being obliged to sign a declaration not to divulge the information). It seems reasonably clear that in the *Beloff* case Ungoed-Thomas J would have been prepared to find the memorandum confidential had that been pleaded.

Lord Denning's statement of principle in *Fraser v Evans,* quoted above, however, makes it clear that there are certain defences to a claim alleging breach of confidence.

(a) Apparently the only party who can succeed in an action is the person to whom the duty of confidence was owed. That was the ground on which the confidence plea was decided in *Fraser v Evans*. The only party with a sufficient interest to prevent publication was the Greek government itself, it being the party to whom Mr Fraser owed his duty of silence; Mr Fraser, the party who owed the duty, had insufficient interest to maintain an action.

(b) It appears that, at least if the equitable remedy of injunction is being claimed, a party without "clean hands" will be unsuccessful. In both *Hubbard v Vosper* (per Megaw LJ) and *Church of Scientology of California v Kaufman (The Times,* 14 May 1973) this was one of the grounds for refusing to suppress information about the cult of scientology. The cult itself used such deplorable means to suppress inquiry and criticism that it did not lie in its mouth to claim an injunction. It is not very certain how far this defence extends: whether, for instance, it would protect a newspaper which proposed to disclose villainies in high places of the kind revealed in the Watergate affair. But this de-

fence does seem to overlap into the next one which seems overall to be the most useful defence.

(c) It is a defence to an action for breach of confidence that it is in the public interest that the matter be disclosed. It would appear that this defence extends not only to cases where the remedy claimed is injunction, but to all cases: indeed it appears that it is a qualification on the very duty to observe confidence. Unfortunately, however, its exact scope has not been defined with clarity.

It was first canvassed in the case of *Initial Services Ltd v Putterill* [1967] 3 All ER 145. The first defendant, who had resigned as an employee of the plaintiff laundry company, took with him a number of documents which revealed that a group of firms in the laundry business had a liaison system to keep prices up, and also that a circular which the plaintiff company had issued to its customers justifying a price rise contained false information. He gave these documents to the *Daily Mail,* which published two articles based on the information thus supplied. The plaintiff sued both the ex-employee and the newspaper claiming an injunction and damages on the grounds of breach of confidence. The defendants pleaded by way of defence that the documents revealed that the Laundries had been guilty of a breach of the Restrictive Trade Practices Act 1956 and that false information had been supplied to the public, and that it was in the public interest that the public should know this. An application was made by the plaintiff to strike out this defence. The application was refused by the Master, by Cusack J, and finally by the Court of Appeal, who held that such a defence was not ill-founded. However, the members of the Court of Appeal were not very clear how far the defence extended. Lord Denning refused to confine it to cases where one party to whom the duty of confidence is owed has been guilty of a crime or fraud. "It extends," he said, "to any misconduct of such a nature that it ought in the public interest to be disclosed to others." Later he said that the exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always that the disclosure is justified in the public interest. Salmon LJ, having quoted the statement of an earlier Court that "there is no confidence as to disclosure of iniquity" said that what is the sort of iniquity that comes within the doctrine is not easy to define, although he thought it arguable that the plaintiff laundry's conduct here was within it. These references to "iniquity" and "misdeeds" leave the matter wide open, perhaps desirably so, for it might be unduly restrictive to attempt to categorise the situations where disclosure would be justified. Later cases have done little to clarify the position. In *Beloff v Pressdram Ltd* (a copyright and not a breach of confidence case) Ungoed-Thomas J made the most conservative attempt so far to confine the doctrine: he suggested that it does not extend beyond matters in breach of the country's security, or in breach of law, or matters otherwise destructive of the country or its people, including matters medically dangerous. On the other hand, in *Fraser v Evans* Lord Denning tried to open the doors a little wider, by suggesting that the word "iniquity" did not express a principle, but was just an instance of just cause for breaking confidence, the only true principle being that the public interest sometimes demands disclosure. In so far as the facts of the cases assist one to plot the graph—and there have not really been enough of them yet to do so with accuracy—it seems that what the plaintiff did in *Putterill's* case itself was sufficiently "iniquitous" to override the duty of confidence; similarly it has been held arguable that it is in the public interest to disclose to the world the secrets of Scientology, for they indicate medical quackeries of a dangerous kind which might do harm to the body as well as the spirit (*Hubbard v Vosper, Church of Scientology of California v Kaufman*), and in addition constitute "a labyrinth of incoherent material", and "absolutely nonsensical mumbo jumbo" for which people were being asked to pay for instruction (Kaufman's case). However the Courts did not believe that such a defence had been made out in *Fraser v Evans* or in *Beloff's* case. (In the latter case the memorandum did not disclose any *misdeeds* of any kind, but was merely of *interest* to the public in the broad sense that it would satisfy their curiosity on certain political matters). Nor was the defence well received in the *Distiller's* case which makes the point that everything depends on the interests involved in the particular case. It was argued that the documents obtained from the drug company supplied important information about how thalidomide had come to be placed on the market, what part commercial interests had played in this, and how much scientific knowledge was then available; and that it was of the highest public importance that this information be made public so as to obviate such a thing happening again. Talbot J admitted that the matter was one of public interest, but con-

cluded that the question involved the balancing of interests. Important though the documents might be, the public interest in their publication was outweighed in this case by the public interest in the proper administration of justice to protect the confidentiality of discovery of documents. Had the case not been one of discovery the decision on this point might have been different, although his Lordship even then was inclined to doubt whether the public interest in disclosure would have outweighed the plaintiff's private right to confidentiality.

The *Putterill* case raised one further point which really goes to the heart of the question of freedom of the press. Lord Denning suggested that in some cases, while a person under a supposed duty of confidence might be permitted in the public interest to disclose the "confidential" information, he would only be able to do so to the "appropriate authority", which might be, for instance, the police or the Registrar of Trade Practices. In other words Lord Denning believed that, however iniquitous the plaintiff, disclosure to all the world through the columns of the press may not always be justified. This suggestion supports a view that tight reins should be kept on "investigative journalism", that if "official" avenues exist for investigating a supposed abuse (for instance the police, commissions of inquiry, trades practices commissions, parliamentary committees, or the like) it is better for all concerned that they be left to do the job without being thrown off the scent, and without public excitement being stirred up, by a newspaper investigation. The traditional British dislike of "trial by newspaper" has had a pervasive influence. Yet Lord Denning quite clearly believed that there are cases where the newspapers ought to be allowed free rein, although it would doubtless provide a further definitional problem to describe what precisely those cases are. However Lord Denning's judgment in the *Putterill* case is the only place where such a view is to be found (although there is possibly a flavour of it in the *Distillers'* case), and he did not receive the support of Salmon and Winn LJJ, the other two members of the Court, even in that case. These two Judges were of the view that if the plaintiff has been guilty of iniquity he has no right that his conduct should be kept secret from anyone. They justified this by saying that it would be contrary to public policy for the plaintiff to extract an express promise from the defendant, perhaps as part of a contract, that he would keep silent about the plaintiff's wrongful conduct; if contrary to public policy it would be unenforceable in toto. An implied obligation could not be in any better position. Salmon LJ said "I do not think that the law would lend assistance to anyone who is proposing to commit . . . a clear breach of a statutory duty." Here one sees a shadow of the "clean hands" doctrine. The question of which of these views is eventually proved to be right could have far reaching consequences for the press: the question being whether it can publish the truth, as it sees it, about all iniquity, or whether it has a residual function to inform the public of its investigations only in a limited area where the public requires information for its own protection.

Conclusions

This part of the law has not been developing in a very satisfactory way, and there are substantial areas of uncertainty within it: for example the scope of the "public interest" exception to the rule about breach of confidence and the "fair dealing" exceptions to copyright. While these uncertainties lead to a flexibility which is in some respects desirable, they do mean that the media lack clear guidelines as to what they may and may not publish. One of the troubles has been that many of the cases have been interlocutory appeals in which it has not been necessary to reach any considered conclusions, but in which it has been enough to decide that a particular defence is or is not arguable. In a number of them, although an interim injunction has been withdrawn or refused thus allowing publication to proceed, it was made quite clear that after publication the plaintiff would be entitled to test the matter at law in a damages action. Such decisions do not bolster the confidence of the press. But the major problem has been that the important constitutional question of the freedom of the press has had to be confined within the framework of two private actions—copyright and breach of confidence—which are simply not appropriate to deal with it. Copyright, originally created to protect an author against unfair pirating by competitors, is ill adapted to deal with matters of exposure journalism; for instance it is to say the least strange to find the defence of "fair dealing for purposes of criticism and review", originally conceived to cover literary and dramatic criticism, being twisted to do service in this area. Likewise breach of confidence, previously mainly confined to the industrial sphere, has been forced into such rapid growth that it has become too amorphous to provide a clear guide. Mainly because the

existing framework of these two branches of the law does not readily provide the opportunity, there have been few judicial attempts to put the matter clearly in terms of what really is the issue, the limits of freedom of the press; it is most unfortunate to find some of the cases turning not on this real issue, but on what can only be called technicalities of the laws of copyright and confidence—for instance the holdings in *Beloff* that the copyright had not been properly assigned, and in *Fraser* that the wrong plaintiff was before the Court. Only Lord Denning has clearly stated his awareness of the underlying issue, as for example in *Fraser v Evans* where he said:

> "It all comes back to this. There are some things which are of such public concern that the newspapers, the press, and indeed, everyone is entitled to make known the truth and to make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away."

(See also, in a different context, the judgments in the recent case *In re X, a Minor* [1975] 1 All ER 697.) The real question is how far our newspaper should be allowed to act as independent inquiry agents keeping a watch on misconduct in government, commerce, and other matters of public importance; and whether they should be allowed to publish their findings, or whether they should be confined only to fairly and accurately reporting the findings of "official" agencies such as commissions of inquiry. This is a question which not only publication of documents has a bearing, but also the subjects of defamation and contempt of Court. These last two branches of the law are at present under consideration in England and New Zealand, and it may be opportune for the question of publication of documents (and confidential information in general) to be considered with them. One feels however that this, like the whole question of privacy of which it is perhaps just one aspect, is something which is too delicate for legislation ever to solve satisfactorily. One suspects it will be left to the Courts to clarify the doctrines so hazily perceived in the cases outlined in this article. And it appears to be the *Sunday Times* which is going to lead the way in providing the opportunities: it has already featured, at what must have been considerable cost, in three major test cases, *Fraser v Evans, Distillers Co v Times Newspapers Ltd* and the leading case on contempt of Court, *Attorney-General v Times Newspapers Ltd* [1973] 3 All ER 54. It may eventually clarify the question of how far it will ever be possible to conduct a Watergate type of investigation in England and New Zealand.

WHILE LONDON BURNS

DR RICHARD LAWSON *continues his Occasional Notes from Britain.*

My grandfather on my father's side was a Swede who, in the formative years of the century, emigrated to Dunedin. He lasted just 17 weeks before returning to Sweden. From thence, he was minded to go to the USA, picking up his boat at Liverpool. Unluckily for him (or perhaps not), he met Grannie before reaching Liverpool, and then he settled in England.

Since England was not his domicile of choice (nor really Grannie's, since her family had fled Ireland at the height of the potato famine), he was never one to wax lyrical about his adopted land. He had a way which I remember well, of occasionally bellowing: "Only in England", and then would follow a tirade of blistering force on some aspect of local life which irritated him. (More often than not it was the presence of Catholics, my Grannie being one such. Official Swedish educational policy had taught him to believe that Catholicism had perished in England long since. Such bigotry, I quickly adjure, has been purged from his offspring.)

All this came back to me when, the other day, a Very Important Society invited me to its annual luncheon at The Hilton. (Incidentally when accepting the invitation, I queried the nearest underground station. The icy response did indicate that guests at The Hilton only rarely emerge from the Tube. The answer, by the way, was Green Park, so remember.)

After a morning of fairly amiable drinking and chatting, we settled back to our six-course lunch. And then My Lords, Ladies and Gentlemen were bidden to listen to the Chairman of this Very Important Society, a noble lord of the realm.

He spoke predictably of the economic crisis and warned us all that while we fought over

the cake, soon there would be bugger all left but crumbs. As he droned on, and we knocked back the Grand Marnier, I noticed that nearly all our captains of industry were here and there at the tables. It scarcely needs saying that something a little obscene drifted in when our noble lord began to condemn the idle and shiftless worker of our land. Our problems would soon be at an end, he vouchsafed, if only everyone did an honest day's work. This was what he said as he sat down to a volley of applause and "Hear Hears".

Actually, his climax was a fine touch of comedy. What he said was: "So, we take our hats off to the future and our coats off to the past." I saw nothing amiss with this, since it was much in line with the intellectual content of his previous words. But some 30 seconds after he had sat down, and some whispered correspondence with the Man from the *Financial Times,* he rose to his feet: "I'm sorry," he said, "I mean: Hats off to the past, coats off to the future." More applause and yells. It was getting more like a Bay City Rollers' Concert every moment. (That may be lost on my readers. The BCR are a group of mindless urchins out of Scotland of even less musical ability than the average group these days, and that is a rare ability indeed. Girls of 5-6 years old go hysterical at their presence. So, incidentally, do I: though for mildly differing reasons.)

Well, anyway, we condemned the shiftless neo-Marxists who are ruining our beloved land and returned to the serious business of sinking some Courvoisier. As I was leaving, I dropped into the Male Comfort Station, as The Hilton will call it. Someone had honked all over the expensive tiling. An embarrassed flunkey directed us around it, providing us with apologies and scented napkins to smother our noses with.

As my poor grandfather would have said: "Only in England."

Judges and Javelins—Shortly after Judge Johnson arrived in the Dominion, he proceeded to Napier to open the circuit sittings there. This was, I think, in 1860 or 1861. The Sheriff had heard rumours that the new Judge was a stickler for form and ceremony. He managed to hire from a livery stable quite a presentable open carriage drawn by two white horses which looked more or less a pair. He had rescued from the bottom of a sea-chest, where it had lain since his arrival in the Colony, a frock coat. He had even managed to procure a top-hat for the occasion, and with a pair of white gloves and a fresia in his buttonhole, the Sheriff thought he had done himself rather well.

Not so the Judge, however. When the Sheriff presented himself at the door of the hotel and proceeded to show the Judge into his carriage:

"Where are the javelin men?" asked his Honour sternly. The Sheriff explained that we do not have javelin men in New Zealand.

"See to it when next I attend the Assizes in your town that proper respect is paid not to *my* dignity but to the dignity of my office." Where the poor Sheriff had secretly hoped for a compliment he received a snub; but he was in due course avenged.

Six months later the Judge came again to Napier to hold sittings. He had by this time learned something of the ways of colonials, and no longer expected javelin men, but he got them—with a vengeance. It happened that a company of travelling barnstormers were playing a season of melodrama in the town during assize week. The Sheriff engaged four men of the company to take part in the opening of Assize. They were rigged out in tawdry finery, theatrical "properties", with helmets and breastplates of tin, and with buskins of tragic impressiveness; they carried javelins of lath, the blades pasted over with tinfoil. Never were seen such sorry-looking scarecrows since Falstaff mustered his ragged regiment at the battle of Shrewsbury. The people in the town had got wind of what was toward, and a small crowd had gathered in front of the hotel. When the Judge came out to enter his carriage, they raised a cheer not without its derisive note. That was the first and last occasion upon which a Judge in New Zealand was attended by javelin men. From *Cheerful Yesterdays* by O T J Alpers.

How bad is the bad news?

"What did he give me?" my client asked.

"Six months" I replied.

"Six months" he said with a big smile.

"I thought he said six years!"

F J C