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JOINT FAMILY HOMES

In one short quarter century the joint family home has become an institution. Solicitors will attest to the almost reverential tones used by many older clients when announcing that their property is registered as a "joint family home." The reference to a "family home" marks an attitude towards hearth and home, and towards the sharing of matrimonial property, not evoked by the terms "joint ownership" or "tenancy in common". It is more than a little saddening therefore to say that it is time for the Joint Family Homes Act 1964 to go.

Although there has been some form of joint family homes legislation since 1895 it was of very limited application and it is doubtful whether more than a score of properties were settled under it. It was not until 1950 that legislation much in the form of that we know today was introduced. In an era concerned with increasing family breakdown it was seen as a means of promoting stability in family life. This it did by removing the greatest bar to co-ownership at the time – gift duty – and by providing some modest encouragement to settlement by giving "protection from the vicissitudes of bankruptcy and the like" and giving some small measure of relief against estate duty.

Fourteen years later in 1964 the then Attorney-General, the late Ralph Hanan, described the 1950 Act as being "perhaps one of the National Government's greatest contributions in the field of social legislation" (a comment which elicited a predictable but for Ralph Hanan unjustified interjection). He went on to secure the passage of the Joint Family Homes Act 1964 which introduced substantial estate duty benefits, and as well, by vesting the property in husband and wife equally, eliminated the need for inquiry on death into contributions to the purchase price.

Paradoxically the increased estate duty savings aided by changing social attitudes may be seen as marking the beginning of the decline of the Act. It marked its transmogrification from predominantly social legislation into predominantly financial legislation. From financial benefits to encourage and enable joint ownership the emphasis shifted to joint ownership to secure financial benefits. This transition has been encouraged by the amendment to the Act in 1974 – an amendment which markedly increased the estate and gift duty benefits. We may expect to see this progression culminate in the introduction of the promised legislation to extend the estate and gift duty benefits of joint family home ownership to farmers. In the past the difficulty in extending the benefits of settlement to farmers was caused by the need to preserve the integrity of other legislation relating to subdivision of rural land. Some form of subdivision would have been necessary to ensure the security of tenure of husband and wife that was the purpose behind the original legislation. It seems that today the extension of that benefit to farmers is less important than extending to them the benefits of the estate and gift duty savings. (Significantly the proposal for farmers was announced in the Budget under the heading "Estate and Gift Duties".)

In their day the various Joint Family Homes Acts represented advanced social measures and for many settlement marked the difference between a home and the house they lived in. This attitude of encouraging the sharing of matrimonial property which the Acts helped to promote has now overtaken it to the point where the Joint Family Homes Act simply complicates our present matrimonial property legislation.

The emphasis in matrimonial property today is on fair apportionment rather than on settlement, or legal ownership. There is a growing acceptance that the needs of a family do not differ by reason only that a certain piece of property is

settled in a particular way. The estate and gift duty exemptions and the protection against insolvency extended to the one are no less necessary or deserved by others who for one reason or another have not or cannot settle a property as a joint family home.

There is certainly every advantage in encouraging the sharing of property between spouses. There is no reason for limiting encouragement of that sharing to one type of property, namely land.

It is time to say that the division and settlement of matrimonial property should be dealt with by matrimonial property legislation, that the imposition of estate and gift duty should be dealt with by estate and gift duty legislation, and that protection from insolvency should be incorporated in insolvency legislation. At present the Joint Family Homes Act simply creates distortions based on the settlement of land – a form of property that is not owned by all.

For many it will be sad to see an old friend go. Nonetheless when the Statutes Revision Committee reports back on the Matrimonial Property Bill it would be a kindness if it were to include a quick coup de grace for the Joint Family Homes Act 1964.

Tony Black

CASE AND COMMENT

Oral agreement to separate and divorce

In *Johnston v Johnston* (the reserved judgment of Somers J was given on 27 July last) the petitioning wife sought a dissolution of her marriage on the ground that she and her husband were parties to an oral separation agreement that had been in full force for not less than two years.

Evidence was given by the wife and her father, from which it appeared that, up till Queen's Birthday Weekend, 1974, the spouses lived in a flat in Christchurch. The husband was described as "drinking, rarely at home, out of work, and supported by" the wife. According to her there was discussion late in 1973 about separation and the husband was then agreeable. In May 1974 the petitioning wife "described matters as very bad. She hardly saw her husband whom she described as wanting to get away from things, including the marriage and all responsibility". She telephoned her father just before Queen's Birthday Weekend, and he arranged a flat for her so that "she could move out". She said "her husband 'was there' " when she made that call. The wife moved over Queen's Birthday Weekend, but the husband was not present at the time of the move, and, shortly afterwards, he was sent to prison, where the wife visited him and informed him where she was living. He expressed no wish to go back and, after leaving prison, he did not visit the wife. Earlier in 1976 a written separation agreement was signed, with a recital to the effect that the parties had lived separate and apart by oral agreement since 3 June 1974. The wife's father testified that he had discussed the marriage with both spouses around May 1974, mentioning the possibility of a separation. He said that his son-in-law's reaction was "rather negative", to use the words of Somers J, and, (to use his own words) "he could not have cared one way or the other; he made no objection to it". As a result, he said, he arranged the flat for his daughter, as already mentioned, and helped her to move.

On the above evidence, it was submitted, the Court ought to find an agreement to separate. His Honour said the law relating to the factum of such an agreement was set out in *Ducker v Ducker* [1951] NZLR 583, at pp 590-591, where Gresson J said:

> "Agreement is something more than having a common mind upon a matter, and there must, too, be something more than knowledge, on the part of each, of such common mind, or the communication each to the other of having such a mind: there must be the intention to form an agreement. That is vital. An agreement is constituted when both parties will the same thing and each communicates his will to the other with a mutual engagement to carry it into effect".

Somers J held, it is submitted rightly, that the evidence in the case under review fell a long way short of any such mutual engagement or, even, of a common will to live apart or communication of that will. He therefore dismissed the wife's petition.

The case may usefully be compared with *Smalley v Smalley* [1972] NZLR 901, noted in [1972] NZLJ 216; [1972] Recent Law 202 on the one hand, and *McKay v McKay* [1949] NZLR 217 on the other.

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TAXATION

THE INCOME TAX BILL – AN EXERCISE IN FUTILITY?

By G J HARLEY, *a Wellington practitioner.*

The Associate Minister of Finance, the Hon P I Wilkinson, on 9 July 1976, introduced to the House of Representatives the Income Tax Bill. It is to replace the income tax provisions of the present Land and Income Tax Act 1954. The present land tax provisions of that Act are to be separately dealt with.

The changes promoted in the Bill are long overdue. Yet, a little further delay, and a lot more thought, together with consultation with those involved in working the tax system, could result in much more usable and effective legislation.

The Bill's emphasis is cosmetic. The draftsmen have removed the land tax provisions – some 30 in all – and simply renumbered the remaining sections. The repealed sections are removed. The additions and insertions – now denoted by capital letters – are separately numbered. Even so, these changes leave a formidable piece of legislation. The 420 clauses take up over 500 pages.

In addition to renumbering sections, the draftsmen have made minor drafting amendments – matters of language – and changes to the internal arrangements of sections. Whereas the Land and Income Tax Act 1954 contains its definitions at the end of its sections, the Bill has them placed at the beginning. This change has the desirable effect of making obvious the existence of definitions. It also means that subsequent additions can be made without the need to re-number the definition subsection or having it appear between substantive provisions. For example, the present s 108, enacted in 1974, defines various terms in subs (6). In the Bill – where s 108 is cl 99 – these definitions are placed at the beginning. If the Government acts on its stated policy of further amending the section (see I L M Richardson, "And Now the New Section 108" [1974] NZLJ 560, 565) all that is required is the addition of a subsection.

These superficial changes aside, the Bill does nothing to make tax law more accessible, nor does it make any attempt at reform. One can only guess as to why the Government has not sought to overcome the effects, of for example, the Privy Council's judgment in *Europa Oil (New Zealand) Ltd v CIR* [1976] 1 NZLR 546 (JC) and has not reviewed s 108 as it promised.

Yet, the substantial criticism of the Bill must be its bulk. When speaking to the 1974 Amendment Bill, and specifically the s 108 amendment, the then Minister of Justice, Dr A M Finlay said (1974 NZPD 4193):

> "At least one [amendment] every year is required to stop up holes that have been pricked in the wall by somebody or other. Each year we have to go through this remedial exercise, with the result that the . . . Act itself has to be reprinted, an exercise that takes up a whole volume of statutes. If there were not this proclivity to avoid, to minimise . . . but instead an open disposition by people to pay the tax that Parliament intended they should pay, there would be a great deal more simplicity in our tax legislation."

The premise – that tax avoidance is responsible for the large number of amendments – does not bear up to examination. The fact is that the Annual Budget usually contains several substantial alterations to income tax legislation. Recent examples are s 88AA in 1973; in 1974 it was special incentive provisions relating to the siting of industry and in 1976 changes were made, inter alia, to s 110B – deduction for wage earners – and dividend tax in relation to the distribution of reserve funds. What cannot be challenged is that the number of annual changes is so large that the Act must be reprinted. Yet as soon as a reprint is available – they date from 1 April – the Budget – in June or July – dates it. The absurdity of this exercise is clearly demonstrated by the effect of the 1976 Budget on the Bill itself. The numerous changes announced by the Minister of Finance have made a reprint necessary even before the Bill is enacted.

The expense involved in this annual exercise must be considerable – to the Government – and to taxpayers and their advisers. If anything, the Bill makes the reprint task more difficult and expensive simply because of its length. It is submitted that the Bill should have been split up into its various component parts – each as separate enactments. In the High Court of Australia, in *Newton v FCT*, Kitto J said of the Australian equivalent to s 108 ((1957) 96 CLR 578, 596):

> "Section 260 is a difficult provision, inherited from earlier legislation, and long overdue for reform by someone who will take the trouble to analyse his ideas and define his intentions with precision before putting pen to paper."

The Bill would profit from such treatment.

The issue of law reform aside, it is suggested that the Legislature should have regard to the following factors when dealing with tax legislation:

(a) Apart from the Inland Revenue Department itself, there are large numbers of people, including accountants and lawyers, necessarily involved in using tax legislation and administering the tax system. These people undoubtedly have valuable practical contributions to make as to how legislation can be clarified and made more accessible.

(b) A basic requirement of any legislation is that it should be easy to use. This requires that relevant provisions be quickly accessible. These features are governed simply by bulk as much as clear setting out and comprehensive indicia.

(c) It is expensive to reprint provisions which have remained unchanged for a long period of time every year.

If these are acceptable criteria it seems clear that the Bill does not conform as well as it might.

At present, income tax law is contained in three basic Acts. They are the Land and Income Tax Act 1954, the Income Tax Assessment Act 1957, and the Inland Revenue Department Act 1974. The Bill leaves land tax out – to be separately covered – and consolidates the remainder of the 1954 Act together with the Assessment Act. The Department Act remains unchanged. It deals with the Department's constitution, functions and administration. It also provides for the Taxation Review Authorities. The Assessment Act provides for such things as PAYE and provisional tax – the mechanism of revenue collection. The Bill includes these functions in Parts IX to XIII – a total of 105 clauses in some 70 pages. Parts II and III of the Bill – now in the Land and Income Tax Act – relate to returns, assessments, and objections and take up some 35 clauses in 20 pages.

As the thrust of all these provisions – including the Department Act – is purely *administrative* it seems logical they should be all grouped together in the one Act – Income Tax Administration. The proposal removes 140 clauses – about 100 pages – from the Bill. They are at present in different parts and illogically patterned. A significant number have remained unchanged since their enactment in 1923. Considerable alterations have been made to others, particularly since 1968. The fact remains that most are not often changed and yet are reprinted every year. An Act dealing with administration only would remove a considerable bulk of material – not often controversial and not often changed. The remaining 400 pages of the Bill warrant similar treatment.

Part IV of the Bill is the omnibus. Headed "income tax" it deals with everything from assessable income to deductions, from tax rebates to income equalisation schemes, from companies to trusts; these in over 200 clauses. A great deal of this legislation could and should be regrouped and some, perhaps, removed. With this part, Dr Finlay's comments assume some relevance.

The cause of the annual reprints is the constant change in Government policy relating to incentive and rebate provisions – especially for export-oriented concerns such as farming, forestry and tourism. The 1976 Annual Budget contains many examples. It is suggested that these "special treatment" provisions could also be in self-contained legislation – Income Tax Incentives. One other area which might be separately covered would be that presently covered by schedules – the rates.

In all, the suggestion is that we have four separate Acts – to deal with administration, tax law itself, special treatment and rates. What is important is that the cause for massive annual reprints is removed at a stroke. The constantly changing provisions would be in small Acts – easily accessible to those requiring them – without unnecessarily encumbering the main pieces of legislation. They are cheaply reprinted and easily changed. The need for the re-numbering exercise apparent in the Bill would be substantially removed.

Even if the suggestions made here are followed – and they are based on successful overseas legislation – it is to be hoped that more accessible and easily used legislation will not obscure the need for, or delay the thorough review of, income tax law. Indeed, the removal of much of the administrative bulk would make the task of reform less daunting. An excellent starting place is making the legislation easy to use and therefore more effective. Attention can thus be concentrated on the areas where there is a pressing need for reform.

"The Courts must protect the liberty of the subject and give a strict interpretation to statutes which erode that principle. Emotional statements about lawyers manipulating the blood alcohol laws, to enable guilty people to evade responsibility for their actions, may make popular reading, but do not, in my view, assist in coping with the basic problem of providing a statute which fully carries out the will of Parliament" – *Deed v Otahuhu Borough Council* (Supreme Court, Auckland. 24 May 1974 (M406/76). Baker J).

COURTS PRACTICE

THE ADMIRALTY ACT 1973

His Honour Mr Justice BEATTIE *introduces a series of articles on the Admiralty Act. Further articles by other authors will deal with the provisions of the Admiralty Act and with procedure and practice under the Admiralty Rules 1975 and the Magistrates' Courts (Admiralty) Rules 1976*

The commencement of the Admiralty Act 1973 *(a)* marks one of the most important advances in the original jurisdiction of the Supreme Court since 1861 when the Supreme Court Act 1860 came into force, completing the inheritance of the Court in terms of the jurisdiction of the superior Courts of common law and equity in England *(b)*. Under the Supreme Court Ordinance 1844 the Legislative Council conferred Admiralty jurisdiction on the Court but the relevant provisions were disallowed on the advice of the Colonial Office and were repealed *(c)*. The reason behind disallowance was that the Court of the Vice-Admiral had always been a branch of the Admiralty and outside the colonial systems of Courts and jurisdiction. The Court, its Judges, its jurisdiction and procedure were regulated by imperial and not colonial statutes and orders. Not until 1890 was this altered under the Colonial Courts of Admiralty Act. Then the Courts of Admiralty were made part of the colonial establishment and colonial legislatures were given considerable but limited power of vesting Admiralty jurisdiction in local Courts *(d)*.

By 1861 the Supreme Court had become a Vice-Admiralty Court but with no more Admiralty jurisdiction than the High Court of Admiralty had before the statutory additions made by the Admiralty Courts Acts of 1840 and 1861 *(e)*. Again, the new jurisdiction which Vice-Admiralty Courts acquired under the Vice-Admiralty Courts Acts of 1863 and 1867 remained less than the full instance jurisdiction of the High Court *(f)*. But in 1891, when the Colonial Courts of Admiralty Act 1890 came into force colonial Courts under that Act for the first time acquired, to all intents and purposes *(g)* the full jurisdiction then vested in the English High Court of Justice, in which the ancient High Court of Admiralty had lost its identity under the Judicature Acts.

This parity of Admiralty jurisdiction between the High Court and colonial Courts of Admiralty, of which our Supreme Court was one, lasted only 20 years. It should be noted that it was a parity of Admiralty jurisdiction only – the fusion of the ancient superior Courts into one High Court of itself added nothing to the Admiralty jurisdiction of the High Court or of colonial Courts *(h)*. But, because under the Judicature Acts, one Judge of that Court, sitting in the Admiralty Division, was empowered to exercise any jurisdiction possessed by any Judge of the Court, the powers of the Admiralty Judge in the High Court were greatly augmented.

In 1911, under the imperial Maritime Convention Act, the Admiralty jurisdiction of the High Court was extended to claims for loss of life or personal injury but the Act did not apply to Admiralty Courts in the dominions. Again, under the Administration of Justice Act 1920, the High Court alone acquired jurisdiction in respect of charterparties and extended jurisdiction both in contract and in tort over claims in respect of the carriage of goods in any ship, but Colonial Courts of Admiralty were given none of this jurisdiction. Nor could a colonial or dominion parliament enact empowering legislation to that effect, for the Colonial Courts of Admiralty Act expressly prohibited a colonial legislature (whether of a self-governing dominion or not) from conferring any jurisdiction which the Act did not confer *(i)*.

The withholding of these extensions of jurisdiction may be explained by imperial policy. A source of much Admiralty jurisdiction in the 19th century and later was (and still is) the imperial Merchant Shipping Acts (amongst which the Maritime Conventions Act just mentioned is numbered). The Merchant Shipping Acts treated

(a) On 1 August 1976 by Order In Council of 12 July 1976. Gazetted 15 July 1976. See Admiralty Act 1973, s 1 (2).

(b) See now Judicature Act 1908, ss 16 and 17.

(c) 1846 (Government) *Gazette* 83.

(d) Harrison Moore, *The Commonwealth of Australia* (2nd ed) 264.

(e) *The Australia* (1859) 13 Moo PCC 132, 160; 15 ER 50, 60.

(f) *The Yuri Maru: The Woron* [1927] AC 906, 913 (PC).

(g) Jurisdiction under the Slave Trade Act 1873 was that vested in a Vice-Admiralty Court: Colonial Courts of Admiralty Act 1890, s 2 (3).

(h) *The Camosun* [1909] AC 597, 608.

(i) See also the Colonial Laws Validity Act 1865.

merchant shipping as an imperial subject. They indicated an endeavour to provide for all contingencies of British mercantile navigation throughout the empire, partly by direct enactment and partly (in relation to the coasting trade) by optional local enactment imperially sanctioned *(j)*. The reasons for this kind of regulation were given by Sir Henry Jenkyns in 1902 *(k)*, as "partly the need for extra-territorial legislation, partly the fact that foreign countries are concerned, and partly the importance of maintaining a uniform law for all vessels which enjoy the protection of the British flag".

With the development of dominion status the legislative restraints upon the self-governing colonies became less supportable, but the logic of a uniform mercantile law for all British shipping continued throughout the earlier Imperial Conferences of the present century to justify, for most delegates to those conferences, the system of centralised control. However, as a result of the Conference of 1926, the Conference on Dominion Legislation and Merchant Shipping Legislation (the committee of experts) which met in London in 1929, issued a series of recommendations which culminated (after the 1930 conference) in the Statute of Westminster 1931. Of those recommendations the three following are of particular relevance for present purposes:

> "114 The existing situation of control in the United Kingdom of Admiralty Courts in the dominions is not in accord with the present constitutional status of the dominions, and should be remedied.
>
> "115 Our recommendation is that each dominion in which the Colonial Courts of Admiralty Act 1890 is in force should have power to repeal that Act.
>
> "117 We think it highly desirable to emphasise that so far as is possible there should be uniform jurisdiction and procedure in all Admiralty Courts in the British Commonwealth of Nations, subject, of course, to such variations as may be required in matters of purely local or domestic interest".

So far as jurisdiction goes, and perhaps also as to procedure the Admiralty Act 1973 and the Admiralty Rules 1975 comply with the spirit of the last of the recommendations mentioned. For the New Zealand Act and the Rules closely follow respectively the provisions of Part I of the Administration of Justice Act 1956 (UK) and Order 75 of the Rules of the English Supreme Court. The relevant provisions of the English Act have been extended by imperial order to a large number of British colonies or former colonies including, amongst New Zealand's neighbours, Fiji, the New Hebrides, the British Solomon Islands (Protectorate) and the Gilbert and Ellice Islands *(l)*. Thus there is a measure of uniformity in British Courts throughout the Pacific.

The Admiralty Act lists the areas of jurisdiction under 19 paragraphs *(m)* some of which extend to aircraft as well as ships *(n)*. For the first time a substantial part of the jurisdiction may be exercised by Magistrates' Courts, within the monetary limits of their general jurisdiction *(o)*. The Supreme Court continues to be invested with all the jurisdiction which it possessed as a colonial Court of Admiralty *(p)* and accordingly retains the inherent jurisdiction of the former High Court of Admiralty. In addition, the Supreme Court, when exercising its Admiralty jurisdiction, may exercise any other jurisdiction connected with ships or aircraft which is vested in the Court under any other Act *(q)*. Again, in exercising Admiralty jurisdiction either the Supreme Court or a Magistrate's Court may exercise at the same time any of its other civil jurisdiction, whether statutory or otherwise, and all powers incidental thereto *(r)*. To the great (and novel) advantage of the legal profession the rules of Court are now readily accessible, in the statutory regulation series *(s)*, instead of being hidden in the innermost pages of volume I of the 1884 *Gazette*.

Finally, under the new Act the Supreme Court becomes a permanent Court of prize, under the imperial Naval Prize Acts 1864 to 1939 which remain in force in New Zealand *(t)*. Although instance jurisdiction was enjoyed by colonial Courts under the Colonial Courts of Admiralty Act their prize jurisdiction was that of a Vice-Admiralty Court. Such jurisdiction was not permanent but was derived from a commission or warrant issued by the Queen or the Admiralty (now the Secretary of State for Defence) and proclaimed by the Vice-Admiral (in New Zealand, the Governor-General) upon the proclamation of

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(j) *Union SS Co of NZ Ltd v The Commonwealth of Australia* (1925) 36 CLR 130, 142 per Isaacs J.

(k) *British Rule and Jurisdiction Beyond the Seas*, 28.

(l) Administration of Justice Act 1956. For orders under subss (2) and (3) see *1 Halsbury's Statutes of England* (3rd ed) 33.

(m) Admiralty Act 1973, s 4 (1).

(n) Ibid, s 4 (1) (i) (j) and (k). The word "ship" includes hovercraft (s 2).

(o) Ibid, s 3 (1) (b).

(p) Ibid, s 4 (2).

(q) Ibid See for example Shipping and Seamen Act 1952, s 461, as to limitation of liability.

(r) Admiralty Act 1973, s 3 (2) as amended by Admiralty Amendment Act 1975, s 2.

(s) Admiralty Rules 1975 (SR 1975/85) and Amendment No 1 (SR 1975/293).

(t) Admiralty Act 1973, s 8.

war *(u)*.

In view of the technical nature of prize jurisdiction and the rare occasions for exercising it the Rules Committee has not ventured to replace the imperial Prize Rules 1939 *(v)*. These were resorted to in New Zealand during World War II and the procedure which they prescribe has a close affinity with the civil procedure laid down in the (New Zealand) Admiralty Rules 1975 *(w)*.

Thus a further recommendation of the 1929 Imperial Sub-Conference has been acknowledged – that uniformity of the law of prize and co-ordination of prize jurisdiction should be maintained *(x)*.

In conclusion, it may be claimed that the new Act vests in the Supreme Court all the Admiralty jurisdiction appropriate in modern times for administering justice in all the shipping claims that may be expected to arise from the marine commerce of a mature maritime nation.

(u) See 1939 *Gazette* 3455.

(v) SR & O (1939) No 1466.

(w) It may be noted that under the Crown Proceedings Act 1950, s 35 (2) (a), the Act does not apply to proceedings within the jurisdiction of the Supreme Court as a prize court.

(x) No 80. See 1930 AJHR paper A-6, at 14.

ESTABLISHMENT OF THE E C ADAMS MEMORIAL IN LAND LAW

Perhaps no member of the legal profession in New Zealand was better known than the late E C Adams. Of the senior practitioners in many parts of the country who knew him personally, none could fail to be impressed by the breadth of his knowledge and by his unassuming courtesy, patience and helpfulness. His name is equally well known to those who have not been privileged to make his acquaintance, for almost all students and practitioners of the law have occasion to consult the books which he wrote or edited and the articles which he contributed so regularly to the *New Zealand Law Journal*.

E C Adams' death in 1972 was an irreparable loss to the profession. A number of his friends and associates and others who knew him through his writings expressed the wish that some fitting tribute should be paid to the man and to his work. After some discussion the idea of writing a volume of memorial essays emerged. It was clearly appropriate that the essays should deal with an aspect of property law – E C Adams' own special interest – and the theme of landlord and tenant was chosen as being an area which had previously been somewhat neglected by legal writers in New Zealand. It was also appropriate that the papers to be included in the volume should, like the writings of E C Adams himself, be on topics of general interest in the day-to-day practice of the law. Twenty-two papers on practical aspects of the law of landlord and tenant were contributed by fifteen authors, all of whom are either practitioners or members of the Law Faculties of the Universities, and five of whom were formerly public service colleagues of the late E C Adams. The work was co-ordinated and edited by Professor G W Hinde and the volume, *Studies in the Law of Landlord and Tenant*, was published earlier this year by Butterworths.

All the contributors to *Studies in the Law of Landlord and Tenant* have agreed that the royalties from the sale of the book are to be applied to provide the capital fund for the *E C Adams Memorial Prize in Land Law*. The fund has recently been established, and as soon as it has built up to a sufficient amount, the prize will be awarded at appropriate intervals by the trustees. The award will be made for the best essay on a topic in Land Law to be set from time to time by the trustees. The prize will be open for competition among:

(1) Members of the staff of the Land and Deeds Division of the Justice Department who are enrolled for any course of study at any University or Technical Institute or for any examination conducted by the State Services Commission: and

(2) law students enrolled at any of the University Law Schools in New Zealand; and

(3) candidates for the Legal Executives Certificate of the New Zealand Law Society.

A notice will be published in this *Journal* when the prize is first offered.

Injustice – It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. JAMES MADISON.

ACCIDENT COMPENSATION

LUMP SUM PAYMENTS UNDER ACCIDENT COMPENSATION

By GEOFFREY PALMER *Professor of Law, Victoria University of Wellington.*

I How the Act has been working

By the end of March 1976 New Zealand's Accident Compensation scheme had been working for two years. The scheme has run fairly smoothly and has done so since its inception with few signs of public dissatisfaction. No doubt legal practitioners have stories of delays, of bureaucratic bungling and inconsistencies. But it is apparent such difficulties do not normally arise and for the most part the scheme has settled down reasonably well.

It is surprising that the scheme has worked as well as it has considering the unfortunate prolixity of the legislation and the bewildering amount of amendment it has undergone *(a)*. The legislation has recently been reprinted for the second time in three years. At least a dozen problem areas remain to be sorted out but none of these concerns fundamental principle.

Table 1 shows Claims, Reviews and Appeals for Two Years ending 31 March 1976. It is apparent from the figures that the scheme is being administered reasonably generously with applications for review running at .75 percent of claims made. That the number of appeals to the Appeal Tribunal has been so small is remarkable.

Fears expressed at the time the Act was passed have proved to be illusory so far. It was predicted that the provision of the Act whereby "counsel have the right to appear in proceedings under the scheme at all stages . . . might well prevent the successful implementation of what is otherwise a most impressive piece of social welfare legislation" *(b)*. It appears that on application for review many applicants appear on their own behalf. Others are represented by accountants, trade union officials, Members of Parliament and friends. Only about a quarter of those cases which come to a hearing involve solicitors. The Commission has adopted no formal rules of procedure for the hearing of applications for review and that appears to have helped in maintaining an atmosphere where the layman feels at no disadvantage. The scheme has as one of its fundamental goals the abolition of the adversary process in the context of compensation for personal injury. In that regard the scheme has enjoyed some success.

The State Insurance Office as agent for the Commission never declines a claim. It has no delegated power to do so. Claims not granted are referred to the Commission where they are considered afresh by the Compensation Division. Where a claim is declined and an application for review of a Commission decision is filed the file goes to the Commission's Legal Divison. At that stage the matter is fully investigated again and use is made of the provision in s 151 (1D) which allows the Commission to revise its decision where it "has been made in error, whether by reason of mistake or by reason of false or misleading information having been supplied or by reason of fresh evidence or for any other reason". In practice many applications for review in fact contain fresh information and many decisions are altered in the light of such information. In this way the vast majority of applications for review never need to go to a hearing.

Despite the absence of formal rules a pattern of practice has developed in relation to the hearing of reviews. Hearings begin by the review secretary informally introducing the applicant and his representative to the Hearing Officer. The Hearing Officer then describes the procedures to be followed and endeavours to reassure the applicant that there is nothing to worry about. The formal part of the hearing commences with the taking of evidence on oath. The evidence is recorded by tape recorder. If a solicitor is present then the solicitor is permitted to make an opening address and to take the applicant through his evidence. The Hearing Officer may cross-examine the applicant. The applicant can call any other evidence he wants. The Hearing Officer can receive evidence whether or not the evidence would be admissible in a Court of Law and in practice much documentary evidence is received. All evidence available to the Hearing Officer, including medical reports, must be made available to the applicant by virtue of s 154 (6). Disclosure of the contents

(a) Accident Compensation Amendment Act 1973; Accident Compensation Amendment Act (No 2) 1973; Accident Compensation Amendment Act 1974; Accident Compensation Amendment Act 1975.

(b) Hansen and Franks, "Lawyers and the Accident Compensation Scheme – the Seeds of Destruction" [1973] NZLJ 145.

TABLE 1

CLAIMS, REVIEWS AND APPEALS FOR TWO YEARS ENDING 31 MARCH 1976

Claims made:	235,675	
Claims declined:	784	(first year only)
Applications for review filed (s 153):	1,785	(446 first year)
Heard and decided:	224	
Revised decisions accepted:	453	
Withdrawn:	233	
Not acceptable (where complaining about decision not yet made etc);	141	
Disposed of	1,051	
Appeals to Appeal Authority (s 162):	14	
Appeals heard and decided:	5	
Appeals to Administrative Division of Supreme Court on questions of Law (s 169):	0	

TABLE 2

DECISIONS MADE AVAILABLE TO LAW LIBRARIES
TO 31 MARCH 1976

Subject	*Allowed in whole or in part*	*Declined*	*Total*
Personal injury by accident section 2	19	25	44
Disease arising out of employment section 67	7	16	23
Hernia, section 66	9	3	12
Medical and hospital expenses			
Damage to teeth sections 110-111	26	19	45
Assessment of earnings related compensation sections 103-105, 113	15	15	30
Lump sum compensation sections 119, 120	3	8	11
Compensation for pecuniary loss not relating to earnings section 121	9	6	15
Funeral expenses section 122	-	5	5
Levies, sections 71-83	7	7	14
Death benefits sections 123-125, 133	1	3	4
Miscellaneous	3	-	3
TOTALS	99	107	206

of medical reports can sometimes cause distress and a solicitor should take steps to guard against situations where, for example, his client learns for the first time at a hearing that he has some serious illness. Hearing Officers do not wish to be responsible for conveying that sort of information.

After all the evidence has been received the hearing enters an informal phase. The Hearing Officer discusses the general provisions of the Act in order to ensure that the applicant and his representative appreciate the provisions to be applied to the case. Sometimes previous review decisions are discussed. Difficulties frequently dissolve at this stage when an applicant becomes fully educated concerning the provisions of the Act. The hearing concludes with the Hearing Officer's statement that he will issue a written decision. Where it is considered that the applicant has acted reasonably in applying for review costs can be allowed, and in practice they very frequently are allowed.

It is perhaps sad to report that those lawyers who have been involved with accident compensation have yet to exhibit any great facility with the statute. The legislation is long and involved. It behoves those giving advice pursuant to the statute to become familiar with its terms, including the amendments. It does seem that legal practitioners are too frequently unaware of what the words of the statute actually say. Some practitioners seem bemused by the memory of the common law. Others take the view, erroneously, that the Act implemented the Woodhouse Report in every particular.

Recently the Accident Compensation Commission has made available to Law Libraries throughout New Zealand copies of many of the review decisions made by its nine hearing officers during the first two years of the scheme. These will be added to from time to time. An analysis of those decisions by subject matter shows the areas in the Act where most contention arises. The analysis is set out in Table 2.

The pattern shown in Table 2 will be much altered in the future. Disputes arising from s 120 of the Act are likely to form a much larger part of the reviews in the next year than they have in the past. The Accident Compensation Commission has been making awards under s 120 only since November 1975 although by the beginning of June 1976 more than 4,000 cases had been dealt with. It is estimated that the Commission will need to pass upon about 12,000 cases a year under the provision, which is 50 every working day. And already it is apparent that applications for review for s 120 cases are running at about five percent of decisions made on that provision. With the build up in applications for review it is likely that delays will occur before hearings are held.

II Lump sum compensation

Section 120 allows compensation up to $10,000 for:

(a) loss of amenities or capacity for enjoying life, including loss from disfigurement

(b) pain and mental suffering, including nervous shock and neurosis.

Section 119 provides up to $7,000 for permanent loss or impairment of any bodily function.

The Woodhouse Report of 1967 recommended strongly against the inclusion of lump sum benefits in the scheme except for minor permanent injuries *(c)*. The Report did emphasise, however, that: "We think that the loss of physical capacity by itself, and regardless of its effect upon future earnings, is a factor which deserves to be compensated and compensated by methods which will avoid extravagance and contention" (para 189). The Royal Commission's proposals would have compensated such loss by periodic payment (para 494). But the vision of the pot of gold proved to be entrancing *(d)*. The main proponents of lump sum benefits were the lawyers and trade unionists. In 1970 the Gair Committee recommended that there should be some lump sum compensation for non-economic loss but not in the way now provided for in the Act. Recommendation No 22 of the Gair Committee was:

> "Compensation for non-economic loss should be available in cases of permanent injury only and principally for loss of enjoyment of life from loss of bodily function. Legislation should prescribe the maximum amount of compensation payable under this head for total disablement at a sum of the order of $10,000 or so. There should also be laid down in legislation, a schedule of minimum payments for certain common injuries but the Authority should also be empowered to award such compensation for injuries not covered in the Schedule" *(e)*.

Concerning the precise method of implementing that type of compensation the Gair Committee said the question should be considered by a Medico-Legal Committee, a proposal taken over from a Royal Commission recommendation that such a group should consider a schedule for assessment of permanent partial incapacity.

(c) Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* para 305 (1967).

(d) Mathieson, "Report of the Royal Commission for Personal Injury in New Zealand" (1968) 31 MLR 544 and 546.

(e) G F Gair, et al, *Report of Select Committee on Compensation for Personal Injury in New Zealand* pp 47-48 (1970).

The Bill as introduced in 1971 contained two provisions for the compensation of non-economic loss. The Gair Committee's Report had seemed to suggest only one would be necessary. A number of alterations to the provisions were made by the McLachlan Committee which considered the Bill in 1972 but the substance was not changed *(f)*.

The second of the two provisions is now s 120, the essence of which is as follows:

> "(1) Where a person suffers personal injury by accident in respect of which he has cover under this Act, there may be paid to him by the Commission, in addition to all other compensation and rehabilitation assistance to which he is entitled under this Act, but subject to the provisions of this section, a . . . lump sum by way of compensation of such amount (if any, but not exceeding the maximum amount hereafter specified in this section) as the Commission thinks fit in respect of –
>
> "(a) The loss suffered by the person of amenities or capacity for enjoying life, including loss from disfigurement; and
>
> "(b) Pain and mental suffering, including nervous shock and neurosis;
>
> "Provided that no such compensation shall be payable in respect of that loss, pain, or suffering unless, in the opinion of the Commission, the loss, pain, or suffering (having regard to its nature, intensity, duration, and any other relevant circumstances) has been or is or may become of a sufficient degree to justify payment of compensation under this subsection:
>
> "Provided also that any sum payable under this section shall be paid as soon as practicable after the medical condition of the person is in the opinion of the Commission sufficiently stabilised to enable an assessment to be made for the purposes of this section, or forthwith after the expiration of 2 years from the date of the accident, whichever is the earlier.

Section 119 of the Accident Compensation Act 1972 pays up to $7,000 in a lump sum where "the injury involves the permanent loss or impairment of any bodily function" (s 119 (1)). In determining the amount of the loss deduction must be made for pre-existing loss or impairment. Compensation under s 119 is determined in accordance with the Second Schedule to the Act which lists a large number of anatomical losses and ascribes a percentage each. The compensation to be paid is ascertained by applying the percentage against $7,000. Compensation for those injuries not on the schedule is determined by the relation of the injury suffered to the severity of those which are on the schedule – the familiar quasi-schedule approach of workers' compensation. The Commission is empowered to pay even where the permanent loss or impairment produces no lump sum on a schedule or quasi-schedule basis (s 119 (4)).

What is it that s 119 aims to compensate? A necessary prerequisite is that the loss or impairment be permanent, a feature not repeated in s 120. The test under s 119 is entirely objective – it relates to an assessment based primarily on medical evidence, of degree of loss as measured on the schedule. Age, sex and occupation are all irrelevant. Consciousness or awareness of the loss are not factors to be considered. Loss of bodily function itself appears to be the reason for compensation. A person without use of an arm or a leg is not as other people are and s 119 is a response to that difference.

The interrelationship between ss 119 and 120 is confusing. Together the provisions seem to provide benefits analogous to common law damages for intangibles and lump sum workers' compensation benefits. Section 120 appears to be aimed at the pain and suffering, loss of amenities or capacity to enjoy life and disfigurement. Section 119 bears some resemblance to the scheduling process for lump sums employed under s 17 of the Workers' Compensation Act 1956. But s 119 also appears to compensate elements of the common law loss of faculty or the capacity to enjoy life. It may be that s 119 is meant to deal with the objective elements of loss of amenities or faculty while s 120 addresses itself to the subjective ingredients *(g)*.

A further problem exists in relation to s 120. Should a separate sum be assessed for each of the various elements mentioned or should each case be looked at in the round? The Commission tends to the latter approach and this would appear to be sound. Attempts to assign separate amounts to each of the various elements of s 120 would produce an air of unreality in a field which is already sufficiently difficult.

The non-pecuniary loss elements of common damages have always been notoriously vague. The history of pain and suffering under the law is sketchy. Up until 1763 there appears to be no record of review of damages for pain and suffering and indeed no mention of pain and suffering at all

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(f) Accident Compensation Bill, No 146 – 2 (As reported from the Accident Compensation Bill Select Committee to House of Representatives, 19 September 1972).

(g) See generally, H Luntz, *Assessment of Damages* – 93 et seq (1974).

(h). It does not appear to have been pleaded regularly until the nineteenth century. In 1862 Pollock CB had this to say:

> "A jury most certainly have a right to give compensation for bodily suffering, unintentionally inflicted. But when I was at the bar, I never made a claim in respect of it, for I look on it, not so much as a means of compensating the injured person, as of damaging the opposite party. In my personal judgment, it is an unmanly thing to make such a claim. Such injuries are part of the ills of life, of which every man ought to take his share" *(i)*.

The conceptually inadequate justification for the common law heads of damage for intangible loss has never been overcome and is well illustrated by the per diem argument developed in some American jurisdictions. In front of a jury, using a blackboard, counsel adds up all the hours, days and years his client will suffer pain. He might suggest to the jury a certain sum for each day the pain will be undergone. Using the per diem method astronomical verdicts have been obtained. That has been possible because no adequate conception exists of what it is that pain and suffering compensates and how it can be measured. In our own jurisdiction we have been saved such absurdities only by the moderating influence of the Judges who would interfere with verdicts which were out of all proportion to the circumstances of the case *(j)*.

Although the conceptual underpinning of both ss 119 and 120 appears to be insecure it is plain that compensation under s 119:

(a) is not tailor-made to the individual
(b) is based on objective factors
(c) requires a medical assessment of the loss in terms of the schedule
(d) leaves relatively little room for argument in its application.

Section 120 tends to have the opposite effect. Compensation under the provision must be tailor-made in each case; it is not based on objective facts, as pain and suffering are notoriously subjective. No schedule exists for s 120 factors nor is the construction of one possible. Under s 120 plenty of room exists for argument, contention and appeals. The elusiveness of the common law damage heads mentioned in the section became no clearer by reason of their inclusion in a statute. With s 120 there is no jury to soften the inconsistency of decision; it is hard to see how ascertainable criteria will develop. It may be, however, that in the course of time a sort of tariff will develop which renders s 120 workable.

It is apparent that ss 119 and 120 despite their inter-relationship can work independently of one another. A claimant may suffer permanent loss or impairment of bodily function in terms of s 119 without being eligible for loss of capacity for enjoying life or pain and suffering in terms of s 120. Alternatively, he may suffer pain and suffering in terms of s 120 with no permanent loss of bodily function in terms of s 119. But most cases which fall for consideration under one provision will need to be considered under the other. The statute makes it explicit that no one can secure more than $17,000 total from ss 119 and 120 together. This is so even where the Commission considers pursuant to s 120 (6) that special circumstances exist which would justify increasing the total amount resulting from the application of both sections.

Observers might be pardoned for thinking that ss 119 and 120 together with s 114 provide a regime for compensating permanent partial incapacity which is "a three pronged assessment, alarmingly similar to the common law, about as vague and a good deal less generous than the original proposals" *(k)*. The system is less generous because there can be no continuing periodic benefit unless future economic loss can be demonstrated.

It is submitted that the Act would be sounder and the prospects of extending it to sickness much better if ss 119 and 120 were not in the Act at all. Of course this would entail a quite new approach to permanent partial incapacity, the justification for which will not be argued here *(l)*. Short of deletion it is suggested that ss 119 and 120 should be combined. That could be accomplished by increasing the amount available under s 119 to $17,000 and adapting the schedule to make some allowance for age differentials, disfigurement and neurosis; such a change would allow s 120 to be scrapped.

Since the suggested policy changes are not likely to be adopted soon the practical limitations on the existing provisions will be analysed.

(h) J O'Connell and R J Simon, *Payment for Pain and Suffering* 91 (1972).

(i) *Theobald v Railway Passengers Assurance Co* 26 Eng L and Eq R 438, quoted in I Redfield, *The Law of Railways* 346-47 (18 8).

(j) *Gray v Deakin* [1965] NZLR 234.

(k) G Palmer, "Accidents, Sickness and Compensation: The Direction of Social Welfare in Australia": J O'Connell and R Henderson, *Tort Law, No-Fault and Beyond*, 696 at 703 (1975).

(l) See Report of the National Committee of Inquiry, *Compensation and Rehabilitation in Australia* para 389-401 (1974).

III How to approach ss 119 and 120

Inquiries I have made at the Accident Compensation Commission show that the Commission examines every case under both ss 119 and 120 where any permanent incapacity has been sustained. Where a medical certificate discloses permanent incapacity the State Insurance Office notifies the Commission. Regional Officers carry out checks each quarter. Some cases may slip through this screen and the first step for any practitioner dealing with a lump sum claim would be to discover whether the incapacity has been brought to the Commission's attention. A separate assessment section has been set up within the Commission to deal exclusively with the provisions.

The Commission looks at both ss 119 and 120 together, not in isolation from one another. In other words the amount awarded under one provision takes into account the sum awarded under the other. Under s 120 the average award is around $800; the minimum about $150. Each assessment which is made is reviewed internally before notice in writing is given to the applicant.

Already the Commission has noticed a tendency for people who believe they are eligible for lump sum awards to spend them before they receive them, to have an inflated view of what they will receive and to suffer anxiety about what the amount will be. With the more serious injuries problems emerge, too. Paying a quadriplegic $17,000 six months after he has been hurt can create as many problems as it solves, depending on the circumstances.

The availability of lump sum compensation will have an adverse effect upon rehabilitation until the quantum has been settled. Section 120 compensation must be paid within two years of the accident but s 119 contains no time limit. The Accident Compensation Commission has a number of liaison officers around the country whose main function is to assist with rehabilitation. These officers visit those with permanent impairments and reports are filed which assist in making the final assessments under ss 119 and 120.

When an assessment is made it is conveyed in writing to the applicant. The letter apprises the applicant of his right to have a review and tells him how to go about it. The form of letter for s 120 is set out hereunder:

> "DECISION UNDER SECTION 120
> ACCIDENT COMPENSATION ACT 1972
>
> CLAIMANT:
> CLAIM NO:
> DATE OF ACCIDENT:
>
> "Section 120 of the Act provides for lump sum awards relating to pain, mental suffering, disfigurement, loss of amenities or capacity for enjoying life. The awards are based on the severity and effect of the injury suffered, the maximum payment being $10,000. However, the Commission will only make an award provided that, in the opinion of the Commission the degree of pain, mental suffering, disfigurement, loss of amenities or capacity for enjoying life has been or is or may become of a sufficient degree to justify payment of compensation.
>
> "After giving full consideration to the medical evidence and other information on file, the Commission's decision is that. . . .
>
> "If you disagree with this decision you may apply in writing for a revision or review, under section 153 of the Act. The application must state briefly the grounds upon which it is made. Form C66 (obtainable from any branch of the State Insurance Office, or the Accident Compensation Commission) is available for this purpose. Any such application must be made within one month from the date of the letter attached to this notice, although the Commission may, at its discretion, extend this time limit. If an extension of time is sought, the reasons for seeking such an extension must be given."

The Commission sends a similar letter concerning s 119 decisions.

Members of the legal profession who are asked to advise on lump sum compensation should keep a number of points in mind. Primarily, it should be remembered the common law settlement methods of horse trading characterised by the "make us an offer" approach are contrary to the spirit of the Act and frowned on by the Commission. The Commission is not buying off the threat of a claim as insurers were wont to do. It is making an award of compensation under statutory provisions. Under such a system those who loudly bang the table are entitled to no more than the person who is unrepresented.

Under ss 119 and 120 the amount of compensation is not at large. No one can secure more than $17,000. For claims which arose prior to October 1974 the maximum amount is $12,500. Section 119 is limited to $7,000 and s 120 to $10,000. Common law damages analogies to the assessment under these provisons are not apt because of the way the compensation is divided up between the objective measures of s 119 and the subjective tests of s 120 and because of the upper limits. The Act provides for compensation. The common law provided for damages. The two concepts are different.

Section 120 is subject to further limitations

which distinguish it from the common law. It is provided "that no such compensation shall be payable in respect of that loss, pain or suffering unless, in the opinion of the Commission, the loss, pain, or suffering (having regard to its nature, intensity, duration and any other relevant circumstances) has been or is or may become of a sufficient degree to justify payment under this subjection . . ." (s 20 (1)). Common law damages had no equivalent to that provision. The words place a considerable limitation upon the making of an award under s 120. In particular it would appear that awards for temporary pain and suffering will not be made and that point was explicitly made by the Gair Committee: "In particular, very little weight, if any, should be given to temporary pain and suffering" *(m)*.

The threshold under the proviso to s 120 has been kept relatively high as review decisions summarised below demonstrate.

Review decisions on s 120 as made available to law libraries

Reference: 75/R0396. An 81 year old woman was knocked unconscious in a motor accident. The report from a neurosurgeon showed that she now suffered from headaches aggravated by the accident and she had become nervous and upset. Held, on review, that claimant suffered from significant mental shock bordering on accident neurosis. While there would be no grounds for an award to a younger person in these circumstances she was awarded $350.

74/R00178. Claimant injured in a motor accident and required hospital treatment. No permanent disability was suffered but was nervous as front seat passenger in a car. During treatment, because of internal injuries, she had suffered vomiting and was unable to take pain killing drugs which added to her discomfort. Held, on review, loss, pain or suffering not sufficiently substantial to warrant an award.

74/R00210. A 74 year old pensioner sustained a head injury when struck by a motor cycle. Medical Report showed he had suffered concussion of a moderate degree associated with fractures of the skull. Recovery appeared to be complete. Held, on review, loss, pain or suffering insufficient to justify an award.

74/R00345. Claimant suffered fractured left collar bone, cracked ribs on the right side, a bruised sternum and abrasions to both knees in a motor accident. He suffered pain made worse by coughing; the ribs were painful for about four weeks. There was no permanent disability. Held, on review, loss, pain and suffering insufficient to warrant an award.

74/R00369. The claimant, a 32 year old locomotive maintainer, suffered burns when a drum which had contained a cleaning agent exploded. The burns were to his right axilla (armpit), and some minor burns around the region of his left eye and over his upper face. The Medical Reports showed the burns were not severe but of partial skin thickness only. The burnt area would be sensitive to sunlight. There was no residuum of cosmetic disability. Held, on review, loss, pain and suffering insufficient to warrant an award.

75/R0660 concerned a keen rugby player who had reached the stage of being an All Black trialist and whose leg and ankle injuries made it highly improbable that he would ever regain his previous level of competence at the game, although the orthopaedic specialist was of the view that he could play social rugby and coach quite adequately. Under s 119 the applicant received $200 for loss of bodily function. On review the applicant argued he was entitled to compensation under s 120 for loss of amenities and pain and suffering or capacity for enjoying life. In the reasons for the decision delivered by the Commission declining the claim it was said:

> "I do not think, however, that the words can be read as implying that changes in the way of life on their own should be compensated. For example, men and women reach the stage where they can no longer enjoy the wear and tear of the rugby field or netball court and exchange these pursuits perhaps for golf. I cannot see in the words used any entitlement to compensation because this kind of adjustment is made necessary somewhat earlier than was anticipated. In [the appellant's] case he said at the hearing that he was proceeding overseas in two or three weeks and that he had every intention of both playing and coaching rugby football.
>
> "Even, however, were this not the case, I cannot accept that his enjoyment of life will be impaired because he lost a possible chance of selection as an All Black. The legislation is not designed to reward those who are able to lead perfectly normal, healthy, full and active lives."

It must always be remembered that payment under s 120 is discretionary. It could hardly be anything else since there is no uniquely correct amount to be awarded. It is submitted that it will be difficult to persuade the Appeal Authority to interfere with the exercise of the discretion. That is so whether one approaches the matter from the

(m) G F Gair et al, *Report of Select Committee on Compensation for Personal Injury in New Zealand* pp 48 (1970).

point of view of administrative law or common law damages.

It is suggested that it would be unwise for the Appeal Authority to substitute its own discretion for that of the Commission upon the question of quantum where the discretion has been lawfully exercised under s 120 *(n)*. The Authority will see only isolated claims. And the daily administration of the Commission would be severely taxed were the Authority to approach quantum under s 120 as though it were writing on a clean slate.

Looked at through common law spectacles the Commission's decision on quantum should be at least as hard to impugn as a jury's verdict on damages where in order to be upset the verdict must be "out of all proportion to the circumstances of the case" *(o)*.

From the practical point of view the best chance of increasing the amount of lump sum compensation is to ensure that all relevant facts are brought to the Commission's attention. Where an application for review is filed many cases are revised without a hearing simply because new facts come to light. If your client had a black belt in karate, was a crack tennis player or an underwater fisherman and can no longer engage in these pursuits, that should be brought to the attention of the Commission. It should not be assumed that because the State Insurance Office has been made aware of the facts that the Commission knows about them.

There is no point in pressing for a decision under s 120 too soon. The award is to be paid as soon as practicable after the medical condition of the claimant has "sufficiently stabilised to enable an assessment to be made" or "after the expiration of two years from the date of the accident, whichever is the earlier" (s 120 (1)).

In applying ss 119 and 120 to old people and to children special difficulties arise. Under s 119 the applicant should get the same amount whether aged 8 to 80. In the case of old people, however, pre-existing limitations of movement resulting from general degeneration may make the assessment under s 119 hard to make. The section requires that "deduction shall be made in respect of any demonstrable, pre-existing, related, permanent loss or impairment of that bodily function which can be established by the Commission". The drastic effects of injuries on very old people might justify a higher payment under s 120 than a child would receive for the same injury. On the other hand the old person has not so long to live to endure the condition.

No time limit within which assessments must be made exists for s 119. That fact makes the assessment of children under the provision rather easier since it is possible to wait and see whether the child can grow out of some of the consequences of the injury. Such waiting is not permitted under s 120. In regard to very young children who suffer burns or pelvic injuries it may well be impossible to know the permanent consequences of the injury within two years. It should be noted that payments to minors and persons under a disability are regulated by s 126. Substantial ss 119 and 120 payments for children usually go to the Public Trustee (s 126 (4)). And remember the usual limitation period within which claims must be made under s 149 is 12 months after the date of the accident. That provision makes it important to act quickly to protect the rights of children (s 149).

(n) SA de Smith, *Judicial Review of Administrative Action* 246 (1973). K J Keith, "Appeals from Administrative Tribunals" 5 VUWLR 123 (1968-1970).

(o) *Gray v Deakin* [1965] NZLR 234 at 242. The New Zealand cases are collected at W Sim, *Practice and Procedure* 203-206 (Vol 1, 1972).

The judicial task – "We are dealing with people, and with rights of people and what after all, is the fundamental purpose of all these legal systems; is it not to bring order and fair dealing into society, invest business with a measure of decency, to interpose barriers against deceit, plunder and oppression, and at the same time to guard against arbitrary conduct on the part of government officials." Judge Simon Sobeloff, *Law & Society* Vol 6 No 3, p 347.

Thumbs down again – Not for the first time, I fell to wondering recently why it is that so many politicians, sociologists and others appear to hate lawyers. The reason, I concluded, was that so far as some of them are concerned, the lawyer poses a threat to the carrying into action by one or some of them of their individual or collective political or other worldly aspirations or intentions. Like Humpty Dumpty, many MPs and others hungry for political, industrial or commercial power, including bureaucrats and some trade unionists, want words to mean just what they want them to mean. It is manifestly inconvenient to such MPs and their imitators outside the House of Commons to have interfering lawyers, daring to be independent, protecting the public or individuals by insisting upon a proper interpretation and implementation of statute and common law. Hatred, it has been said, arises from fear. The ambitious who care not for the rights of the small man fear the lawyer. – *Solicitors Journal.*

SIR THADDEUS McCARTHY RETIRES

On 19 May 1976 a large gathering of practitioners assembled in the Court of Appeal to mark the last occasion on which the Rt Hon Sir Thaddeus McCarthy would sit as President of the Court of Appeal and to mark his retirement from the Bench.

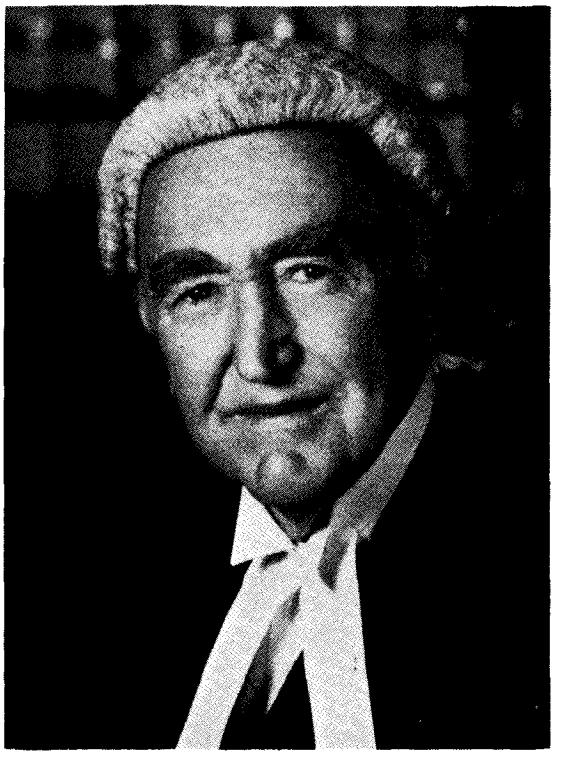
On behalf of the Attorney-General, Government, and the profession generally the Solicitor-General Mr R C Savage QC paid tribute to the distinguished services Sir Thaddeus had rendered to his country and especially over his 19 years as a Judge. Thirteen of those years were served as a member of the Court of Appeal and for the last three he had been its President.

He continued: "My learned friends from the Law Societies will, I have no doubt, speak of your career while in practice, and your services to the profession and the warmth of personal regard in which you are held by us all. Let me say something of your work and service since your appointment to the Bench.

"Throughout your term as a Judge, both in the Supreme Court and the Court of Appeal, two qualities in particular have been apparent. First your capacity as a lawyer's lawyer. Perhaps this is not surprising for your Honour was a distinguished student and gained the degree of Master of Laws with first class honours from Victoria University. At all events your Honour's judgments, of which there are fortunately many in the law reports, are a permanent record of the contribution you have made to the development of the law of this country. Secondly, the soundness and practicality of your judgment upon men and affairs; and it may be added that always there was to be seen shining through your decisions a very deep sense of compassion for the less fortunate of our fellows and a wish that the working of the law should be seen by everyone to accord with common sense

"When your immediate predecessor, Sir Alexander Turner, retired he expressed the view that the standing and reputation of the Court of Appeal, both inside New Zealand and outside it, was high and secure. It can be said with confidence that during these last three years under your Presidency that reputation has been preserved and strengthened so that today the Court of Appeal of New Zealand is to be counted among the great appellate Courts of the common law world.

"Your Honour sat for a period on two occasions as a member of the Judicial Committee



Sir Thaddeus McCarthy

of the Privy Council. Your views as to the continuance of that Court as the final appellate Court for New Zealand are not unknown – and are perhaps not universally shared – but your contribution to its work cannot be gainsaid. Amongst other cases your Honour played a notable part in the formulation of the final judgment in the Admiralty case of the 'Philippine Admiral' which made a radical and generally welcomed change to the law in relation to State immunity over ships engaged in international trade so as to make it compatible with modern concepts of commercial practice.

"However, it has not been only upon the Bench that your abilities have been of service to this country. There have been many fields. As Chairman of the Rules Committee from 1969 to 1974 your Honour initiated a complete revision of the Code of Civil Procedure – a task which now seems to be approaching fruition. Your Honour has served as Chairman of several Royal

Commissions on matters of great importance. Your reports have left a lasting impact upon the organisation and administration of the State Services, racing and, perhaps even closer to your heart, the development of the system of social welfare in this country. Your chairmanship of the Churchill Trust for several years is another illustration of your service to your fellow men.

"You have retained your affection for the land, springing no doubt from your early days of working in the green hills of Hawke's Bay and which has carried through to the large tracts of Molesworth Station. I have no doubt that those days of mustering played an important part in absorbing some of your restless energy and in your notable understanding of the ordinary man.

"The time has come to say farewell to you as President of the Court of Appeal and we do so with sincere respect and real gratitude for your great service over many years. On behalf of the Government I record its grateful appreciation. Maybe it will have reason to be grateful to you for other services in the future. Your approach to life is, as your career has shown and we know, one of energy, hard work, determination and constant striving" He concluded by wishing Sir Thaddeus and Lady McCarthy a satisfying and contented future.

Both the President of the New Zealand Law Society Mr L J Castle and the President of the Wellington District Law Society Mr P T Young welcomed the opportunity to pay tribute to Sir Thaddeus's lifetime of unswerving service to the law. Mr Castle recalled the occasion of Sir Thaddeus's appointment to the Bench when it was said: " 'Coming at a time when the judiciary has shared with the legal profession dismay and apprehension at delay in hearings and judgments, your appointment must inevitably strengthen the Bench by adding to its number one whose age is ideal for the work and who possesses a well deserved reputation for versatility, common sense, humanity, scholarship and outstanding industry.' That prophecy has been fulfilled in abundant measure; that you have steadfastly maintained the traditions of your high offices is beyond question. In applauding your public services, we warmly acknowledge your devotion to duty, your outstanding industry and abilities – all of which attributes have ensured that you have lived a full and, one hopes, a rewarding life."

Mr Young noted that "Wellington has been the main scene of your Honour's working life as a student, a law clerk, a young practitioner, a partner in one of our leading law firms, a member of our District Law Society Council and as a Judge. Your Honour was one of the first group of those appointed to the Supreme Court Bench who had not been an adult in 1914 and who could not, therefore, take for granted the traditions and seemingly immutable values of the 19th century. However, the years of the twenties, of depression in the thirties and of the second World War in the forties, in which your Honour served with distinction, were testing ones so that your Honour brought to the Bench in the 1950s as strong a moral sense and as great a wisdom as your predecessors.

"I am sure that your Honour's many interests, which have never been limited to the law and have embraced interests in commerce, in farming, in national parks, in sport, in our society's well-being and in human activity generally, will ensure that your retirement is an active and happy one."

Both wished Sir Thaddeus and Lady McCarthy well in retirement.

In reply Sir Thaddeus said: "It is fitting that I first express my gratitude to the Attorney-General for his wish to be here today, to you Mr Solicitor, you Mr President of the New Zealand Law Society and you Mr President of the Wellington District Law Society and all my friends from the profession who have paid me the courtesy of your presence. I am delighted to see the Secretary for Justice present. It is difficult without revealing unbecoming emotion to tell you how touched I am by your giving of valuable time and by the kindly extravagances which you Mr Solicitor and the other speakers have spoken about me.

"I have had a full life in the law, and I have loved it. Whilst coming in on my left ear have always been the insistent whisperings of the outdoors, I have been captivated by the majesty of the law and its purpose. I am grateful that I have been able to give my life to it, and for the doors it has opened and the honours it has brought. It has given me a grand, vibrant life; one of crowded days, of the excitements of endeavour, and of the discipline of work without which life has no salt.

"But especially I have affection for the men of the law, for as I have said to you on other occasions, I believe that the professional lawyer is the finest adjustment of intelligence and experience. He is so often the complete man, not the removed critical academic, but the man of action after thought. His mind is conditioned by the experiences of living, by knowledge of the frailties of human nature, and by certainty that man never has been and never will be, a perfectly logical being; but withal he knows that man is the object of our labours. The lawyer whom I admire recognises that the great function of the law is not the building of strange castles for people who do not exist, but rather labouring amongst those who do exist in order to meet their problems and to serve them. And there is something more. As Lord

Hailsham wrote recently, 'The advocate who sees many cases has his sense of justice acutely developed. He is slow to condemn the sinner. But he comes to love righteousness and hate iniquity'. Of course, we have had our tragic departures from grace among our brethren – indeed, far too many of them. But the public knows little of the desire for justice which drives most of you.

"Why then, you will ask, do I, while still comparatively vigorous, as I hope, leave the Bench. There is seldom any one single reason for important decisions in life. Let me tell you some of mine. One product of the highly developed critical faculty of lawyers is that one does not sit in these seats without learning quickly about one's faults. It may be possible to do so, but I would think it difficult. I know your views about my impatience and my intolerances, and you have been right. This is the day of apology. But I have tried, always, to avoid being a hypocrite. Hypocrisy is a dangerous temptation for all who occupy high office. I do not intend to be a hypocrite today. So I admit quite frankly that great as has been my affection for our life, I have never believed that it encompasses the whole sweep of human endeavour and human thought; that the corpus of knowledge is to be found within the covers of the Code. Lord Radcliffe put what I am trying to say so much more gracefully, as one would expect, in an address to the Harvard Law School in 1967. He said:

> " 'Law indeed is not a thing which men can love as they love their country or their familiar surroundings or poetry or the faces of those who are dear to them; yet in the last resort it holds their respect and their allegiance. Two things have been the foundation of their loyalty: the long persistence of its general course and a belief that there is an honest desire in those who play their different parts in its administration that the scales of justice should be held by an impartial hand. These do not make a record of spectacular achievement, it may be; but they have played no small part in the unending struggle in which men have erected upon the basic anarchy of things the frail edifice of civilization.'

"Great as has been my respect and allegiance to the law I have not been able to give it my total and undivided attention. Sometimes I have envied those who could. For me there has always been some other task to be undertaken, some further hill to be climbed, some fresh sea to be sailed. I have seen life as a many splendoured thing. In short, I have been a restless mover, and anyone with that defect inherent in him, finds the daily pressures of listening and writing explanatory judgments an increasingly heavy burden. I once asked Lord Devlin, whom I am sure you consider one of the great common lawyers of this century, why he retired at a comparatively early age from the Lords. He said because he had wearied of legal disputation. I admit that I, too, have reached the point where sometimes I have wearied. It is now over 51 years since I commenced work in a law office. I have lived through the rather traumatic experiences of the depression of the 1930s, and the War. I have been a Judge over 19 years – I think the Attorney-General understated the period the other day – and I have been sitting in this Court for over 13 years. I can tell you that 13 years in this place is quite a lot. Appeal work is arduous work. It requires constant concentration and few of our problems are easy ones. There are so many other things that I must do, while there is yet time. The Book of Job reminds us that at my age the years move with the speed of the shuttle on the weaver's loom.

"How do I see the work of the Court over the last three years. It is impossible to be objective in areas of deep personal concern and involvement. I think we can say that we have certainly improved the efficiency of the Court's procedures. Chief among the measures introduced were the obligations to file particulars of grounds of appeal and, at the hearing, to put in a precis of argument. When I suggested to some Judges that I thought these steps desirable, I was told that the Bar would never accept change. But on the contrary, when I raised it with a committee of the Law Society, I found that they readily agreed and proved extraordinarily co-operative. I do not accept that lawyers are inevitably obstructive reactionaries. I have no doubt at all that from our point of view these amendments to the procedures have been a marked step forward. I am gratified that most counsel who regularly appear in this Court thoroughly approve of the changes. The times consumed in the hearing of appeals have been materially reduced by these steps but this has, of course, had the result that because we have been able to hear more appeals during our sitting days, we have more judgments to write afterwards; the pressures have built up at that end. We have managed to keep the lists up to date. I know that some of you have felt that I have been over-insistent on appeals being brought to a hearing without delay. The result is however that there is really no backlog at all at the moment. I wonder how many senior appellate Courts in the Commonwealth can say that? But the pace at which we have been required to work to meet the legitimate demands of those seeking the help of the Court has, in my respectful view, been undesirable in a Court whose situation and

function demands a reflective, considered approach to its work, and it has placed unreasonable demands on the health of men, who up till now at least, have been past the flush of youth.

"But quality and not quantity should be the aim of the highest Court in the land, and I must be honest and say that I have suspected that the quality of our work has not always reached the levels I had hoped for. This has been so, mainly, when the Court has been over-committed and has, I'm sure, been contributed to by what has been a constant change in personnel. In the three years that I have sat in the Presidential chair, the permanent members of the Court were able to sit together for only 4½ months. Such a state of affairs I submit was never contemplated when this Court was established. However that may be, our work is still highly regarded by the Privy Council. I have good reason to know that that is so. True, we have had one or two much publicised reverses of recent times. In the unhappy case of Nakhla we at this level thought that we were bound by earlier decisions of this Court. The Privy Council was, of course, free to take a different line. Lord Morris of Borth-y-Gest who wrote the judgment of the Board, had since made all that perfectly clear. Then, in Europa, I would think that there can be little doubt that the Board came to a somewhat belated view that we were right on the first, the earlier, appeal, though for obvious reasons they did not find it necessary to say so. Apart from these two causes celebre, the pattern of results (reverses and upholdings) has I think been very much as before.

"You will, I am sure, rejoice with me that we have been able to get the building of the new Court in Molesworth Street under way. Those of you who appear here know what physical and mental strains have been imposed by our working conditions. It is hoped that the new building will be completed about the end of 1977. We had quite a tussle to get it started, and I think it proper that I should acknowledge the support I received when I appeared before the Cabinet Committee from the members of the previous Government and especially from the then Minister of Finance, Mr Tizard.

"In common with most of you I am disappointed at the postponement of the proposed inquiry into the structure of the judicial system, acknowledging at the same time my recognition of the Attorney-General's attempts to have it undertaken without delay. Without any possible doubt the Judges, and the Magistrates, are over-strained and disturbed. There are many reasons for this. It has happened, as I was bold enough, when speaking to the Wellington Society 12 years ago, to forecast that it would, that the climate of universal and uncritical approval of our judicial system has disappeared and one of questioning and criticism has arrived. We now have, as the Attorney-General put it recently, a 'testing phase'. Life as a Judge is, frankly, not as undisturbed, nor do I think as pleasant, as it was years ago. Too much to do, too little time and, I fear, too, inadequate rewards for the great pressures carried. However the Judiciary does not have rolling strikes, or even stop-work meetings, and priorities in politics are largely determined by pressures. But what is more important in any society than the health of its administration of justice? I suggest that there may be nothing – neither the nation's wealth, nor its physical health, nor education or other welfare services, for in the end the coherence of any free society largely depends upon the quality of its law and the way it is administered.

"But I must be fair about this and concede that I find it difficult to believe that the problems which beset us will be solved by a compressed hearing and a quick report. I think that the Attorney-General put the matter excellently the other day when he said that what is needed is a deep and patient inquiry. For myself I would think that much more is involved than the contested issue of inserting another floor in the structure of the Courts. We have had that structure a long time, certainly since the Judicature Act of 1873, though its origins reach back long before that, and the question which is being asked in many countries where the common law has been adopted is whether its historical forms are sufficient in the highly mechanised mobile civilization which the Western world has produced. What is done now will fix the form of our administration of justice for a long while to come. The Attorney-General in his pronouncement said from 50 to 100 years. Certainly for your lives and those of your sons. Of course, one can draw judicial structures on paper with ease. Holmes used to say that 'paper is kind and patient: one can write any damned thing on it'. But in the end the administration of law, like all administration, is not essentially a matter of drawing plans and issuing memoranda, the art of it is securing the right pegs to put in the right holes and then putting them there. This you may think may also involve factors such as, methods of appointment, terms of office, remuneration, age of retirement, superannuation and the indefinable attraction which we call status. Moreover, there is a tendency for us – you and me – to live with our heads sometimes in a cloud of professional legal considerations. How easy it is for us to forget that justice is administered for the people. So the people must be heard, as well as the Judges, as well

as the profession. In short, I accept the Attorney-General's view of the type of inquiry required, and I support his urging for an early commencement of it. From my experiences of Royal Commissions and of the inevitable subsequent investigations of the report by Departmental and Parliamentary Committees before legislation is enacted, I have some doubts, in view of the postponement, whether any remedial legislation will be passed in this parliamentary term, that is within the three years of this administration unless no time is lost.

"I move on to another subject, the retention of the right to appeal to the Privy Council. Now that Malaysia has also, in the last month or so, cancelled its rights of appeal to the Board, there are – I think I am right in this – only New Zealand, Singapore, West Indies, some Crown colonies and the Australian States (not the Commonwealth) that retain theirs. Gone are all the great components of the British Commonwealth. This and the increasing flow of the 'incoming tide' as Lord Denning put it, into the United Kingdom of the legal as well as the political and economic effects of the EEC Treaty, must lead to a review of our link before long. When I was interviewed recently by a journalist from the *Evening Post*, I tried to be careful about this subject, and to make it abundantly clear that there were advantages and disadvantages in the current situation, and that I was not urging abolition, but stressing the inevitability of change. He accurately reported our conversation, and I am grateful to him; but by the time the story of my retirement was translated into other papers in other cities, I had become, it rather seemed, a rigid advocate of immediate cancellation. I am far from rigid in my views. The arguments for retention of the link as long as we can are of course powerful: the existence of a Court of superb intellects at no cost to the New Zealand taxpayer, and the benefits which come from an extra stratum in an appellate composition. Against this there is what the grand New Zealander, Sir David Smith, has described as the demeaning of our sovereignty, and then there are the difficulties their Lordships have in understanding the backgrounds to New Zealand cases, our social philosophies, our ways of life generally, sometimes even our language. Lastly there is what I think is the most important aspect of all – the heart of the matter – and that is the inhibitions which, in my experience of over 13 years in this Court, this right of appeal to the Board places on the capacity of this Court to develop our case law in a way which best suits New Zealand and the New Zealand way of life. This effect is strikingly apparent when the Board deals with statutes which have no counterparts in England and around which settled practices have developed in this country over a period of years. But it is by no means confined to these. Don't believe if you are told that this is not so.

"As I have indicated there is no doubt in my mind that it is only a matter of time when the link with the Privy Council will go, not necessarily, of course, in the immediate future. I have no doubt at all that we in this country have enough legal talent to handle our own judicial system entirely without resort to overseas aid. I know that this opinion is shared by my two predecessors in office. But, of course, whether the link should be broken, and if so when, are in the ultimate political questions. And especially as our Queen is now the Queen of New Zealand and not merely the Queen of England, no question of disloyalty to our connections with the Crown can possibly arise: not that I accept that they ever did in this issue. All that I ask now is that we do ponder the issue objectively, at an appropriate time, and that we remember constantly that if we do abandon this right of appeal, we will need to have here a Court of five, and that calls for at least six Judges to service it. This should be, and probably is, remembered when appointments are being made to the Supreme Court.

"And now gentlemen, that is very nearly all I have to say to you. We of the Court that sat here so long, Sir Alfred North, Sir Alexander Turner and I, have run our race. I am vain enough to think that that was a good Court. An entirely new generation now takes over. I have no hesitation at all about the capacity of the later appointments to do as well. I hand over to Sir Clifford Richmond in a spirit of full confidence, and I wish him the same warm support as you have always given me. I acknowledge my debt to him and indeed, to all the Judges with whom I have been associated over my years on the Bench – they have been encouraging and understanding of the difficulties inherent in fulfilling the office of a Judge of this Court, and especially that of its President, with resolution and objectivity. I acknowledge, too, my debt to the Registrars and their staffs who have sustained me by their help and have met my impatience with patience. Lastly, but above all, I acknowledge my enormous debt to my associate Miss Gwen Fraser. Since the day I was first appointed to the Supreme Court in February 1957 she has looked after me continuously, whether I have been in the Courts or away on Commissions – looked after me selflessly, ably, and, I think, with some affection. You, all who practise in the Courts, know what a treasure she is, and how lucky I have been; but you don't know that half as well as I do.

"You have listened to me long enough. Now comes the rather sad moment of farewell. I am

acutely conscious, notwithstanding what you may say in your kindness, that when I walk out of here a great door clangs behind, cutting me off from my profession, in a great variety of ways. Someone wrote that there is nothing so stale as yesterday's cheers. Above all I am grateful for your friendship, your tolerance and your courtesy. Throughout the whole of my 19 years of judicial life only on one much to be regretted occasion have I ever had anything other than exquisite courtesy from my profession. That has meant more to me than you can imagine. I hope that I will not lose you entirely. I would like those of you who have known me, struggled with me at the Bar, and later put up with me on the Bench, to remember that there is always a place for you at my board and around my hearth.

"I would now like to follow the tradition of coming down from the Bench and saying goodbye to each of you individually" which he then did.

THE AMERICAN DEATH PENALTY CASES: GREGG v GEORGIA

By WILLIAM C HODGE, *Senior Lecturer Auckland University*

If Olympic gold medals were awarded for judicial gymnastics, the US Supreme Court would outscore even Nadia Comaneci with its back-twisting double somersault in the recently decided death penalty cases. The decision in *Gregg v Georgia*, announced on 2 July 1976, effectively reverses *Furman v Georgia (a)*, the 1972 decision which struck down as unconstitutional the death penalty laws of some 28 states.

The *Furman* decision was the culmination and apparent seal of victory on a long legal struggle which aimed at completely eliminating capital punishment from American statutes; the *Gregg* decision only four years later is the apogee of a backlash which has swept at least 35 state legislatures and the federal congress since 1972 *(b)*. With hindsight, it could be argued that proponents of capital punishment were galvanished into action by the Court in *Furman*; without that federal decision, state legislatures might have gradually and democratically repealed their death penalties in their own good time. The merits and morality, or otherwise, of the death penalty were frequently overlooked in a debate over "who shall control our criminal law: nine old men in Washington, or the democratically elected representatives of the people of this state".

Use of the death penalty had been clearly *withering away for some time before Furman*. In 1935, there were 199 executions in the 48 American states. In 1950 there were 82, and in 1955 the number was 76. By 1965 there were only 7 executions in the entire country, in 1966 there was only 1, and there were 2 in 1967. *There has not been a single execution since 1967 in any state of the United States.*

Furman v Georgia, after years of legal delays, struck down the capital punishment laws of the 28 states which still had such laws by a five to four decision. The dissenting block of Mr Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist argued that, however repugnant and morally distasteful capital punishment might be, the Supreme Court should not overturn 200 years of American legal practice by judicial fiat. Such moral decisions were for the state legislators, not federal Judges, argued the four-man dissent.

The five-man majority was split into two distinct blocks: Marshall and Brennan JJ held that death was, per se, "cruel and unusual" and thus constitutionally prohibited by the Eighth Amendment to the Constitution, and Douglas, Stewart, and White JJ held only that the laws in question *as administered and applied* were cruel and unusual. The latter group of three expressly stated that they did not need to reach the question of whether death, per se, was unconstitutional; they found that with excessive discretion given to Judges and juries, death, as a penalty, was administered almost exclusively against the poor, the young, the ignorant – and dark-skinned people. The death penalty, they held, was applied in a manner which could only be described as "capricious", "arbitrary", "freakish", and as rational a death as being struck by lightning.

With almost indecent haste, some 36 states, and the Federal Government, then rushed through their legislatures amended capital punishment laws. President Nixon signed the congressional death penalty provision for causing a death by an aerial hijacking, and Jimmie Carter, then Governor

(a) 408 US 238, 33 L Ed 346 (1972).

(b) These are the states which did *not* pass a death penalty law after 1972 (Illinois did pass such a law but it was declared invalid by the Supreme Court of that State): Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Oregon, South Dakota, Vermont, West Virginia, Wisconsin.

of Georgia, signed the law of the state which was soon to provide the test case.

The death rows of 30 states enjoyed – or suffered – a population boom, and 611 persons were awaiting execution, pending legal appeals to the Supreme Court: 312 black males, 267 white males, 17 Mexican-American males, 5 Indian males, 1 Puerto-Rican male, 5 black females and 4 white females. In the meantime, Mr Justice Douglas had retired and was replaced by Mr Justice Stevens.

Five test cases were brought to the Supreme Court, directly representing 313 prisoners in 5 states and indirectly representing the remaining 298 prisoners in the other 25 states. The decisions in *Gregg v Georgia*, *Proffitt v Florida* and *Jurek v Texas*, upholding the death penalty laws in those states, were all seven to two decisions with only Marshall and Brennan JJ in dissent. The dissenting justices maintained their opposition to death, per se, but the seven-man majority found that the statutes of Georgia, Florida, and Texas were in no way "cruel and unusual". The majority noted that juries could no longer wantonly or freakishly impose or not impose the death penalty. The new Georgia sentencing procedures, in contrast with the law in the *Furman* case, require the jury to focus on the particularised nature of the crime and the characteristics of the defendant. The jury must find and identify at least one statutory aggravating factor before it can impose a sentence of death.

Ironically, the Court found the statutes in two cases – *Woodson v North Carolina* and *Roberts v Louisiana*, unconstitutional because the state made death a mandatory punishment for premeditated murder, allowing no clemency for particular circumstances.

Although there is no immediate prospect that America's third century will commence with an orgy of official electrocutions, gassings, and hangings (further legal appeals will undoubtedly delay the actual executions), it should be noted that the Governors of both Texas and Florida have indicated that they will sign the death warrants. And the District Attorney from Georgia said he was "esctatic" with the decision *(c)*.

(c) *New York Times*, 3 July 1976, p 7.

LEGAL RESEARCH FOUNDATION INC PRIZE

The 1975 Prize has been awarded to Mrs Marion Farmer of Auckland for her paper, "Equitable Protection of Interests in the Company".

For those wishing to submit a paper for the 1976 prize the regulations relating to it are as follows:

(1) The Legal Research Foundation Incorporated Prize shall be awarded annually for the best unpublished paper involving substantial research in a legal topic written in New Zealand.

(2) The Prize shall be of an annual value of two hundred dollars ($200).

(3) Papers submitted for the Prize shall not exceed 15,000 words.

(4) Though the Foundation's intention is to encourage research that would not otherwise have been undertaken, papers submitted in partial or full compliance with the requirements of any degree or diploma course at any university or tertiary education institution shall not be excluded from consideration for the Prize.

(5) The Foundation reserves the right in any year to define the subject or subjects of the papers to be submitted for the Prize.

(6) The Prize shall be awarded by the Council of the Legal Research Foundation Inc after recommendation of a panel of three assessors appointed by the Council to examine the entries.

(7) The Council may decline to award the Prize in any year if in its opinion there is no paper considered worthy of the Prize. An additional Prize may in such event be awarded in a subsequent year.

(8) Persons wishing to be considered for the Prize should forward three copies of the paper to the Secretary of the Legal Research Foundation Inc, C/- Faculty of Law, University of Auckland, Private Bag, Auckland. The Foundation will endeavour to return such papers after the award has been announced.

(9) Closing date for entries is 1 December each year.

(10) It is a condition of entry for the Prize that the Foundation may in appropriate cases publish the prizewinning entry or any other entry as an Occasional Paper or otherwise.

(No specific subject has been prescribed for 1976.)

FAMILY LAW

ENTICEMENT OF A SPOUSE: A REVIVAL?

Enticement was the tort of, without lawful justification, inducing a wife to leave or remain away from her husband against his will *(a)*. In England the tort has been abolished by the Law Reform (Miscellaneous provisions) Act 1970. In New Zealand the Domestic Actions Act 1975 (hereinafter "the Act") abolished enticement of children as a tort, but declared that enticement of a spouse was still a valid cause of action.

Historically, enticement of a spouse was based on the right which a husband had to the services of his wife. Accordingly it was unclear whether the action lay at the suit of a wife whose husband had been enticed away. This doubt is resolved by s 3 (5) of the Act which provides "for the avoidance of doubt it is hereby declared that an action for enticement may be brought by either a husband or a wife".

Section 3 (1) provides: "In this section 'action for enticement' means the action in tort that lies against a person who has induced the plaintiff's spouse to leave the plaintiff". It is no longer necessary to prove that the plaintiffs spouse was in the service of the plaintiff (s 3 (2)) and the action cannot succeed unless it is shown that the plaintiff has suffered a loss of consortium by reason of the plaintiff's inducement (s 3 (3)).

In what was apparently the first reported decision in New Zealand on the question of enticement, the Chief Justice considered the tort in *Spencer v Relph* [1969] NZLR 237. He held that the cause of action, though not common, existed in New Zealand. On the facts he was not prepared to hold that there had been enticement but said "The essence of the action is persuasion or inducement to depart from the home so that the husband loses the consortium and services of his wife. Evidence of adultery is neither necessary for the success of the action . . . nor in itself sufficient to establish the cause of action . . . The question whether what was done amounted to advice or persuasion is one of degree, the test being whether the wife would have left but for the interference of the defendant."

The plaintiff also claimed against the defendant for harbouring his wife. As the tort of harbouring has been abolished by the Act (s 4) we need not consider that aspect of the case.

The plaintiff appealed to the Court of Appeal [1969] NZLR 713. On the facts the Court of Appeal refused to reverse the finding of the Chief Justice that there was no enticement – he had had the advantage of seeing the witnesses. McCarthy J (as he then was) discussed the question of what sort of action would amount to enticement and suggested "whether there was enticement in this present case is a question of fact and degree to be determined in the light of the increasingly relaxed codes of association between married people of different sexes which exist today in this country and in so many others. Whilst the legal test in terms of definition may not have altered, criteria of conduct have" (p 732).

This suggestion has found a home in the Act, s 3 (4) of which provides "In an action for enticement damages may be recovered only for loss of consortium and any loss of services resulting from the defendant's inducement; and in the assessment of damages (if any) which may be awarded all relevant aspects of the relationship between the plaintiff and the plaintiff's spouse and all the relevant circumstances of the inducement shall be taken into account".

The provisions of the Act, and the remarks of the Court of Appeal raise several topics for discussion. First, the question of damages for adultery. The Chief Justice, and the members of the Court of Appeal, commented on the fact that it would have been open to the plaintiff to have commenced divorce proceedings and claimed damages for adultery. The inference to be drawn from their remarks is that usually they would regard that as the appropriate proceedure.

Similar comments were made by the Torts and General Law Reform Committee in its report on miscellaneous actions. They recognised that a situation could arise in which the action for divorce was not open or appropriate, and that it might thus be proper to bring an action for enticement.

Much of the force of these adverse comments on the invocation of enticement has been removed by s 2 of the Act, which repeals Part V of the Matrimonial Proceedings Act 1963. It is no longer open to a plaintiff spouse to claim damages for adultery, or to have costs awarded against the co-respondent.

The result of the repeal of Part V of the Matrimonial Proceedings Act is obviously to produce a situation in which there is no longer any

(a) Salmond Law of Torts (16th ed) 363.

point in joining a co-respondent at all. As a matter of policy, since enticement is only available where a spouse is persuaded away from the marriage, and would not otherwise have left, the damages for enticement are available in the one situation where the Courts seemed prepared to award damages for adultery.

As the enticement claim can be brought in the Magistrate's Court it will provide a cheap and simple method of getting a contribution to the costs of the plaintiff spouse in a divorce which is proceeding at the same time. As the only remaining method of getting such a contribution, albeit an indirect one, the action is likely to become very popular with the domestic practitioner.

It ought to be observed however that whereas under Part V the damages could be applied for the benefit of children, the tort damages go to the wronged spouse absolutely and the Court cannot direct otherwise. Also, legal aid is not available to assist the plaintiff in an enticement action. See s 6 (5) of the Act and s 15 (2) (d) of the Legal Aid Act 1969.

The second matter is the reference to damages being recoverable "only" for loss of consortium and loss of services. In tort generally, consequential loss is usually recoverable, and where the essence of the particular tort is a *knowing* interference with the right to consortium it seems odd that consequential loss should be excluded.

In the example given above the husband had an evening job as a taxi driver. After his wife's enticement he had to give up this secondary employment in order to run the home and look after the children. The claim for enticement did not plead the loss of the secondary income ($60 per week) as a consequential loss, but there seems to be no good reason in principle, why it should not have been advanced. The words of s 3 (4) may yet prove not to be wide enough to exclude consequential loss.

The facts of the example raise a third point. The wife returned after 18 months and the parties were reconciled. There is a suggestion in the Torts and General Law Reform Committee Report that "The enticement must result in a continuing loss of consortium by the plaintiff. It is not enough to show that the wife committed adultery, or went to stay temporarily with another man, if she has not given up cohabitation with her husband".

Whether there is a loss of consortium is naturally a question of fact in each case. Where the husband and wife are later reconciled that will of course be a factor to be taken into account, but even a short separation may result in a loss of consortium.

Obviously where the enticed spouse returns, the plaintiff's argument that "they would not have left but for the enticement" is somewhat stronger. Where the enticed spouse has left the enticer but not been reunited there may be two possibilities. First, that they now feel they cannot live with the plaintiff any longer, but at the time of the alleged persuasion, they could have (which is a weak argument); or secondly, that the plaintiff will not now have them back, which is a somewhat stronger position for the plaintiff.

DOUG WILSON

Christianity and the law – Lastly, there is the relationship between religion and law. "The phrase 'Christianity is part of the law of England' is really not law; it is rhetoric, as truly as was Erskine's peroration when prosecuting Williams: 'No man can be expected to be faithful to the authority of man, who revolts against the Government of God.' ... Best CJ once said in *Bird v Holbrook* (a case of injury by setting a spring-gun): 'There is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England'; but this was rhetoric too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament. 'Thou shalt not steal' is part of our law. 'Thou shalt not commit adultery' is part of our law, but another part. 'Thou shalt love thy neighbour as thyself' is not part of our law at all." Lord Cranworth, while at the Bar, had disposed of the doctrine in a sentence. "Were you ever employed," he asked a companion, "to draw an indictment against a man for not loving his neighbour as himself?"

Indeed, the law is not always happy in its contacts with the churches. In one most celebrated case, the House of Lords, by a majority of five to two, held that the Free Church of Scotland was not entitled to change certain fundamental doctrines, so that the very small dissident minority of the Free Church was entitled to the Church's substantial assets. Of this, Maitland said "I cannot think that ... it was a brilliant day in our legal annals when the affairs of the Free Church of Scotland were brought before the House of Lords, and the dead hand fell with a resounding slap upon the living body." From *'Miscellany-at-law'* by R E Megarry, QC.