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REVOLUTION OR REHASH?

After five long years we now have the Town and Country Planning Bill and it could hardly have been introduced at a better time – right in the middle of the run up to local body elections. That, coupled with the one month period within which to make submissions, should ensure that the select committee considering the Bill is not overburdened either by detailed representations from responsible bodies or by fatuous mewlings from the lunatic fringe (from which category the New Zealand Law Society has been graciously excluded).

Next follows some good news and some bad news. The good news is that anyone familiar with the old town planning legislation will find the language in the new Bill touchingly familiar. The bad news is that that leaves matters much as they were five years ago. Take one fiddling little example. "Owner" is defined as the person who is or would be entitled to the rack-rent of the land and includes the owner of the fee simple. Far from being part legal jargon "rack-rent" is a term that is not used at all, except to the extent that it is perpetuated in the definitions sections of legislation. It is as Byron O'Keefe said in his book on Rating "redolent of an era of effete economic doctrine". One matter that this definition does not explain in clear language is whether a person who leases land, constructs a building on it, and lets that building to others (so that he is not an occupier) comes within the definition of owner so as to have any standing in town planning matters.

A much vaunted aspect of the new Bill is that it imposes restrictions on the Crown. Inconveniences would be a better word for the Crown may drive a Clydesdale and tumbrel through the "restraints".

Throughout the planning process the Minister of Works and Development has the power to do what he wants. Consider, for example, matters such as forestry development or the siting of thermal or hydro power schemes. These are matters which one would expect to see dealt with in a regional planning scheme. The Bill makes provision for extensive public participation in the formulative processes. The last word, however, lies with the Minister and once the regional scheme is operative then its provisions prevail over the provisions of a district scheme.

What of public works within the district? The Bill provides procedures for notification, for objection, and for appeals to the planning tribunal which has power to revoke any requirement. The Minister may, however, avoid the appeal procedure by himself referring the matter to the tribunal for inquiry. The tribunal reports to the Minister, the Minister decides, and no appeal lies from his decision.

Then there are public utilities – electricity transmission, district heating, gas pipes and the like. In addition the Minister may specify other public utilities (and where do "public utilities" end and "public works" begin?) in regulations. These are deemed to be permitted throughout every district. The local authority *only* may appeal against their location.

The provisions affecting the Crown are dotted about the Bill. They give a bit here, take a bit there, and in the end it all comes down to the Crown being bound except when it does not want to be.

The first question of principle to be asked then is must we bear the heavy hand of the Minister to this extent?

That standing to appeal on district planning matters has been extended to organisations and societies of public benefit or utility should not be allowed to distract attention from the continuing unsatisfactory nature of the provisions as a whole. These provisions allow "any person" to be heard on maritime planning matters; an "interested body or person" to be heard in the preliminary stages of a district planning scheme but only "any person affected by the provisions of the scheme" to be represented before the tribunal (and has not "affected" caused troubles enough?); and owners and occupiers claiming to be "affected" (yet again!) and, of course, the new provision for societies and organisations in respect of district schemes. It is a bit of a muddle.

The second question of principle then is why should not standing in planning matters be unrestricted. Certainly the word "affected" is an inept touchstone. Many in authority are possessed of a bogy that lifting restrictions will bring the busybodies out from under the mushrooms. The greater fear is that restrictions will deny standing to those who have something valuable to contribute. Certainly perpetuating with modifications the existing system, which involves hearing what an alleged party has to say and then deciding whether they have standing (and then holding a decision off while the standing issue is appealed), is nonsense of the first water.

Next we should turn to the Courts. There are two provisions that limit the jurisdiction of the Courts in planning matters. Firstly, questions relating to the validity of district schemes are to be referred to the planning tribunal only, and secondly, there is no right of review by the Supreme Court in cases where there is a right of appeal to the planning tribunal. Two difficulties spring immediately to mind. If a party seeks an injunction in order to preserve the status quo until the matter is determined two sets of proceedings will be required; one in the Supreme Court for an injunction and the other before the tribunal to determine the matter. The second difficulty arises where it is alleged that a decision of a local authority is void. What happens, for example, where a consent is given without authority? Is this a case where there is a wrong decision that should be appealed against, or is the consent a nullity and the party aggrieved free to seek a declaration to this effect from the Supreme Court?

Apart from the jurisdictional issues these exclusions raise a more fundamental question; should the Supreme Court, traditionally looked on as the guardian of the rights of the individual, be excluded in this manner?

Among the matters to be dealt with in regional schemes is the regional need for water supply. The Town Planning Appeal Board has already observed that water management plans have no statutory backing and may be attacked by any individual applicant for a water right. Bearing in mind that regional planning schemes have the status of a regulation only it would seem that any attempt by the Regional Planning Authority to formulate a water management policy would likewise be susceptible to attack. Water management planning and land use planning are so closely related that they should be dealt with together rather than in a piecefashion. While it is good to see that maritime planning has been included, a further general question that needs to be asked is whether sufficient consideration has been given to the ambit of town and country planning.

While it may be said that the Bill is an improvement on the existing Act the overall impressions remain that fundamental issues have not been tackled squarely and that the Bill is designed to concede as little as possible to the general public. All this is perhaps symptomatic of a Bill that has been prepared with the very minimum of public involvement and discussion.

It is becoming fashionable to criticise the drafting of legislation. Town planning probably affects more people than any other legislation. It is very much an area of do-it-yourself law. It is a pity that more trouble has not been taken to ensure that the legislation is clearly and simply expressed. It is worth observing that many of the more complex and repetitive provisions are in the areas relating to the right to be heard and the rights of the Crown; areas that we suggest need re-thinking.

The uncertainties, however, are not all in the Bill. They also reside in what is not in the Bill. Many who are concerned with environmental matters will look at the powers of inquiry that are to be vested in the planning tribunal and wonder what is to happen to environmental impact reporting procedures. As with water management these procedures should have been dealt with as part of an overall legislative planning scheme. They have not been. To that extent the proposed legislation is incomplete.

That is enough – compensation can wait for another day.

We were promised a revolutionary Act. We have received a patched-up version of the old. It is little more than a compromise with the few odd sops to environmental groups. Despite some improvements the Bill remains a considerable disappointment.

Tony Black

PRACTICE NOTE

PAYMENT INTO COURT

A couple of recent cases arising out of payment into Court merit mention. No one could assert that the present rules of the Code are crystal clear and the proposed new Code will clear up many uncertainties; a brief sketch of the new rules as to payment into Court is given below.

In *McVicar Timber Industries Ltd v Lloyd*, Christchurch, 3 August 1977, judgment had been given for plaintiff for $3840 for loss of timber arising out of a fire, and an agreed sum of $300 for clearing the land etc. The claim was based on three causes of action: negligence, nuisance, and *Rylands v Fletcher*. Plaintiff had not, as required by R 115, asked for judgment on each cause of action separately; in its statement of claim it averred that plaintiff had suffered loss of timber valued at $21,649, and cost of clearing the land in a sum yet to be ascertained. It claimed (1) $21,649 for the timber (2) damages for clearing land 'yet to be ascertained' (3) costs (4) interest.

The Supreme Court had, some months before trial, given leave to defendant to pay into Court $4000 with a denial of liability (a fixture must have been obtained at that stage, necessitating leave under R 213). On the same day as leave was given, the money was paid into Court and the notice to plaintiff ran along the lines of the form suggested in *Sim's Practice and Procedure* (11th ed), 164; It said

> "Take notice that the Defendant while denying all liability for the Plaintiff's claim for the damages of . . . $21,649 . . . , the Defendant has paid into court the sum of . . . $4000 and says that that sum is sufficient to satisfy the plaintiff's claim for the specified sum of $21,649."

The defendant moved for judgment, submitting that the amount which plaintiff recovered for loss of the timber, $3840, was less than the amount paid in in respect of that head of claim; therefore defendant was entitled to judgment and costs; the other head of damage had been agreed on at $300, and interest should not be taken into account in determining the consequences of a payment into Court. Somers J, observing that the rules as to payment into Court were technical and that strict compliance was necessary, referred to R 213, as relevant. That rule provides that if the claim is for a sum of money, the defendant may pay into Court a sum by way of satisfaction either of the whole claim or of general damages. "The whole claim" in the rule means, his Honour said, the totality of the monetary claim made by a plaintiff in respect of a particular cause of action . . . . . In the present case, whatever may be said as to the manner of formulation of the plaintiff's claim, it was, in the result entitled to judgment for one sum only. That sum comprised an item in respect of loss of timber and another item in respect of clearing. The "whole claim" (apart from interest) embraced both those heads of damage; there was no separate cause of action in respect of which each item was claimed; the heads of damage were in substance pleaded as, and were in fact and law, a consequence of each of the three causes of action pleaded. But payment was in respect of one only of the two heads of damage. No doubt that was because the second head of damage was not then quantified. It was of course open to the defendant to have applied for particulars and so be able to measure his payment with regard to both. The payment in was therefore not authorised by the rule. Moreoever the leave the defendant obtained was to pay in $4000 in satisfaction of the plaintiff's claim; the payment was in satisfaction of a part only of it. Interest could be disregarded as it was not part of the cause of action and payment could not be made in respect of it. The defendant's motion was accordingly dismissed.

In *Lambert v Mainland Market Deliveries Ltd* [1977] 2 All ER 826 (CA) a vehicle driven by defendant's servant collided with the plaintiff's parked car. The plaintiff obtained $982 from his insurers for the greater part of his loss but was left with an uninsured balance of $72 for his franchise etc. While the plaintiff's insurers were in negotiation for recovery of the $982 from the defendant's insurers, the plaintiff, acting on his own behalf, and without his insurer's knowledge, sued the defendant for the $72 in the County Court. The defendant sent the summons to his insurers and, on the day they received it, they paid into Court the $72, which was duly forwarded to the plaintiff. Under the County Court rules a payment into Court in satisfaction of the claim, and costs, operated as a stay of the action. It was accepted by both sides that the stay, unless removed, also operated to bar the plaintiff's claim (at the behest of his insurers) for the $982. The County Court declined to remove the stay and the two questions before the Court of Appeal were whether the Court had jurisdiction to remove the stay, and if so, whether it should do so in the

circumstances. Holding that there was jurisdiction, Megaw LJ, at 833h, observed that this was a proper case for removal of the stay, being one of the few and rare proper cases where this should be done; the defendant's insurers, at the time they made the payment into the County Court were seeking to take advantage of the procedural provision as to stay so that any further claim against them or their assured would be barred as a result. Their prompt action in paying the small claim was taken to avoid liability for the larger claim. The stay was removed subject to the $72 being refunded to them.

What would be the likely attitude of the New Zealand Courts on these facts, but applying our own Code, which does not contain provision for stay on payment into Court? By R 213 defendant may pay a sum into Court by way of satisfaction of the whole claim and by R 220, if defendant pays into Court the full amount claimed, the plaintiff is entitled to costs to date of payment. While we have no provision for stay when this is done, clearly, in normal circumstances, a plaintiff proceeding with his action after payment in full will be met with satisfaction, and a costs liability. His action would fail, and the result is little different from applying a rule directing stay at the outset. In *Lambert* however the circumstances were not normal; the plaintiff, by embarking on his own action without the knowledge of his insurers for a small fringe sum, brought about circumstances which resulted in the barring of proceedings on the same cause of action for the major sum involved. New Zealand would be in an a fortiori position with no rule directing stay after payment into Court, and it is suggested that *Lambert* would be followed here on similar facts.

A brief sketch of the proposed new rules on payment into Court is as follows. (They are not quite in final form.)

Various situations where money may be paid into Court are listed as:

(a) with admission of liability and quantum;
(b) with admission of liability and denial of quantum;
(c) in liquidated demands, in satisfaction of claim with admission of liability up to the amount paid;
(d) with admission of liability as to one or more heads of damage and denial of liability as to remainder;
(e) with denial of liability as to the whole of the claim;
(f) as to general damages only, with: (i) a denial of liability as to the whole of the claim or (ii) an admission of liability but denial of quantum.

The defendant may proceed separately as above in respect of each or any cause of action, but his notice of payment into Court is to make it quite clear as to which cause of action the money is paid in, and as applicable, the amount allocated to it. The plaintiff may accept as to that cause of action, and proceed with other causes of action, his notice of acceptance specifying just what he is doing.

A payment under (a) above may be made at any time and whether or not a statement of defence is filed. In other cases a payment in may be made when the statement of defence is filed or later, up to setting down; leave of Court is required for a payment thereafter before trial. Notice of payment in is to be filed and served on all parties who have given an address for service. If the plaintiff desires to accept a payment in to Court in satisfaction of the cause of action or head of damage, he must within 14 days after service of notice of payment in file and serve on all parties a notice of acceptance. If the 14 days expires in the Long Vacation the time is extended to 20 January. The plaintiff accepting is to be paid the money forthwith, with exceptions such as where payment was in respect of general damages only or other than by all defendants or where the cause of action arose under Deaths by Accident Compensation Act 1952, with more than one person entitled to the money, or where the plaintiff is under disability; leave of Court is necessary in these cases. If the payment in is in respect of general damages only, the plaintiff may accept the money and proceed with his claim for special damages. He may not accept money paid in, after the trial has commenced, without leave. If the payment is not accepted within the time allowed it is deemed declined, and, on an affidavit of service of the notice of payment in being filed, is to be refunded to the defendant forthwith, without affecting the costs provisions below.

Except as to a payment in under para (c) above the fact that money has been paid into Court is not to be pleaded nor disclosed to the Court at the trial of any questions of liability or quantum until those questions have been decided.

In non-monetary claims, the defendant may admit part of the relief claimed, or other relief.

If a payment has been made under para (c), the proceeding is deemed to be for the balance only, subject to any question of interest.

If the payment is of full amount claimed, the plaintiff is entitled to costs to date of payment. If he does not accept as satisfaction any payment in and fails at the trial to recover a greater sum than that paid in, the Court may allow the defendant his costs of action subsequent to the payment in.

Provision is made for offers of contribution by a party liable to another party; such offers

are not to be brought to the notice of the Court until liability of quantum is decided; and the offers may be taken into account by the Court when awarding costs.

Notices of payment in may be amended by increasing the amount paid in, but may not be withdrawn or otherwise amended without leave.

Where the Court would have jurisdiction to award interest to the plaintiff, a payment into Court is deemed not to include interest unless the notice of payment specifically says it does. If it does not, and is accepted by plaintiff, he may within seven days of acceptance apply to have interest determined.

The rules apply to counterclaims, with necessary modifications, and where a counterclaiming defendant pays into Court, his notice is to make it quite clear his intentions as to the counterclaim.

Payments out are to be made to the party's solicitor unless the Court orders otherwise.

Gordon Cain

SOCIAL WELFARE

CHILDREN: CONSENT TO MEDICAL TREATMENT

By RODNEY J HOOKER, *a solicitor with the Department of Social Welfare.*

The recent investigations into the administering of Electro Convulsive Therapy (known as ECT) to children in the custody of various government departments raised the question of who may consent to the medical treatment of children *(a)*. Regrettably neither report answered the question but merely castigated officials for failing to obtain "a consent".

There can of course, be little doubt that medical treatment constitutes an assault upon the patient unless the patient consented to the treatment. Regardless of the difficulties in administering this "consent concept", particularly in the case of sexual assaults, the English and New Zealand Courts have accepted, and the legislature has preserved the defence *(b)*. See Crimes Act 1961, s 20.

But the defence is limited for it does not apply to battery or mayhem, and a fortiori is no defence to a homicide – Crimes Act 1961, s 63. As these limitations have been imposed on the grounds of public interest *(c)*, it is questionable whether the Court would extend the limitations into the medical field. In *Bravery v Bravery* [1954] 3 All ER 59, at 68, Lord Denning as he then was, stated that "an ordinary surgical operation which is done for the sake of a man's health with his consent is of course perfectly lawful because there is just cause for it. If, however, there is no just cause or excuse for an operation it is unlawful even though the man consents to it". Admittedly Lord Denning's comments are obiter, but they do cast doubt upon the lawfulness of sterilisation operations, and indeed some other types of operations, for example sex change operations and cosmetic surgery. The Royal Commission on Contraception, Sterilisation and Abortion has recommended that s 61 of the Crimes Act 1961 be amended so as to remove the uncertainties surrounding the legality of sterilisation operations.

Having briefly summarised the law relating to assault one can now examine the question whether a minor can consent to an assault on himself. A number of cases have accepted the defence of consent by the child to the assault, and have thereby conferred upon the child the power of consent. *R v Meredith* (1838) 8 C & P 589, *R v Martin* (1839) 9 C & P 215, *R v Read* (1849) 3 Co CC 226, *R v Mehegan* (1856) 7 Cox CC 145. While the defence of consent must now be read subject to ss 133-142 of the Crimes Act 1961, the right of the child to consent is not affected by those statutory provisions.

The most recent case where the Court examined the question of consent by a minor to an assault upon himself is *Burrell v Harmer* [1967] Crim LR 169. In that case the defendant had tattooed devices on the arms of two boys, aged 12 years and 13 years. The marks subsequently became inflamed and the defendant was charged with and convicted of causing the boys actual bodily harm. The defendant appealed on the grounds that the boys consented to the tattooing. The appeal was dismissed, the Court stating that if a child of the age of understanding was unable to appreciate the nature of the act, apparent consent to it was no consent at all. There is judicial authority to sup-

(a) The Ombudsman's Report, Reference 11066, The Report of the Commission of Inquiry into the Case of a Nuiean Boy.

(b) For an interesting discussion of the French and West German approach see 26 MLR 233.

(c) *R v Coney* (1882) 1 QBD 543, *R v Donovan* [1934] 2 KB 498.

port such an approach. In *R v Lock* (1872) LR 2 CCR 10, the defendant was charged with indecently assaulting two boys aged 8. Kelly CB stated in his summing up to the jury that the boys were "wholly ignorant of the nature of the act done as to be incapable to exercising their will one way or other". In *Agnew v Jobson* (1877) 13 Cox CC 625, it was accepted that the minor was capable of consenting to assault, the jury finding as a fact that there was no consent.

On the basis of these decisions it is submitted that at common law a minor is capable of, to use the Ombudsman's term, giving "informed consent".

The common law must of course, now be read subject to the provisions of s 25 of the Guardianship Act 1968. Subsection (1) of that section confers upon a minor of 16 years or over the ability to consent to medical, surgical or dental operations as if he was of full age, if the operation is for his "benefit". It is submitted that "benefit" be construed narrowly so as to exclude operations of a more "unusual nature" for example sex change operations, cosmetic surgery. Section 25 (2) confers upon a minor who is married the power to consent to medical surgical or dental treatment.

At common law it is somewhat uncertain who could consent where the minor is incapable of giving informed consent, but the power probably resided with the minor's guardian. The position is now clarified in the s 25 (3) specifies who may consent for the minor (at least where the minor is incapable of consenting). Section 25 (4) deems a person who has the care of a child for the purpose of adopting that child a guardian for the purposes of s 25 (3).

Section 25 (5) provides that

> "Nothing in this section shall limit or affect any enactment or rule of law whereby in any circumstances –
>
> "(a) No consent or express consent is necessary or;
>
> "(b) The consent of the child in addition to that of any other person is necessary;
>
> "(c) Subject to subsection (2) of this section, the consent of any other person is sufficient."

Paragraph (a) preserves s 61 of the Crimes Act 1961 which provides that "Every one is protected from criminal responsibility for performing with reasonable care and skill any surgicial operation upon any person for his benefit, if the performance of the operation was reasonable, having regard to the patient's state at the time and to all the circumstances of the case." In the case of a patient incapable of consenting because he is delirious or unconscious, it is submitted, that this section is applicable. The late Sir Francis Adams in his learned book, *Criminal Law in New Zealand* (2nd ed) considered that s 61 would protect a surgeon where he administered medical aid against the patient's refusal, where, in the circumstances it was reasonable to administer such aid. With respect to the learned author it is submitted that the Courts would be reluctant to deprive parents of control of their children merely because officials considered the treatment to be in the child's interests. It is further submitted that where the doctor considers the child needs medical treatment and the guardian refuses consent, then recourse be had to the machinery of the Children and Young Persons Act 1974, ie being a child or young person in need of care, protection or control.

It is difficult both to interpret and reconcile s 25 (5) (b) and (5) (c) of the Guardianship Act 1968. Where a child refuses medical treatment and that refusal is informed, the child's consent is necessary – subs (5) (b). Should the guardian consent to the operation, his consent is only sufficient (subs (5) (c)), and cannot override the child's refusal as the child's consent is the necessary prerequisite to the treatment. With respect to the law draftsman, it is submitted that the common law which subs (5) (b) and (c) purports to perserve would not have permitted this inconsistency and that the common law, which is as submitted before, prevails.

It is the writer's conclusion that the consent necessary to condone medical treatment of a child must be given by the child if the child's consent is informed. If the child by reason of his immaturity is incapable of giving informed consent then those persons specified in s 25 (3) of the Guardianship Act 1968 may consent. Where the child is capable of giving informed consent but refuses consent then the medical treatment may not be given unless the circumstances are such that s 61 of the Crimes Act 1961 applies.

PROFESSIONAL

PRACTICAL TRAINING OF LAWYERS

By EVAN WILLIAMS, *Junior Lecturer at Victoria University of Wellington.*

Once again the subject of practical legal training has reared its hoary head and is currently being debated in a number of forums with a view to determining its present state and future prospects. Unfortunately many discussions of this topic comprise little more than vague articulations of a general feeling that something is wrong. It is regrettable that we often do not apply the same rigour of analysis to our own problems as we do to those of our clients. It is my belief that the initial focal point for any such discussion must lie in the specific problems which are to be remedied. Therefore this article represents an attempt to identify the specific problems which practical legal training is aimed at solving. A further aim is to put forward some tentative views on the ways in which these problems might be remedied. However before doing so I wish to examine briefly the debate over practical training in a more general way, and to suggest that broad historical factors should not be allowed to obscure the real issues or to unduly colour our view of the true nature of the answers to the problem posed.

There appears to be a feeling that is said to be stronger today than in the past that entrants to law firms are not properly trained. One might therefore ask why this feeling might be stronger. I wish to suggest that there are two primary reasons why this may be the case.

The first is that there generally exists a good deal of confusion about the best way in which to train people for vocations, the two main options being "on the job" training and separate institutional training. Thus we see nurses now seeking to learn nursing in polytechnics rather than hospitals, teachers learning how to teach away from schools, and many other vocations moving towards this method of training. However there are many who argue forcibly that only a very limited amount can be achieved by such moves; that practical skills are very difficult to teach away from the job; that a more valuable method of vocational training is one which takes place within the actual environment of the work place itself and that it is difficult to transfer many skills out of the institution in which they are taught into the environment in which they are to be exercised. Indeed recent evidence exists which tends to show that the transfer of professional skills out of a contrived learning situation into the *real* professional context is very much more difficult than has been generally admitted in the past *(a)*. However a general educational debate is beyond the ambit and competence of this article. The primary point is that in a time when there is general uncertainty over methods of job training there is likely to be greater questioning by lawyers of their particular training. Accordingly it is also likely that there will be more doubt about the product of this training – in our case the law graduate – and about the role of a firm in training him for practice.

A second reason why there might now be a stronger feeling that a law graduate is not adequately equipped with practical skills is historical. For financial or other reasons fewer law students complete their degrees part-time and the budding lawyer now enters an office at a much later stage of his professional training. (It is worth noting in passing that the common idea that this is due to a University policy towards full-time study throughout the degree is not correct.) Some even hold, or nearly hold, practising certificates when they first join a firm. Not surprisingly these graduates expect somewhat more interesting and responsible work than the part-time clerk of the past. They also expect much higher remuneration. On the other hand it is no less surprising that a law firm expects more from these more expensive graduates than it did of part-time clerks. On a quantitative level at least a firm obtains a full-time employee. However it is almost certain that on entering a firm a graduate is no more practically skilled than a part-time clerk was when he entered a firm – particularly in relation to the kind of tasks he is called upon to undertake in the first few months of employment. It should be observed here that this last point does *not* call into question the overall competence and ability of a graduate. It is confined to the question of practical skills, and in particular the *lack* of practical skills needed in the first few months of his working career. The proposition I wish to challenge is the one which says that "because graduates have spent four years at university they should be more practically skilled than part-time clerks were and

(a) Argyris C. "Theories of Action that Inhibit Individual Learning" American Psychologist (1976) Volume 31 p 638.

therefore better at doing the same kind of conveyancing and debt-collecting that those clerks did; because they're not, there is now a problem (which did not exist before) and it should be solved prior to entry to a firm."

Thus I suggest that any increase in doubts about the practical ability of a new entrant to a law firm owes its existence more to external historical factors than it does to the internal content of the training of that person. These historical factors tend to discredit the proposition that there must be a problem because everyone says there is. However that is not to say that we should throw up our hands and walk away. Nor should we refuse to examine the courses offered by the universities to see whether they might be improved. But might practitioners not also look to themselves and their own houses and put them in order too? In doing so we must attempt to identify as clearly and precisely as possible the problems that exist for the solving.

Deficiencies in a typical entrant to a law firm

It will doubtless have become apparent that the particular area which I wish to focus upon is the level of practical expertise of new entrants to law firms and the transitional problems posed by their entry to the actual practice of law. Assuming a reasonable grasp of their degree courses together with all, or some, or none of their professional units these graduates can be expected to have the following deficiencies:

(1) They are not familiar with the people, the routine, the formal and the informal systems and rules of the particular office in which they work. They may not have worked in an office before.

(2) They will probably be unaware of the ways in which they are expected to act and to communicate with people.

(3) It is likely that they will have large gaps in their knowledge of the kinds of accounting practitioners are required to handle.

(4) They will not know very much, if anything, about the systems and procedures of registration and filing of land and court documents.

(5) They will not be at all good at drawing documents or writing letters.

(6) They will not be aware of the details or implications of planning and executing a transaction in its entirety – in other words they will be somewhat lacking in their handling of the raw material of a transaction.

(7) They will be unfamiliar with the details of the process of bringing a matter before the court, planning a case, the procedures of the court; initially their advocacy will be fairly undeveloped.

(8) They will probably have forgotton or not have been confronted with a reasonable proportion of the substance and details of the law relating to many of the matters they will be called upon to deal with.

To expand upon these points:

(1) They are not familiar with the people, the routine, the formal and the informal systems and rules of the particular office in which they work. They may not have worked in an office before. Some may seem overconfident. Others may be too timid, All will be ill at ease. I believe that this problem cannot be cured in advance. However it is crucial that firms appreciate this problem and provide their new employees with as much information, guidance and supervision as possible. New employees especially need a particular person whom they know they can turn to for guidance and assistance. It seems to be crucial that either one or two persons are responsible for the overall supervision and managment of the content and load of new employees' work.

(2) They will probably be unaware of the ways in which they are expected to act and to communicate with people. There are good grounds for believing that this is a significant question. Entry to a law firm involves a person in a wide and complicated set of relationships. This set of relationships is reasonably hierarchical and involves a wide number of persons including partners, firm's solicitors, other solicitors, clients, magistrates and Judges, court staff and others. In particular new employees do not know where people fit in and are unsure about the way in which they are supposed to relate to them. A central problem is that of their relationship with their clients.

One wonders whether there is any substitute for experience in this area. However notwithstanding this comment it can be said that some graduates will handle this problem much more easily than others. Some people fit into new situations and assume the practitioner role much more readily than others. In addition many tensions or problems perceived in this area may be put down to the gap in ages and attitudes which must inevitably exist between practitioners and graduates.

Despite the general conclusion that this deficiency cannot be remedied outside of the office situation one aspect that might be cured in part by external training is the lack of negotiating and interviewing skills. By the use of role plays, discussions and practical exercises graduates may be given more confidence and sophistication in their approach to these parts of their practises. They would have conducted a few interviews and negotiation sessions (albeit in simulation) and may be more aware of the undercurrents and complexities inherent in these situations together with the

techniques they may bring to bear on them *(b)*.

(3) It is likely that they will have large gaps in their knowledge of the kinds of accounting practitioners are required to handle. There is some feeling that as well as an ability to cope with the firm's own accounting system the new practitioner needs a knowledge of accounting principles. One difficulty in teaching firm accounting outside of a firm is that the outward appearance of these systems varies quite markedly from firm to firm. However there is little doubt that it is possible to teach elementary principles of book keeping and trust account procedures by a course such as the Office and Courtroom practice course. It should also be possible to familiarise students with the solicitors' audit regulations and make certain general observations about office systems. Unfortunately I find that I cannot avoid commenting that the only Office and Courtroom Practice course of which I have personal knowledge does not appear to succeed in this regard. While bearing in mind the observation that we should not expect too much from such a course it is probable that close scrutiny of the format of these courses would be worth while. Furthermore it should be even more possible to provide a fairly good introduction to general accounting principles and procedures. One might observe that it is probably appropriate that general accounting principles be taught by a full-time accountancy lecturer.

(4) They will not know very much if anything, about the systems and procedures of registration and filing of land and Court documents. In regard to the systems and procedures of physically registering and filing documents the new employee will not be in a very different position from that of most practitioners. In a great number of firms the task of registration and filing of documents is now carried out by girls hired specifically for that purpose. Very few principals or solicitors within firms would know which counters or rooms to go to in the Land Transfer Office or which forms and abstracts to attach to documents. Doubtless we would all agree that this does not represent a problem. What is required, however, is that new employees be aware of the implications of this system for them as they draft documents and decide whether, when and where to file and register them. One might conclude that these implications are neither large in number nor terribly difficult and that in any case this ability is only acquired by actual performance of the task of coming to grips with these implications as one drafts and registers documents.

(5) They will not be at all good at drawing documents or writing letters. This deficiency together with the next are probably the two items of greatest concern. To what extent can this lack of drafting skills be remedied before entry to a firm or in a learning situation outside the firm? How quickly can it be remedied within a firm?

It would seem to me that the problem is accentuated by the fact that most graduates will have no training whatsoever in drafting before entering a firm. Most will start their first job in the same year as they are taking the professional courses, Conveyancing and Draftsmanship and Civil Procedure at University.

The period during which the inadequacies of a new law clerk or solicitor are greatest and most clearly on display is the first three or four months in a firm. The four deficiencies listed prior to this one will probably be causing him quite some concern and taking a reasonable amount of his concentration and effort. Add to this a complete lack of experience in, and knowledge of, drafting and it is no wonder an older experienced practitioner will ask whether his clerk has been taught anything of use, or anything at all while at university. Is the practitioner right to arrive at a negative conclusion? As a general proposition it is demonstrably false but in regard to the specific skill of drafting documents and letters it is indeed correct. It is unfortunate that this specific complaint is often broadened into a generalised statement that not very much of practical value is taught within the law course.

There remains the substance of the question concerning the extent to which drafting skills can be remedied prior to entry to a firm. I would contend that a reasonable amount of the skill of drafting can be taught outside a law firm – but not without the actual "doing" of the drafting by those being taught. It is widely recognised that practical experience is the primary tutor of the skills of drafting. It is therefore logical to advocate a higher element of the "doing" of drafting in the Conveyancing courses than presently exists. However, one constraint is that of time and resources. Conveyancing is but one of the professional units. A balance of emphasis must therefore be arrived at. In addition while the Universities may wish to hire practitioners or other part-time teachers to take tutorials in drafting it is worth asking how many tutorial hours are needed to bring a student up to a significantly better level. A dozen tutorial hours will not provide a volume of experience comparable with that which even the first few weeks in a law office might provide. Another limitation on the extent to which drafting can be taught is that of the situation in which it is taught. I believe that a graduate will bring more care, attention and effort to bear on a *real* document or letter than on an exercise. He will

(b) See for instance the discussion of special training in interviewing by A McM Stanton in [1969] NZLJ 514.

undertake the task of improving his skills of draftsmanship far more diligently in a real situation than in a simulated setting.

Therefore my conclusion is that the important skills of drafting can be taught to a certain extent by separate institutionalised training but only to a very limited extent. One is thus forced to the conclusion that not very much should be expected of the drafting skills of a new entrant to a firm.

(6) They will not be aware of the details or implications of planning and executing a transaction in its entirety – in other words they will be somewhat lacking in their handling of the raw material of a transaction. This aspect focuses on the initial confrontation with the facts and requirements of a particular problem or transaction in an efficient and proper manner. Both aspects emphasise a knowledge of practical requirements. These requirements are partly shaped by theory and partly by the situation in which the transaction is being conducted. I would suggest that only a limited proportion of the situational requirements can be taught outside the context of the actual work situation. However a tool such as the legal practice manual edited by S MacFarlane and issued by the Auckland District Law Society can impart a significant level of information about the environment within which a legal problem exists and the steps that must be taken to carry the problem through to its solution.

(7) They will be unfamiliar with the details of the process of bringing a matter before the Court; planning a case, the procedures of the Court, initially their advocacy will be undeveloped. Much the same comment can be made about this deficiency as was made about the last one. Furthermore, the same type of solution appears appropriate. An example of another way of attempting to solve this problem is an integrated litigation course which uses fairly simple but complete files as precedents for exercises which students undertake in simulation.

(8) They will probably have forgotten or not have been confronted with a reasonable proportion of the substance and details of the law relating to many of the matters they will be called upon to deal with. No one would seriously argue that a graduate should know all areas of the law and all its details. No lawyer does. I do not feel that this area represents a serious problem. The graduate who is in any way competent can find the law on a particular problem and analyse it, albeit not with the confidence and precision of an experienced practitioner. Apart from the skills of analysis and research a law student who enters the profession must have done Contracts, Torts, Criminal Law, Constitutional Law, Land Law, Equity, Commercial Law, Company Law, Family Law, Office and Courtroom Practice, Conveyancing and Draftsmanship, Civil Procedure, Taxation and Estate Planning and the Law of Evidence. In these areas he will have been taught the basic principles of the subject and the way in which these principles relate to factual problems. At first sight teaching basic principles may seem too theoretical. These important principles are not often the immediate subject matter of a specific problem a practitioner will have directly in front of him. However these principles have shaped the subject and they make up the framework in which the specifics lie. Therefore I am of the opinion that it is more important to teach the framework together with an ability to then work with the specifics than it is to simply teach a great many specifics. That is not to say that the specifics of subjects are not taught. Indeed they are, but primary emphasis lies with the framework of the subject and its basic principles.

The feeling of a meeting held recently in Wellington comprising representatives of all groups with interests in the practical training debate was that only three or, at most, four of the deficiencies listed above could be tackled outside of the context of a firm. It appeared that the consensus was that only deficiencies (3) (relating to accounting) (5) (the drafting of documents and letters) and (7) (the process of bringing a case to Court) could be taught in a classroom situation. Even in relation to these three deficiencies it appeared clear that the problem could be solved only to a very limited extent.

Conclusion

Thus my conclusion is that the deficiencies in a graduate and the current methods of institutionalised practical training do not constitute a serious problem. Or, as others prefer, they do represent a serious problem but there is very little which can be done about it.

Therefore firms have to expect that new law clerks, whether graduate or undergraduate will lack practical skills and "savvy". In this area there is no substitute for experience. Training of whatever kind can ease the transition from University to a law office but the major part of the problem can be solved only by experience.

One might well ask what kind of training will ease the transition. Obviously the professional courses in the Universities can help. Bearing in mind the fact that the professional courses constitute a professional qualification with aims beyond the transitional period, the courses in which practical skills are taught should be examined to isolate the specific ways in which these may be of more, or more immediate, assistance to a graduate entering practice. Another way in which the transition might be eased lies in the use of practical workshops tailored to a specific area of practical

concern. These courses are more readily understood and better received if they are given *after* a student has entered an office and has had to actually grapple with the problems tackled in the workshops. The fact that these courses can be run successfully in New Zealand is established by the effective running of just such programmes by Young Lawyers' Groups.

However the primary way in which to ease the transition is by satisfactory "on-the-job" training and supervision. If my outline of the problems and the comments on them is capable of being agreed with then the only significant means of easing the transition lies within offices. Different firms have different approaches to "on-the-job" training and the New Zealand Law Society or the District Societies might play a significant part in improving this training by drawing together the collective experience of the profession on this aspect and assisting individual firms to find new and better ways of training their new employees.

Several areas of responsibility have been identified. The Law Society and the Universities both have a responsibility – but the prime responsibility rests upon the individual practitioner. In accepting institutional responsibility for this matter the Law Society should ensure that it does not thereby absolve individual practitioners from their responsibility. In an age of increasingly total abdication to institutional solutions to problems we should resist the temptation of assuming that these solutions are the best ones and recognise instead the true nature of the problem and its solution.

PROPERTY REAL AND PERSONAL

CONVEYANCING WITHOUT CONTRACTS

By NOEL A CARROLL, *a Dunedin practitioner.*

Introduction

Conveyancers have traditionally been happy to leave the more esoteric delights of argument to their partners or brothers at Court. Recently the harsh spotlight of the Court has fixed on their work in a series of cases concerning contracts "subject to finance" *(a)* and, more particularly overseas, contracts "subject to zoning" *(b)*.

One wonders whether the spotlight has temporarily blinded the conveyancer to the attention recently paid to "deposits" which appears to make payment of a deposit fundamental not only to performance but possibly to the existence of the contracts which agreements for sale are intended to evidence.

The following propositions now appear sustainable:

Payment of a deposit is a condition precedent to the existence, or the taking effect, of at contract for sale *(c)*.

Payment of a deposit is a condition precedent to the performance of a contract *(d)*.

Payment of a deposit if not a condition precedent is a fundamental term, the failure of which entitles the vendor to rescind *(e)*.

A vendor cannot sue for an unpaid deposit on breach, he must elect specific performance or rescission *(f)*.

This article will concern itself with the effect of non-payment of a deposit on both buyer and seller, leading to the extreme conclusion that neither party may have any rights and that payment of deposits is a matter of pre-eminent importance in conveyancing practice.

Deposit defined

"Everybody knows what a deposit is . . . it is a guarantee that the purchaser means business" *(g)*. What everybody knows is of course liable to be only half the story and a deposit has a dual nature.

> "A deposit . . . serves two purposes; if the sale is completed it counts as part payment of the purchase-money, but primarily it is security for performance of the contract" *(h)*.

and is well illustrated in terms of effect by Lord

(a) See summary of cases in "Subject to Finance – Again" [1974] NZLJ 392. "Agreements 'Subject to Finance'". The Conveyancer Vol 40 No 1 37, both by Dr Brian Coote.

(b) *Herron Garage Properties Ltd v Moses* [1974] 1 All ER 421. *Barnett v Harrison* 57 DLR (3d) 225.

(c) cf *Barnett v Harrison*, supra. *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, *Watson v Healy Lands Ltd* [1965] NZLR 511 but contrast *Alarm Facilities Pty Ltd v Jackson Constructions Pty Ltd* [1975] 2 NSWLR 22.

(d) *Alarm Facilities Pty v Jackson Constr Pty*, supra.

(e) *Alarm Facilities Pty Ltd v Jackson, Myton v Schwab-Morris*, supra.

(f) *Lowe v Lowe* [1969] 3 All ER 605.

(g) *Soper v Arnold* [1889] 14 App Cas 429, 435 per Lord Macnaghten.

(h) *34 Halsbury* (3rd ed) art 545.

Justice Fry

> "In the event of the contract being performed, it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee" *(i)*.

How a deposit is dealt with when paid is prima facie clear, although it might be noted in passing that a deposit must be distinguished from a true part payment of purchase money, which is recoverable by the purchaser even if he defaults *(j)*. It might appear to be stating the obvious to say that an agreement must specifically provide for payment of a deposit – "For no deposit of any part of the purchase-money can be lawfully demanded after an open contract for sale has been concluded, as the whole price is not payable until the time for completion, which in the case of an open contract is the time when the vendor shall have shown good title" *(k)*.

Time for payment

Of equal, if not greater importance than provision of a deposit is provision of a time for payment. It is interesting to compare a random sample of agreements in use today (emphasis added):

1. The purchaser *upon execution* of this agreement shall pay to the vendor or his agent as a deposit and in part payment of the purchase price the deposit detailed in the schedule.

2. The purchaser *upon the signing* of this agreement shall pay to the vendor or his agent as a deposit and in part payment of purchase money the sum of $X *(l)*.

3. (Vendor) has this day sold and (purchaser) has this day purchased (property) for the sum of $X of which the sum of $Y *is now paid* by way of deposit.

4. The sum of $Y shall be paid *on the execution hereof* as a deposit.

5. (Vendor) has this day sold and (purchaser) has this day purchased (property) for the sum of $X of which the sum of $Y *is now paid* by way of deposit and in part payment of the purchase.

6. The purchaser shall *upon the signing of this agreement* pay as deposit to the vendor's agent herein named as stakeholder the sum of $ which shall vest in the vendor upon and by virtue of completion .... The deposit may be paid by cheque but if the cheque is not honoured on presentation the purchaser shall immediately and without notice be in default under this agreement ... *(m)*.

It will be seen that the deposit tends to be relegated to an historical recital, perhaps with good reason, as will shortly be discussed. So long as the deposit is paid and accepted, this will cause no difficulty.

The basic rule is that the deposit is due at the time the contract is entered into. Williams precedes the quotation referred to above *(k)* by referring to payment of a deposit as a matter "to be considered before the formation of the contract". It is of the very nature of the deposit to guarantee performance that it be paid at the outset. The various cases identifying a deposit as a condition precedent referred to shortly all reinforce and support this – see later particularly the comments of Woodhouse J in *Watson v Healey Lands* (supra).

A situation where some attention should be paid to the time for payment of deposits is the common "conditional contract". Failing an express stipulation that the deposit is payable on the contract "becoming unconditional" the deposit is due at the time the contract is entered into.

> "The fact that the contract is subject to finance does not usually, it seems to me, diminish the importance of the deposit. It is in earnest that the purchaser will make reasonable endeavours to raise finance. In the absence of arrangements to the contrary, the agent should normally, I think, collect the deposit when the conditional contract is made" *(n)*.

The contractual importance of a deposit

In *Myton Ltd v Schwab Morris* [1974] 1 All ER 326 Goulding J decided that as a general rule, payment of a deposit was a condition (precedent) to an agreement taking effect and expressed amazement that counsel had been able to find no direct authority on the point:–

> "Perhaps its absence is due to the point being a clear one on the ordinary everyday understanding of transactions of sale of land" (p 330).

Had counsel cast around the Commonwealth they could have found long standing authority, both in Canada and New Zealand establishing at least that a deposit was a condition precedent. It is however suggested that current conveyancing

(i) *Howe v Smith* (1884) 27 ChD 89, 101.

(j) *Mayson v Clouet* [1924] AC 980.

It is interesting to note in a number of agreements referred to shortly those which refer to rescission refer to this for non-payment of *purchase monies*.

(k) *Garrow's Law of Real Property* (5th ed) 202, *Williams on Vendor and Purchaser* (3rd ed) 27.

(l) Form approved by Auckland Law Society.

(m) 1972 New South Wales Law Society form see later.

(n) *McLennan v Wolfsohn* [1973] 2 NZLR 452, 459 per Cooke J.

practice has little regard to this "ordinary everyday understanding", and the point of the case may not be taken *(o)*. The proposition has arisen in a number of cases where a purchaser seeking specific performance of an agreement for sale and purchase of land has been met with a defence that he has disentitled himself to an equitable remedy by his own default, namely non-payment of the deposit. Canadian authority commences in 1912 where the deposit was an express condition *(p)*. Here it was held that the vendors did not put themselves in the position of being bound or being willing to be bound without a cash payment. In 1952 the British Columbia Supreme Court *(q)* held that a cash payment was a condition (precedent) to an option holder acquiring any rights under his option.

In New Zealand, payment of deposit as a condition (precedent) had been recognised in 1952 *(r)*:

> "equity would not provide relief where a purchaser had failed to provide a stipulated deposit on the appointed day because the deposit, . . . is a condition precedent to the purchaser being entitled to any contract at all . . . . The very nature of the deposit requires that payment should be made on the day expressly stipulated by the parties" (p 517).

Since *Myton's* case there has been a number of cases recognising the fundamental importance of a deposit to a contract. In 1974 the High Court of Australia (dealing with wording in form 6 (supra and fn (m)) commented – "the provisions of . . . the contract emphasise that the payment of the deposit was an essential element of the bargain" *(s)*, and in 1975 the New South Wales Supreme Court (dealing with the same form) in *Alarm Facilities Pty Ltd v Jackson Constr Pty Ltd* [1975] 2 NSWLR 22 allowed the vendor rescission for non-payment of a deposit.

Most recently in New Zealand the Court of Appeal commented obiter "There is much to be said for the view that failure to pay the deposit when due or in full would be fatal in any event to the purchasers" *(t)*.

Whilst the various authorities appear consistent in viewing provision for a deposit as a condition, if not a fundamental condition, in a contract for sale of land *Myton's* case and *Alarm Facilities* case are in direct conflict as to whether payment of a deposit is a condition precedent to the existence or performance of the contract – *Myton* regarding the contract as non existent for non-payment and *Alarm Facilities* regarding non-payment as a default under the contract.

It then becomes necessary to examine the nature of the condition in some detail and consider its true classification.

Should deposits precede the formation of a contract?

Generally, argument is whether a condition is precedent or subsequent. This is purely a matter of construction *(u)*. There does not appear to have been any suggestion that a deposit is a condition subsequent and cases consistently refer to condition precedent. Classification of conditions however is not generally helpful. Even given the classification, it is necessary to distinguish further between conditions precedent to (1) the existence of the contract and (2) performance of the contract *(u)*.

(1) *Conditions precedent to the existence of the contract* – These have been described as a true condition precedent *(v)* or pure condition precedent *(w)*. The Supreme Court of Canada, sitting as a full Court on both occasions *(x)*, has laid down and approved a rule for ascertaining the nature of the condition precedent known as the rule in *Turney & Turney v Zhilka*, the rule taking its name from the first decision. The rule distinguishes between (i) the manifest right of A to waive default by B in the performance of a severable condition inserted for the benefit of A, and (ii) the attempt by A to waive his own default or the default of C upon whom depends the performance which gives rise to the obligation ie the true condition precedent *(y)*.

Both the Canadian cases concerned sales subject to change of zoning and the finding particularly emphasised in the second decision was that both parties had an interest in the condition *(z)*.

It is difficult to see how a deposit can fall within this classification in terms of the rule for a number of reasons.

A deposit appears to be intended solely for benefit of the vendor, and certainly of no gain to the purchaser.

(o) (1974) 38 The Conveyancer 133 draws from this case the obvious (?) moral "get a banker's draft"!

(p) *Richardson v Ramsay* [1912] 2 DLR 686.

(q) *Carlson v Jorgenson Logging Co Ltd & Jorgenson* [1952] 3 DLR 295.

(r) *Watson v Healy Lands* [1965] NZLR 511.

(s) *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57.

(t) *Frampton v McCully* [1976] 1 NZLR 270.

(u) See particularly the comments of Dr Coote, note (a).

(v) *Barnett v Harrison* at 57 (3d) DLR 225.

(w) *Donaldson v Tracey* [1951] NZLR 684, 690.

(x) *Turney & Turney v Zhilka* (1959) 18 DLR (2d) 447. *Barnett v Harrison*, supra.

(y) *Barnett v Harrison*, supra at p 246.

(z) *Barnett v Harrison*, supra at p 230.

Fulfilment or performance of the condition is warranted or promised by the purchaser. This appears to sully a true or pure condition precedent *(aa)*.

A majority of the High Court of Australia was recently prepared to sever meaningless provisions relating to the payment of a deposit *(ab)*.

It is however interesting to note part of the logic of the Supreme Court of Canada, which would seem equally appropriate to a deposit. The Court appeared to consider it unreasonable that the purchaser could have advantage of the opportunity to waive zoning in the event the property went up in value – giving him an effective option *(ac)*. Is it reasonable for a vendor to have the option of enforcing a contract for sale if the property goes down in value – but rescinding for want of a deposit if the property goes up in value?

(2) *Conditions precedent to the performance of the contract* – The critical difference from the previous classification is that these conditions, or their performance, can be waived by the other party. Generally, waiver is associated with comment as to the condition being for one party's benefit only *(ad)*, although the Supreme Court of Canada has emphasised that application of its rule ascertaining a dual (if different) interest in a condition can avoid the difficulty of deciding for whose benefit a condition has been inserted *(ae)*.

It is noteworthy that the Canadian, Australian and New Zealand decisions already referred to all considered that the vendor had not done anything which excused the purchaser from payment of the deposit – in each case the Court specifically adverted to the fact that there had been no waiver *(af)*. This view may also be implicit in the English decision *(ag)*. It should be noted however that the Canadian decisions considered waiver in passing as it did not arise. The New Zealand and Australian decision both held there was no waiver. There have however been two further unreported decision in New Zealand which have found facts giving rise to waiver. In the first case *(ah)* Casey J found waiver in the land agent not requesting immediate payment but collecting payment on the purchaser's solicitor approving the contract. Here of course the deposit was paid late and the Court was concerned with waiver of prompt payment rather than waiver of payment at all. In the second case *(ai)*, Cooke J found waiver in the vendor's solicitor sending out a settlement statement for the full purchase price. If it is correct that a deposit is a condition precedent that can be waived, solicitors and agents should take heed of these last two cases *(aj)*.

Conditions precedent to the formation of the contract – Of the decisions now cited, only three, two expressly and one implicitly, have referred to the question of whether payment of a deposit precedes the existence of the contract.

Against the proposition are Wooten J:

> "Nor do I see anything in the nature of a deposit or the purpose which it serves which would give rise to any inference that its payment was intended to be a condition precedent to the contract coming into existence" *(ak)*.

He then held non-payment was a default which permitted rescission.

And Cooke J:

> "None of the cases cited shows, I think, that failure to pay the deposit promptly terminates the contract automatically and leaves the vendor with no option" *(ah)*.

In favour of the proposition, Goulding J:

> "... Clause 2 of the contract stated a condition precedent to the contract taking effect as one of lease or sale, and ... the cheque having been returned unpaid, the plaintiff is not bound by the document" *(al)*.

Prior to 1974 the Courts had not really grappled with the problem of whether the failure to pay a deposit precluded a contract coming into existence. We now have two decisions of first instance in direct conflict and the earlier decisions with the exception of *Jackson v Lock (ai)* referring simply to conditions precedent.

(aa) *Barnett v Harrison*, supra; *Scott v Rania* [1966] NZLR 527, 532.

(ab) *Laybutt v Amoco Australian Pty Ltd* (1947) 132 CLR 57.

(ac) *Barnett v Harrison*, supra at p 247.

(ad) *Chitty on Contracts* (23 ed), 1248. The Ontario High Court has recently held that a condition as to finance was for the purchaser's sole benefit and not within the rule in *Turney v Zhilka. Brooks v Alker* (1976) 60 DLR (3d) 577.

(ae) *Barnett v Harrison*, supra at p 247.

(af) *Richardson v Ramsay* (1912) 2 DLR 686, 689; *Carlson v Jorgenson Logging Co Ltd & Jorgenson* (1952) 3 DLR 295; *Alarm Facilities Pty Ltd v Jackson Constructions Pty Ltd* [1975] 2 NSWLR 22, 29; *Watson v Healy Lands* [1965] NZLR 511.

(ag) *Myton Ltd v Schwab Morris* [1974] 1 All ER 326, 332.

(ah) *Robin v R T Shiels & Co Ltd* (265/73 Christchurch); *McLennan v Wolfsohn* [1973] 2 NZLR 452 dealing with agent's commission also found waiver of prompt payment by a solicitor.

(ai) *Jackson v Lock* (329/73, Wellington).

(aj) A solicitor may have actual or ostensible authority: see *Alex Paul Pty Ltd v Schembri* [1975] 2 NSWLR 769; *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57.

(ak) *Alarm Facilities Pty Ltd v Jackson Constructions Pty Ltd* [1975] 2 NSWLR 22 at 26.

(al) *Myton Ltd v Schwab Morris* [1974] 1 All ER 326, 330.

A comparable ground where New Zealand Courts have classified a condition as a condition precedent is the situation of "subject to finance" clauses. The approach exemplified by the Court of Appeal in the leading case of *Scott v Rania* [1966] NZLR 527 might well give cause to doubt how a deposit may be treated in New Zealand now. North P and McCarthy J concluded that a condition as to arranging finance was a condition precedent to the formation of a binding contract whilst Hardie Boys J in his dissenting judgment considered the condition was precedent not to the formation of a contract but merely to the obligations of the purchaser, the vendor being fully bound. Hardie Boys J based his distinction on cases concerning purchasers recovering deposits only where they had made reasonable attempts to find finance:

> "one must ask why it is (if through non-fulfilment of a condition within the stipulated time no contract has ever come into being) that one of the parties to it has obligations to the other which would only exist by virtue of a contractual relationship. If it is simply a case of no contract at all, the test of reasonableness of effort would not seem to arise and the purchaser would recover his deposit as money had and received by the vendor without consideration or upon a consideration which had failed" (p 539).

McCarthy J however summarised the position – there was no contract of sale to be completed – the contract was inchoate – a party's right to sue is suspended – until the condition precedent is fulfilled *(am)*.

As has been already mentioned earlier in this article, it has been held that a deposit is payable at the outset on a conditional (subject to finance) contract *(an)*. If there is still no contract in existence, after payment of a deposit, until finance is arranged how much less is there a contract in existence when the deposit has not been paid?

It appears implicit in the judgment of Goulding J that treatment of a deposit as a condition precedent might well result in no contractual relationship arising. The long-standing case of *Dewar v Mintoff* [1912] 2 KB 373 recognised the right of a rescinding vendor to sue for a deposit. Goulding J comments *(ao)* that if the true view of the matter is that a condition precedent was never fulfilled, then the vendor would be unable to sue for the unpaid deposit, without however expressing any concluded view on the point. There is added force to this comment in the more recent departure from *Dewar v Mintoff* on the basis that the seller must elect either to enforce the contract or sue for damages – he cannot rescind and then purport to enforce the provision for payment of a deposit *(ap)*.

Dr Coote in his articles mentions the difficulty caused by deciding that a contract has not come into effect and suggests that subject to finance clauses ought not to be treated as conditions precedent to the contract's very existence. In the light of Court of Appeal authority to the contrary on this point, it may be that New Zealand Courts would be more likely to follow the approach of Goulding J on the question of deposits. The question of waiver of conditions precedent to existence of a contract may then cause some difficulty. The reason for sub-titling this section conditions precedent to the *formation* of the contract as opposed to conditions precedent to the *existence* of the contract essentially arose from the quotation from *Williams (k)* and it may be desirable to quote those words in the context of the opening sentence, again:

> "A matter to be considered before the *formation* of a contract is the payment of a deposit. For no deposit of any part of the purchase-money can lawfully be demanded after an open contract of sale has been concluded . . . ." (emphasis added).

It is suggested that this puts the consideration of a deposit in its true perspective and having regard to the nature of a deposit as also a guarantee, it is a matter arising at the outset. If there be any distinction between "formation" and "existence" – they appear to be treated as synonymous by the majority in *Scott v Rania* – this may be a means to avoid the difficulties that would be created in trying to bring a deposit within a true condition precedent.

There is some compulsion in the comments of Goulding J on the foundation of a deposit.

> "The vendor . . . never intends to be bound by the contract without having the deposit . . . In any ordinary case where a deposit on signing is demanded, if the purchaser says, 'I am sorry, I cannot find the deposit'; the vendor would naturally reply 'I do not propose to hand over the contract until I am paid' " *(aq)*.

If payment of a deposit properly precedes the formation of the contract, it will be open to the Court to say there is no contract to be performed and no waiver can alter that position.

The principal objection to this may be that

(am) At p 535. There is further difficulty in that both McCarthy J and North P appear to have considered the condition could be waived – not a true condition precedent to the existence of a contract?

(an) *McLennan v Wolfsohn* [1973] 2 NZLR 452 see fn (n).

(ao) *Myton v Schwab Morris*, supra, at p 331.

(ap) *Lowe v Hope* [1969] 3 All ER 605.

(aq) *Myton v Schwab Morris*, at p 330; contrast however Wooten J at p 27.

it appears to give the party in default the right to take advantage of his default – against "a principle of law of great antiquity and authority that no one can take advantage of the existence of a state of things which his own default has caused" *(ar)*.

The principle is however appropriate to concluded contracts. There can be no waiver of terms where there is a failure to establish any concluded agreement *(as)*.

From the point of view of the vendor, this may appear unsatisfactory – but it appears simpler to say there is no contract than to require him to repudiate any inchoate agreement. And if the vendor has the freedom to deny the contract, should the purchaser have a contingent liability?

A mere promise – At the other extreme to denying the very existence of a contract because of non payment of a deposit is the proposition that payment is a mere promise, not a condition *(at)*. The simple recital of payment of a deposit may lend some weight to this. It would however be against authority.

The contract

The foregoing proceeds as a general discussion of principle. It cannot be emphasised too strongly that a Court will deal with the contract before it and have regard to

(1) the express wording of the contract
(2) the intent of the parties shown both by the contract and their conduct
(3) the need to give business efficacy to contracts.

All cases cited will demonstrate the first principle. Only the leading two need mention again. In *Alarm Facilities Pty Ltd v Jackson Constructions Pty Ltd* the express provision for action in the event of the deposit cheque not being honoured assisted the Court in deciding the contract must be in existence *(au)*. In *Myton Ltd v Schwab Morris (av)* the Court put emphasis in the words "on or before" to decide the condition precedent existence.

The Supreme Court of New South Wales *(aw)* and the High Court of Australia *(ax)* both dealing with conditions as to local council approval have recently referred to the need to give business efficacy to contracts, in the former case to the extent of implying terms. Gibbs J in the High Court of Australia dealing directly with payment of a deposit commented:–

> "The Court will of course attempt to give efficacy to an agreement which the parties no doubt believed would be binding, and will be most reluctant to hold meaningless and void an agreement which the parties intended to have legal effect" *(ay)*.

Reference has already been made to the intent of the parties in *Myton's* case *(az)* and *Bowman v Durham Holdings Pty Ltd (av)* looked at the conduct of the parties as evidencing the fact that they treated it as in force.

Conclusions and recommendations

The basic conclusion must be that there is some basis for the proposition that without payment of a deposit, there is no contract. Certainly a purchaser runs the risk of losing his contract if he is in default. The middle view is no doubt that a deposit is a condition precedent to performance of the contract and this may be waived. Whatever the view, a deposit is of major importance.

Conveyancers might now ponder whether they have been carrying non-existent contracts to fruition as a matter of common practice. If they feel that suggestion unreal, they should at least give some thought to how many times they have waived a client vendor's right.

The position may now then be restated that in the absence of special terms:

(1) A deposit should be paid on execution of the agreement.
(2) Failure to pay the deposit:
- renders the contract unenforceable by the purchaser.
- may deny the vendor a contract to enforce.

The practical consequences for the conveyancer are:

(a) If acting for the purchaser:
(1) To ensure the time for payment of the deposit can be met.
(2) In the case of conditional contracts ensure that the deposit is payable only on confirmation.
(3) Impress on client necessity for prompt payment.
(b) If acting for the vendor:
(1) Insist agent collect deposit.

(ar) McCarthy J in *Scott v Rania* (supra) at p 535 citing the locus classicus on the point *NZ Shipping Co v Societe des Ateliers et Chantiers de France* [1919] AC 1 (PC) per Lord Atkinson.

(as) *Alsop v Orchard* [1923] 1 Ch 323.

(at) *Barnett v Harrison* (1976) 57 DLR (3d) 225, 234.

(au) [1975] 2 NSWLR 22, 26.

(av) [1974] 1 All ER 326, 328. Note: the High Court of Australia has recently held "upon" may mean before, simultaneous or after. *Bowman v Durham Holdings Pty Ltd* (1973) 131 CLR 8, 16.

(aw) *Commercial & General Acceptance Ltd v Dunlop* [1975] 2 NSWLR 439.

(ax) *Norman v Gosford Shire Council* (1974) 132 CLR 83.

(ay) *Laybutt v Amoco Australian Pty Ltd* (1974) 132 CLR 57 at 82.

(az) See also *Carruthers v Whitaker* [1975] 2 NZLR 667.

(2) Not waive vendor's right to terminate or deny the contract.
(3) If preparing contract, provide a date for payment of deposit and right to enforce or to terminate and sue for, or forfeit deposit.

CRIMINAL LAW

INTOXICATION AT THE CROSSROADS

By G R WALKER, BA (Hons) (Otago), *Tutor in Law, University of Adelaide. The area examined in this article is dealt with at length in Walker,* Intoxicants and Criminal Responsibility *(Honours Thesis, Otago University, 1977).*

1. Introduction

This article scrutinises very briefly a conflict between policy and principle within the law of self-induced intoxication as a "defence" to a criminal charge. In 1976 the House of Lords in *Majewski v DPP (a)* decided, in effect, that policy considerations precluded the application of the "defence" in some criminal charges involving violence, for example, assault. They unanimously considered that such a result would be inimical to the proper protection of society.

The Courts in New Zealand must now decide whether to follow this policy or to uphold the decision of the Court of Appeal in *R v Kamipeli* [1975] 2 NZLR 610 (CA) which is authority for a contrary proposition. As Woodhouse J remarked recently in *R v Roulston* [1976] 2 NZLR 644, 653-4 (CA), "the whole question of the applicability of *Majewski's* case in New Zealand . . . must still be regarded as open". The matter is still at large but cogent submissions can be advanced in favour of the New Zealand jurisprudence.

2. Background to the decision in Majewski

The history of the "defence" of self-induced intoxication at common law is characterised by the evolution of special rules to deal with the intoxicated offender. These rules are overtly concerned with the effect which intoxication may have upon the mental element required to constitute the offence. Originally developed to cope with the effects of alcoholic intoxication they have been extended, principally as a result of the decision in *R v Lipman (b),* to include other intoxicating drugs. Because of this judicial extension but also for convenience the noun "intoxicant" will be used in this article as an omnibus word to include any intoxicating agent capable of producing states of intoxication sufficient to negate requisite elements in a criminal offence.

Decisions of English Courts dealing with the "defence" of self-induced intoxication may be grouped into four periods. During the first period, which loosely corresponds with the years 1550 to 1800, intoxication provided no defence *(c).* In the second, between 1800 and 1835, intoxication was regarded as perhaps a partial excuse to crime. From 1835 to 1920 some attempt to incorporate a reference to the mental element in crime was made, culminating with the decision in *DPP v Beard* [1920] AC 479; [1920] All ER Rep 21 (HL). The fourth period runs from 1920 to 1976 when the House of Lords handed down their decision in *Majewski.*

At least three influential notions or movements of current significance derive from this historical development.

First, in the early period, the major reasons why the "defence was inoperative may be identified as the influence of the concept of freewill deriving from the prevalent moral theology and the then objective test of moral blameworthiness as the basis of criminal liability *(d).* It is clear that the conflation of moral blameworthiness with self-induced intoxication persists in *Majewski (e).*

Second, it seems important to understand the basis for the "merciful relaxation" *(f)* of the strict

(a) [1977] AC 443; [1975] 3 All ER 296, (CA); [1977] AC 457; [1976] 2 All ER 142; [1976] 2 WLR 623; 62 Cr App Rep 262, (HL).

(b) [1970] 1 QB 152; [1969] 3 All ER 410; [1969] 3 WLR 819; 53 Cr App R 600, (CA). See also *R v Curtis* (1972) 19 CRNS 11; 8 CCC (2d) 240, (Ont CA).

(c) On this period, see Singh, "History of the Defence of Drunkenness in English Criminal Law" (1933), 49 LQR 528. For more general accounts of the history of the "defence" see, Beck and Parker, "The Intoxicated Offender – A Problem of Responsibility" (1966), 44 Can Bar Rev 563; D A R Williams, "Drunkenness and the Criminal Law in New Zealand" (1967), 2 NZULR 312; Berner, "The Defence of Drunkenness – A Reconsideration" (1971), 6 UBCL Rev 309 and Orchard, "Drunkenness as a 'Defence' to Crime – Part 1", [1977] 1 Crim LJ 59 at 61.

(d) See, eg, J W Cecil Turner, *Russell on Crime* (12th ed, 1964) Vol I at 31.

(e) Supra note (a) at AC 498; 2 All ER at 171 per Lord Russell.

(f) Supra note (a) at AC 456; 3 All ER at 305 per Lawton LJ.

rule in the period 1835 to 1920. The salient reasons appear to have been the growing importance of the mental element in crime and a swing in social attitudes *(g)*. It was just such an historical explanation of the limited "defence" of self-induced intoxication to crimes of "specific intent" that was adopted by the Court of Appeal in *Majewski (h)*. In the House of Lords, however, policy considerations were frankly acknowledged as the true basis of the "defence".

Third, it is useful to regard *Majewski* against the background of a discernible retreat from *Beard*, an ongoing movement in Commonwealth Courts away from the famous three rules enunciated by Lord Birkenhead in *Beard* (p 500-2:28). In particular, the following aspects of *Beard's* case have been disapproved:

(i) The use of the word "proved" in the term "proved capacity" (third rule) *(i)*;

(ii) Any reference to "the presumption that a man intends the natural consequences of his acts" (third rule) *(j)*;

(iii) The "incapacity test" (second and third rule) *(k)*.

Further, although the distinction between crimes of "specific intent" and those of "basic" or "general intent" continues to be drawn by English, Canadian and Australian Courts, no such distinction was drawn in *Kamipeli (l)*.

3. The decision in Majewski

The most succinct account of the facts in *Majewski* may be found in the speech of Lord Elwyn-Jones LC *(m)*. On the night in question, Majewski and a friend, one Stace, went to the Bull, a public house in Basildon. Majewski was involved in a fracas in the lounge bar and was later charged on counts of assault. His sole defence was absence of the requisite mens rea at the material time by reason of self-induced intoxication caused by the ingestion of non-prescription drugs and alcohol *(n)*.

In the Crown Court at Chelmsford, the trial Judge, Petre J, directed the jury that the fact that the defendant may have taken drink or drugs was irrelevant provided that they were satisfied that the state he was in was self-induced. On this direction Majewski was convicted on counts of assault occasioning actual bodily harm and assaulting police constables in the execution of their duty. Majewski appealed against conviction.

The Court of Appeal (Lawton LJ, James LJ and Milmo J) dismissed the appeal but granted leave to appeal to the House of Lords. As mentioned, the decision of the Court of Appeal was based firmly on an "historical approach" – virtually no attempt was made to resolve the "specific intent" controversy.

Seven law lords considered the case of Robert Stefan Majewski and all seven of them dismissed his appeal. Majewski had argued that the absence of the requisite mens rea for assault was enough to exculpate notwithstanding that the relevant mental element could not be described as "specific intent". This argument was rejected on the basis that while self-induced intoxication provided a defence in cases involving "specific intent", no such defence operated in criminal charges involving crimes of "basic intent" such as assault. Further, it was said that this rule remained unaffected by s 8 of the Criminal Justice Act 1967 (UK).

A second reason for rejecting Majewski's appeal involved consideration of public policy – the fact that self-induced intoxication is a causal factor in crimes of violence *(o)*. Lord Elwyn-Jones

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(g) Serious medical research was beginning to be undertaken on drink and drunkenness. See Sayre, "Mens Rea" (1932), 45 Harv L Rev 1013 and D A R Williams, op cit, at 301. On social attitudes generally, see Harrison, *Drink and the Victorians: The Temperance Question in England 1815-1872* (London: Faber, 1971) at 37ff.

(h) Supra note (a) at AC 456, 3 All ER at 305.

(i) See *Woolmington v DPP* [1935] AC 462; [1935] All ER 1, (HL); *Broadhurst v R* [1964] AC 441, (PC); *R v Sheehan* [1975] 2 All ER 960, (CA); *R v Menniss* [1973] 2 NSWLR 113, (CA); *R v Gordon* [1963] SR (NSW) 631, (CA); *Capson v R* [1953] 1 SCR 44; *R v Smith* (1977) 33 CCC (2d) 172, (Ont CA); *Leary v The Queen* (1977) 33 CCC (2d) 473, (Can) and *Kamipeli*, supra.

(j) Supra note (i). See also *R v Glannotti* (1956) 115 CCC 203, (Ont CA); *R v Bourque* (1969) 69 WWR 145, (BC CA); *R v Baker* (1976) 28 CCC (2d) 489, (Ont CA).

(k) *Broadhurst*, *Sheehan* and *Kamipeli* (supra) note (i). The judgment in *Sheehan* is approved by Butler and Mitchell eds, *Archbold's Pleading, Evidence and Practice in Criminal Cases* (38th ed, 1974), in Supplement No 8 at para 43. Canadian Courts in general retain the "incapacity" test. See, eg, *Smith* (supra) note (i) but note the judgments of the minority in *R v Ducharme* (1976) 28 CCC (2d) 478, (Man CA); *Mulligan v The Queen* (1976) 28 CCC (2d) 266, (Can) and *Leary* (supra) note (i).

(l) *Kamipeli* (supra) at 614. See also the minority judgment in *Leary* (supra) note (i).

(m) Supra note (a) at AC 467-8; 2 All ER at 144-5.

(n) On the facts, this contention seems far-fetched. Prima facie, *Majewski's* response to Stace's request for help, his apparently conscious abuse of the police constables and his allegedly deliberative assault on PC Barkway seem to indicate the presence of the requisite mens rea. Lord Russell thought as much – see supra note (a) at AC 498; 2 All ER at 171. On this basis Glanville Williams contends that the House could have correctly dismissed *Majewski's* appeal on the grounds that no substantive miscarriage of justice had occurred. See, G Williams, "Intoxication and Specific Intent" (1976) 126 New LJ 658.

(o) Clearly true in the New Zealand context. See, Schumacher, *Violent Offending* (Wellington: Govt Printer, 1973) at 33.

LC puts it thus:

> "Self-induced alcoholic intoxication has been a factor in crimes of violence, like assault, throughout the history of crime in this country. But voluntary drug taking with the potential and actual dangers to others it may cause has added a new dimension to the old problem with which the courts have had to deal in their endeavour to maintain order and to keep public and private violence under control. To achieve this is the prime purpose of the criminal law (AC 469: 2 All ER 146).

Thus, the five speeches in the House of Lords show two strands of thought. On one hand, a sophisticated legal argument aimed at shoring up the "specific intent" doctrine; on the other, policy statements and value judgments. A number of these value judgments equate self-induced intoxication with moral turpitude, thereby echoing the attitude of the early law which identified drunkenness with sin. These two aspects of the decision in the House of Lords will now be examined more closely.

4. The reasoning of the House of Lords in Majewski

(a) *The "specific intent" doctrine* – The major legal premise upon which *Majewski* is based is the doctrine of "specific intent" as formulated by Lord Birkenhead in *Beard:*

> "That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent (pp 501:29).

Subsequent to *Beard,* two opposing attitudes have been taken as to the meaning of this second rule. Those who subscribe to the "narrow" view hold that "specific intent", as used in *Beard,* contrasts significantly with the notion of "basic intent" (in particular, the definition of "basic intent" offered by Lord Simon in *DPP v Morgan* [1976] AC 182; [1975] 2 All ER 347). Lord Birkenhead, it is argued, placed a specialised meaning on the term. According to Lord Simon in *Majewski* that meaning was best described by Fauteux J in *R v George* (1960) 128 CCC 289 (Can). Further, it is said that the second rule is not inconsistent with a later passage in *Beard* from which it might be inferred that intoxication could provide a defence in cases other than those involving a "specific intent" (pp 504:30). In *Majewski* their Lordships preferred this "narrow" view of the second rule.

Proponents of the "broad" view maintain that there is no logical difference between "basic" and "specific intent"; that Lord Birkenhead placed a specialised meaning upon the term "specific intent" in *Beard* but that its meaning is not that given in the definition of Fauteux J in *George* and, finally, that since there is a fundamental inconsistency between rule two and the later passage, the latter should logically prevail. It was this "broad" reading of the second rule that was preferred by the Court of Appeal in *Kamipeli (p).*

It is submitted that the "broad" view taken in *Kamipeli* is the better alternative. This submission can be made out (i) logically and in principle, (ii) by an analysis of *Beard,* (iii) by an analysis of *George* and, (iv), by an analysis of *Majewski.*

(i) In *Majewski* Lord Salmon stated that if intoxication could negate "specific intent" it must also, "in strict logic", negative "basic intent" *(q).* In the Court of Appeal, the prosecution accepted a similar proposition *(r).* Numerous studies have indicated that states of intoxication may negate requisite elements of an offence *(s).* If intention may be negated in this manner then the legal distinction between "specific" and "basic" intent is meaningless in terms of the effect of the intoxicant upon the intent; however one describes it the intent is equally absent.

Again, since the decision in *Woolmington v DPP (i)* it is clear that, whatever the crime, the Crown must prove the intent required by the alleged crime. A rule exempting crimes of "basic intent" from the *Woolmington* rule appears, therefore, to be wrong in principle.

(ii) Whatever Fauteux J in *George* may have had to say about the meaning of "specific intent", it is submitted that Lord Birkenhead used the term in *Beard* in a different sense. Two arguments can be advanced to support this contention.

First, it is said that Lord Birkenhead was

(p) At 614. Commentators who support this reading include Glanville Williams, *Criminal Law: The General Part* (2nd ed, 1961) at 181-2; Smith and Hogan, *Criminal Law* (3rd ed, 1973) at 153; Beck and Parker, op cit, at 583-4 and Berner, op cit, at 331-2.

(q) Supra note (a) at AC 482; 2 All ER at 157.

(r) Supra note (a) at AC 455; 3 All ER at 305.

(s) For alcohol see, eg, Maling, "Toxicology of Single Doses of Ethyl Alcohol" in *Alcohols and Derivatives,* ed, Tremolieres (Oxford: Pergamon Press, 1970), Vol II at 279; Beeson and McDermott, eds, *Cecil-Loeb Textbook of Medicine,* 12th ed, (Philadelphia: Saunders, 1969) at 1500; Hall, "Intoxication and Criminal Responsibility", (1944) 57 Harv L Rev 1048; Gray, "Alcoholic Amnesia" (1958-9) 1 Crim LQ 484 and Blair, "The Medico-Legal Problems of Pathological Intoxication: An Illustrative Case" (1969) 9 Medicine, Science and the Law. Interested practitioners should also take note of the important research being undertaken by the Detoxication Unit at Massey University. For other intoxicants see, eg, *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1973) at 278ff. Hereafter cited as "The Le Dain Report".

referring to an intent which was specified in the definition of the crime. Thus, "specific intent" is distinguishable from "general mens rea" (ie, the situation where one infers that mens rea is a requisite element in the crime but that mens rea is not specified in the statutory or common law definition). This is an historical explanation which places the term in the context of the then current mode of defining crime *(t)*.

The second argument is based on a reading of the later passage in *Beard* (pp 504:30). It is contended that in this passage Lord Birkenhead was saying that he did not regard the proposition concerning the "defence" of drunkenness derived from the early cases as an "exceptional rule" applicable only in those cases where it is necessary to prove a specific intent to constitute the crime. On the contrary, in "accordance with the ordinary rule applicable to crime" the mens must be rea as to each element of the actus reus in every crime. It is inferred, therefore, that Lord Birkenhead was acknowledging that there were no special intoxication rules as to mens rea. Evidence of intoxication would thus be admissible not only where a particular intent is spelled out, but also in all cases where mens rea is held to be a constituent element of the crime. Since mens rea involves both intention and recklessness, it follows that intoxication should be able to negate recklessness. This argument was preferred in *Kamipeli (u)*.

Despite the cogency of this reading of the second rule and its appeal to principle and logic, the Courts in general and some academic writers prefer a narrower reading of the rule, simply on the basis that to admit otherwise would amount to an unwarranted extension of the "defence" *(v)*. A more substantial attempt to harmonise the later passage with the "narrow" view of the second rule was made by Lord Russell in *Majewski (w)*. Lord Russell focuses upon the words "in order to constitute the graver crime" and argues that the "specific intent" exception does not only apply to the murder/manslaughter situation where the "lesser crime" is available, but embraces all cases of "special intent". The reading is not altogether convincing.

First, no explanation of "specific" or "special intent" is given. Second, one might argue, given Lord Simon's definition of basic intent, that attempted suicide was a crime of basic intent. A third objection is that the analysis is perhaps unduly selective – does the clue to the later passage really lie in the seven words selected? It is suggested that it does not. If these words are to be the criterion for exegesis, then equally, by focusing upon the following words which occur in the same passage, "only in accordance with the ordinary law applicable to crime", one can advance the "broad" view.

(iii) Lord Simon *(x)* in *Majewski* stated that the best description of "specific intent" as used in *Beard* was that given by Fauteux J in *George:*

> "In considering the question of mens rea, a distinction is to be made between (i) intention as applied to acts apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act" *(y)*.

But first, it is far from clear whether or not this was the sense in which Lord Birkenhead used the term – see (ii) above. Second, at least three Canadian writers have exhaustively criticised the judgment of the Supreme Court of Canada in *George* and, in particular, the Court's analysis of "specific" and "general intent". It is submitted that the criticisms are of substance. Here the writer adopts the representative analysis of Beck and Parker who conclude that the explanation given by the Court is "purely a play on words" *(z)*.

(iv) In *Majewski,* the House of Lords indicated three methods by which the concept of "specific intent" might be defined – the "purpose" test, the "basic intent" test and the "recklessness" test *(aa)*. Certain problems arise with each of these tests.

As to the "purpose" test: Lord Simon, following the definition of Fauteux J in *George,* (stated that, "The mens rea in a crime of specific intent requires proof of a purposive element" *(ab)*.

(t) Beck and Parker, op cit, at 582-3.

(u) Supra at 616. See also *R v Stones* [1956] SR (NSW) 25; 72 WN 465, (CA) and the minority judgment in *Leary* (supra) note (i). Most academic writers support this reading.

(v) See, eg, Stroud, "Constructive Murder and Drunkenness" (1920) 36 LQR 270 and Snelling "Drunkenness and Criminal Responsibility" (1956) 30 ALJ 4.

(w) Supra note (a) at AC 499; 2 All ER at 172. Lord Russell's explanation was adopted by Lord Elwyn-Jones LC, (Lords Diplock and Kilbrandon concurring), and Lord Simon.

(x) Only Lord Simon attempted to make much use of the term "specific intent". Lord Elwyn-Jones LC, (Lords Diplock and Kilbrandon concurring), referred to the notion of "basic intent" but did not analyse "specific intent". Lords Salmon and Edmund-Davies acknowledged the illogical nature of the distinction. Lord Russell did not deal with the matter directly.

(y) Supra note (a) at AC 479; 2 All ER at 154.

(z) Beck and Parker, op cit, at 584ff.

(aa) The following draws heavily on JC Smith, "Commentary on *Director of Public Prosecutions v Majewski*" [1976] Crim LR 374; Gold, "An Untrimmed 'Beard': The Law of Intoxication as a Defence to a Criminal Charge" (1976) 19 Crim LQ 34 and Glanville Williams supra note (n).

(ab) Supra note (a) at AC 479; 2 All ER at 154.

Whatever a "purposive element" may be, it seems that, on this explanation, everything hinges on the purpose of the action. One infers that where a crime requires some purposive conduct on the part of the accused, the crime is one of "specific intent" and vice versa.

First, it is difficult to see how a "purposive element" may be eliminated from any crime. To use Ferguson's words, "if acts are directed towards ends . . . then all intentional acts are specific" *(ac)*. Thus, the most that can be said is that the purpose of one crime may be different from another.

Second, it is said that such a test is unworkable since it would require a further construction process on the part of the Court. Thus, where a crime contained a "purposive" element in its definition, the Court would be required to interpret that requirement as relating to the essential elements of the offence. Where the legislation was silent, the Court would have to decide whether "purpose" or intention was required at all and if so the extent to which this related to the ingredients of the offence. Thus, the distinction begs the question since it takes us (and the Courts), no closer to deciding whether an offence requires one intent or another *(ad)*. Everything will turn on the construction favoured by the court – those constructions, as both Glanville Williams and Professor J C Smith note, bear little relationship to any test for "specific intent" let alone the "purpose" test *(ae)*.

A third objection to the "purpose" test has been raised by Professor J C Smith. He thinks that Lord Simon's definition is different from and inconsistent with, the basic intent test as propounded by Lord Simon in *Morgan* and adopted by Lord Elwyn-Jones LC in *Majewski (af)*.

Both Lord Elwyn-Jones LC, and Lord Simon distinguished "specific" from "basic intent". The only definition of basic intent given, however, was that offered by Lord Simon in *Morgan:*

> "By 'crimes of basic intent' I mean those crimes whose definition expresses . . . a mens rea which does not go beyond the actus reus. The actus reus generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it; but with a crime of basic intent the mens rea does not extend beyond the act and its consequence, however remote, as defined in the actus reus" *(ag)*.

The problem with this formulation, as Professor Smith has noted, is that, as Lord Simon defines it, murder is a crime of basic intent:

> "The actus reus is killing and it is certainly not necessary to prove any mens rea going beyond that . . . If the basic intent is applied then, intoxication negativing mens rea ought not to be a defence to murder . . . The law approved by the House seems totally inconsistent with the theoretical basis proposed" *(ah)*.

Another justification for the distinction between "basic" and "specific intent" is the "recklessness" test advanced by Lord Elwyn-Jones LC, Lord Edmund-Davies and Lord Russell. They explained the law by saying that the mens rea of committing a criminal act while intoxicated consists in the act of self-induced intoxication reckless of possible consequences *(ai)*. This explanation appears to imply that crimes requiring recklessness only are crimes of basic intent and that crimes requiring intention are crimes of specific intent.

First, however, mens rea (intention and recklessness) is a jury question. In *Majewski* the jury was not asked to consider the defendant's state of mind at the time he took the various intoxicants and subsequent to the decision in *Majewski* that consideration is removed from the jury entirely – the intoxicated offender is responsible for his acts as a matter of law unless the offence with which he is charged involves "specific intent".

Second, even if this were the law it would be no less objectionable in principle (since intoxication may clearly negative recklessness) than the "specific intent" doctrine.

It is submitted, therefore, that the concept of "specific intent" is ambiguous *(aj)*, quite meaningless in terms of the effect of intoxication upon the intent, unsound in principle and inconsistent in application.

(b) *Public policy* – While the distinction between crimes of "basic" and "specific" intent is "neither meaningful nor intelligible" *(ak)*, its continued existence is explicable on policy grounds. In *Majewski* the House had no doubts about the policy reasons for the limitation of the

(ac) Ferguson, "Mens Rea Evaluated in Terms of the Essential Elements of a Crime, Specific Intent and Drunkenness" (1971) 4 Ottawa LR 362 at 373.

(ad) After the analysis of Berner, op cit, at 333.

(ae) Glanville Williams, supra note (n) at 660; J C Smith, op cit, at 376.

(af) J C Smith, op cit, at 377.

(ag) Supra note (a) at AC 471; 2 All ER at 146 per Lord Elwyn-Jones LC.

(ah) J C Smith, op cit, at 377.

(ai) See, eg, supra note (a) at AC 474-5; 2 All ER at 150 per Lord Elwyn-Jones LC.

(aj) See Smith and Hogan, op cit, at 47 and *Leary* (supra) note (i) at 495 per Dickson J.

(ak) *Leary* (supra) note (i) at 491 Dickson J. On the public policy justification generally, see Orchard, "Drunkenness as a 'Defence' to Crime – Part 2" [1977] 1 Crim LJ 132 at 136-40.

"defence". Their Lordships felt confident that their decision would, inter alia; (a) maintain order, (b) control public and private violence, (c) protect the public against physical violence, (d) prevent the appalling social consequences which would occur in the absence of a penal sanction for injury committed while intoxicated and, (e) prevent the increase of a serious menace.

None of these considerations troubled the Court in *Kamipeli* and this is unsurprising since it is difficult to find any substance in them. For example, there is no evidence to suggest that the limited "defence" has had any effect on the incidence of violent crime.

At various times, five major justifications for a policy of delimiting the "defence" have been put forward:

(1) The "defence" would be abused *(al)*.
(2) Self-induced intoxication amounts to recklessness *(am)*.
(3) Self-induced intoxication equates with moral culpability *(an)*.
(4) Deterrence *(ao)*.
(5) Political necessity *(ap)*.

Without entering into an analysis of the merits of each of these justifications it is submitted that each is unconvincing *(aq)*. If societal judgment demands some special sanction for those who offend while intoxicated then a legislative response is appropriate *(ar)*. Here, the recommendations of the Butler Report (the creation of a new offence of "drunk and dangerous") are apposite *(as)*.

Notwithstanding the more overt policy considerations adopted by the House (see above), it is suggested that the principal policy influence in *Majewski* was the ancient conflation of self-induced intoxication with moral blameworthiness (or sin). Thus, on close examination of the principal speeches one finds a language of reaction characterised by emotive appeals and simplistic value judgments. This is unfortunate since it is plain that modern understanding of alcoholism and drug addiction (in particular the "disease" concept of alcoholism) *(at)*, the impact of the biological sciences *(au)*, the philosophical problem of mechanism *(av)* and the greater importance of the mens rea concept in criminal responsibility *(aw)* have destroyed whatever credibility this approach might have obtained in a less sophisticated age.

It is concluded that both legal and policy reasons for the decision in *Majewski* are suspect.

(al) See the reference to the 1843 Law Commissioners (UK) in Glanville Williams' (supra) note (p) at 565.

(am) See, eg, *Model Penal Code: Proposed Official Draft* Philadelphia: Am Law Inst, 1962) and see supra note (ai).

(an) *Beverley's Case* (1604) 4 Co Rep 123b; 76 ER 1118. For an earlier expression of this attitude see J A K Thomson, trans, *The Ethics of Aristotle: The Nichomachean Ethics* (London: Penguin Classics, 1966), at 90. See also *Majewski* (supra) note (a) at AC 494-8; 2 All ER at 168-171 per Lord Edmund-Davies.

(ao) See, eg, supra note (a) at 484; 2 All ER at 159 per Lord Salmon.

(ap) Wechsler, "Codification of Criminal Law in the United States: The Model Penal Code" (1968), 68 Columbia LR 1425 at 1441.

(aq) On the "abuse" justification, see Glanville Williams, supra note (p) at 565. Note that malingering is thought to be uncommon. See Gray, op cit, at 484 and Hall, op cit, at 1048. As to the "recklessness" justification, see the preceding discussion of the "recklessness" test in *Majewski* and Packer, "The Model Penal Code and Beyond" (1963) 63 Columbia LR 594. As to the "moral culpability" justification, it is submitted that immorality per se is a *necessary* but *insufficient* condition for the invocation of the criminal sanction – see Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford UP, 1973). See also notes (at)-(aw) *infra*. As to the "deterrence" justification; first, there is no evidence to support this "political necessity" justification, one might argue that simply because public opinion is against wholesale acquittal of all those who offend while intoxicated, it does not follow that all those who offend unknowingly must be punished.

(ar) On the premise that judicial tinkering with fundamental principle may have adverse results in the substantive law, ie, the Courts' response may be inappropriate and merely expedient, may defuse pressure on Parliament to legislate and may sacrifice principle in the interests of current policy.

(as) *Report on the Committee on Mentally Abnormal Offenders* (London: HMSO, Cmnd 6244 of 1975), paras 18.53 to 18.59. A number of uncertainties remain but most commentators consider the creation of a new offence to be the best solution. See Ashworth, "Reason, Logic and Criminal Liability" (1975) 91 LQR 102; Gold, op cit, at 82 and A T H Smith, "Voluntary Intoxication and Criminal Responsibility" (1976) 126 New LJ 28. The approval of the House in *Majewski* may be inferred – see, supra note (a) at AC 475; 2 All ER at 151 per Lord Elwyn-Jones LC.

(at) The literature on alcoholism is extensive but see, generally, Jellinek, *The Disease Concept of Alcoholism* (New Haven: Hillhouse Press, 1960); Grad, Goldberg and Shapiro, *Alcoholism and the Law* (New York: Oceana, 1971). Sargent, *Alcoholism as a Social Problem* (St Lucia: U of Q'ld Press, 1973) and Meyers, Jawetz and Goldfein, *Review of Medical Pharmacology*, 3rd ed, (Philadelphia: Lea and Febiger, 1975). In the US, 15 states have given legislative recognition to the disease concept of alcoholism – see Johnson, "Decriminalization of Alcoholism" (1975) 50 Washington LR 770. For other intoxicants see, generally, *The Le Dain Report*.

(au) In particular, psychology and psychiatry.

(av) For an introduction to the concept, see Ryle, *The Concept of Mind* (1949), rpt Aylesbury: Penguin U Books, 1973) at 60ff. For a review of the philosophical debate, see Berofsky, ed, *Free Will and Determinism* (New York: Harper and Row, 1966). Legal solutions to the problem are offered by Whitlock, *Criminal Responsibility and Mental Illness* (London: Butterworths, 1963) at 57ff and Glueck, *Law and Psychiatry: Cold War or Entente Cordiale?* (Baltimore: Johns Hopkins Press, 1966) at 15.

(aw) See Jacobs, *Criminal Responsibility* (London: Weidenfeld and Nicholson, 1971).

The decision in Kamipeli

In effect, *Majewski* imposes strict liability hereby departing from a subjective notion of fault in favour of an objective criterion. In *Kamipeli,* however, a subjective approach to the criminal responsibility of the intoxicated defendant was taken. The appellant, Siaosi Kamipeli, had been convicted of the murder of Pelesitama Patulagi under s 167 (b) of the Crimes Act 1961 (NZ). Kamipeli, after consuming about eight quart bottles of beer, had violently assaulted Patulagi who later died from injuries received. Kamipeli's unsuccessful defence in the lower Court was absence of intent on account of intoxication. His appeal was based upon misdirection to the jury on the degree of intoxication required for the defence to succeed. In the event, his conviction was quashed and a new trial ordered.

The majority decision of the Court of Appeal was delivered by McCarthy P. The Court rejected the "narrow" reading of the second rule in *Beard* and the distinction between "basic" and "specific" intent; "whether it be a general or a particular intent the burden is the same; the Crown must prove the intent required by the crime alleged (p 614).

The ratio of the case and, it is submitted, the correct approach to the problem appears in the following passage:

> "We are strongly of the view that the alternative proposition mentioned by Lord Devlin, namely, that the law as laid down in *Beard's* case must now be interpreted in the light of later decisions on the proof of guilty intent, should be adopted; for the common law, as it must be applied since *Woolmington's* case, requires the prosecution to prove all the elements in a definition of an offence, including any mental elements such as intention or recklessness. Drunkenness is not a defence of itself. Its true relevance by way of defence, so it seems to us, is that when a jury is deciding whether an accused has the intention or recklessness required by the charge, they must regard all the evidence, including evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances. It is the fact of intent rather than the capacity for intent which must be the subject matter of the inquiry. The alternative is to say that when drunkenness is raised in defence there is some special exception from the Crown's general duty to prove the elements of the charge. We know of no sufficient authority for that, nor any principle which justifies it" (p 616).

This view of the relationship between intoxication and criminal responsibility is funadmentally different to that taken in *Majewski.* Intention and recklessness must be proved by the prosecution as indeed must "any mental element". Evidence of intoxication is, in a proper case, a matter for the jury. Intoxication is not to be withdrawn from the jury simply because the offence happens to be one involving "basic intent"; the jury is to regard *all* the evidence.

McCarthy P found support for this view of the part that intoxication may play in a defence in the Australian case of *R v Gordon* and also in the leading Canadian cases. As noted above in the section of this article dealing with the background to the decision of *Majewski,* the Courts in those countries have retreated from the decision in *Beard.* At present, *Kamipeli* can be regarded as leading that retreat but further support for the New Zealand jurisprudence can be found in the strong minority dissent of Laskin CJC, Dickson and Spence JJ in the Supreme Court of Canada in *Leary v The Queen (ax).*

Leary was decided after *Majewski* but the minority of the Court had no hesitation in rejecting both the "specific intent" doctrine *and* the public policy argument. After observing that the "specific intent" doctrine was "neither meaningful nor intelligible", Dickson J, for the minority, stated:

> "Whatever utility the concept of 'specific intent' may have had in the past it is very doubtful whether any good purpose is served by its retention, having regard to the difficulties to which I have referred and, since *Beard,* to the greater knowledge of the nature of intoxication and alcoholism and the increasing emphasis on mental state as an element of criminal responsibility. Society and the law have moved away from the primitive response of punishment for the actus reus alone. The doctrine of mens rea has increasingly emerged as an essential element of criminal accountability. The effect of the second proposition in *Beard's* case is to hold the accused to account not for his self-induced drunkenness, but for whatever harm he may have done, without intending to do so, while in that state" (p 492).

Later, referring to the public policy argument in *Majewski,* Dickson J observed:

> "With great respect for those of another view, I think it is wrong to say that merely because a man voluntarily ingests a substance which causes him to cast off the restraints of reason, such conduct must inevitably be branded as reckless enough to support the crime charged, whatever that crime may be" (p 494).

He then proceeded to frame the ambit of the

(ax) Supra note (1).

"defence" in a manner strikingly similar to that of the Court in *Kamipeli.*

6. Conclusion

It is submitted that the law on self-induced intoxication as a "defence" to crime as stated in *Kamipeli,* is consonant with principle and perfectly defensible in terms of policy. In the above quotation from *Kamipeli* dealing with the "true relevance" of the "defence", the Court stated that not only did they know of no authority for a departure from the *Woolmington* principle but also that they knew of no "principle" which would justify such a departure. Thus, in regard to intoxication negating the mens rea of a crime, the law as expounded in *Kamipeli* is to be preferred to the formulation of the House of Lords in *Majewski.*

Finally, it might also be argued that the rule in *Kamipeli* could extend to negate the actus reus of an offence. This argument rests on the premise that in all offences there must be an intention to commit the physical acts which constitute the crime. Certain limited support for this view can be found in the New Zealand case law and elsewhere *(ay).*

This variation of the "defence" commonly arises in manslaughter cases. Here, the "traditional view", as Cooke J described it in *R v Grice* [1975] 1 NZLR 760, 766 is simply that intoxication can never do more than reduce the crime from murder to manslaughter. Against this proposition it could be said, in theory at least, that evidence of intoxication could be raised to negate the mens rea (if any) of manslaughter or, alternatively, to raise a defence of involuntary actus reus or automatism. On the traditional view, however, neither aspect of the defence applies when the only evidence raised in defence to a charge of manslaughter is that of intoxication. In England, this view has hardened into a special rule. In *R v Howell* [1947] 2 All ER 806, 809, Wein J stated:

> "I come to the view that it is quite impossible to deal with this matter logically. Intoxication in relation to manslaughter stands on its own and it is not right to introduce into cases of intoxication those concepts of intention or realisation of harm that are necessary in other forms of manslaughter."

Majewski takes the point even further; self-induced intoxication is no defence to crimes of "basic intent" no matter how great the degree of intoxication.

The English position has been adopted by some Courts in South Africa and Canada *(az).* In Australia there is authority to the contrary *(ba).* In New Zealand it is uncertain how far the traditional view (now further strengthened by *Majewski*) is applicable. The Court of Appeal in *Grice* (at p 766), in the light of the Australian cases of *Keogh, Haywood* and *Ryan,* left open the question of whether, apart from the defence of insanity, intoxication could do more than reduce murder to manslaughter. The Court adverted to the same point in *Roulston* (at pp 653-4) and again left the question open. Whatever the final answer to the manslaughter question may be, it seems probable that a defence of involuntary actus reus or automatisim will remain. In *Grice,* Cooke J remarked:

> "We think it may prove to be the law that, putting aside only the rare cases of drunken stupor so complete as to result in automatism, intoxication can never be a defence to manslaughter. Such a rule would have the merit of justice as well as simplicity (p 767).

Manslaughter may be a special case *(bb),* but what of other offences? The logic of the rule in *Kamipeli* seems to lead inexorably to the conclusion that intoxication is capable of providing a defence to all crimes which require voluntary conduct as an essential ingredient of the offence *(bc).*

The problem stated – "the creation of literally hundreds of offences for conduct not regarded by most people as really reprehensible is bound to lessen respect for law and depreciate the seriousness with which more important offences are regarded. The credibility of the criminal justice system is likely to be significantly weakened." Justice Department Annual Report.

(ay) *R v Cottle* [1958] NZLR 999 at 1007 per Gresson P. In *Roulston* the trial Judge, Roper J, took this view. See *Roulston* (supra) note (b) at 653-4. See, generally, Smith and Hogan, op cit, at 34-5 and *11 Halsbury's Laws of England* (4th ed, 1976) 13.

(az) See, eg, *R v Johnson* (1969) 1 SA 201, (AD); *R v Garrigan* (1937) 69 CCC 98 (BCCA) and *R v Hartridge* (1967) 1 CCC 346, (Sask CA).

(ba) *R v Keogh* [1964] VR 400 (SC); *R v Ryan* [1967] ALR 577 (HC of A) and *R v Haywood* [1971] VR 755, (SC). The futility of the contrary approach is well demonstrated in *August v Fingleton* [1964] SASR 22, (SC).

(bb) See the proposals for reform of the law on manslaughter in *Report on Culpable Homicide* (Criminal Law Reform Committee, NZ, 1976) at 24 and B Hogan, "The Killing Ground: 1944-73" [1974] Crim LR at 393.

(bc) Cf Orchard, supra note (c) at 67-8.