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PLAIN WORDS

"Mummy! Johnny's polluted his environment again". That expression is given in *The Complete Plain Words* by Sir Ernest Gowers as a neat commentary on the tendency to use language which is at once polysyllabic, euphemistic and fashionable. It is probably safe to say that it would be abhorred by Lord Denning MR who in a recent judgment indicated a preference for more forthright forms of expression.

The case *R v Barnsley Metropolitan Borough Council Ex parte Hook* [1976] 3 All ER 452 tells the tale of Harry Hook, a street trader in the Barnsley market. "On Wednesday 16th October 1974 the market closed at 5.30pm. So were all the lavatories, or 'toilets' as they are now called. . . . Three-quarters of an hour later at 6.20pm Mr Hook had an urgent call of nature. . . . He went into a side street near the market and there made water, or 'urinated' as it is now said." Unfortunately for him he was spotted by employees of the Council and there followed an exchange of "language which street traders understand". The upshot of it all was that he lost his licence to trade. Lest anyone should doubt, Harry is now back in business (". . . the Court can interfere by Certiorari if a punishment is altogether excessive and out of proportion to the occasion").

Gowers' selection of words may have differed slightly for he observed that "we do not seem to have done ourselves much good when we assigned the blameless but unsuitable word *'lavatory'* to a place where there is nowhere to wash"! Nonetheless Lord Denning's feet are aimed in the right direction not to mention crunching on the heels of Barwick CJ who remarked in one judgment – "as it is said, if one must continue to regard the English language as inadequate – res ipsa loquitur".

The Bar has not been altogether silent. There is the case of a personal injury action brought by a Bradford factory worker during which the Judge became a little perturbed at the extraordinary frankness of the plaintiff and asked Counsel if his client was aware of the maxim volenti non fit injuria. Counsel reputedly replied "my Lord, in Bradford they speak of nothing else".

So much for Latin. If nothing else, shaking makes its bones rattle. A more serious business is shattering the "mind forged manacles" of well worn verbiage. The senior practitioner who responded to a letter commencing with the overworked phrase "we enclose herewith" by asking the author with old style courtesy, coupled with the bluntness and economy of expression that so endeared him to his farming clients, where else he proposed to put it performed an important service. It is difficult to decide who best portrays the importance of that service – George Orwell:

> "A scrupulous writer in every sentence that he writes will ask himself. . . What am I trying to say? What words will express it? . . . And he probably asks himself . . . Could I put it more shortly? But you are not obliged to go to all this trouble. You can shirk it by simply throwing open your mind and letting the ready-made phrases come crowding in. They will construct your sentences for you – even think your thoughts for you to a certain extent – and at need they will perform the important service of partially concealing your meaning even from yourself."

Or an anonymous diplomat:

> "What appears to be a sloppy or meaningless use of words may well be a completely correct use of words to express sloppy or meaningless ideas."

Tony Black

COURTS PRACTICE

THE ADMIRALTY RULES 1976

By J T EICHELBAUM *and* T J BROADMORE.

This is the last of three articles on Admiralty law. *(See pp 365 and 387 for the earlier articles.)*

His Honour Mr Justice Beattie in his recent article on the Admiralty Act 1973 ([1976] NZLJ 365) drew attention to the circumstance that the Act and the new Rules made thereunder fulfilled a long-felt need to bring the admiralty jurisdiction of the New Zealand Courts into line with modern British and international practice. In so doing, the Act and the Rules have introduced some concepts and procedures which differ from those encountered in the ordinary jurisdictions of the Supreme Court. Mr Ian MacKay having recently dealt in some detail with the Act ([1976] NZLJ 387) it is the purpose of this article to draw attention to those aspects of the Rules in which they diverge from the customary. At this time it is not, however, proposed to comment on the special features of a limitation action. It will be noted that Rule 4 provides that the Code rules and the general practice of the Court (including Chambers practice) shall, in cases not provided for by the Act or the Rules and so far as they are applicable and not inconsistent with the Act or Rules, apply in all proceedings.

Perhaps the most notable of the new Rules is Rule 7, which deals with the manner of commencement of admiralty actions. A writ, whether in personam or in rem, need not (and in the case of a collision action may not) annex the traditional statement of claim: all that is required is an endorsement containing "a concise statement of the nature of the claim, and of the relief or remedy required, and of the amount claimed, if any." An example of the kind of endorsement acceptable in England under a comparable rule (RSC Order 6, Rule 2) is as follows:

> "The plaintiffs' claim is for damage to their ship PYTHIAS and loss and expense sustained by them by reason of a collision with the defendants' ship DAMON, which occurred in the English Channel on or about the day of 19 as a result of the negligence of the defendants, their servants or agents."

Under the New Zealand Rules, however, it would seem that it is still necessary to specify an amount claimed for damages.

The principal advantage of this procedure is to enable an admiralty action to be commenced with a minimum of delay or difficulty against a ship which may depart the jurisdiction within a very short period. It is possible that an aggrieved party overseas may track down to New Zealand a vessel, or a sister ship of a vessel, which caused him damage on the other side of the world, and may wish proceedings to be commenced against her here, where she may be arrested and security obtained for the claim. In such cases, where time is of the utmost importance, it would often be difficult to prepare a statement of claim in traditional form on the basis of brief urgent instructions from overseas principals.

Further, the chief advantages of the preliminary act procedure (considered below) would be lost if a statement of claim were to be filed and served with the writ.

Partly for these reasons, and perhaps more importantly because Admiralty practice is international, the framers of the new rules decided to retain the writ procedure, notwithstanding that the draft of the new Supreme Court Code dispenses with it in favour of a universal statement of claim.

Rule 10 confirms the passing of the ancient rite of effecting service of proceedings in rem by "nailing" the writ to the mast, and provides merely for the "attachment" of a sealed copy to the mast "or some other conspicuous part of the ship." The rule also sets out the manner in which service is effected on cargo or freight the subject of an action in rem.

The English procedure is again followed as to the steps to be taken by a defendant after service. In lieu of a statement of defence, the filing of a brief memorandum of appearance by the defendant or his solicitor is all that is immediately required. There is provision (Rule 11 (6)) for a defendant to enter a conditional appearance, which enables him to challenge the validity of service of the writ or of any order giving leave to serve the writ or notice of it outside the jurisdiction. The memorandum may be filed by post (Rule 11 (16)).

The memorandum of appearance is of greater significance than a mere notice of intention to defend, as the statements it contains as to the true address and capacity of the party appearing, and the port of registry of the vessel, are prima facie evidence of those matters. Thus are avoided the

difficulties of proof from which the plaintiff only narrowly escaped in *Lewmarine Pty Ltd v The Ship Kaptayanni* [1974] VR 465 in which the defendant entered an appearance through Melbourne solicitors showing its address only as care of the solicitors, but took no subsequent action, and in order to establish jurisdiction it was necessary for the plaintiffs to show that the vessel belonged to a port outside Victoria.

One of the great advantages to a plaintiff of invoking admiralty jurisdiction in rem is that he can obtain security for his claim in advance of judgment by arresting the res to which his action relates. Rule 15 sets out clearly the manner in which a plaintiff applies for a warrant of arrest (which is executed by the Registrar of the Court rather than the party applying), and deals with other matters appropriate to a situation which is generally urgent and which involves an uncooperative defendant. For example, the warrant may be served on a Sunday, Good Friday, Christmas Day or any public holiday, the Registrar may instruct deputies by telegraph, even the relatively straightforward procedure set out earlier in Rule 15 may be abridged under Rule 15 (11), and it is provided that a master moving his ship after notice of the issue of a warrant has been communicated to him is in contempt of court.

Arrest is of itself a counter-productive measure, as it freezes the movement of a highly expensive income-earning chattel. The Rules provide two means whereby this consequence can be avoided. First, Rule 16 enables any person who desires to prevent an arrest to procure a caveat against arrest by filing an undertaking in the Wellington Registry that he will (a) enter an appearance to any action that may be commenced against the res, and (b) give security to the satisfaction of the Registrar within three days after being notified of the commencement of such an action. Default in compliance with such an undertaking may render a caveator personally liable in damages, and if he is a solicitor to attachment. Secondly, after an arrest has been effected, any person interested in the res may procure its release by putting up security or bail under Rule 20.

A third possibility is less formal: where an arrest is threatened, the vessel's hull underwriters or liability insurers may sometimes be persuaded to give a claimant an undertaking to be responsible for his claim if liability is established. Such an arrangement, though common, is entirely outside the Rules.

Thus far we have dealt with the commencement of proceedings, service, appearance, and the obtaining of security in an action in rem. We now briefly consider the rules relating to pleadings, and also examine the preliminary acts procedure in collision cases.

Generally speaking, a plaintiff has until the expiration of 14 days after the defendant has entered an appearance in which to file and serve a statement of claim in the customary form, and the defendant has 30 days after service upon him of the statement of claim to file and serve a statement of defence. In collision cases, however, the plaintiff's statement of claim is not due until 14 days after the latest date on which the preliminary act of any party is filed.

In collision cases the filing of preliminary acts by each party is a step taken prior to the filing and delivery of pleadings. A preliminary act is a formal statement of the matters of fact listed in Rule 24, which deal generally with the weather, wind and tide obtaining at the time of the collision, course steered and speed and alterations thereto, lights displayed and observed, signals exchanged and other matters relevant to the issue of liability. It is filed in the Court in a sealed envelope, and is not seen by the other party until the pleadings are closed. It is not to be regarded as a pleading: it is a formal admission binding the party making it. The great advantage of the procedure is that the defendant does not have the benefit of being able to tailor his case to that disclosed by the plaintiff in his statement of claim: neither party has knowledge of the other's case, and it is open for the Judge to draw his own conclusions when the pleadings and evidence led at the hearing differ from the statements contained in the preliminary act.

Rule 14 makes provision for trial without pleadings where the Court is satisfied that the issue in dispute can be defined without them or that there is other good reason for so proceeding. Attention is also drawn to the special provisions for judgment by default contained in Rule 26.

An interesting extension to the general practice of the Court is contained in Rule 33, which empowers the Court, either on its own motion or on the application of a party, to appoint an expert to report on any question of fact. The rule reproduces Order 40 of the English Rules – which has general application – almost precisely, the only significant difference being that in England the Court has no power to appoint an expert on its own motion. The New Zealand rule further specifically empowers the appointment of an expert to report on a vessel's limitation tonnage for the purposes of s 460 of the Shipping and Seamen Act 1952. As noted, there is no such general power under the Code of Civil Procedure (except to the extent to which it may be found in Rule 478, which deals with the taking of observations and measurements, making plans and

conducting experiments) although learned commentators on the English rules suggest that the Court has inherent power to appoint an expert in appropriate cases.

Attention should be drawn to Rule 32, which enables the Court to order that two or more actions be consolidated or otherwise dealt with appropriately where there are common questions of law or fact, the right to relief claimed arises out of the same transaction or it is otherwise desirable to do so. The rule is much wider than the powers of consolidation in Rule 210 of the Code of Civil Procedure, and reproduces almost exactly Order 4 Rule 10 of the English Rules. It may be noted, however, that Shorland J in *Clark v Sutton; Christy v Sutton* [1960] NZLR 829 considered that the Court had inherent powers to order that actions be heard together where the justice of the case demanded it.

The Magistrates' Courts (Admiralty) Rules, which came into force on the same day as the Admiralty Rules, may be dealt with shortly. In all except collision actions, proceedings in admiralty are treated in the same way as ordinary actions under the Magistrates' Courts Rules 1947. In collision cases, however, the preliminary act procedure is introduced, and as a consequence the times for filing and service of statements of claim and defence are delayed until after preliminary acts have been filed. Further, the Court in admiralty has the same wide powers of consolidation of actions and appointment of experts as is noted above in relation to the Supreme Court.

CHRISTMAS MESSAGE TO THE PROFESSION

FROM THE ATTORNEY-GENERAL

I gladly accept the invitation of the Editor of the *New Zealand Law Journal* to address the profession through the *Journal's* columns at the close of my first year of office. In doing so I wish to thank you for your welcome to me as your titular head. I have spoken at functions for the profession in Auckland, Wellington, Christchurch and Dunedin and I have greatly appreciated the warmth of the reception I have been given. I hope, in the coming year, to speak to gatherings of the profession in other centres.

I need hardly remind you that the economic circumstances of the country have made this a difficult year for the Government to accede to the many representations from the profession and others for extending the scope of community legal services. So far as the profession and litigants are concerned, however, steps forward have been taken for the short term solution of some difficulties. The Judicature Amendment Act increases the number of Judges of the Supreme Court by two. I hope that when this is implemented, and there should be an appointment of one additional Judge early in the New Year, some of the delays now experienced will be reduced.

In the long term I hope that both the need and scope of any extended legal services will be elaborated in the course of the inquiry to be made by the Royal Commission on the Courts. Such a systematic inquiry as is contemplated by the Commission's terms of reference is, I think, unique in New Zealand's history. I confidently expect that the Commission's report due at the end of next year will lay the foundations for the organisation of the Courts and of their judicial officers in a way that will meet the needs of New Zealand for the rest of this century and into the next.

I must not conclude without expressing my appreciation of the profession's continued assistance to the Government's legislative programme. The representations of the New Zealand Law Society on legislation before the House has been of great assistance and is highly valued by members on both sides of the House. The thorough and disinterested presentation of submissions on legal topics by the profession through the New Zealand Law Society has assisted Parliament greatly. I add, too, my appreciation of the work of the members of the Rules Committee who are engaged at present on the very onerous task of the revision of the Code of Civil Procedure.

I wish you all a very merry Christmas and a happy New Year.

P I Wilkinson

TORTS

LOCAL AUTHORITIES AND NEGLIGENCE

Dr KENNETH A PALMER, *Senior Lecturer, Auckland University, examines a recent decision which marks a major development in the law relating to the obligations imposed on a local authority by its building bylaws.*

The recent decision of Chilwell J in *Hope v Manukau City Corporation* [1976] Current Law 762 marks a significant step in advancing the potential liability of a local authority in carrying out its functions. Obvious questions raised by the decision are whether it is consistent with other authorities the scope of the extension of liability; and the possible options open to local authorities.

The facts concerned the purchase by the plaintiff of a home unit from a building company. After entry into possession, the plaintiff found that parts of the plumbing were incorrectly installed, and a damp-proof course had not been inserted under the concrete floor of a lower rumpus room rendering necessary a new floor. The builder had left the country, and recovery of damages against his company was not practicable. The incorrect plumbing arose from a failure to obtain a plumbing permit, and the omission of the damp-proof course was in breach of the Council building bylaws which applied. But, in the circumstances, Chilwell J held the corporation to be liable to the plaintiff for the total cost of remedial work.

The basis for liability found by his Honour can be summarised as follows: (a) the bylaw requiring a damp-proof course was primarily related to the protection of health and prevention of a statutory nuisance, and the Council was directed to make the type of bylaw and enforce it under s 23 of the Health Act 1956 – by way of contrast, the general powers to make building bylaws under s 386 of the Municipal Corporations Act 1954 were enabling only; (b) that it was careless of the Council inspector to approve plans showing no provision for a damp-proof course or other approved method of construction of the rumpus room floor; (c) that a final inspection should have been made before occupation by the plaintiff as required under the bylaws, even though the builder failed to request the inspection; (d) the carelessness outlined in (b) was causative as to loss, but not that in (c); (e) the failure to make a final inspection was causative as to damages suffered from the faulty plumbing, and the inspector should have noticed the omission to obtain a plumber permit; (f) following *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, the Council owed a legal duty to the plaintiff carrying responsibility for negligent acts as it did in fact have "all-embracing control over most of the building operation" – the decision of the British Columbia Court of Appeal in *McCrea v City of White Rock* (1974) 56 DLR (3d) 525 was distinguished on the facts as concerning a matter of non-feasance only by the City, where the builder failed to request an inspection as required under bylaws; (g) the ability of the purchaser to make intermediate inspections of the flat during construction did not lessen the duty of the inspectors, and it could not be assumed that private inspections would be made – *Rutherford v Attorney-General* [1976] 1 NZLR 403 at 412 was considered; (h) as a matter of inference the plaintiff was entitled to assume that the new building would comply with bylaws, and whether reliance on the corporation's performance of duties was necessary or not (as doubted in the *Dutton* case), the defendant ought reasonably to have contemplated the plaintiff as being affected by its acts or omissions; (i) that although the damages related to economic loss in one sense and not personal injury, this fact did not defeat the claim as the damages represented foreseeable consequences which were as much the fault of the defendant as of the builder, and no other statutory remedy was provided. In sum, liability for the cost of replacing the floor and lost coverings arose out of the issuing of the building permit when the plans made no provision for a damp-proof course and the inspector made no specific requirement to that end, and liability for remedying the defective plumbing arose out of the failure to make a final inspection and be alerted to the absence of the plumbing permit. In conclusion, Chilwell J stated:

> "Having regard to the foregoing factors I consider that the tort of negligence has been established. I have tried to refrain from laying down any general principle applicable to cases within this new field of the tort of negligence preferring to determine this action, as I believe I have, on its own particular facts."

One can comment that, notwithstanding this modest declaration, the decision does establish a

new field of liability arising out of the control by local authorities over building operations. The correctness of the decision may be judged against the evolution of the law.

Negligent advice

Since the year 1932, the law of negligence has been progressively updated by the Judges to accord with notions of justice appropriate to the times. Although *Donoghue v Stevenson* [1932] AC 562 established the firm principle of liability for physical injury arising from a lack of care in preparing goods or carrying out activities extending to all persons who could reasonably be contemplated as likely to suffer harm in the circumstances, the most dramatic conceptual advance, as all lawyers know, occurred with *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. The effect of the latter decision was twofold; first to recognise special relationship situations outside contract and trust where liability could arise from negligent advice or written statements, and, secondly, to recognise economic loss as against physical harm as a sufficient basis upon which to award damages.

Since 1964, the *Hedley Byrne* case has given rise to an extensive body of law as to liability for careless statements and representations limited only by judicial differences as to the types of special skill or circumstance in which the duty may arise: see (inter alia) *Mutual Life and Citizens Assurance Co Ltd v Evatt* [1971] AC 793 (no duty); *Capital Motors Ltd v Beecham* [1975] 1 NZLR 576, 580 (car salesman); *Plummer-Allison v Spencer L Ayrey Ltd* [1976] 2 NZLR 254, 265 (claims clerk).

With reference to the giving of advice by local authorities and individual officers, there can be no doubt that a corporation may in particular circumstances be liable for negligent advice. Where an officer holds out or possesses a special skill or knowledge not available to the inquirer, and in the circumstances the officer should be aware that the inquirer and others may rely upon the advice and may act to their legal detriment, liability can arise. Conversely, informal inquiries and casual advice are not likely to create liability for damages: *Care v Papatoetoe City* (1975) 1 Recent Law (NS) 355 (planning inquiry). In any event, negligent advice may create an estoppel against the Council, unless it is bound by statute to act in a certain way: see *Taranaki Electric Power-Board v Proprietors of Puketapu 3A Block Inc* [1958] NZLR 297 (erroneous electricity account); *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222 (erroneous planning advice); cf Town and Country Planning Act 1953, s 33 (3) (no planning estoppel as such). The position is different if the advice (such as irregular approval of plans) is qualified by a clear statement imposing other obligations: *Keay v Forbes* [1928] NZLR 411, 414.

In a more general context, in *Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg* (1970) 22 DLR (3d) 470, the Supreme Court of Canada declined to apply the *Hedley Byrne* rationale to establish liability for economic loss against a statutory body which in good faith came to a decision later found to be invalid. In the particular case, the appellant suffered economic loss after relying upon a zoning change which was declared to be invalid due to failure to give notice of a hearing to an interested party. Thus, liability for negligent advice or directions causing economic loss stops short of decisions of local authorities executing quasi-judicial functions, such as determining the contents of a district scheme or determining planning applications.

Bounds of the general duty of care

Outside the area of negligent statements or representations causing economic loss, the *Hedley Byrne* case has also acted as a catalyst for the reexamination of the situations in which the duty of care laid down in *Donoghue v Stevenson* (supra) may arise. In *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, the duty was presumed to apply in any situation where a lack of reasonable care on the part of one person could be foreseen as likely to cause personal or property damage to another, unless for some good reason liability was not to be imposed. This approach has been accepted as correct by our Court of Appeal in *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741, in holding an owner of property liable in negligence for damage caused to a neighbouring property following excavation of soil. But it should be noted that neither the *Donoghue* nor the *Dorset* case concerned economic loss alone not arising out of damage to person or property, whereas the *Hedley Byrne* principle depending upon a special relationship and reliance does apply to pure economic loss. These separate aspects of the development of negligence have been blended and overlooked in some recent decisions, but were considered in *Bowen v Paramount Builders (Hamilton) Ltd* [1975] 2 NZLR 546 in rejecting a claim in tort against a builder for defective foundations.

Statutory liability

This head can be used to cover both the negligent performance of a statutory duty, and civil liability expressly or impliedly created by a statutory obligation. In the latter category, the

liability of employers for breach of duties under Factories and Construction Acts is well known, and also liability under the Occupiers' Liability Act 1962 could fall under this head. The liability of corporations under the traditional heads is well known: see for example *McCarthy v Wellington City* [1966] NZLR 481 (unsafe storage of detonators); *British Railways Board v Herrington* [1972] AC 877 (humane duty to trespassers). Where a Council is under a positive duty to provide a service, such as maintaining fire hydrants in working order, a failure to perform the service which amounts to negligence by act or omission may establish liability: *MacEachern v Pukekohe Borough* [1965] NZLR 330, 1089.

On the other hand, a failure correctly to enforce or apply town planning obligations has been held to confer no personal right to damages against a Council or person benefiting, but an injunction may be available: *Attorney-General v Birkenhead Borough* [1968] NZLR 383, 389. Similarly, the non-observance by a private person of directory bylaw obligations does not confer a statutory right of action: *Emms v Brad Lovett Ltd* [1973] 1 NZLR 282, 289. These decisions indicate that the traditional heads of statutory liability are unlikely to be expanded, and losses of an economic kind not arising out of actual damage to property will not be compensated under these heads.

Negligent performance of statutory functions

A much broader basis for liability has long been recognised where a statutory corporation is negligent in carrying out a particular function. Although an act may not be strictly authorised, the corporation cannot plead ultra vires as a defence: *Campbell v Paddington Corporation* [1911] 1 KB 869, 875.

Concerning the construction and maintenance of highways, the fine common law distinction between matters of non-feasance for which there is no liability, and acts or omissions of misfeasance for which there is liability, is still maintained in this country. See for example *Oamaru Borough v McLeod* [1967] NZLR 940 (failure adequately to fence street); *Mee v DWD Hotels Ltd* [1974] 2 NZLR 260 (failure to supervise carpark sealing). In Canada, the employing authority of a traffic officer has been held liable in negligence for the failure of an officer to take positive steps to give warning of a known road obstruction, being an obligation arising from the particular office: *Schacht v The Queen* (1972) 30 DLR (3d) 641.

In carrying out works generally, a Corporation may be liable for negligence or for the creation of a nuisance which is not a necessary or inevitable consequence of the exercise of the power: *Irvine and Co Ltd v Dunedin City Corporation* [1939] NZLR 741, *Powrie v Nelson City Corporation* [1976] 2 NZLR 247 (water discharges). Where the damage is covered by the statutory power, the Council will remain liable to pay compensation: *Nobilo v Waitemata County* [1961] NZLR 1064; *Dijkmans v Howick Borough* [1971] NZLR 400 (restoration cost awarded). As owner of property a Council may be liable for creation of a nuisance thereon: *French v Auckland City Corporation* [1974] 1 NZLR 340 (escape of weeds); *Matheson v Northcote College Board of Governors* [1975] 2 NZLR 106 (pupils' nuisance). As a land subdivider the Council may be under a special duty of care in preparing the land: *Gabolinscy v Hamilton City Corporation* [1975] 1 NZLR 150, 158.

Vehicle warrants

With reference to the issue of warrants of fitness for vehicles, which may be a function performed by local authorities, the recent decision in *Rutherford v Attorney-General* [1976] 1 NZLR 403 recognises another area of liability for negligent omissions. Here the purchaser of a truck, who relied upon the representation of a warrant of fitness freshly issued to the vendor by the Ministry of Transport, was able to recover damages for substantial defects in the truck which were carelessly overlooked by the inspector. Cooke J, relying on the *Dutton* and *Dorset Yacht* cases (inter alia) held that a duty of care was imposed by law upon the Ministry, and the duty extended to a person likely to purchase the vehicle in the event of an immediate sale as that person could be expected to rely upon the warrant. The fact that the loss to the particular buyer was economic did not defeat the claim, as the claim contained no element of loss of profit or consequential loss. In a negative sense, the damages related to property loss or defects which should have been discovered, and this line of reasoning was similarly adopted in the *Hope* decision.

The extent of liability under the warrant of fitness cases is still under judicial consideration. Cooke J applied the duty of care as extending to an immediate purchaser in point of time. Logically, the duty of care must also be owed to existing owners of all vehicles presented for inspection, but the failure of an inspector to locate a defect could not in a causal sense give rise to liability for the cost of repairs overlooked or consequential damages, unless the circumstances established reliance upon the inspection. Thus, as a matter of principle, Councils are likely to be liable for personal injury or property damage immediately following a careless inspection or within a reasonable time thereafter, but they are not likely to be liable for economic losses alone, except in

the special *Rutherford* circumstances where a buyer relies upon the warrant following an immediate sale.

Building responsibilities

The basis for liability in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 rested essentially upon the holding that a local authority in England has not only a bare power to regulate building activities, but also a duty which is not specifically imposed but arises from a middle term "control". Lord Denning MR in the Court of Appeal stated (p 392):

> "In this case the significant thing, to my mind, is that the legislature gives the local authority a great deal of control over building work and the way it is done. They make bylaws governing every stage of the work.... In my opinion, the control thus entrusted to the local authority is so extensive that it carries with it a duty. It puts on the Council the responsibility of exercising that control properly and with reasonable care."

In extending the duty of care to render the Council liable to the purchaser of the particular dwelling for costs of repair, following subsidence of the foundations which were negligently approved by the inspector, the Court relied upon *Donoghue v Stevenson*, and the *Dorset Yacht* cases as inviting a new application of the concept of negligence. Furthermore, the Court categorised the damage as physical damage to the property rather than economic loss. Thus the obvious difficulties of extending the *Hedley Byrne* principle did not arise, and the purchaser was not obliged to show active knowledge or reliance upon the inspectors' ommissions.

By way of contrast, the British Columbia Court of Appeal in *McCrea v City of White Rock* (1974) 56 DLR (3d) 525 refused to apply the *Dutton* reasoning in a case where the purchaser of a building suffered loss from collapse of a ceiling beam negligently constructed. The Court considered that policy or public interest to give a remedy as adverted to in the English case was no legal justification for an extension of liability, that the local bylaw placed no positive duty upon the Council to carry out an inspection, that no inspection was requested by the builder as required under the bylaws, and the absence of an inspection at best was an act of non-feasance for which no liability arose. The Court accepted an earlier decision of Stark J, in *Neabel v Town of Ingersoll* (1967) 63 DLR (2d) 484, who held that where a contractor was immediately responsible for faulty construction and loss, there was no principle that the Council inspector was also liable in failing to require better plans.

In choosing to follow the *Dutton* decision rather than the *McCrea* judgment, Chilwell J in *Hope* was able to point to the Health Act 1956, s 23 (e) as directing the Council to make bylaws for the protection of public health, and to agree that the particular bylaw infringements concerned matters of health and comfort. It is respectfully submitted that this finding is fundamental to the decision, as imposing upon the Council the right and obligation of control found to be legally necessary and present in *Dutton*, but not present on the facts in *McCrea*. Conversely, the statutory duty imposed to promote public health can be taken as a limiting factor generally as to liability of a Council under other assorted bylaws. For example, Council bylaws may cover a vast array of activities and it is unlikely that a failure to enforce the bylaws in areas (not concerning matters of public health or contributing to actual property damage) could give rise to liability.

Another hurdle for a claimant to establish is physical damage to person or property, which was an important factor in *Dutton* and *Hope* as against the more remote economic loss identified as profits, loss of use or other consequential loss. As a principle of compensation law, claims against a local authority arising out of the exercise of statutory powers will not be upheld where the loss is quantified as loss of profits only with no physical interference with the property: *Superior Lands Ltd v Wellington City Corporation* [1974] 2 NZLR 251, 257 (delay in interim use); *Argyle Motors (Birkenhead) Ltd v Birkenhead Corporation* [1975] AC 99, 130 (loss to relate to land value). Therefore, the bare powers to create bylaws under the many subclauses of s 386 of the Municipal Corporations Act 1954 and s 401 of the Counties Act 1956, are not likely to be construed to impose any mandatory duty of care conferring a civil right of action for failure or carelessness in exercising the controls, assuming that any action is carried out in good faith. This conclusion accords with dicta in *Emms v Brad Lovett Ltd* [1973] 1 NZLR 282, at 289 (mobile shop licence breach).

Disclaimer of liability

Assuming that in future a territorial corporation will be liable for negligent acts of servants in issuing warrants of fitness for vehicles or permits for new building work, where loss to person or property arises as a foreseeable consequence of the negligence, the question remains whether the Council may lawfully disclaim responsibility.

In the *Hope* case, the stamp of approval placed on the plans read "Approved subject to all work being carried out in accordance with the City Bylaws and Town Planning Regulations". It was not accepted that the qualification could excuse

the Council from specifically requiring the plans to show the damp-proof course or to otherwise require the builder to insert a damp course, but in the *McCrea* case, the Canadian Court considered a similar stamp shifted all obligations onto the builder. The *McCrea* reasoning is consistent with the decision in *Keay v Forbes* [1928] NZLR 411, where a similar qualified stamp of approval and overriding bylaws obligations were held to qualify approval of non-conforming plans, and to prevent any plea of estoppel by the builder against a later prosecution for failure to rectify construction.

Where a Council could disclaim civil liability for negligent actions in the issue of warrants or building permits raises difficult questions of statutory construction and public policy. In the *Hedley Byrne* case, the House readily accepted that a private corporate body could disclaim liability for negligent advice where given in a special relationship situation, which would otherwise give rise to liability for negligent words. In principle, a local authority should be free to disclaim liability for advice which may prove to be incorrect or negligently given, where the inquirer has a real choice in seeking or accepting the advice. A possible comparison can be drawn with the right of an occupier of property to disclaim liability for injury caused to a visitor, where the disclaimer is obvious and sufficiently comprehensive: Occupiers' Liability Act 1962, s 4 (7); *White v Blackmore* [1972] 2 QB 651, 670, 674 (jalopy races); cf *Evans v Waitemata District Pony Club* [1972] NZLR 773, 775 (sports events).

However, where a Council is bound to carry out a particular function, it would be inconsistent with the statutory intent to permit disclaimer of liability for negligent actions causing injury to person or property. The statutory compensation provisions contemplate awards for losses suffered of this type. Similarly, where a Council has a monopoly over a service, such as the issue of warrants of fitness, it should be contrary to public policy to permit a disclaimer of liability. Comparisons can be made with and between the liability of a corporation for failure to maintain a supply of gas: *Pease v Eltham Borough* [1962] NZLR 437; the failure to take reasonable care of property held by an employee for safekeeping: *Timaru Borough Council v Boulton* [1924] NZLR 365; or the failure to maintain fire hydrants in working order: *MacEachern v Pukekohe Borough* (supra). In certain cases disclaimers may be proper and acceptable, but not so in others.

Conclusion

This article has endeavoured to explore the growth and limits of liability for negligence of local authorities, and to consider the correctness of the decision in the *Hope* case.

For reasons given it is respectfully submitted that the *Hope* decision is based upon sound principle. Furthermore, the nature of the statutory duty is such that as a matter of construction and public policy a Council should not be at liberty to disclaim potential liability.

Concerning duration of liability, the Limitation Act 1950 provides for a six year time in which to claim, but in the case of hidden damage following non-compliance with bylaws, the time runs not from any negligent act of an inspector as to approval or supervision, but from the time the damage becomes apparent: *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] 2 All ER 65; *Gabolinscy v Hamilton City Corporation* (supra) (10 year interval between building and subsidence). Thus the potential period of liability of the corporation is limited only by proof of causation between negligence by the staff and the resulting damage.

As to extensions of liability beyond the issue of permits under bylaws or regulations in situations where personal harm or actual property loss may be foreseeable, it is considered that legal principles do not support any general concept of liability replacing the presently established heads in tort law. For example, a failure to license street vendors, or failure to control street processions causing economic loss to traders, should not give rise to civil liability.

"Bear in mind that we practise a profession, not a trade; a vocation, not a business. We are indeed dedicated to a high calling, and, in the words recently used by an eminent writer, we are 'the custodians of a very sacred and precious inheritance which enshrines the long results of the perpetual warfare of the spirit of man, the spirit of love and fellowship against the enemies of the soul, the evil hosts of selfishness and brute force and tyranny and chaos.'" The Rt Hon Lord Macmillan.

A Mistake in High Places – There was an occasion upon which the Prime Minister of the day was engaged in drafting the King's Speech. When the draft was brought to him, there was a pencil note at the bottom: "Refer to A-G" The Prime Minister, saying that the Attorney-General had nothing on earth to do with the King's Speech, struck out the remark. Whereupon the Secretary to the Cabinet told him that the note was but a reminder that the customary blessing of Almighty God should be prayed.

LEGAL LITERATURE

Molloy on income tax by A P Molloy. xlviii + 724. Butterworths of NZ Ltd, 1976. Hardback $30; paperback $25. Free of charge to subscribers for "Cunningham" as Volume 3 of Butterworths Taxation Library. Reviewed by the Hon Mr Justice Mahon.

The effect of taxation on democratic societies has assumed progressive significance with the passing of the years. In 1923 Lord Keynes estimated that once direct taxation absorbed 25 percent of the gross national product its inflationary tendency would become destructive. In the year ended 31 March 1976 the gross national product of New Zealand was estimated at $10.5 billion, and direct taxation for the same period amounted to $2.35 billion or 22.3 percent of the gross national product. If, however, the estimated value of the gross national product for that year is adjusted by calculating the actual private income earned throughout the country in that year, excluding Social Security income paid by the Government to beneficiaries out of taxation, then the total is $9 billion. Then the total of $2.35 billion for direct taxation represents 26.1 percent of the private income of the community. No doubt the continued maintenance of an expensive welfare system will preclude any contraction of the huge sums now recovered by the State as revenue, and there must be some uncertainty as to the ultimate destination of our detached and limited economy as it moves along under this costly incubus. For the last fiscal year, net Government expenditure equalled 41.9 percent of the gross national product and 48.8 percent of private income. Lord Keynes would presumably regard all this not so much as a national economic programme as a doom-laden carnival. The influence of income tax is thus a significant factor in the community, and the principles of assessment and recovery are of such importance that the appearance of a new book on the subject is a welcome event.

Mr Molloy's new publication is an admirable work for a number of reasons. The layout of the intricate subject matter is the first point worthy of attention. The method adopted by the author varies from the conventional textbook treatment of an area of law primarily controlled by statute. Instead of dealing with the sections of the Land and Income Tax Act in sequence, Mr Molloy has arranged the detailed provisions of the Act into 20 chapters, of which each is subdivided into numbered paragraphs consisting of individual commentaries on the many aspects presented by each chapter. For example, Chapter 3 deals with "Profit-making Schemes and Personal Property Purchased for Re-Sale". This chapter is then subdivided into 26 paragraphs, each dealing in detail with a separate element of this branch of income tax law.

The material contained in each paragraph is condensed, but clear. In the interests of mitigating the arid rigour of most taxation questions I will select as an example paragraph 750 which deals with income from betting on horses. To the legal philosopher, uncontaminated by fiscal reality, it might seem strange that a tax on income could be levied on fortuitous gains from betting. Yet in *Commissioner of Taxes v McFarlane* [1952] NZLR 349 a majority of the Court of Appeal held that this was so. The taxpayer in that case was a jockey and he was held to be assessable for betting gains because his betting activities were so "organised" and so "systematic" as to amount to a business. The existence of that principle was acknowledged by R B Cooke J in *Duggan v Commissioner of Inland Revenue* [1973] 1 NZLR 682, where it was held to be potentially applicable to a businessman. Although the learned Judge regarded such an assessment as being justified only in exceptional cases, it is clear that he recognised the significance, as he was bound to do in view of *McFarlane's* case, of systematic and organised betting. But what of the scores of thousands of New Zealand taxpayers who at weekly intervals systematically invest small sums on racehorses? One supposes that they would, if asked the relevant question, unanimously reply that their betting activities were founded upon the closest research, and were systematically organised not with mere wistful aspiration but with the firm intention of realising a steady income. However, here is Mr Molloy's summary of this topic:

> "**[750] Betting Income:**
>
> Finally, even such windfall receipts as winnings from betting on the outcome of races occasionally may have the quality of income in the hands of the recipient. As a general rule, of course, they will not. The proceeds of a bet, being a gain comparable to a gift or a finding, *generally* are not of an income nature, unless they form part of the

income of a wider business."

That succinct exposition occurs at the commencement of paragraph 750 and adequately conveys the essential point of principle, the remainder of the paragraph being devoted to relevant citations from authority.

There are in the book 2028 numbered paragraphs comprising the contents of the 20 chapters, and with the aid of the Table of Contents the reader can pick up without difficulty the special topic engaging his attention. A well constructed index provides a more specific guide, but the Table of Contents is the prime method of inquiry and has the special advantage of displaying the particular subject-matter in an unusually detailed context.

In respect of the paragraphs themselves the author has generally followed the practice of first stating the particular point at issue, as illustrated by paragraph 750 already referred to, and then dealing with the leading authorities bearing on the matter, and in almost every paragraph will be found an actual citation from the leading judgment or judgments on the point. This process has the advantage of revealing the actual text of the statement of principle for which a case is an authority, and avoids the perils inherent in venturing upon a paraphrase of what was said. In addition, the other relevant authorities are collected in the footnotes to the various paragraphs. Where there are conflicting dicta on a particular point the opposing citations are referred to, and in those areas where the author himself has doubts as to the validity of a particular decision he does not hesitate to say so. In summary, the contents of the numbered paragraphs contain, in the opinion of this reviewer, an accurate distillation of the law relating to the topic under discussion, aided by the relevant citations from the judgments which establish the relevant principle.

Finally, the style of the author is notable for its clarity of expression, particularly when the subject-matter of the book is taken into account. From any viewpoint, Mr Molloy's publication is an admirable exposition of the law of New Zealand relating to income tax and by virtue of the layout of the book and the clarity of presentation it should find a ready place not only on the bookshelves of lawyers and accountants but also in University libraries as an excellent text for students.

CASE AND COMMENT

1688 and All That: *Fitzgerald v Muldoon*: **The "Bill of Rights Case"**

The judgment of Wild CJ (11 June 1976 at Wellington) has already received its proper encomium in this Journal ([1976] NZLJ 265). However, something remains to be said by way of comment and analysis.

Little need be said about the facts. In his press statement of 15 December 1975 the Prime Minister coupled an announcement, that "the compulsory requirement[s]" for employee deductions and employers' contributions under the Scheme set up by the New Zealand Superannuation Act 1974 "will cease" from the date of the statement, with promises that early in the 1976 Parliamentary session legislation would be introduced to abolish the Scheme and to remove "the compulsory element in the law . . . with retrospective effect". All persons who relied on the statement and "acted in accordance with it would be excused [by the repealing legislation] from any penal provisions of the Act". In a further press statement of 23 December 1975 the Prime Minister said that "the Government had already made it clear that the Superannuation Scheme finished on December 15 and the compulsory requirement[s] . . . ceased for pay periods ending after that date".

Parliament did not next assemble until 22 June 1976. While it was still prorogued Mr Fitzgerald brought his successful proceedings against the Prime Minister for a declaration that the latter's "announcment and instruction" of 15 December were in exercise of a pretended power of suspending of laws or of the execution thereof and therefore illegal by virtue of s 1 of the Bill of Rights 1688. It should be added that the Prime Minister's co-defendants, the New Zealand Superannuation Board, the Crown in respect of the Treasury and the Education Department (in which the plaintiff was employed) and the Controller and Auditor-General, had all treated the Superannuation Scheme established by the 1974 Act as at an end and had done so (as the Chief Justice found) because of the statement of 15 December.

Section 1 of the Bill of Rights, successfully invoked by the plaintiff, provides "That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Paliyament is illegal".

Describing the Prime Minister as "the leader of the Government elected to office, the chief of the Executive Government" who had "lately received his commission by royal authority", Wild CJ held that, in making the statement of 15 December "in the course of his official duties", the Prime Minister made it by "regall authority" for the purpose of s 1 and was purporting to suspend the law without consent of Parliament. It was "implicit in the statement, coming as it did from the Prime Minister, that what was being done was lawful and had legal effect".

The Prime Minister's statements, which are more fully set out at [1976] NZLJ 265, are sufficiently quoted above to show the two elements which the learned Chief Justice found to involve a conflict with s 1 of the Bill of Rights – (1) the exercise of "regall authority" and (2) the purported suspension of the law.

As to (2) the judgment is, with respect, clearly right. The statements leave no doubt that the Prime Minister had crossed the line between the mere promise to introduce retroactive repealing legislation on the one hand and the announcement of the immediate suspension of the law, or at least of its execution, on the other. To the practical politican of any ruling party with an apparently secure parliamentary majority, there may appear little difference. But in the eyes of the Courts and the country there is and must be a great deal. Legal obligations cannot cease *now*, as the Prime Minister clearly implied that they did, in terms of promised retroactive legislation. They *will* cease with effect as from now *if* that legislation is passed. Anyone, whether public officer or private citizen, who acts in reliance on a promise of such legislation, takes the risk that it will not be passed – that its enactment will be forestalled or prevented, eg if sufficient Government back-benchers revolt, if there is simply a change in government policy, if the General Assembly is dissolved (at the will of the Governor-General or even by a successful gunpowder plot) or if the Day of Judgment comes. Those are no doubt unlikely contingencies (though not all equally so) in the constitutional and political stability presently prevailing in New Zealand; but any such unlikelihood cannot provide a basis for announcements which, anticipating changes in the law, also purport to suspend the law in the meantime.

Answering the question, "Did the Prime Minister act 'by regall authority'?", is more difficult. The Chief Justice held that he did, the statements being made in the course of prime ministerial duties. But, with respect, it may be questioned whether the Prime Minister had any such authority. His statements certainly do not appear to have been authorised or ratified by the Governor-General; and, if he advised the latter that the New Zealand Superannuation Act be suspended by royal proclamation, that advice would no doubt have been very properly rejected. The Prime Minister himself is not as such an officer with prerogative (or "regall") power and in his capacity as a member of the Executive Council (a prerogative body) he has only the power to advise the Governor-General. Perhaps in the most exceptional and critical circumstances (say an extreme national emergency where statute could not avail) some delegation to him of the necessary prerogative might be presumed. But there can be no implied delegation of any sort in the circumstances of the present case, especially when the power claimed could not be exercised by the Queen or the Governor-General without infringement of the Bill of Rights. It is then submitted that, rather than acting "by regall authority", the Prime Minister usurped an executive power once claimed by (but since 1688 denied to) the Crown itself. Such a usurpation would clearly have been void of legal effect even before the Bill of Rights – and likely to have led in those days to consequent Royal displeasure of which dismissal from office might be the mildest manifestation.

It is helpful to refer here to *R v London County Council* [1931] 2 KB 215 where the English Court of Appeal had to consider whether the LCC might permit cinemas to open on Sundays despite the Sunday Observance Act 1780. Scrutton LJ, in passages quoted by R F V Heuston in the latter's discussion of the prerogative in *Essays in Constitutional Law* (2nd ed 1964) 68, remarked (at pp 228-229 of the report): "One is rather tempted to inquire whether the Theatre Committee of the London County Council have ever heard of the Bill of Rights . . . I take it that the London County Council is in no better position than James II and that laws cannot be dispensed with by the authority of the London County Council, when they cannot be Royal authority". Scrutton LJ is referring to the dispensing power rather than the suspending power but both are dealt with by the Bill of Rights and his observation would apply to both. If the above analysis is correct the case of *Fitzgerald v Muldoon* appears, like that of the *London County Council*, to be one of usurpation, rather than of exercise of "regall authority".

It is suggested then that for authority the Chief Justice need not have gone beyond the principle which he quoted from Dicey – ". . . that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" (*Law of the Constitution* (10th ed 1959) 40).

But these observations do not affect the great

importance of the judgment of Wild CJ in this case and one may respectfully but wholeheartedly join in the welcome accorded to it. The authority of Parliament has certainly been upheld. Ministers of the Crown of whatever political party may by public statement still on occasion announce that they intend seeking legislation to give retroactive effect to their policies. But the statements of intention will be expressed merely as such and not in words which purportedly clothe the apparent certainties of political power in robes of legality. And Parliament will be more promptly summoned to consider making the robes.

Finally, it is tempting to speculate as to what would have happened if, Mr Fitzgerald's action having been brought and disposed of even more promptly than it was, a longer time had elapsed between the judgment and the passing of the necessary legislation and (perish the thought) the Prime Minister had been seen to disregard the judgment. No doubt the plaintiff's applications for injunctions against the Prime Minister and for remedies against the other defendants, which were adjourned by the Chief Justice in view of the expected legislation in the impending parliamentary session, would have been granted. The matter could have rested there, in the keeping of the Courts. But it is at least arguable that the Governor-General could properly have intervened – and, indeed, perhaps he could have done so even without the judgment in *Fitzgerald v Muldoon*. His Excellency may of course counsel his ministers in the course of exercising his undoubted right "to be consulted ... to encourage ... and to warn". Public action on his part could be expected only as a last resort; and the drastic ultimate step of dismissing the ministry for their illegal actions, adopted by the Governor of New South Wales in 1932 (indeed without the support of any Court judgment), could scarcely become appropriate in circumstances such as those considered here. It is submitted, however, that His Excellency might properly insist on the prompt summoning of Parliament and the introduction, if necessary under s 55 of the New Zealand Constitution Act 1852, of draft legislation for the curing of the illegality. But the proper course to be taken by a Governor-General, in the face of illegal action by his ministers, is in any event generally a matter of some difficulty (as to which see H V Evatt, *The King and His Dominion Governors* (2nd ed 1967) 157 et seq).

This is largely to speculate about a crisis which happily did not develop beyond the first stages. Such speculations may however serve to emphasise the constitutional gravity of the circumstances giving rise to *Fitzgerald v Muldoon*. As to the case itself, it stands as a clear warning to governments of the future.

Postscript

As expected the Superannuation Schemes Act 1976 has been passed, in effect retroactively removing the illegalities occasioned by the press statement of 15 December 1975. The adjourned proceedings of the plaintiff have accordingly been struck out but the learned Chief Justice has made a salutary award of substantial costs ($2,500) against the Prime Minister. The latter, in reported criticisms of the original judgment, describes it as "curious ... brought down under the Bill of Rights, which was enacted at a time when cabinet government as we know it did not exist" (*New Zealand Herald*, 14 September 1976). If the comments made above are correct, there is point in criticising the invocation of the Bill of Rights; but not the point the Prime Minister intends, for the principle which really sustained the plaintiff's case against him was (in its application to the subject) already ancient in 1688. The Prime Minister's historical learning is of course irrelevant anyway. It is elementary that the institution of cabinet government, great though its political importance may be, has added nothing to the legal powers of the Ministers of the Crown (themselves subjects) who compose the cabinet. It has not enabled them to suspend the statutes of Parliament.

F M Brookfield
University of Auckland

"The first thing to be said, and said very firmly indeed, is that Her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's Judges use their sentencing powers to dispose of those who are socially inconvenient. If the Courts became disposers of those who are socially inconvenient the road ahead would lead to the destruction of liberty. It should be clearly understood that Her Majesty's Judges stand on that road barring the way". Per Lawton LJ in *R v Clarke* (1975) 61 Cr App R320.

Deeming – ". . . generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing." *R v Norfolk County Council* (1891) 60 LJQB 379, 380-381, per Cave J.

CORRESPONDENCE

Sir,

Income Tax Bill

The New Zealand Law Journal of 7 September contained an article entitled "The Income Tax Bill – An Exercise In Futility" by G J Harley. I feel it is appropriate that I should comment on the points raised by Mr Harley.

The separate Land Tax and Income Tax Bills which have been introduced into the House are in fact consolidations of the existing law, and do not purport to be measures of law reform. I am sure members of the profession will agree that a move to consolidate the tax legislation was overdue, when it is remembered that this was last done as long ago as 1954.

As the land tax provisions are not the subject of frequent amendment and with minor addition can stand on their own, these have been consolidated into a separate Bill. This will help reduce the size of future annual reprints which will contain only the Income Tax Act and amendments.

The "cosmetic" alterations to which Mr Harley refers are made in accord with more recent drafting techniques, but – as is usual in the case of a consolidation – care has been taken *not* to alter the existing law. Alterations of a substantive nature rightly belong in the amendment Acts which are passed from time to time, and which provide the opportunity for submissions and debate as to the merits of their provisions.

Even within the limited scope of what can be achieved with a consolidation, the volume which will require reprinting each year has been reduced by about 300 pages. While the size of the Income Tax Bill is still considerable, any further reduction in its contents by splitting it into several different Bills would tend to create more difficulties than it would solve.

The Inland Revenue Department is responsible for the administration of a number of taxes and duties each governed by a separate Act. All matters relating to each tax or duty, administration, collection, enforcement and substantive provisions are contained, as a rule, in one piece of legislation. With the notable exception of objection and appeal procedures, the non-substantive provisions in relation to any tax or duty tend to be different from those of any other. The matters contained in the Inland Revenue Department Act are really all that administration of the different taxes and duties under the Inland Revenue Acts have in common. The non-substantive parts of the Income Tax Bill could not readily be amalgamated with the Inland Revenue Department Act when that Act relates also to the administration of the other taxes and duties. The splitting of them, and of other parts of the Income Tax Bill, into separate Bills, would detract from the object sought in all the Inland Revenue Acts, which is to have all the provisions relating to each tax or duty available in one Act.

Many of the alterations made over the years to the Land and Income Tax Act while resulting from changes in policy and in some cases being of limited application, have an effect on other provisions of the Act, or are related to other provisions. While some special incentives could go into a separate Act, there would be some difficulties in relating them to the main Act, and there are a considerable number of provisions which simply could not be made the subject of a separate Act.

Mr Harley also refers to the fact that each annual reprint of the Act, shortly after it comes out, is dated by the Budget. As a rule changes announced in the Budget each year take effect, at the earliest, for the year in which they are announced – that is, for the income year ending on the following 31 March. The latest reprint, while being made out of date for that year, still states the law as it was for the preceding income year. Annual returns are prepared after the end of the year to which they relate, and taxpayers and their advisers are working within the law as it was for that year, rather than as it is later amended, so that a taxpayer preparing his return for furnishing by the September deadline is able to rely on the latest reprint, which states the law for the relevant year.

The changes which will be made by the amendments announced in this year's Budget will be incorporated into the two Bills before those Bills are passed.

Yours sincerely,
Peter Wilkinson
Associate Minister of Finance

Sir,

The Income Tax Bill

The Minister invited me to reply to his comments on my article. I suggested that the Income Tax Bill was something of a futile exercise, although I agreed that a consolidation was long overdue.

The Minister argues that the consolidation achieves a reduction in size of the Act of about 300 pages. In fact, the Bill was 520 pages, and with the Budget changes, is now probably longer. The present Act is 590 pages. The deletions from the Act – especially Land Tax – seem more than compensated for by the additions. Where the Minister's reduction of 300 pages comes from is not apparent.

It is suggested by the Hon Mr Wilkinson that the division of the Act into its component parts would create more difficulties than it would solve. That is certainly not the experience of those working with overseas legislation on which my proposal is based. The object of these large pieces of legislation, it is stated, is to have all the provisions relating to each tax in one Act. It is my opinion that this object is achieved at the expense of simple use and application. The corollary is that the whole Act has to be reprinted annually because of the Budget changes. Simple use should be the prime object of any piece of legislation. "Bulk" does not imply "convenience".

The Minister states, correctly, that taxpayers and their advisors are working with the law prior to the Budget changes when preparing returns and are able to rely on the latest reprint. This overlooks the fact that a substantial amount of tax practice is concerned with a client's *prospective* and not *accrued* liability. It is essential that practitioners have ready access to easily used and up-dated legislation. The present system cannot meet this requirement. The changes I suggest would still cater for the preparation of returns.

Finally, it is interesting to note Mr Wilkinson's comments on the removal of incentive provisions. He states that the Budget changes will be incorporated in the Bill and that there would be problems in relating incentive provisions, contained in a separate Act, to the main Act. Two comments can be made. Firstly, a competent draftsman would have no problem, if the provisions relating to deductions were standardised and based on s 111. The same aplies to rebates. The second comment is based on the benefit of hindsight. The Government is expected to change the present export incentives as a result of the recent currency movements made by Australia and New Zealand. These incentive changes will, no doubt, require Amendments to the Act. Once again, the Act becomes outdated before it is printed. If these provisions were placed in a separate Act this exercise could be avoided. There is no need for reprinting five or six hundred pages every year. It wastes time and money.

Yours faithfully,
G J Harley
Wellington

Sir,

Law Reform

It is interesting to note the recent articles and editorial on the question of law reform. Both of the recent articles (RG Hammond [1976] NZLJ 353 and David Collins [1976] NZLJ 441) advocate a full time Law Reform Commission similar to the current English Model. Both articles envisage such a body having a considerable degree of independence and yet also having a substantial claim on legislative time. Neither article really grapples with the problems of Parliamentary supremacy which such an approach raises.

The major criticisms Mr Collins makes of the Law Reform Committees existing up to 1975 are

(a) That the recommendations resulted in comparatively little legislation, and
(b) That they dealt mainly with technical matters, referred to them by the Minister of Justice;

As to the first matter it might well be said that the allocation of Parliamentary time is a reflection first of the importance of the matters referred, and secondly of the fact that legislative priorities reflect social priorities. It perhaps demonstrates our social priorities to observe, as Mr Collins makes clear, that the Contracts and Commercial Law Reform Committee enjoyed the greatest "success" rate.

As to the second matter, one must entertain grave doubts about whether a full-time law reform commission would be permitted to consider matters where unresolved questions of social policy are directly involved. The experience of the English body has already demonstrated that where Parliament supplies the money it also supplies direction. As Mr Collins points out (at p 450) the Lord Chancellor "is able to impose a veto". He did so when the Law Reform Commissioners wished to conduct an enquiry into "the whole principle of liability for negligence in personal injury cases" and to prevent a broad enquiry into "administrative law".

Both Mr Hammond and Mr Collins suggest an ambit for the proposed Commission which would enable it to decide to investigate a "whole field" of law. The prospects for such a Commission are not bright. Suppose it was in existence now, and decided that the time was ripe for an independent review of the law and social policy relating to abortion, or to penalties in industrial law, or to immigation?

It is extremely likely that a full-time law reform commission in New Zealand would be able to consider non-contentious matters only, or to put it another way, matters acceptable to the government of the day. As such it would still be an improvement if it increased the quantity and speed of "technical" reform, but it is unlikely to produce a qualitative change in the kind of reform.

The desirability of law reform per se is hardly open to question but what is required now, is some further discussion on the precise relationship which is to exist between the law reformers and the law makers.

Yours faithfully,
Doug Wilson
Wellington

Mr Collins comments:

An examination of the 124 Bills which have been before Parliament during the course of this year up until 11 November leads one seriously to question the validity of Mr Wilson's observation that "legislative priorities reflect social priorities". A debate on that point however, would detract from the central theme of his response to my article. When I suggest that law reformers should study broader and more socially important topics I do not mean that they should handle the political hot potatoes of the day. The examples I suggest in [1976] NZLJ 441, 447 are by no means exhaustive, but merely illustrate the kind of topic upon which I hope a full-time law reform body would concentrate. There can be no doubt that like the Ombudsman, full-time law reform commissioners would need to maintain a certain amount of independence from government control. At the same time, the law reformers must undertake work which is going to receive legislative priority. I envisage dangers in allowing the government to have a veto power over topics studied, similar to that enjoyed by the Lord Chancellor in England. For that reason I suggested a New York style of liasion between the Attorney-General and the Commission for the purpose of ensuring a certain amount of independence, and at the same time avoid embarking upon topics which are not going to get any legislative priority.

Sir,

Accident Compensation – Suicide

I should like to comment very briefly on the reply by the Minister of Labour (reproduced [1976] NZLJ 456) to the parliamentary question which Dr Finlay based on my article in [1976] NZLJ 54.

The Minister appears to expect that, in deciding whether a death by suicide has been the result of a "personal injury by accident", the Commission will take a liberal view. If that expectation proves to be justified, the main concern expressed by my article will have been met.

Disconcertingly, though, the reply goes on to say that, once it has been established that a particular suicide was the result of personal injury by accident, the Commission may "in its discretion" pay compensation. The very reason why it is important to determine whether a suicide has been the result of personal injury by accident is that, as such, it entitles the dependants to compensation *as of right*. It is only if the suicide is not the result of personal injury by accident that the discretion applies.

This latter point, incidentally, has the unusual result that in some cases the dependants of those who have died by suicide can have, concurrently, rights under the Deaths by Accident Compensation Act and, at the discretion of the Commission, rights under the Accident Compensation Act itself. This is because, by conferring discretionary rights in some cases where death has not been the result of personal injury by accident, s 137 goes beyond the general scheme of the Accident Compensation Act. Presumably, the fact that the right is only discretionary would mean that cases of double compensation would be unlikely to occur in practice.

Yours faithfully,
Brian Coote
Professor of Law,
University of Auckland.

FIFTH COMMONWEALTH LAW CONFERENCE

Edinburgh, Scotland, 24th-29th July 1977

On behalf of the Joint Hosts, the Faculty of Advocates and The Law Society of Scotland, I extend a warm invitation to you to attend the Fifth Commonwealth Law Conference

The Hon Lord Thomson
Chairman, Organisation Committee

The theme of the Conference is: 1977: The Role of Law in the Commonwealth and the following Sessions are proposed:

Law reform
Agencies of Law Reform in the Commonwealth
The Scope of judicial development of the law
Legislation: principles and methods
The contribution of legal literature

The legal profession and the state
Main Session: The Place of Law Officers and Ministers of Justice
Legal Aid
Legal Education Public Defenders and Public Prosecutors
Public Defenders and Public Prosecutors
The regulation of admission to, and the scope of, professional practice

Developments in family law
Courts and Jurisdictions
Marriage and divorce
Public and private interests in the custody of children
Family property

The law of the sea and natural resources
Main Session: Consideration of the results of The Law of the Sea Conference
The concept of a continental shelf
Profits and pollution
State participation in the exploitation of resources
The financial problems of exploitation

Facilities will also be available for discussion groups on matters of particular concern to specialist practitioners

Social Programme

Tickets for Tours, Scottish Opera, Scottish Ballet and the Closing Dance are optional extras. Early reservations are advisable, as certain places and tickets will be limited. A booking form will be issued to delegates with their receipt and registration card

The ladies programme

The Ladies Programme will include lectures on Edinburgh, and opportunities to see something of Scottish fashion, craft and design. A talk on tartans is also arranged

The meeting place for ladies will be the Adam Suite of the George Hotel where Members of the Ladies Committee and their helpers will be ready to advise and assist regarding shopping and visits of interest in Edinburgh etc

Further information and registration forms are available from the convenor of the Travel Committee of the NZ Law Society P O Box 6048 Auckland or from the Conference Secretary (Miss Ann Davidson) Law Societies Hall, P O Box 75 26 Drumsheugh Gardens Edinburgh EH3 7YR Telex 72436 Lawsco G.