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INTER ALIA

Preventive Law

One area that tends to be overlooked both at university law faculties and in publishing the profession's activities, is the field of preventive law.

Students are given a good grasp of how a lawyer approaches a case where a client is in legal difficulties, but they tend to be less aware of the techniques of avoiding legal problems before they develop.

The profession, too, has been traditionally inhibited when it comes to taking law to the people. For example, it can appear to be touting if one writes to a person one once acted for, drawing his attention to proposed town planning changes that may adversely affect his property. Yet should one feel so reticent? And if not, where is the line to be drawn?

Certainly there is room for the view expressed by Mr James D Fellers as president of the ABA that "only where lawyers routinely, and regularly, advise all [citizens] as to how to prevent legal problems—in the same way that physicians advise patients in annual check-ups—will the legal profession be providing the services that it should".

It seems unprofessionally aggressive and smacks of a deliberate marketing strategy for a firm to send out annual check-up cards in the same way as, say, a dentist.

Yet why should it? Everyone has clients who dally over keeping their wills up-to-date, or who have misconceptions of their rights and duties in situations which, if neglected, can develop into problems. Firms, too, could do with an annual legal audit.

If we genuinely care for our clients, as the writer is sure that we do, why should we feel reticent about providing the kind of service that will save them money, and save us time?

Need we remain crisis-orientated? Or is the pursuit of preventive help a constructive move which the profession can actively encourage and promote to best fulfil its role?

[*Practitioners with an interest in the topic can obtain a "Preventive Law Newsletter" by writing to Louis M Brown, Editor, University of Southern California Law Centre, Los Angeles, California 90007, USA.*]

The Duty Solicitor

The Duty Solicitor has quickly become an essential social institution. So effective has he been that when those involved in schemes around the country gathered in Wellington on 31 October for a two-day workshop, no one attending questioned the very real need for him.

Rather, as the Chairman, Mr David Hurley, reports on p 768, the emphasis was on ways in which the service can be improved, not simply in terms of efficiency but principally in the field of effectiveness.

It was, however, disappointing to note that the Police are still somewhat chary of the scheme—and persist in a head office ruling that deprives the Duty Solicitor of summaries of facts while lamenting an increase in the number of remands.

As one delegate pointed out, the refusal of summaries directly led to the applications for remands.

The comment, too, was made that some Duty Solicitors are almost depriving defendants of their right to plead guilty—but they can hardly encourage them to exercise this right unless they are satisfied that the defendants understand precisely what is involved.

The Duty Solicitor's primary obligation is to the Court and to his client, the defendant, but properly used by the Police he can smooth the passage of Court business.

If a greater degree of co-operation can be established, the Police will gain immeasurably in terms of time saved.

The apprehension felt by the Police and an apparent wish to limit the Duty Solicitor's scope, perhaps stems, from a wider misunderstanding of the lawyer's role. We all have a firm grasp of this, but far too many of the Police are under a variety of misapprehensions. That they are, is as much a criticism of the profession as it is of the Police.

Perhaps greater emphasis can be given to our role in the course of Police training programmes. This would involved greater participation by practitioners in the programmes. But until the residue of mistrust that divides us can be dispelled, the Police can hardly be blamed for an overly-cautious attitude to innovations such as the Duty Solicitor.

Social Security Cash Benefits in New Zealand

Those with a domestic proceedings practice by now should have a copy of the 32 page booklet published by the Department of Social Welfare—at least so says a correspondent.

The booklet outlines the basic criteria for some 12 types of cash benefits and deals too with income tests, general provisions, supplementary assistance and welfare services. A loose leaflet provides details of the latest maximum rates.

Copies are available from Departmental offices everywhere.

JEREMY POPE

CASE AND COMMENT

Australian Cases Contributed by the Faculty of Law, University of Otago

Breach of copyright by unsupervised use of photocopying machines in University libraries

The High Court of Australia in *University of NSW v Moorhouse and Anor* [1975] 6 ALR 193, (McTiernan ACJ, Gibbs and Jacobs JJ) has now considered the decision of the Supreme Court of New South Wales ([1974] 3 ALR 1, see [1974] NZLJ 485), and unanimously held that the declaration in the form made by Hutley AJ was insupportable, but on allowing the cross-appeal of the respondents granted another declaration on much narrower grounds. It will be remembered that the author and the publishers of the literary work, *The Americans Baby* intended to create a test case, and it was for that purpose that Mr Brennan made the photocopies by the use of the coin-operated machine. Upon examining the measures taken by the University to prevent any possible infringement of copyright Gibbs J concluded that they "even when considered cumulatively [did] not appear . . . to have amounted to reasonable and effective precautions". The library guide, beside being erroneous, did not necessarily come to the attention of all users of the machines, and the notices on the machines themselves were totally ineffective for that purpose. Consequently, Mr Brennan not only infringed the copyright by using the photocopy machine, but the University authorised him in doing so.

This conclusion was arrived at by examining the dictionary meaning of the word "authorise" denoting "sanction, approve, countenance" and also "permit". In *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481, "permit" and "authorise" were treated as synonyms. In that case express or formal permission or active conduct indicating approval was not held essential to constitute authorisation, as inactivity or indifference may infer authorisation or permission. According to Gibbs J a person who has under his control the means by which a copyright may be infringed, if he makes it available to others "knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from its use". Jacobs J, McTiernan ACJ concurring, similarly held that invitation to use photocopying machines was not limited to copying only material that would not be breach of copyright, and knowledge by the University of the fact that users were doing acts of infringements was immaterial without a clear qualification "that the invitation did

not extend to the doing of acts comprised in copyright". As a result the learned Judges thought it an appropriate finding that in the circumstances the University authorised Mr Brennan's acts.

Although the power vested in the Supreme Court of New South Wales to make declaratory orders is fairly wide Gibbs J pointed out with reference to Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 that "the question must be a real end not a theoretical question". The facts supported only the declaration that the University on the day specified authorised Paul Brennan of the act of reproducing the literary work in question, and thereby infringed the copyright. The declaration made by Hutley JA rested purely on hypothesis, as there was no evidence of any other infringement being a basis for the statement that thereby the University authorised "breaches of copyright", as distinct from one particular breach.

The decision of the High Court turns on the form of the declaration and on the power of making declaratory orders. For the purposes of clarifying any unsettled points of copyright law it is very disappointing. Gibbs J acknowledged the appeal's "limited significance" when stated that although librarians and authors "would welcome a clear definition of the circumstances in which literary copyright is infringed by the making of photocopies in a library—a definition capable of practical application in the daily activities of those called upon to supervise the work of libraries," as the Act does not lay down precise rules, but its principles are broadly formulated by reference to such abstract concepts as "fair dealing" and "reasonable portion", the answer to a question of infringement is left to the Courts on applying the principles to the facts, "so that a decision on a particular set of circumstances may be of no assistance in other cases".

It is clear that the High Court essentially restated the position regarding the unsupervised use of photocopying machines by students. Applying the principles to the New Zealand Copyright Act 1962 the situation does not seem to have changed. "Fair dealing" for the purposes of "research" or "private study" is definitely excepted by virtue of s 19 (1) (which is the equivalent though not the same as s 40 of the Commonwealth Copyright Act 1968), but the meaning of these expressions still lacks judicial certainty. Making of photocopies by students for the purpose of their course, in view of the decision, obviously does not constitute "fair dealing", and such study is neither "private" nor "research". As far as s 21 (similar to s 49 of the Commonwealth Act) is concerned the special exception for libraries and Universities manifestly does not apply as the photocopies are not supplied under the conditions prescribed. Thus, Universities and other educational institutes allowing the use of coin-operated photocopying machines without adequate supervision will continue to face the risk of committing breaches of copyright as inactivity or indifference has been interpreted to be capable of reaching the degree of authorisation. The only guidance that may be derived points towards the adoption of adequate measures by placing notices on the machines explicitly prohibiting their use in a manner that would constitute infringement of copyright, and by issuing library guides which clearly explain the relevant provisions of the Act. Although in the view of Gibbs J the fatal weakness of the University's case was the inadequacy of the notices, the effectiveness of constant supervision still appears to remain a relevant criterion, and it seems doubtful whether even an express disclaimer of liability incorporated in the notice would definitely exonerate the University.

A S

RECENT ADMISSIONS

Barrister		
Kennedy Grant, TWH	Auckland	22 Aug 1975
Barristers and solicitors		
Bartley, P	Auckland	12 Sep 1975
Brandts-Giesen, J J	Christchurch	9 Oct 1975
Kerr, G A	Auckland	29 Aug 1975
Lawson, A S	Dunedin	17 Oct 1975
Morrison, B A	Christchurch	20 Oct 1975
Rowe, B G	Christchurch	9 Oct 1975
Rowe, W B	Christchurch	30 Sep 1975
Salter, B T	Auckland	5 Sep 1975
Slater, A N	Nelson	6 Oct 1975
Stuart, A G	Auckland	22 Aug 1975
Swanson, T J	Nelson	6 Oct 1975
Thambyah, P S	Auckland	22 Aug 1975

Always possible—Learn early in the piece that there is no case impossible to win. It matters not how much the case may appear against you, it can still be won. I learned that in the second criminal trial I ever took. But on the other hand, learn also that there is no case impossible to lose, you are never on a certainty, remember it and it means that you prepare accordingly.—MR W V GAZLEY to the Wellington Young Lawyers.

NATIONAL DUTY SOLICITOR WORKSHOP

MR DAVID HURLEY, *Chairman of the recent New Zealand Law Society, Workshop on the Duty Solicitor Scheme, and convenor of the Wellington scheme, reports on the workshop.*

Duty Solicitor schemes in some areas have been operating in New Zealand on a voluntary basis since 1973. In mid-1974 the scheme was extended to cover all Magistrates' Courts and the Government undertook payment of remuneration.

Flexibility in administration was an essential feature in getting the scheme going in each area, but different local interpretations by others involved in the scheme such as the Police, Justice Department and others, have meant solicitors in some areas have and to develop schemes rather different to the main stream.

For example, in Wellington the Police do not have arrest cases to the cells at Court before 9.30 am, thus allowing only half-an-hour for interviews to be completed before 10.00. Yet in Auckland, dealing with much larger numbers, the Police have their arrest cases to the cells by, at the latest, 8.40 am.

Again, some districts have developed ideas not known about elsewhere which can facilitate administration substantially. In Auckland a "Duty Officer" has been appointed by the Justice Department to help administer the scheme and to complete legal aid forms. This idea has been extended to Wellington, but there would seem to be no reason why it should not be extended to other main centres such as Christchurch, Dunedin and Hamilton.

The Law Conference at Easter gave an opportunity for informal discussion, and it was mooted that a National Workshop be held to explore these techniques and to assess the success of the scheme.

The idea was taken up with New Zealand Law Society who obtained a Justice Department grant towards travel expenses and otherwise met all costs save accommodation. Billets were arranged in Wellington where required.

All District Councils were advised and representatives met at Wellington on 31 October and 1 November. The only District Councils not represented were Wanganui, Nelson, Marlborough and West Coast.

Also invited as special guests were Mr D J Sullivan SM and representatives of the Justice Department, Police, Department of Maori Affairs, Victoria University, the Chairman of the New Zealand Legal Aid Committee, Social Welfare and Probation services, the *New Zealand Herald* and the editor of the *New Zealand Law Journal*

The opening session on Friday afternoon comprised reports from different councils of how the scheme was operating and the difficulties they were experiencing. The various guest speakers then commented.

The Saturday morning session was conducted in three committees being, first, those centres with two or more Courts sitting simultaneously, chaired by Mr J J Shaw of Auckland, secondly those areas with one Court sitting continuously, chaired by Mr D R Kohn of Gisborne and a third group directed to satellite Courts, chaired by Mr P A Low of Invercargill.

These committees were charged with considering the relationship of the Duty Solicitor scheme with: (1) the Police; (2) the Courts—their administration and facilities—and associated agencies; (3) the Magistrates; (4) other solicitors, including their recruitment, selection and training as Duty Solicitors; (5) the defendant and his community; and (6) Law Society policy.

In addition, each committee made an assessment of a Duty Solicitor Manual (to be prepared for national distribution) and also commented on a draft interview form for completion with defendants which is to be published by the Justice Department and made available in Courts throughout the country.

On the Saturday afternoon plenary session with reporting back was held as a result of which a number of resolutions was passed for referral to the Executive of the New Zealand Law Society.

A full report is to be produced and distributed to district councils, but the following are examples of important issues determined under the above headings.

— It was the unanimous wish of all Councils that the Police be asked to make statements of fact available to Duty Solicitors, prior to interview. As the scheme has developed, this is now essential if defendants are to be properly advised on why they are before the Courts.

In reply, the Police representatives stated that as the scheme was seen by them as being for referral purposes only, there was no need for the statement of facts to be made available.

Most participants however could cite examples of when availability of this sheet would have made dealing with a case much easier for all involved, including the Police.

— Under the heading of "The Courts" it was acknowledged by Justice Department representatives that present facilities are very poor, but improvements are to be taken into account as soon as finances permit. An excellent suggestion coming from one committee is that Court Aid Committees be set up in each registry. These should include official Social Welfare workers and voluntary agencies to liase with Duty Solicitors in ensuring defendants make contact with counsel (whether legally aided or not), and otherwise to co-ordinate care for the defendant and his family during and after Court proceedings.

— It was clear from discussion that Magistrates around the country made use of the Duty Solicitor Scheme to differing extents. Generally co-operation between the profession and the Bench was extensive to the point where Magistrates felt they could rely on a defendant having seen a Duty Solicitor as being a discharge of their responsibilities under the new s 13A created by the Criminal Justice Amendment Act 1975.

— Discussion concerning other solicitors centred on the need to maintain high standards of competence, but this was contrasted with a recognition that responsibility for the success of the scheme as with other legal aid matters rests with the profession as a whole.

— One aspect of the discussion concerning the defendant and his community was whether the Duty Solicitor should have a role in being available from, say, 5.00 pm the preceding evening to be called to a Police Station on the request of a defendant. Council representatives have been asked to make an assessment of what happens in practice in each centre and to report to the New Zealand Law Society Legal Aid Committee.

— Present Law Society policy was confirmed, in that the Duty Solicitor scheme was recognised as being basically one of referral. However Duty Solicitors should advise Magistrates of facts in their knowledge where a defendant wants to have his case dealt with on first appearance. This should happen only in minor cases and it was recognised there is often insufficient time involved to prepare a proper plea in mitigation.

— Wellington challenged the present policy which it suggests that Duty Solicitors should not take interviewees as their own clients. Instead, Wellington proposed that Duty Solicitors should be able to take all Offenders Legal Aid cases assigned on their day. Careful rostering would ensure those on the present legal aid list all had a fair share of the work, and the ability to deal with several cases on a single day would eliminate time wasted waiting for a single appearance. A separate roster of more junior Duty Solicitors, not on the Legal Aid list, would act as assistants. If Magistrates deal with a legal aid application on the spot, the defendant could be directed to a practitioner already in Court, thus avoiding the very serious delays in assigning counsel which can occur at present. The meeting saw no objection in principle to such a scheme, although it may have application in large Courts only.

— The question of Duty Solicitor payments and Offenders Legal Aid rates was too large an issue to be dealt with in the time available. The meeting supported New Zealand Law Society policy in that civil and criminal legal aid systems should be combined, and it urged that in the meantime the granting of Offenders Legal Aid be liberalised.

It is the personal view of the writer that the workshop was a great success, and that delegates have returned home to inject renewed enthusiasm in their respective Courts.

Whilst there are considerable differences in operation between large and small centres, all delegates were able to learn from an interchange of ideas, and some will doubtless be able to make their operations more effective by applying techniques in use in other areas.

It was noteworthy that the workshop centred on the concept of the scheme discharging a duty to defendants as individuals, and also that this work is undertaken, in the main, by practitioners under the age of 35—a fact reflected in the ages of all but a few of the participants.

A pretty plight—"It is difficult to know what Judges are allowed to know, though they are ridiculed if they pretend not to know."—SCRUTTON LJ in *Tolley v Fry* [1930] 1 KB 467.

Penology—"I regard imprisonment as an inappropriate punishment for any crime you can name. It doesn't work. It doesn't deter, it doesn't cure, it doesn't rehabilitate, it does nothing. It costs a lot of money and it shows no returns whatever."—GERMAINE GREER.

PERSONAL INJURY BY ACCIDENT

MR A A P WILLY, *a Christchurch barrister attempts to make sense of the statutory definition of "Personal Injury by Accident" enacted by s 2 of the Accident Compensation Amendment Act (No 2) 1974(a).*

It is hoped that the suggested approach to the interpretation of this rather difficult section will be of some practical assistance to practitioners in their dealings with the Commission and it's officers and agents.

1 Situation prior to the act

(a) *Preliminary*—It must be kept clearly in mind that in interpreting the meaning of the phrase "personal injury by accident" we are concerned primarily, but not solely, with the interpretation of a statute. If the particular disability which calls for a decision can be found within, or is excluded by the definition contained in Section 2 (1) of the Accident Compensation Act (hereafter called "the Act") then the common law and the cases decided under the Workers' Compensation Act are relevant only to the extent that they decide matters which are in pari materia the provisions of the Act. There remain, however, a class of case for which no definition exists under the Act, but which may yet constitute personal injury by accident. This situation arises because the legislature has abandoned any attempt to bring down an exhaustive definition of personal injury by accident, rather it has enacted that a number of disabilities, and some of their consequences, shall be included within the definition, whereas a number of disabilities, and therefore their consequences, are excluded in whole or in part. In so far as those personal injuries by accident for which no provision is made in the Act are concerned, it will be necessary to have recourse to the common law and cases decided under the Workers' Compensation Act.

The second preliminary observation is that when construing the Workers' Compensation Act, the Courts commenced the enquiry by ascertaining the fact of the accident. If no event was proved to exist which could in law be described as "an accident" then the applicant failed. On the other hand, in actions for negligence and other torts providing a remedy for personal injury the Courts were concerned with proof of negligence or nuisance or breach of contract, or whatever the cause of action which gave rise to the right to claim for the loss. Clearly implict in all such enquiry was the need to prove the happening of an event, such event need not be accidental, it was enough that it could be called negligent or a nuisance or a breach of a contract. This vital difference must be kept clearly in mind common law causes of action to the provisions when applying cases decided under one of the of the Act.

(b) *Definition of "accident"*—As no definition of "accident" is given in the Act it becomes important to decide upon some acceptable definition of the word.

The most widely accepted definition is that given by Lord Macnaghten, for the purposes of the British Workers' Compensation legislation in *Fenton v Thorley* [1903] AC 443. His Lordship defined the word as meaning "any unlooked for mishap or untoward event not expected or designed". This definition has been adopted by the Courts in the United Kingdom, *Glover & Clayton & Co v Hughas* (1908-10) ER 222 (HL) and in New Zealand by the Court of Appeal in *Storey v Wellington Hospital Board* [1932] NZLR 1553. It has been adopted by the New Brunswick Legislature and incorporated into its Workers' Compensation Act.

The definition was recently re-examined and adopted by the House of Lords in *Jones v Secretary of State for Social Services* [1972] All ER 145, and it is submitted that Lord Macnaghten's formulation may be safely relied upon by the Commission as an authoritative definition of the word "accident".

(c) *Confusion of accident with the injury*—It is necessary at the outset to avoid any confusion between the accident and the injury. The books abound with examples of judicial and academic confusion of "the accident" and "the injury". The following extract from the judgment of Lord Aitken in *Fyfe Coal Co v Young* [1940] AC 479 will illustrate the point:

> "The accident may be internal and the injury and the accident may be one and the same,

(a) I wish to acknowledge the valuable research assistance received from Miss Rosemary Aitken, a student at the Faculty of Law, University of Canterbury. The views expressed are my own, and the errors remain my responsibility.

thus the ruptured aorta may be the accident and the injury."

With all the respect due to that eminent Judge, in the writer's view, that cannot be so. The ruptured aorta without more is a disease produced by the action of some ascertainable physical degeneration. Such a disability can only become "an accident" in law if it is caused or contributed to by some event other than the natural degenerative processes. There must always be an element of vis major (*22 Halsbury* (3rd ed) 299)—see also *Sinclair v Maritime Passenger Assurance Co* [1861] 3 E & E 478. As Romer LJ said in *Ormand v C D Holmes & Co Ltd* [1937] All ER 795:

"If a man should die suddenly of heart disease without any contributing cause no one would say that his death was accidental or due to an accident. In some cases, however, incapacity is caused by disease in conjunction with a contributing cause."

Lord Wilberforce put the matter in its correct perspective in *Minister of Social Security v Amalgamated Engineering Union* [1967] 1 All ER 210 at 255 when he said:

"In all cases what (sic) the National Insurance Industrial Injuries Act 1946 has to deal with is a complex event or of events, compounded of the impact of something in the external world on physical organs or vice versa. Where a body (say a stone) swings and crushes a man it is not the swinging stone that is the accident but its impact in an unexpected and generally damaging manner on the body—the compound happening. Is there any less an accident because the workman tries to stop its movement, and strains himself in so doing? Is there any less an accident because the workman struggles with the stone's inertia instead of its momentum? Would it become more of an accident if the stone had been fortuitously immobilised by frost? These kind of situations shade with one another and the principles of analysis must be the same. Linguistically one may find difficulty in some accident injury cases in saying *that the one thing is the accident and the other is the injury* but even here if one changes the linguistic form and says, as one may, that the workman was accidentally injured or (to take the expression of Lord Macnaughten's in *Fentons* case) that the man had met with an accident one can perceive the two elements, the physiological change, and the unforeseen impact of the physical world."

The reasoning and analysis of Lord Wilberforce finds powerful support in the judgment of Lord Diplock in the *Jones* case. At p 184 he says:

"It cannot be the personal injury itself which is described as the cause. It must be something external which has some physiological or psychological effect on that part of the sufferer's anatomy which sustains the actual trauma, or some bodily activity of the sufferer which would be perceptible to an observer if one were present. It is convenient to call this external event or bodily activity the causative element."

There is an apparent conflict between the dicta of Lord Diplock that the applicant need prove some event external to the body, and the decision of the Privy Council in *Patrick & Co Ltd v James Sharp* [1954] 3 All ER 216 where it was held that the injured person need not prove some event external to the body in order to succeed. It is submitted that in the *Patrick* case the Privy Council was concerned to dispel the notion that the applicant must prove the application of physical force to his person in order to succeed. If this is so then there is no conflict between the two cases, both recognise that proof of some causative observable event is necessary even though that event is an ordinary everyday occurrence as far as the sufferer is concerned.

It is to be hoped that the decisions of the House of Lords in the *Jones* and *Amalgamated Engineering* cases have clarified the practical importance of the distinction between the accident and the injury and assigned each to its proper place in the enquiry.

2 The statutory definition

(a) *Background*—Neither the Workers' Compensation Act nor the Accident Compensation Act 1972 contained any exhaustive definition of "personal injury" or "accident". A satisfactory definition of the latter was evolved by the Courts but no attempt was made to incorporate this into the Act.

In 1973 a committee appointed by the House and comprising medical and legal people produced a definition which was then incorporated into the 1973 Amendment (No 2) Bill. The proposed definition ran into trouble in the House and was referred to a select committee. After hearing submissions the committee proposed that the definition be abandoned and suggested instead the following definition, which has now been enacted into law:

" 'Personal injury by accident'—
"(a) Includes—
"(i) The physical and mental consequences of any such injury or of the accident:
"(ii) Medical, surgical, dental, or first aid misadventure:
"(iii) Incapacity resulting from an occupational disease or industrial deafness to the extent that cover extends in respect of the disease or industrial deafness under sections 65 to 68 of this Act:
"(iv) Actual bodily harm arising in the circumstances specified in *section 105B* of this Act, which section was inserted by *Section 6* of the Accident Compensation Amendment Act *(No 2) 1974*:
"(b) Except as provided in the last preceding paragraph, does not include—
"(i) Damage to the body or mind caused by a cardio-vascular or cerebro-vascular episode unless the episode is the result of effort, strain, or stress that is abnormal excessive, or unusual for the person suffering it, and the effort, strain, or stress arises out of and in the course of the employment of that person as an employee:
"(ii) Damage to the body or mind caused exclusively by disease, infection, or the ageing process."

It is immediately apparent that this definition does not exhaustively define personal injury or accident. It merely states what may be included and what shall be excluded. In the result it appears that in so far as an event or a disability or the consequences of a disability are not within the express provisions of the Act the Commission and the Courts will need to have recourse to the common law and cases decided under the Workers' Compensation Act.

(b) *Course to be followed*—It is submitted that in any given case the appropriate course to be followed should be:

(1) To consider whether the applicant has suffered a personal injury by accident within the meaning of that phrase as discussed in Jones's case. If the application satisfies either of the two tests provided in that case then no recourse need be had to s 2 (1) (a) of the Act. This is so, irrespective of which scheme the application arises under.

(2) If the applicant succeeds thus far then the Commission should consider whether or not the applicant is expressly precluded from recovering by virtue of the provisions of s 2 (1) (b).

(3) If the applicant has not suffered an injury by accident within the common law meaning or has suffered such an injury but is expressly excluded from recovering by virtue of the provisions of s 2 (1) (b), then the Commission should look at s 2 (1) (a) to see if: either it expressly includes the applicant's disability within the meaning of personal injury by accident, or it overrides the provisions of s 2 (1) (b) which is expressed to be subject to s 2 (1) (a).

To illustrate this somewhat tortuous process: If a housewife suffers a cardio-vescular episode while lifting a heavy weight at home, that could fairly be described as being a personal injury by accident within the criteria laid down in the *Jones* case. No reference need be had to s 2 (1) (b) (i) and therefore the applicant However, such a claim is expressly excluded by s 2 (1) (b) (1) and therefore the applicant would fail. If, however, the cardio-vascular episode had been suffered as a result of the housewife witnessing the death of her child in a motor accident then she could have recourse to s 2 (1) (a) (i) which overrides s 2 (1) (b) and claim that her disability is compensatable as being a physical consequence of "the accident".

(c) *Nature of the Enquiry*—In the majority of cases it will be perfectly plain that either the applicant has or has not suffered a compensatable disability. There will however remain a significant number of cases where it is not immediately apparent that the applicant has suffered an "accident" or a compensatable disability.

It is the writer's view that in all of these cases, except those involving cardio-vascular or cerebro-vascular episodes and work-related disabilities all of which are dealt with separately, the first object of the enquiry should be to ascertain the fact of the accident. It is not until this point is reached that one is concerned with the nature of the disability. It is the accident which converts the disability into a compensatable personal injury, not the nature of the disability. To illustrate: if a person inhales a germ (to use a nursery term) and suffers brain damage he will have sustained no compensatable injury. If, however, he cuts his finger and the germ enters the cut thereby causing brain damage he will have sustained a compensatable injury.

In the case of work accident diseases the legislature has for policy reasons adopted the

special provision for compensation contained in the Workers' Compensation Act. In the case of cardio-vascular and cerebro-vascular diseases the legislature has for policy reasons restricted compensation to those earners who suffer such disabilities in a carefully defined work context.

(d) *Analyses of the statutory definition*—It is now proposed to examine the constituent parts of s 2 (1) in an attempt to determine the meaning and effect thereof:

(1) *Section 2 (1) (a) (i)*—This subsection provides that all the physical and mental consequences of any injury or "the accident" shall be compensatable as personal injury by accident.

Clearly the subsection contemplates that some disabilities may flow from the injury and some from the accident, and that both are compensatable losses.

The question arises—what is meant by "the accident", must it be an accident directly affecting the body of the applicant such as a blow, or bad news, or may it be an accident affecting directly the body of another, and only vicariously affecting the body of the applicant, such as the witnessing of a bad accident. It would appear that both are intended. To give any meaning to the words "mental consequences" they must include nervous shock cases such as *Chadwick v British Railways Board* [1967] 1 WLR 912 and *Benson v Lee* [1972] VR 879. In both of these cases the primary accident happened to somebody other than the plaintiff. However, it can be fairly said that such incidents were unlooked for mishaps or untoward events and therefore accidents to the applicant. Such a conclusion is in no way affected by the decisions in cases such as *Bourhill v Young* [1943] AC 92 because there the Court was concerned with the question of the foreseeability of the plaintiff's injuries, not with the question of whether the plaintiff had suffered a personal injury by accident.

Some doubts may arise concerning the meaning of "physical". The word is capable of including such material consequences as loss of an opportunity to make a profit because of the intervention of an accident or it may mean "bodily" as opposed to mental. It is submitted that the latter interpretation is to be preferred as being more consistent with the subject matter of the section and other provisions of the Act, notably s 121, which excluded recovery of such heads of damage.

It seems clear that the intention of the legislature is to compensate for nervous shock howsoever it arises, even if the cause is a disability which is not compensatable under the Act. If the disability causes nervous shock and that cause can fairly be described as accidental then the plaintiff will be entitled to recover compensation. Thus if the tax collector in *Commonwealth v Bourne* (1959-60) 104 CLR 32 had suffered mental consequences flowing from his heart attack, then although the heart attack would probably not be compensatable by virtue of s 2 (1) (b) (i) the mental consequences probably will be.

The question of the meaning of the word "consequences" may arise. It seems clear that the legislature intends to refer to what Fleming calls "Causation in fact", and not those foreseeable consequences with which the law of torts is much concerned. The very real difficulty will be in deciding whether the legislature intends to refer to "proximate consequences" or any casually linked consequences. If the latter, then we have a return to the views expressed in *Polemis* [1921] 3 KB 560, which views the Privy Council took such pains to discredit in *The Wagon Mound* [1961] AC 388. If we adopt the former interpretation of proximate cause, then we put a gloss on the plain wording of the statute which may not be warranted. Probably the Commission and hopefully the Courts will eschew the rather barren arguments which arise from a strict adherence to the causation in fact, theory, and will in practise apply the "but for" test, ie be able to say at the completion of the investigation, "these consequences would not have arisen, but for the accident".

(2) *Section 2 (1) (a) (ii)*—This subsection provides that the expression "personal injury by accident" includes medical, surgical, dental or first aid misadventure. Presumably what is intended is that disabilities arising from one of those causes shall be deemed to be personal injury for the purposes of the Act, and that irrespective of how that disability arose in fact, it is deemed to be accidental.

The Oxford Dictionary defines "misadventure" as "bad luck". *Words and Phrases Legally Defined* (2nd ed), lists no judicial interpretations of the word. It remains to be seen whether the Commission will construe this subsection as conferring a right to claim compensation for all disabilities which arise from the types of treatment listed. Would it, for example, include the case of a person who suffers disability or death from a blood clot which a medical practitioner failed to diagnose? Clearly, the disability is the result of medical bad luck, but equally clearly the Act does not

provide compensation for a person who dies or is disabled by a blood clot without proof of more. Should the intervention of the medical examination make any difference? It is submitted that it should not; the person would have suffered the disability anyway. In that case the Commission will be required to limit the meaning of the word "misadventure" in some way to disabilities which arise out of some error or mischance consequent upon the treatment itself, for example, disability resulting from having a pair of forceps sewn into one's stomach. If this approach is to be adopted then there will be a large grey area which comprises cases where the disability was partly caused by the mishap or error and partly caused by natural degenerative processes. Probably the difficulty will be solved by requiring only 1 percent error or mischance to found a claim. The alternative is to attempt to apportion the compensation between the two—an exercise probably beyond the wit of medical men.

It is to be noted that the subsection does not make it clear whether it refers to all forms of the stated types of misadventure or only those which arise from treatment received from a person lawfully entitled to carry out that calling. Thus, is it intended that the Act compensate the woman who is aborted by the quack or is it intended only to cover the case of misadventure flowing from an abortion by a legally qualified doctor? If the former, then disability resulting from such activities as self-administered drug injections with a dirty needle will be compensatable and possibly even the effect of the drugs taken (subject to s 137 which precludes claims for wilfully inflicted injuries).

It would seem that, irrespective of the anomolies which might arise, there is no warrant for importing a requirement into the subsection that it only applies in the case of disability arising in the case of treatment by qualified persons. Indeed it is probably unnecessary to even consider the question because most, if not all, such misadventures will constitute personal injury by accident quite apart from the provisions of subsection 1 (a) (i).

The question may arise whether or not there is any particular significance to be attached to the use of the words "medical and surgical". There can be no doubt that in one sense these words bear very restricted meanings. The one is antithetical of the other. "Medical" may mean those healing arts practised by the physician as opposed to those healing arts practised by the surgeon or the obstetrician, or the psychiatrist. It is difficult to believe that the legislature intended the words to be used in this restricted way, but if so then a woman who suffers disability as a result of some misadventure sustained in childbirth will be outside the terms of the subsection and will have to rely upon an allegation that she has suffered personal injury by accident.

It is much more likely that the Legislature intended that the word "medical" is used to mean "of the healing art". If this is so then no artificial distinctions between branches of the healing art will be possible. The matter is far from clear however.

Industrial diseases

Section 2 (1) (a) (iii) provides that all incapacity arising from the industrial diseases set out in ss 65, 66, 67, 68 of the Act, and industrial deafness shall be personal injury by accident for the purposes of the Act.

(A) *Industrial deafness*—Industrial deafness is treated as a special case, presumably to abrogate the effect of the decision in *Beasley v Attorney-General* [1966] NZLR 1084 where it was held that industrial deafness is not a disease by a natural process of gradual onset. In a superabundance of caution, the legislature has now made double provision for the complaint (s 2 (1) (a) (iii) and s 68).

No compensation is payable unless the deafness becomes apparent within two years of being exposed to the noise causing the disability. The section came into force on 1 April 1974. Thus, any claimant who wishes to establish that he has the disease at the time the section came into force must do so before 1 April 1976, unless he can show that he was entitled to compensation under the Workers' Compensation Act.

The subsection applies only to earners and only in respect of noise arising out of employment, and only then where it can be established that the noise was a hazard particular to the employment in question. No compensation is payable if the disability would have arisen from the normal ageing process. It seems that the right to compensation under this head continues to relate closely to its nickname "boilermakers' deafness".

(B) *Hernias*—Disablement from hernia is dealt with in s 66, which substantially re-enacts s 18 of the Workers' Compensation Act. The section envisages hernias arising in two distinct ways:

(a) Those arising out of and in the course of employment, and

(b) Those arising out of personal injury by accident in respect of which the sufferer has cover under the Act.

Dealing with each in turn—

(a) Section 2 (1) (a) (iii) expressly includes hernia suffered to the earner in the course of employment within the definition of personal injury by accident. The types of hernias provided for in Section 66 include both clinical and strangulated hernias. In the latter case only the onset is immediately preceded by strain and immediately accompanied by pain. The earner must report the incident to his employer immediately, ir in the case of the self-employed, to a medical practitioner within 72 hours of the occurrence.

Pain—In considering the degree of pain required to found a claim, the Courts, in construing section 18 of the Workers' Compensation Act, recognised that hernia pain is usually transitory and does not last for the duration of the injury. (*Bishop v Fletcher Construction Company Ltd* [1945] NZLR 128. It has been further held that the requirement of pain only applies to strangulated hernias (*Lundrig v State Fire Insurance General Manager* [1947] NZLR 284). Sensibly so, otherwise it would be almost impossible to establish that the strangulation arose out of employment.

Section 66 (5) extends the cover provided by the Act to all earners who suffer a hernia which can otherwise be described as a personal injury by accident even though the hernia does not comply with the requirement of the section, ie the hernia is the result of some untoward or unexpected event which would have been perceptible to the impartial onlooker. It therefore seems clear that providing the earner can show that his hernia is caused by an accident then he is entitled to compensation, even though the hernia did not arise out of the employment. If this is so then it is difficult to see how one could suffer a hernia to which Section 66 applies, which is not also a personal injury by accident, unless it is possible to imagine an unexpected or untoward event, not being a strain, which is capable of causing a hernia.

(C) *Other diseases arising out of employment*—Section 2 (1) (a) (iii) provides that "personal injury by accident includes incapacity resulting from an occupational disease . . . to the extent that cover extends in respect of the disease . . . Section 65 to 68 of this Act".

Section 67 provides that compensation shall be payable to any person who suffers a disease arising out of and in the course of his employment. The section is substantially a re-enactment of Section 19 of the Workers' Compensation Act, and it has the effect of deeming certain disabilities tc be personal injuries by accident, without the necessity of proving an event which can be described as an accident. The sole intention is that the applicant has suffered a disability and that such disability arose out of and in the course of employment.

The rules for ascertaining whether or not a given incapacity arose "out of and in the course of employment" are now tolerably clear, although their application is not always easy. They may be summarised as follows:

(1) The phrase "due to the nature of the employment" does not mean due "to employment". It means due to the nature of the particular employment in which the applicant is engaged at the time the disability occurs. (*Blatchford v Staddon & Founds* [1927] AC 461; 20 BWCC 391). The emphasis is upon the particular employment as a cause or contributing factor of the particular disability.

(2) No particular emphasis is to be given to the word "nature". It simply means diseases "owing" to the employment (*Nightingale v Hewitt & Biffin* (1925) 18 BWCC 358), or alternatively due to the condition of the employment (*Lynch v Attorney-General* [1959] NZLR 445.

(3) The disease must be a special incident of the employment or the way in which it was required to be performed (*Raeburn v Lochgelly Iron & Coal Co* SC 21), *But,*

(4) It is always a question for the Court to decide whether or not the particular disability is capable of arising out of the employment by virtue of tendencies present in that class of employment. Thus in *Commonwealth v Bourne* (1959-60) 104 CLR 32 the plaintiff, a tax inspector, claimed compensation for disability resulting from arterio-sclerosis. The evidence was that for some years he had been engaged on a particularly worrying sales tax investigation and that finally the worry had brought on his heart condition. The Court accepted that this was so, but held that arterio-sclerosis could not be said to be a disease incidental to the plaintiff's employment as a tax inspector. The reason given is that there is no special incident, tendency or characteristic of that type of work which could give rise to the disease. Even if one accepts this value, judgment to be accurate in *Bourne's* case, there are no doubt some callings which can give rise to heart conditions. (However, as will be discussed later, it seems that under the Accident Compensation Act in cases involving vascular complaints, the ap-

plicant will fail unless he satisfies the special test provided for in s 2. This will be so even though he establishes that the disability is a special incident of the particular calling.)

(5) Where the applicant's case is one of aggravation of a pre-existing condition the claim will only succeed if it can be shown that the aggravation was caused by some incident characteristic or tendency particular to the employment. Thus, where a worker suffers a heart attack arising out of and in the course of his employment, but dies from pneumonia while in hospital, it cannot be said that the aggravation of his condition arises out of the employment, and therefore any claim based upon the consequences of the pneumonia will fail (*Ogden Industries Pty Ltd v Lucas* (1967-8) 41 ALJR).

(6) The disabled applicant who has worked for a number of employers does not have to prove which particular employment was responsible for the disease, merely that the disability is an incident of the work in respect of which the claim was made (*Wilson v Blyth Ship Building* [1919] 1 KB 324, and *O'Neil v Wilsons Clyde Coal Co* 1926 SC 680. Both of which cases are extensively discussed in *Cliffords v Morrison & Ors* [1960] NZLR 539). The only limitation of this principle is that the claim must be brought within the prescribed period, ie 20 years in the case of radio-activity induced diseases, 10 years in the case of hydatids, and two years in the case of all other diseases, except where a special period is prescribed by Order in Council.

Subsection (6) provides that the time shall run from the date of the commencement of the incapacity, if no other time is prescribed. Thus, if the applicant can only show that the disease was of gradual onset he will be met by the same difficulties as the plaintiff in *Beasley v Attorney-General* [1966] NZLR 1084. It is noteworthy that although s 68 substantially re-enacts s 19A of the Workers' Compensation Act relating to industrial deafness, no provision is made for other diseases or incapacities of gradual onset. Subsection (6) of s 19 of the Workers' Compensation Act has not been brought down into the present Act. Section 67 (1) provides that the applicant shall recover from the employer for whom he last worked after the date of the commencement of the Section, being 1 April 1974, providing the disability becomes evident within two years after the applicant leaves the employment upon which he blames the disability. It does not matter that the applicant has been in the employ of various other persons in the meantime.

Under the Workers' Compensation Act the previous employer could, in appropriate cases, seek indemnity from other employers whose type of work might reasonably have caused or contributed to the disability. These provisions have not been brought down into the Accident Compensation Act, probably because at the most the employer is only liable for the first week's compensation and complicated apportionments are unnecessary having regard to the amount at stake.

Criminal injuries

Section 2 (1) (a) (iv)—Compensation for criminal injuries is now assimilated into the Act by s 6 of the Accident Compensation Amendment Act 1974. The Criminal Injuries Act 1963 is repealed except for s 1 and 22A. The amending Acts of 1967, 1969, and 1971 are also repealed.

The criterion for recovery under this section is that the applicant has suffered actual bodily harm by any criminal act or omission within any of the offences specified in ss 128, 132, and 201 of the Crimes Act.

Compensation is payable irrespective of whether anybody is charged or convicted of the offence, or whether the perpetrator of the criminal act had legal capacity.

It is noteworthy that the Act adopts quite different criteria for recovery under this section than it does in the case of other disabilities. By virtue of s 2 (1) (a) (iv) all actual bodily harm is deemed to be personal injury by accident. It is assumed that the intention is to remove the requirement that the applicant's harm was caused by an accident, neither does it matter whether or not the disability is injury or a disease. The ambit of the section is further increased by the provision s 105 (b) (1) which expressly includes pregnancy and mental or nervous shock within the definition of personal injury by accident. It is a moot question why has the legislature used the words "mental or nervous shock" when referring to the non-physical manifestations of any criminal injury, but has used the words "mental consequence" when referring to the non-physical manifestations of personal injury by accident when defining those consequences which are capable of coming within the definition.

If any distinction is intended it would seem that the range of mental consequences which are compensatable under s 105B is narrower than under s 2 (1) (a) (i). It is restricted to

mental or nervous shock and excludes all other mental or nervous consequences.

The question may also arise whether there is any valid distinction between "mental shock" and "nervous shock".

Clearly, however, criminal injuries, including pregnancy, are now compensatable as personal injury by accident, and the sufferer is entitled to all of the forms of compensation payable under the Act. Equally, the claimant loses all common law rights to sue for any head of damage not compensatable under the Act, eg loss of marriage prospects, loss of career of choice which does not cause any financial loss, and is also prevented from recovering for any aggravation of those losses.

2 Cardio-vascular or cerebro-vascular episodes

Section 2 (1) (b) (i) provides that the earner is entitled to compensation for the consequences of a cardio-vascular or cerebro-vascular episode, provided that the episode is:

(a) The result of effort, strain or stress, and
(b) The effort, strain or stress is abnormal, excessive or unusual to the earner, and
(c) The effort, strain or stress arises out of and in the course of the earner's employment.

The effect of this provision appears to be: first that an earner who suffers a cardiac or cerebro incident other than at work will not be entitled to claim compensation unless it can be shown that the precipitating cause of the episode occurred at work, and that conditions (a), (b) and (c) above are satisfied. Second, it seems clear that the intention of the legislature is that a non-earner shall not recover compensation for disability arising out of a cardiac or cerebro episode. But s 2 (1) (b) (i) must be read subject to s 2 (1) (a) (i) and (ii). The former provides that the physical consequences of an accident are included within the definition of personal injury by accident. The Act does not specify what is meant by accident. It does not say "accident to the applicant" so presumably it is intented to compensate the applicant for the physical and mental consequences of an accident happening to a third person. Thus if a mother suffers a cardiac or cerebro failure at seeing her child run over by a bus, then it is submitted that notwithstanding s 2 (1) (b) (i), she will be entitled to compensation. The consequences of this contention are far reaching and would entitle any person who witnesses or hears of an accident to another and thereby suffers disability to be compensated under the Act. Similarly, the earner or non-earner who suffers a cardiac or cerebro incident while in the course of medical, surgical or dental or first aid treatment would be entitled to compensation.

So much is tolerably clear. The real difficulty is in trying to reconcile s 2 (1) (a) (ii) with subsection 1 (b) (i). If an earner suffers a cardiac or cerebro incident at work, then providing he can establish that he has suffered an occupational disease he is entitled to recover compensation. It may not be an incident of such disease that he has sustained by any effort, strain or stress that is abnormal, excessive or unusual for the person suffering it. Thus, in *Clover, Clayton & Co v Hughes* [1910] AC 242 Lord Loreburn, in rebutting an argument that to succeed the plaintiff must show some special or unusual strain said "I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary". This view was adopted and applied in New Zealand in *Muir v J C Hulton Ltd* [1929] NZLR 249 and is still the law in so far as unresolved Workers' Compensation claims are concerned. (See *Patrick v James Sharp Ltd* [1954] All ER 216.) Is it the intention of the legislature to set a more onerous degree of proof for the injured worker under the Accident Compensation Act than that which existed under the Workers' Compensation Act? If not, what then is the effect of s 2 (1) (b) (i)? It expressly deals with work-related cardiac or cerebro incidents, but is to be read subject to s 2 (1) (a).

In the writer's view, the resolution of this needless anomaly probably lies in the fact that it is the clear intention of the legislature to provide compensation for all injured workers who would have received compensation under the Workers' Compensation Act. If this is so, then s 2 (1) (a) will prevail over s 2 (1) (b) (i) and a worker who suffers a cardiac or cerebro incident arising out of his employment will be judged primarily by s 2 (1) (a) (iii). Implicit in this contention is that s 2 (1) (b) (i) is otiose in so far as it concerns work related cardiac or cerebro incidents. So be it.

Conclusion

The Legislature has been faced with a task of considerable difficulty and although the solution arrived at is based substantially upon policy considerations, the definition is not to be condemned upon that ground alone. Although there are serious anomalies it is the

writer's view that much of the definition will provide a relatively straight-forward guide to those persons concerned with its interpretation, whereas the more difficult areas will require the continuing interest of the legal profession.

It remains only to say that the great majority of the difficulties will be resolved if the legislature decides to extend the cover provided by the Accident Compensation Act to sickness as well as accident.

THE EKETAHUNA LAW REPORTS PRACTICE NOTE

The Resident Chief Magistrate, by his clerk Non-Illegitimus Carborundum, wishes to draw practitioners' attention to The Criteria for Appointment to Eketahuna Rules 1975.

These provide that no Magistrate shall be eligible for appointment to Eketahuna until he:

1. Has gained an 80 percent pass in examinations conducted on the following instructions by the Senior Magistrate;
2. Has played at least three rounds of golf with the Police Prosecutor and laughed at his jokes;
3. Is on first name terms with the Crown Solicitor.

No Magistrate who has committed any of the following felonies and misdemenours shall be eligible for appointment to Eketahuna:

1. Ever awarded costs to a defendant against the Police without just cause, the proof whereof shall lie on him;
2. Acquitted a defendant without just cause, the proof whereof shall lie on him;
3. Been consistently polite to counsel or witnesses;
4. Allowed defence counsel to cross-examine without interruption;
5. Failed to close gaps in a poorly presented prosecution case;
6. Regarded a successful appeal against a decision of his as a matter requiring heart searching and reflection;
7. Considered it his duty to work later than 2.30 pm on a hot, cold or any other sort of Friday;
8. Oiled the wheels of Justice by prompt delivery of reserved decisions;
9. Repressed personal, religious or other prejudice in the interests of Justice.

Instructions for Magistrates appointed at Eketahuna

1 The laying of an information by the Police or the Ministry of Transport shall constitute prima facie evidence of the guilt of any person who appears in answer to the charge.

2 It is essential to find a prima facie case for the prosecution because:

(a) The Police know who did it.

(b) Any actual doubt you have may be resolved by reference to any inconsistencies however minor in the defence evidence. Minor inconsistencies in the Prosecution evidence are, of course, proof of the genuineness of the witnesses and that they have not collaborated except for the perfectly proper purpose of ensuring a conviction. Furthermore, if all the defence witnesses tell the same story they have obviously collaborated for the improper purpose of attempting to pervert the course of justice in achieving an acquittal.

(c) If the defendant does not give evidence he is obviously guilty.

(d) If the defendant gives evidence and he appears to establish an affirmative defence you can overcome this difficulty merely by calling him a liar and directing the Prosecution to prosecute him for perjury.

3 Any legal argument of a technical nature should be regarded with severe suspicion. It is just an attempt of defence Counsel to pervert the course of justice. Accordingly, such submissions ought to be taken into account in aggravation of penalty.

4 Only defences which prove innocence beyond reasonable doubt ought to be entertained. Costs however, should never be awarded against the Prosecution unless it has acted maliciously and recklessly and has wrongfully accused a completely innocent person without any shadow of justification.

5 Any person who appears to be guilty of the offence of being on premises without lawful excuse whether or not he is charged with that offence is prima facie guilty of any other charge which the Police in their wisdom may care to bring. The problem of actually working out the ingredients of any of these other charges

can be best met by adopting the following approved formula:

"The defendant will be convicted of the offences with which he is charged."

6 The evidence of Police and Traffic Officers is always correct. Any contradiction of such evidence in any particular by the defendant is to be regarded as proof that he is lying on Oath and it is also conclusive of his guilt on any charge he faces.

7 It is the duty of defence Counsel as officers of the Court to disclose and concede any gaps in the prosecution evidence before closing their own cases. If any gap should appear always allow an adjournment whether on application or not to enable the police to call the evidence. This is particularly important in blood alcohol prosecutions. On the ensuing conviction always allow the Police costs on that adjournment.

8 If defence Counsel raised a defence which has some technical or legal merit, a conviction which will stand on appeal can still be entered by an experienced judicial officer who:

(i) Is careful in making his findings of fact to exclude the defence, and

(ii) In any event imposes a nominal penalty rendering any appeal uneconomic.

9 It is not possible to help any defendant who is acquitted of a charge which he faces. The whole purpose of Police Law is to ensure that judicial officers are given the opportunity of directing defendants in correct paths and putting them in the hands of people who will be able to help them with their personal problems. Unfortunately the Legislator has not yet seen fit to give any powers to Magistrates outside the Children and Young Persons Court to do this without first imposing a conviction. Accordingly the imposition of a conviction is essential to the proper administration of Justice. In this light the short-sightedness of Counsel who attempt to defend Police prosecutions can be shown in proper prospective.

10 On domestic prosecutions if through some oversight a husband who has applied for variation of maintenance has not been prosecuted for failure to maintain adequately, the defendant should be dealt with on the basis that his application is to avoid his clear legal responsibility to keep his wife and children in any style to which they think they ought to be accustomed. The temptation to have regard to the defendant's personal circumstances should be resisted. If he could have paid more than he did then the avoidance of his responsibility is deliberate and no regard shall be had to any allegation he makes that:

(a) He had been consistently denied access to his children
(b) His wife has a star boarder
(c) He was saving to pay the rates and mortgage repayments on the matrimonial home which is his wife's possession to his exclusion.

DUEL

Barrister inspired by youth and success
Lapels finger-touched with confident mein
Declaims in tongue sweetened by Eton and Cantab:
"The Court is a battleground
"Where two adversaries meet
"And be-wigged and armed
"With the sharpened poinard of precedent
"Duel with studied wit
"Dwelling in the maelstrom of words
"The cause of his client,
"And when thrust and counter-thrust
"Is complete
"The Learned Judge awards the accolade,
"And the Victor with his garland of success,
"Marches from time cloistered Court
"Head held high
"In word-won triumph."
But he understanding and wise
who sits high on the podium of truth and justice
Chides gently—
"Nay—of wits, no battle in my Court.
"Eloquence and precedent
"Seek only truth
"And when Truth is so found
"All Counsel walk proudly from my Court,
"For they have found
"That the most precious metal
"Moulded from my throne of power and wisdom
"Sends them forth, both Victors,
"Truth and justice
"Truly found by their intent."

GEORGE JOSEPH

Money back—Overheard in an NAC booking office:

Customer: I've lost an air ticket and understand that I can arrange a refund.

Staff member (obligingly): Certainly. All you have to do is produce the original ticket. . . .

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING": 17

Drafted by Scilicet *Engrossed by Neville Lodge*

Challenge for cause.

A MATTER OF EQUITY

G A CRISP, *Senior Lecturer in Financial Management and Business Law at Massey University, discusses the practice of rescuing companies by ad hoc legislation.*

On the evening of 14 August 1975, the Government acted to protect the interests of those involved in the trustee companies as beneficiaries, depositors, managers and employees. A debate on the estimates was interrupted and after a brief special Government caucus meeting, the Attorney General and Minister of Justice (Dr A M Finlay QC) introduced a Bill termed the Trustee Companies' Management Bill 1975. Urgency was taken, and it passed through all its stages that night to come into force from 7.30 pm.

The Act is the second introduced by the Government during its term of office to deal with the situation of a major New Zealand company faced with liquidity problems. The other, introduced in July last year, was to protect the depositors with and creditors of Cornish Investments Ltd when that company was crippled by overwhelming debts. It is the fourth occasion that special legislation of this type has been used in recent years. The other instances being the failures of the JBL group of companies and of Circuit Investments Ltd. This type of legislation illustrates a changing relationship between government, business, investors and the community as a whole, in that it represents a further erosion of the laissez faire approach to the problems of the unsecured creditor or investor which was usual in New Zealand in the past. For this reason it appears worth while examining the implications of the use of special legislation in such cases.

In order to enable an appreciation to be gained of the background against which the legislation was enacted, a brief summary of the situation that affected the principal company involved and some of the main legal problems are given.

Matters giving rise to government action

News of the problems facing Perpetual Trustees came as a severe blow to the business community in New Zealand. It was easier for them to accept the failure of relatively new companies such as Cornish Investments Ltd, the JBL Group and Circuit Developments Ltd because these entailed obvious risks, a factor emphasised by the higher interest return offered. But Perpetual Trustees, with 90 years of Business behind them, was regarded as a conservative trustee organisation.

In the early 1970s the company surprised the New Zealand business world by its apparent change in management thinking. From a low key operation with a substantial interest in farm financing and restricted primarily to the Otago province, it suddenly opened offices in both Wellington and Auckland in a highly expansionary mood. Its expanded operations were almost entirely in the area of home financing. Rumours of the financial problems facing the company became widespread in early 1974, though these abated when the company seemed to be managing to continue its operations, though on a somewhat reduced scale. At that time, however, the Government became aware through the Reserve Bank, that the company was having a liquidity problem of growing magnitude. This problem arose out of the group fund which the company was authorised to operate under part II of the Trustee Companies Act 1967. It occurred because the company accepted moneys on deposit in the group fund, other than moneys controlled by the company through its estates and other administrations, for shorter periods than the periods for which they lent that money.

Throughout 1974 the Reserve Bank, through the National Bank of New Zealand Ltd, and the Housing Corporation, provided support to maintain the liquidity of the company's group fund. This was done because the Government did not wish to see the operations of an old and respected trustee company jeopardised by a problem related only to the group fund which it operated. The support action included the transfer of $8,000,000 of mortgages at their face value to the Housing Corporation or the Rural Bank. These mortgages, and indeed all the companies' mortgages, are stated to be sound conservative investments. At the same time, the company arranged an overdraft facility with its bankers, the National Bank of New Zealand Ltd. The security for this took the form of a general lien over the group fund to the extent that the bank was entitled to hold $2.00 on mortgages for every $1.00 of the advance made to the company under the terms of the overdraft facility granted.

It was expected that the financial position of the company would improve, but it did not.

Early in 1975, certain questions of a legal character arose in relation to the company's administration and its group fund and the Justice Department was asked to look at these questions. This, incidentally, was the first time that the Department came into the picture. As a result, it became clear that the validity of the general security held by the National Bank was distinctly questionable.

In addition, about the beginning of 1975, both the company and the Government officials involved, had become concerned about the small size of the available shareholders' funds in relation to the massive amounts administered by the company. Apart from a special call of $10 a share that may be made on the liquidation of the company, the total assets available probably did not exceed $500,000. On the other hand, the estates and other funds controlled by the company amount to approximately $200,000,000. Also the company agreed that it would draw its accounts for the year ended 31 March 1975, in a way that allowed the cost of the support action on the part both of the Housing Corporation and of the National Bank to be shown as a charge against the company's own assets and this increased the weakness of the company's position by diminishing further the shareholders' funds.

The Government, therefore, with the agreement of the company's directors, sought a partner of sufficient financial strength for the company, who could stand by the company in liquidity crises and whose standing was such that the company's future would be secured. A possible partner was found. The proposed partner asked for and was given access to company records in order to satisfy its auditors and solicitors as to the existing operations of the company. On investigation, however, they were unable to give the company the clean bill of health that was expected because of what appeared to be a large contingent liability by the company to its beneficiaries and, in the case of money other than estates and of administrations, the principals for whom the company was acting. The partnership proposal therefore fell through.

The general conclusion of the prospective partner's advisors, was passed on to the Justice Department through the Reserve Bank. The Department did not have available to it the confidential evidence on which the conclusion was founded and because of this, the opinion of Crown Council was sought on the Government's position, remembering that the support for the company had been provided on the Government's instigation. The advice given was that the Crown could not, through any agency, continue assistance until the issues raised had been adequately resolved.

On receipt of this advice, the Registrar of Companies appointed three inspectors under s 9A of the Companies' Act. They were asked to ascertain whether or not there was a contingent liability such as the auditors and solicitors of the proposed partners had suggested, and the nature and extent of the liability. The inspectors were told that the general tenor of their investigation should be that they were to disprove the allegation. There was, therefore, no pre-judgment of guilt and indeed there was an active desire on the part of the Government to find the company free from any responsibility. That hope, however, was not justified. The doubts expressed by the partners' advisors were confirmed and reinforced.

Among other matters, the inspectors found that the company operated one bank account for each branch, a general interest-bearing account into which funds of all kinds held or administered by the company were paid, and in which all funds stayed until they were placed on investment or claimed by the person entitled to them. There were no separate and distinct trust accounts. In the brief time available, the inspectors were unable to ascertain the position in respect of particular estates or investments. However, they had no difficulty in eliciting the overall state of affairs and after analysing it, reached the conclusion that the amount for which the company appears to be liable exceeds $900,000 and possibly greatly exceeds that. During the same period, the company's pre-tax profits totalled $949,000, derived substantially from interest earned on moneys held in the general account. Thus, the situation appeared to be that the company's profitability for at least 20 years had depended on the interest that it had received from its use of its clients' funds.

After considering the situation outlined above, the unanimous legal advice given the Government, was that it could no longer properly offer further assistance to the company by the way of support action, nor of course, could it assure the company's own bankers that the security taken by the bank was valid. The Minister of Justice stated that:

> "To continue to support the company in the way it has hitherto been supported, would mean that the Government would knowingly be assisting a company that appeared to be liable to account to its beneficiaries and

investors for considerable sums. Nor, in any event, could the Government be expected to support indefinitely an ailing company. If the Courts agree that the company's liability is anywhere near as extensive as there is reason to believe, the company would not on the face of it on its own accounts be able to meet its liabilities. The Government can therefore, see no option but to allow, and indeed to arrange for the Court to decide the matters involved. In the meantime, however, legislation is essential to protect the position of those involved. A moritorium provision is built into the Bill in such a way as to allow the Board that is to be appointed under the Bill to hold the position of Perpetual Trustees while the legal problems are resolved."

To deal specifically with the matter of the validity of the lien, the Act provides that the Minister of Finance may advance money or guarantee the advance of money, to enable the repayment of the overdraft from the National Bank.

A week after it took office, the Statutory Board of Perpetual Trustees announced that it would concentrate initially on the rights of two main groups of people financially involved with the company. The two groups are those concerned with the trustee executory agency business of the company and those involved in the contributory mortgage business developed by the company. The company's new Chairman stated that his Board had given priority to these areas, because it was here that people, many of them elderly and dependent for essential income, relied almost entirely on the company.

In terms of money received, the trustee executory and agency business, and the contributory mortgage business, fell into two categories. Firstly, there was the situation of the money received by way of income or as a result of realisation of assets on, or after 15 August, which was the day when the Board appointed by Government assumed control. Moneys received on or after that time would be paid to those entitled to them in the ordinary course of business. The second category, moneys received on or before 14 August would be retained in the company's Trust Account until a balance is effected between the amounts due to beneficiaries and clients on the one hand, and the cash held in the company's numerous bank accounts on the other.

It was stated that the Board was considering separately those people involved in the company's group investment funds and those persons or organisations who have placed money with the company for short term investment.

The main problems in brief

The problems of Perpetual Trustees arose from a *general* liquidity problem encountered by the company. It was this aspect that precipitated the Government action; that the company was apparently unable to meet its commitments. As a consequence of the general liquidity problem, the questions of the liquidity of the group fund itself and the extent to which the company could give a general lien over its group fund arose early in 1975. Following a meeting of officers of the Department of Justice, the Reserve Bank, and company, the Secretary for Justice (with the Solicitor-General's consent) took the opinion of a senior Wellington practitioner expert in these matters. His opinion confirmed the view that the "group fund" was legally required to be administered in such a way that at all times it could retain *its* liquidity. This meant that there had to be a very close relationship between the terms of advances to the fund and the terms of advances by the fund. The legal opinion also confirmed doubts held by departmental officers that the power to mortgage conferred by the Trustee Act, was not available to trustee companies in relation to their group funds under Part II of the Trustee Companies Act. For this, and other technical reasons, it was clear that the validity of the security held by the National Bank is at least uncertain, although the only place where the issue could be tested is the Court.

Arising from the investigations prompted by the liquidity crisis were a second group of problems derived from the allegation that the company had conducted aspects of its business in a manner that was open to question dating back to at least 1943. It must be stressed however, that there was every evidence that any questionable action by the company had been in good faith over a long period of years. Also, there was no suggestion that the company had made excessive profits at any time.

The first aspect of this group of problems was the question of breach of trust (or contract as the case may be). This problem arose from the administration of the estates administered by the company and the interest earned on the general bank account containing "funds in transit" belonging to clients. The crucial question was whether, and to what extent, the company might be considered to have obtained a financial benefit for which it was liable to account as trustee to its beneficiaries or as

agents to its principals. It was stated by the Minister of Justice that the inspectors were firm in their view that the company had indeed gained substantial benefits of that kind, and if it proves that the company is liable at all for such gains, then that liability would be large. As to the amount involved the inspectors were agreed, that the gain to the company during the last two financial years, exceeded $300,000. The amount decreased as it went further into the past, but the estimated amount of benefit to the company during the years 1955-1975 inclusive is in excess of $900,000. It was stated that the investigation into the accounts had not been carried back further than that although there is no limitation on the period that could be reviewed since there is no statutory limitation applicable to possible trust defalcations.

It was established that the practice followed by the company was a long standing one that went back further than the memory of any of the present officers of the company. Possibly the company may have taken a view that placed a very restricted interpretation upon the term "income from the fund" as being that which arose *directly* from the investment. The incidental benefit that arose from the "cash in transit" was possibly regarded by the company in the same way as the trading banks regard income earned from funds in non-interest bearing accounts of their customers.

The inspectors were unable to distinguish clearly in the time available, what money in the company's bank account at any time was money owned by the company and what was money held in trust or as agent. However, it was possible to establish from the published accounts of the company for each year the amount of interest earned and credited to the company as from investments. Having ascertained that, the inspectors made an assessment of the possible earning rate of all the available funds belonging to the company itself. While the figures could not be precised, and there is a margin of possible error of up to 10 percent, the conclusion was such that it must be assumed that the greater part of the interest credited to the company could not have been earned by the use of its own funds but it was derived from the funds of beneficiaries and principals.

Allied to the above question of breach of trust is the question of liability for breach of contract by the company in its role of agent. The inspectors also mentioned the matter of insurance commissions, brokerage and placement commissions, penalty interest and underwriting commissions which appear to have been obtained by the company. In many of these cases, the company appears to have been an agent for two different principals without one of the principals, the estate or settlement or investor, consenting to the double agency position or being able to consent. Without further analysis, therefore, the possibility of an even more extensive liability to unknowing principals from moneys received by the company in this way, cannot be excluded.

The need for a moratorium

In a case such as this, the National Bank of New Zealand, on learning that the security for the advance made by them to the company was questionable, could have called up the overdraft. Since the Perpetual Trustees would not have been able to repay the advance, the Bank would have appointed a receiver. As a consequence of this, those depositors who have money at call with the company would have sought to withdraw it. Beneficiaries and others who have interests in estates and trusts administered by the company would also have sought to protect themselves. This would have probably resulted in a liquidator being appointed.

Broadly, the distinction between a receiver and a liquidator is that a receiver's prime duty is to recover an amount of money sufficient to meet a debt due to the person or organisation that appointed him. Having done this by either selling sufficient assets or alternatively controlling the operations of the company and obtaining the required cash from those operations, he then relinquishes what is left to the owners. On the other hand, the prime duty of a liquidator is to sell the assets of the company, distribute the proceeds among those entitled and to wind-up the company.

In general, there are three possibilities open to a receiver. He can continue to run the business in an attempt to make it profitable and to pay its way out of its indebtedness; he can break it up and sell its assets for the best price available; or he can adopt a combination of these alternatives. While any responsible receiver endeavours to realise assets to the best advantage a receiver appointed by a debenture holder has only a strict legal obligation to the debenture holder who appointed him. He may just realise enough of the company's assets securing the debenture to pay off the debt owing to the debenture holder and then give up his receivership. In this event, a problem occurs

in that this could well cause irretrievable damage to the company which may make the rest of the company difficult, or impossible, to continue to operate or to sell as a going concern, and thereby cause a considerable loss in the value of the remaining assets. This may adversely affect others who have an interest in the company.

In this case there was a need not only to protect the assets of the Perpetual Trustees against precipitate action by creditors, but also a need to ensure that the difficulties encountered by that company did not unduly prejudice the operations of the other five trustee companies. The Act therefore not only prohibited withdrawals by investors from the Perpetual Trustee company for 12 months but also instituted a moratorium of four months for the other trustee companies even though it was stated that the Government had no cause to suppose that any of them could not meet their liabilities or were substantially affected by the legal problems pertaining to Perpetual Trustees.

Another important aspect of this Act was the suspension of the rights of beneficiaries and depositors under the Trustee Act 1956 and the Trustee Companies Act 1967 as to inspection of records and the institution of proceedings against trustees for breach of trust. Instead, s 18 of the Trustee Companies Management Act provides that where the Statutory Board is satisfied as to there being a breach of trust, it may bring an action on behalf of the beneficiaries against the company. For many beneficiaries this provision for the institution of a "class action" will be of real benefit against what in these circumstances might have been a somewhat illusory right.

The other interesting provision contained in the Act is that in the event of a deficiency, the amounts due to beneficiaries and depositor's shall abate ratably.

A matter of equity

While the need to institute a moratorium in this case is not disputed, nevertheless, the interests of some parties may not be as well served by this type of legislation as are others. An example of this is the situation of secured creditors. While in this case there was specific authority under s 23 of the Act to provide for the repayment of the overdraft due to the National Bank, in the absence of such a provision, obviously the rights of the secured creditor suffer to some extent. In addition, a creditor may be looking to the debt owed him to satisfy his own creditors from whom he will not be protected.

Flowing from this difficulty is the more general one that as things stand at present, there is no certainty as to, for which companies and under what circumstances legislation such as this may be enacted.

The position of beneficiaries and depositors in the case of Perpetual Trustees while protected to some extent is not without some hardship. Briefly, the situation of these persons is that the Statutory Board of Perpetual Trustees has announced that it would concentrate initially on the rights of two main groups of people financially involved with the company. The two groups are those concerned with the trustee executory agency business of the company and those involved in the contributory mortgage business developed by the company. The company's new Chairman stated that his Board had given priority to these areas, because it was here that people, many of them elderly and dependent for essential income, relied almost entirely on the company. In terms of money received, the trustee executory and agency business, and the contributory mortgage business, fell into two categories. Firstly, there was the situation of the money received by way of income or as a result of realisation of assets on, or after 15 August, which was the day when the Board appointed by Government assumed control. Moneys received on or after that time would be paid to those entitled to them in the ordinary course of business. The second category, moneys received on or before 14 August would be retained in the company's Trust Account until a balance is effected between the amounts due to beneficiaries and clients on the one hand, and the cash held in the company's numerous bank accounts on the other. It was stated that the Board was considering separately those people involved in the company's group investment funds and those persons or organisations who have placed money with the company for short term investment. These latter groups may well have to wait a considerable period of time before the problems are resolved and their funds are available to them.

Some other issues

The issues involved in this case are many and complex. There are, however, some that should be mentioned since they may be of immediate interest to practitioners. The first of these concerns the question of the taking of commissions from a third party. When investments are made

on behalf of principal it is usual to place the firm's stamp upon the application for shares or debentures before it is completed by the client. Whether all clients would appreciate the significance of this without further explanation is not certain. Also, whether this action constitutes sufficient notice to the principal of the agent's interest is perhaps questionable. In the circumstances, it may be desirable to ensure that the fact that the client was made aware of the situation is evidenced in writing.

While still on the subject of agency, in connection with the taking of insurance commissions where there is a clause in the mortgage providing that the mortgagor must insure with an insurer nominated by the mortgagee, there may perhaps be a problem if it can be established that there was a cheaper cover available. Also, in a similar vein, there might be problems where a trustee invests money in a group fund or similar scheme which yields a lesser return than could be obtained from alternative approved investments. Whether the trustee could be said to have discharged his duty to the beneficiary in such circumstances is perhaps open to argument.

A final point of interest that emerged from this case is the period that may be reviewed. In the case of a possible trust defalcation there is no statutory time limitation—an interesting thought to bear in mind when considering the purging of unnecessary files.

Conclusions

It appears that if it is the intention of the successive governments in New Zealand to act to avoid the normal consequences of the collapse of a large company, then this should not be by way of special legislation dependent upon an arbitrary decision that might reflect a political whim or the possible effects upon the employment statistics. There is a clear case for an early amendment to the Companies Act in order to avoid separate legislation for each occasion that a "large" company encounters severe financial problems. This would ensure that not only is the law equally applied for small as well as large companies, but also that the business community knows for certain what the legal position will be on the occasion of the failure of a company. While it is not argued that it was inappropriate to use public funds to support Perpetual Trustees, nevertheless such support must in general have limits and should be based on carefully considered legislation and not that passed in emergencies as they arise.

CORRESPONDENCE

Dear Sir,

"Dangerous Products and the Consumer in New Zealand"

I thank Professor Palmer for taking the trouble to reply to my comments on his paper [1975] NZLJ 392). Unfortunately, part of his reply appears to be based on a misconception.

Professor Palmer's paper included a "procedure for developing standards", I commented that "this appears to me to be completely impracticable", and he replied that it "seems to be working well in the United States". This amounts to a claim that the procedure of his paper is the same as that used by the US Consumer Product Safety Commission (CPSC) to develop standards. I dispute this.

The CPSC system is laid down by 16CFR Part 1105, see the "Federal Register" of 7 May 1974 "Consumer Product Safety Commission : Consumer Safety Standards : Requirements and Procedures". It is completely different from the procedure described in Professor Palmer's paper.

(Incidentally, I would argue that the CPSC system itself is suited only to the US and does not provide a useful guide to New Zealand; the Australian approach seems to me preferable. However, that is a separate topic.)

It was presumably on his misconception of the CPSC system that Professor Palmer based his statement that "The way in which standards are developed by consent for voluntary use is quite different from the way in which enforceable standards should be developed".

I reject this.

It is not the view of the CPSC, whose chairman, Mr R O Simpson, is on record as saying that its system "is really almost identical to the long standing and successful system that has been operated by the principal voluntary standards-writing organisations" ("ASTM Standardization News" Vol 3, No 4, p 10, April 1975).

A similar "long standing and successful system" exists in New Zealand, and many of the New Zealand Standards so produced have been made mandatory by Acts, Regulations, and bylaws. My own professional life is very largely spent in developing such mandatory standards, and I listed some of them in my original comments. Professor Palmer made no attempt to demonstrate where we went wrong in the development of those standards, and

why we should have used some "very different" means, but treated my list solely as a reflection on the paucity of his citation.

I do not claim that our system is perfect, but I cannot accept a sweeping condemnation that "rests on no analysis" (to use another of Professor Palmer's phrases).

(Possibly there has been some semantic confusion, and I have taken the words "development of standards" to mean something that Professor Palmer did not intend. If so, at least one member, of the CPSC's staff appears to have misunderstood him also (*pers comm* Mr R W Smith, technical liason division CPSC). Surely, when he attacks a system, the onus is on Professor Palmer to use its terminology in the same way as do those who operate it.)

Professor Palmer asked me to "contemplate the big picture". Fair enough, I have criticised only details, but they were details that Professor Palmer himself chose to paint into his "big picture", they affect me directly, and I would be wrong to let them go uncorrected.

By all means let us have a New Zealand Consumer Products Safety Commission to plug a gap left by the abolition of the action for damages in respect of personal injury. Let that commission decide whether or not particular classes of products should be subject to mandatory standards (and for this purpose Professor Palmer's procedure may well be appropriate). Let it investigate injuries, set priorities, and allocate funds (the Australian example is relevant here). On no account, however, charge it with the detailed technical work of developing standards, least of all by some "quite different" new system.

Yours faithfully,
B D CASHIN,
Senior Technical Adviser,
Standards Association of
New Zealand.

A CHRISTMAS CAROL

DR RICHARD LAWSON *continues his Occasional Notes from Britain with a plea for inventivenes to keep law alive.*

When he was asked as to who was the greatest of composers, T S Eliot replied: "Bach may not have been the greatest, but he certainly sounds as though he was." For many people, that must sum it up. They would say that Bach certainly is the composer of them all, but they would also say so because others say so and that belief is now part of the common heritage. There is no doubt, too, that Bach is a powerful force and does indeed sound like a great composer.

But if many acknowledge Bach's accepted greatness, few of the many would admit that Bach, in the modern idiom, turns them off. Now, however, the faint-hearts have received the strong support of Bernard Levin writing in *The Times*. Bach, he says, sounds everlastingly as though written in the minor key. Which is to say that, to him, Bach means a mournful, lugubrious noise. As a matter of fact, Bach is not especially prolific in the minor key, but Levin's point is what the music sounds like.

I do not want to stand up and say "Me too, Bernard, me too", for Bach has always been to me a composer to whom I often and gladly turn. What I do want to say is that I also have a blind spot, a composer whom the world has long adored and worshipped, but who to me has earned his fame simply because he had a degree (a high degree, I do concede) of precocity and youthful virtuosity: whom else can I mean but the unspeakable W A Mozart.

The vast outpourings of this prolific youth are, to my ear, the most banal fripperies imaginable. Today, television soap operas are the bland pap served up to lull us into doing our daily tasks with as little rancour as possible. As I see it, that was the purpose or effect of "Mozart". In fact, his father, Leopold, was a musician, a respectable fiddler, and I believe that he passed off all his compositions as those of his three-year-old son. Naturally, the world would treat such music then as being the work of a genius.

Whether you believe that or not, there is one established fact about the life of young Mozart (apart from his being a brilliant pianist, violinist and so forth, which I unhesitatingly accept), and that is that his favourite pastime was billiards. This fits exactly Mozart as I see him. Fag in mouth, chalk in hand, cue poised, ready to pot the yellow, then dashing off a painless divertimenti while his opponent cleared the table. All superfluous, inconsequential stuff. I don't normally pay too much heed to what my wife says about music (or much else for that matter) but she is very right to class Mozart as a decorator while such as the overwhelming Beethoven are the true and noble painters, men with vision.

Amongst my favourite pieces of music is the slow movement of Mozart's Violin Concerto No 3, but it is so much the petunia in the onion bed, for it is surrounded by the bad old Mozart, the stuff indistinguishable from the piles of other music he wrote. My real criticism is that Mozart plainly thought of music as deriving from musical instruments. He never realised that instruments are imperfect tools for making music, and that there are sounds between the notes playable on a piano. Because they realised that music exists outside the media on which it is played, men such as Beethoven, Mahler and Ives must truly be reckoned great. Ives, in his Concord Sonata, bids the pianist use his forearm or a ruler to depress a couple of octaves at once. Whether you like the result or not, you have to admit that Mozart could never have been thought of that. His mind and music was much too limited.

But even Mozart must rank as a mighty man alongside our pop phenomenon, the Bay City Rollers. Pop music is now purely a visual issue, being the best of effects which the cameraman can produce on the telly-spectacular *Top of the Pops*. It must indeed be recognised that the fun and games played by the cameraman and lighting experts make for fascinating watching. But it is these images which the little ones buy. The music is now irrelevant and sounds it. The inventiveness of the Beatles and the Stones is gone and replaced by studio brilliance and mass persuasion. The ghastly Rollers recently conceded, in a series of guttural, monosyllabic honking noises, that they first heard a record of "theirs" on the radio. In short, their name appeared on the label and that was the sum of their contribution. Does anything else need saying?

A bloody deed—The late Sir John Salmond, many years ago, told me a story of the 1870s, when the fusion of law and equity took place and occasioned so many strange "mix-ups" in the work of the Judges. Elderly gentlemen, accustomed all their lives to applying equitable doctrines in suits where they only gathered the fact from affidavits, found themselves suddenly confronted with actions at nisi prius. They had to distinguish the true from the false as told by witnesses in the box in the language of a workaday world instead of in the pedantic phraseology of equity clerks.

An elderly Judge sat with a jury for the first time in his life to try a particularly brutal murder case. The deed had been done with an axe, and one might reasonably have expected the case to smell of blood. But there was no allusion to blood or blood-stains from beginning to end. This was the Judge's summing-up:

"It must have struck you as strange, gentlemen, that in this case, where it is alleged that the victim was done to death with an axe, there is so little allusion in the evidence for the prosecution to blood or blood-stains. There is, indeed, one sentence you will remember which seems to me most significant—but, of course, gentlemen, its significance is entirely for you. I merely draw your attention to it. And it is perhaps my duty to remind you that counsel for the prosecution does not appear to regard it as important, for nowhere does he advert to it throughout his exhaustive and, if I may say so, very able analysis of the evidence. But you will remember, gentlemen, that one of the witnesses deposes to hearing the accused, when he was in the act of getting out of bed the morning after the murder was committed, use these words to his wife: *'Maria, chuck us over that bloody shirt'."* From *Cheerful Yesterdays* by O T J Alpers.

Some useful precedents—If you lose a case you will feel you have been kicked by a horse but control your feelings and remember you have rights of appeal. After all, Magistrates are not infallible. In olden days the Rajah of Bengal whipped or executed a Magistrate if there was a successful appeal against his judgment. In King Alfred's day 44 Judges were hanged in one year for making errors.—MR D J SULLIVAN SM to the Wellington Young Lawyers.

Barristers don't shake hands—Recently I had occasion to consult an old colleague of Temple days and unthinkingly, on leaving, held out my hand. "Members of the bar don't shake hands with one another, have you forgotten?" he remarked . . . Indeed why barristers don't shake hands would have escaped me . . . it stems, I understand, from the days when barristers rode in the Assize Judges' cavalcade and were known to their Lordships and to each other as distinct from the surrounding provincial population. From *Confessions of a Country Magistrate* by Edward Grierson.