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JUDICIAL APPOINTMENTS — TIME FOR A CHANGE

Even before the Chief Justice, Sir Richard Wild, announced his retirement there had been some toying with the question of who his replacement would be. The announcement of his retirement simply gave impetus to speculation that was fueled not only by curiosity but by a shadowy fear that the appointment would be blatantly political. After all the appointment of Sir Keith Holyoake as Governor-General is but months past.

In these circumstances confirmation of the rumour (reminiscent of the leak preceding the announcement of the appointment of Mr Justice Richardson that Mr RK Davison QC had been appointed was met with a sigh of relief and life continues.

However, the tremor that passed through the country deserves greater recognition than a mere mopping of the brow. The general lack of lasting concern gives ground for asking whether the independence of the judiciary is being threatened by an attack of complacency – by an acceptance that the present selection procedure is good enough. After all there have been political appointments in the past. In one of the more blatant cases the profession was even moved to criticise. Yet justice has survived. There is always the Court of Appeal to set things right. Judges asserting the Rule of Law over political expediency have received the support of the profession. Surely all is working happily.

Maybe. But it is vigilance rather than complacency that will keep it that way and for that reason it is worth re-emphasising and supporting the New Zealand Law Society's observations and recommendations to the Royal Commission on the Courts.

Appointments to the Bench are made by the Attorney-General (or by the Prime Minister in the case of the Chief Justice) and the Law Society in its submission accepts that the Executive retain this power of appointment. Present practice is for the Law Society to be consulted informally before an appointment is made. The description "informal" embraces procedures that in the past have ranged from an invitation to submit names followed by consultation before appointment, to "advice that certain appointments had been made".

Obviously, informal consultation gives no guarantee that those who are suitable will be considered; or that those who are considered will be suitable; or that there will be time for adequate evaluation; or indeed that the exercise will prove more than window-dressing. Formalising that practice by requiring consultation would advance matters no further.

Instead the Society recommends the establishment of "an Appointments Advisory Committee consisting of . . . the Chief Justice and Chief District Judges (or other representatives of the Bench), two lawyers appointed by the Law Society and two nominees of the Government."

Broadly it would be charged with receiving suggested names of those likely to be interested in appointment to the Supreme Court and Magistrates' (District) Courts and assessing their suitability. "The Committee's role would be purely advisory. At no time would it select a candidate and it is envisaged that in putting names forward for con-

sideration it would submit a panel from which the selection could be made".

Restricting the Excutive to a panel of names obviously limits its choice and should severely limit the scope for blatant political appointments. Yet in another sense it may free the Executive from any constraint it may feel about appointing a person who, although eminently suitable, has been politically active.

The latter point is particularly important for a profession whose members are finding themselves increasingly embroiled in, and not infrequently taking a lead in, some of the foremost moral, social and political issues of the day. It would be sad if judicial appointment became the reward of the fence-sitter only, or that controversy was shunned and conscience denied for fear of prejudicing a chance for higher office. Yet the hard fact remains that judicial appointment made by an Executive in favour of one who has supported it, neither appear to be impartial nor are accepted as impartial. In this area an independent selection process has the advantage of enabling an objective assessment.

The system proposed should go a long way towards ensuring that all who are likely to be suitable and available for judicial appointment are adequately considered. It will also limit the extent to which extraneous, or political considerations may bear on appointments.

Still it is hard to feel any real urgency about changing a procedure that seems to be working. But try this test. When lying in the sun over Christmas, among the thoughts that occasionally intruded, was one of them that the next Chief Justice might be a political appointment.

Tony Black

FAMILY LAW

WARDSHIP OF COURT — AN EMERGENCY PROCEDURE

By P R H Webb, *Professor of Law, University of Auckland.*

Introductory

Although wardship of Court was known before the Guardianship Act 1968 came into force *(a)* it is thought that the concept has become known since the coming into force of that Act on 1 January 1970 and that a review of the wardship cases decided under that Act would be of practical assistance to practitioners.

The position is governed by s 9(1) of the 1968 Act, which enacts that the Supreme Court may, upon application, order that any unmarried child *(b)* be placed under the guardianship *(c)* of the Court, and may appoint any person to be agent of the Court either generally or for any particular purpose *(d)*.

Between the making of the application and its disposal, and therafter if an order is made, the Supreme Court has the same rights and powers in respect of the person and property of the child as it possessed immediately before the commencement of the 1968 in relation to wards of Court *(e)*.

(a) See the Judicature Act 1908, ss 17 and 98, and the unreported cases collected in Inglis, *Family Law*, Vol 2 (2nd ed , 1970), at p 474.

(b) A "child" is defined by s 2 as a person under the age of 20 years. Some may wonder why married minors should have been emancipated from the Court's jurisdiction.

(c) Defined by s 3 as meaning "the custody of a child (except in the case of a testamentary guardian and subject to any custody order made by the Court) and the right of control over the upbringing of a child, and includes all rights, powers, and duties in respect of the person and upbringing of a child that were at the commencement of this Act vested by an enactment or rule of law in the sole guardian of a child; and "guardian" has a corresponding meaning." ("Upbringing" includes education and religion: s 2)

(d) The Court may make a child a ward of Court notwithstanding that that child may be under the existing guardianship of the Director-General of Social Welfare: see *Re T (An Infant)* [1977] 1 NZLR 545; [1977] NZLJ 114; [1977] Recent Law 80, where there would apparently have been advantages as regards questions of residence, education and access if a wardship order were made.

(e) Section 9 (3). There are two important provisos to this subsection to the effect that (i) a child of or over the age of 18 cannot be directed by the Court to live with any person unless the circumstances are "exceptional" and (ii) that a ward of Court who marries without consent cannot be committed for contempt of Court, nor can the spouse, for so marrying. For a recent English case on contempt of Court, concerned with the publication of information contained in newspapers relating to a girl who had been made a ward of Court in wardship proceedings that were held in private, see *In re F (or A) (A Minor) (Publication of Information)* [1976] 3 WLR 813 (CA).

Section 9(2) gives a list of the person entitled to invoke wardship proceedings, viz, a parent; a guardian; a near relative *(f)* of the child; the Director-General of Social Welfare; the child itself, no next friend or guardian ad litem being necessary, or anyone else who has leave of the Court *(g)*.

Protecting a minor from contracting a possibly undersirable marriage

One of the traditional uses of the wardship procedure has been to prevent what is feared by an interested third party to be likely to be an undesirable marriage. Such a case appeared in *Re P (An Infant) (h)*. The applicant and respondent were the parents of a 17-year-old girl. They were separated, and the girl was living with her mother. She consented to the girl's marrying an American man who was recently divorced and aged 36. However, before an application was made to the Registrar of Marriages to issue a marriage licence and to marry the girl and her intended husband, the father anxious to defer the marriage until further information came to hand about the character and circumstances of the intended bridegroom, intervened and had his daughter made ward of Court *(i)*. This put in issue the question whether a ward of Court could marry without the Court's consent. Mahon J held that consent was necessary *(j)* and, having noted the above factors about the future husband, and having animadverted to the comparative brevity of the acquaintance between the engaged couple, but agreeing that the proposed husband had indicated the sincerity of his affections by coming down to New Zealand from his duties in Alaska so as to be present at the hearing and for interview with the Court, he gave the Court's consent to the marriage. The wardship order, which, his Honour noted, had not been jointly applied for by the girl's parents, was ordered to subsist until the marriage, from which point of time it would automatically cease in terms of section 9(4) of the 1968 Act *(k)*.

Protecting a minor from associating with undesirable persons

A further traditional use of the wardship procedure is to bring about the discontinuance of an undesirable association between the minor, usually a recalcitrant girl, and some undesirable older male friend of hers. A typical example is to be seen in *Re M (an infant) (l)*. The parents of a girl aged just over 16 applied to make her a ward of Court on the grounds of her association with S, a married man of 28 who was separated from his wife and children. He was not served with the papers. M opposed the application by her parents and she was represented by counsel. M had begun the association when she was 14, had twice stayed away from home overnight with S, had insisted on leaving school in the middle of her school certificate year, had continued to associate with S despite his having been warned off by her parents' solicitors and corresponded with him through intermediaries. She spent a third night with S, returning home only after police intervention, and told her parents that, when she was 16, she would go and live with S, The crowning episode was the girl's departure from home, allegedly for the YWCA. When she did not arrive there, her parents invoked the aid of the police, she being still under 16. It eventually turned out that the couple had spent a month in Australia, during which time the girl had turned 16. On her return, she said she wanted to continue her association with him, and if possible, to live with him. S pleaded guilty to a charge of abduction of the girl. It is small wonder that the parents objected to the association. Mahon J was satisfied that it was in the girl's best interests to ward her and to make her parents agents of the Court. He ordered that she should live with her parents and that S should be directed to discontinue the association with her forthwith and to refrain from seeing her or communicating orally with her while the order was current, which would be until

(f) Defined by s 2 as meaning "a step-parent, aunt, uncle, brother or sister; and includes a brother or sister of the half-blood as well as of the whole blood".

(g) Of course, no application may be made where statute forbids it. Thus, under s 49(1) of the Children and Young Persons Act 1974, if a guardianship order is made under that Act whilst there is in existence a wardship order under s 9 of the Guardianship Act 1968, then the wardship order automatically ceases: Cf *Re T (An Infant)* (supra). Cf *W v K* (1973) MCD 86. Under the 1968 Act, wardship of Court lasts until the Court orders or when the child reaches majority or sooner marries, whichever first occurs.

(h) [1975] 1 NZLR 450, noted sub nom *Ellis v Ellis* [1975] NZLJ 26.

(i) Since s 18(2) of the Marriage Act 1955 provides that, if a minor's parents are living apart and the minor is living with one of them, consent must be obtained from the parent with whom the minor is living, it could fairly be said that the girl, prior to the wardship order, had a vested legal right to obtain a licence to marry on producing the consent of her mother alone. Thus, only by commencing wardship proceedings could the father secure any locus standi for himself.

(j) See his reasoning at [1975] 1 NZLR 451-453

(k) At p 453.

(l) [1974] 2 NZLR 401; [1974] NZLJ 255.

the girl was 18. It will be appreciated that his Honour did not, at this stage, prevent correspondence between the girl and S.

Protecting a minor against himself

A minor may need protection against the consequences of his or her own foolish behaviour, as in *Re A (An Infant) (m)*, decided at a time when the Court was unable to direct any child over the age of 16 to live with any person unless the circumstances were exceptional. Beattie J made a wardship order in respect of a young unmarried girl of 17 and appointed her parents as agents of the Court generally. He further directed that she should live with her parents on the ground that there were exceptional circumstances, viz, that the man with whom she had been living, and by whom she was expecting a child, was a married man with three children and he had not maintained his family since he left them; he had mocked up the girl's and his own "disappearances" by contriving a car accident without giving a thought to the shock that it would give the girl's parents (of whom he had been a friend) or to his own family, and there was some evidence that the girl had indicated that she would return to this man of bad character when released from the control of what was then the Child Welfare Department. Obviously, the making of these orders was in this girl's best interests *(n)*.

Protecting a minor against undesirable qualities in a parent

The sad case of *S v S and S (o)* illustrates the use of wardship proceedings in a case where custody of her very young child was sought by a mother who was by no means a perfect parent. Indeed, the taking of the proceedings was adumbrated by the Judge himself. Both parents had lived a bohemian and nomadic life before and after their unsatisfactory marriage. The husband's drug record overseas was bad and both parents had been fined in New Zealand for cannabis offences. The mother had a casual liaison with a married man with children and he was said to have drug convictions. The mother hoped to get a home together in Hamilton, whereas the father's work plans were unrealistic and his claim to reformation was unconvincing. Nevertheless, he sought custody, alleging that he would have his parents' help in caring for the child. The father had a partner who admitted to some involvement with the drug scene (but had no convictions). The father was also acquainted with a woman who had been involved with drugs, including hard drugs. The father's parents were really only prepared to help with the child, who was nearly two years old, for their son's sake and as a lesser evil than having it brought up by the mother, who, unfortunately, did not get on too well with her own mother (who was likely to have a stabilising influence). Barker J refused custody to the father and his parents and made the child a ward of Court having regard to the uncertainty of the mother's future with the man described above, to the mother's susceptibility to outside influences and her inability to make appropriate major decisions about the child's future education and upbringing on her own. Barker J said that, until such time as the situation sorted itself out, the mother got a permanent residence and showed that she had shed her companions with drug records and had gained some stability in her personal life, *it would be as helpful to her as to the child (p)* to have the responsibility for major decisions about the child resting with the Supreme Court. On the other hand, the Court would only be too happy to rescind the wardship order should it turn out that the mother's circumstances had changed. Meanwhile, to assist the Court, it was directed that a welfare report should be prepared each December on the child's circumstances and that the mother should seek further directions in the event of the filing of a divorce petition and just before the child reached the age of five so that an order might be made about his schooling. Pending further order of the Court, the child was not to leave New Zealand. It is hard to conceive what more the Court could have done to protect the child against his poor parental background.

Protecting a right of access after adoption

In *Re N (an Infant) (q)*, the minor was the child of the applicant and her first husband, whom

(m) [1972] NZLR 1086. Cf *Re F (An Infant)* [1971] QWN 927, where a woman's behaviour with a boy was the cause for complaint.

(n) It should not be thought that wardship proceedings are brought only by parents simply because all the above cases have involved parents. *In Re D* [1976] 1 All ER 326, a gynaecologist was proposing, with parental consent, to permanently sterilise a mentally handicapped girl aged 11 to prevent the future possibility of children. An educational psychologist connected with the case applied successfully to have the child made a ward of Court to prevent the operation from being performed. That there are limits to the wardship jurisdiction may be seen from *Re X* [1975] Fam 47; [1975] 1 All ER 697 (CA) (interests of the child are unlikely to be held to prevail over the more wide interests of the freedom to publish a book which might be psychologically damaging to her). See, further, Everton (1975) 125 New Law Jo 930.

(o) [1977] NZLJ 139.

(p) Italics supplied.

(q) [1975] 1 NZLR 454.

she divorced. The applicant remarried and she and her second husband filed an adoption application in respect of the child. The child had been in the de facto custody of the respondent, the child's maternal grandmother. Late in 1973, Cooke J made an order making the child a ward of Court and appointed its mother to be the agent of the Court generally. The grandmother's custody application was adjourned for three months, which was intended to be a probationary period. The applicant sought an order releasing the child from wardship on the ground that the adoption proceedings were being impeded or could not proceed because of the wardship. The respondent grandmother no longer sought custody of the child but wished to preserve her right to apply for access, at present denied her by the applicant, arguing that unless the child was a ward of Court, the Court would have no jurisdiction to grant her rights of access *(r)*. This put in issue the important question, not greatly relevant to the present discussion, whether a ward of Court may be adopted without the consent or leave of the Court. Cooke J held that it is not necessary to obtain the leave of the Court to commence adoption proceedings in respect of a ward but that it is sufficient if the Court's consent is obtained before or after the filing of the adoption proceedings *(s)*. More important for present purposes, however, is that Cooke J agreed that the grandmother's right to apply should be preserved, though, quite aside from that, he did not consider that the order should be discharged at the moment as he did not think it would be justifiable to deprive the child of the Court's protection *(t)*.

Preserving the status quo before matrimonial proceedings

Sometimes wardship proceedings may be a wise step on the part of a parent desirous of putting himself or herself legally "on the side of the angels". Thus in *Re B (Infants) (u)*, the parents' marriage broke up and the mother brought their young children to this country (which was the country of her origin) in May 1969. She did not forewarn her husband. In June 1969, he followed them to this country only to be denied access to the children. In July 1969 he instituted Australian matrimonial proceedings, inter alia for the custody of the children, and, in the December following obtained an interim custody order. In February, 1970, the children were made wards of Court to preserve the status quo. The Australian proceedings had not come on for hearing, so the case cannot be described as one where the mother was decamping so as to defeat an order as to custody made by the Court of the matrimonial domicile – the interim order had not been made until she had been in this country for seven months *(v)*. The Court of Appeal decided that the father should not be permitted to remove the children at once from New Zealand (where, by that time they had lived for over a year) and that the mothers's custody application would be heard at an early date on its merits, at which stage the Court could give proper weight to the Australian order *(w)*.

Prevention of removal of child from the New Zealand jurisdiction

It is competent for the Supreme Court to order that a minor shall not be removed from the jurisdiction of the Court when that minor has been made a ward of Court. In *S v S and S*, discussed above, Barker J made such an order and in *Re N (an infant) (x)*, Cooke J continued the wardship order and the order that the child not be removed from the jurisdiction. In this connection, however, there must be remembered the preventative possibilities of Section 20(1) of the Guardianship Act 1968 which enacts that any Judge or Magistrate or, if no Judge or Magistrate is available, any Registrar of the Supreme Court or of a Magistrate's Court (not being a constable) who has reason to believe that any person is about to take a child out of New Zealand with intent to defeat the claim of any person who has applied for, or is about to apply for, custody of, or access to, the child or prevent any order of any Court as to custody

(r) Consideration of ss 11, 15 and 16 of the Guardianship Act 1968 will make clear that this is indeed the case.

(s) See at p 456 especially. Cooke J there states that he would treat the motion as an application for the necessary consent or leave and would grant consent. It is, perhaps, an unfortunate thing that *F v S (Adoption: Ward)* [1973] Fam 203 (CA) was not cited to his Honour.

(t) At p 455. It has been suggested that wardship of Court may be a means of enforcing a broken condition as to the adopted child's religious denomination: see s 11 (c) of the Adoption Act 1955 in conjunction with *Re J (A Minor) (Adoption Order: Conditions)* [1973] 2 WLR 782; [1973] 2 All ER 410.

(u) [1971] NZLR 143 (CA) with which the simple custody case of *E v F* [1974] 2 NZLR 435 may usefully be compared.

(v) Cf in this respect *C v C* [1973] 1 NZLR 129.

(w) Ultimately the mother was granted custody, and access was reserved to the father, Quilliam J saying he expected the mother's co-operation: *Re B (Infants) (No 2)* [1971] Recent Law 242.

(x) [1975] 1 NZLR 454, at p 456. The case was also discussed above.

of, or access to, the child from being complied with may issue a warrant directing any constable or social worker to take the child (using such reasonable force as may be necessary) and place it in the care of some suitable person pending the order or further order of the Court having jurisdicition in the case. There is, however, no need to make the child a ward of Court if all that is desired is to prevent removal of such a child from New Zealand – it will suffice to resort to this statutory emergency procedure *(y)*.

(y) As to the criminal liability of such would-be "kidnappers", see s 20(2) of the 1968 Act, and s 210 of the Crimes Act 1961 and *R v Mikkelsen* (1912) 31 NZLR 1261; (1912) 14 GLR 755. As to contempt of Court in this context, see s 20(3).

NEGLIGENT ACTS – RECOVERY FOR ECONOMIC LOSS

By G R WALKER *BA (Hons) (Otago), Tutor in Law, University of Adelaide*

The decision of the High Court of Australia in *Caltex Oil (Aust.) Pty Ltd v The Dredge "Willemstad"* (1976) 11 ALR 227 *(Caltex Oil)*, marks a significant development in that area of tort law concerning recovery for economic loss not consequential upon physical damage to the plaintiff caused by negligent acts. As Fleming notes *(Law of Torts,* 5th ed., at 170), pecuniary loss "standing alone" remains the "really controversial" matter. To date, the preponderance of English authority has been against recovery; in Canada and North America, however, claims for financial loss not consequential upon physical damage have succeeded (see eg *Seaway Hotels Ltd v Cragg (Canada) Ltd* (1959) 21 DLR (2d.) 264; *Rivtow Marine Ltd v Washington Iron Works* (1973) 40 DLR (3d.) 530 and *Union Oil Co v Oppen* (1974) 501 F (2d) 558. The principal reason for delimiting recovery for pure economic loss has been, as Craig observes, "fear of a too extensive liability and the correlative multiplicity of litigation that would ensue" (PP Craig, "Negligent Misstatements and Economic Loss" (1976) 92 LQR 213 at 240). The decision in the *Caltex Oil* case, in which a claim for the recovery of pure economic loss was allowed, is thus of interest for the attempt of the High Court to formulate a means by which recovery can be achieved and, at the same time, to avoid the danger of an indeterminate liability.

The Australian Oil Refining Pty Ltd (AOR) owned certain underwater pipelines on the bed of Botany Bay. The pipeline connected the oil refinery of AOR at Kurnell on one side of Botany Bay with an oil terminal owned by Caltex Oil (Australia) Pty Ltd (Caltex) at Banksmeadow on the other side. Under the processing agreement made between Caltex and AOR, Caltex supplied crude oil to the Kurnell refinery for processing by AOR and AOR delivered the refined products to Caltex at the Banksmeadow terminal via the underwater pipelines. While the refined product carried through the pipelines belonged to Caltex, the agreement provided that the risk of damage or loss rested with AOR until the products reached the Banksmeadow terminal.

On the night of 25-26 October 1971 the dredge "Willemstad" was dredging a deep water channel in Botany Bay when, due to negligent navigation, the suction pipes of the dredge damaged the underwater pipelines. There were two aspects to the negligent navigation of the dredge. First, it was established that those in charge of the dredge were negligent in their navigation. Second, however, the dredge was using navigation equipment supplied by Decca Survey Australia Ltd (Decca). A chart supplied by Decca to the dredge was inaccurate and this was found to be a contributing cause of the damage.

In the subsequent litigation Caltex brought actions against the dredge and Decca for damages for the cost of arranging alternative means of transporting the refined petroleum products. In the Supreme Court of New South Wales Caltex was unsuccessful. On the authority of the decision in *French Knit Sales Pty Ltd v N. Gold & Sons Pty Ltd* [1972] 2 NSWLR 132, Sheppard J held that such damages were not recoverable since they were entirely economic in nature and did not flow from the loss of the product. Caltex appealed to the High Court of Australia.

Although the members of the High Court (Gibbs, Stephen, Mason, Jacobs and Murphy JJ), differed in their reasoning and expression, they unanimously held that Caltex could recover. Further, with the exception of Murphy J, the members of the Court were concerned to formulate a test or "control mechanism" (to use the words of Stephen J), that would sensibly delimit the relevant duty of care.

Although Gibbs J expressed satisfaction with

the "general rule" that damages are not recoverable for economic loss not consequential upon physical damage to the plaintiff, he considered that this rule had an exception where:

(a) The defendant has *knowledge or means of knowledge* that the plaintiff *individually*, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a result of his negligence and,

(b) The defendant owes the plaintiff a duty to take care not to cause him such damage by his negligent act. Here all the facts of the particular case will have to be considered but it will be material that (i) some property of the plaintiff was in *physical proximity* to the damaged property or that (ii) the plaintiff and the person whose property was injured were engaged in a *common adventure.* (Emphasis added; *Caltex Oil* (1976) 11 ALR 227, 245).

In his judgment Stephen J was largely concerned with finding a "control mechanism" which would operate as a restraint upon an otherwise excessively wide liability. Ultimately, he based that control mechanism upon "notions of proximity between tortious act and resultant detriment" and "policy considerations". Accordingly, Stephen J examined the relationship between plaintiff and defendant and found that this showed "sufficient proximity to entitle the plaintiff to recover its reasonably foreseeable economic loss" (p 261). In enumerating the features of the case that together amounted to a relationship of sufficient proximity, thereby giving rise to a duty of care, Stephen J singled out for particular comment "the element of *knowledge*, actual or constructive, possessed by the defendant about the use of the pipeline to convey products to the plaintiff's terminal" (p 263). It was this element of knowledge that was crucial in establishing a relationship of sufficient proximity between plaintiff and defendant.

Mason J distinguished "three competing views" taken by the English courts which acknowledge, to a limited extent, a right to recover for pure economic loss (p 270). Then, after rejecting a test based solely on foreseeability or proximity of damage, he proposed that the more acceptable path to the solution of the problem was to be found "through the duty of care". Thus he considered it preferable that "the delimitation of the duty of care in relation to economic damage through negligent conduct be expressed in terms which are related more closely to the principal factor inhibiting the acceptance of a more generalized duty of care in relation to economic loss, that is, the apprehension of an indeterminate liability" (p 274). Echoing the reference of Gibbs J to the "individual plaintiff", Mason J proceeded to frame his formulation of the legal test in the following manner:

> "A defendant will then be liable for economic damage due to his negligent conduct when he can reasonably foresee that a *specific individual*, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct "(Emphasis added; (p 274).

In ascertaining the relevant duty of care, Jacobs J focussed on the elements of physical proximity and foreseeability of physical effect:

> "The relevant duty of care in the present case is the duty of care owed to those whose persons or property are in such *physical propinquity* to the place where an act or omission of the defendant had its physical effect that a *physical effect* on the person or property of the defendant is foreseeable as the result of the defendant's act or omission" (Emphasis added: (p 278).

Here it is important to note that a "physical effect" is not limited, in the opinion of Jacobs J, to actual physical injury. A physical effect which immobilises property will suffice.

Essentially then, all four judgments seek to delimit the relevant duty in a very specific manner. If a composite test can be drawn, then it would seem that its ingredients are:

(1) *Foreseeability* of economic loss to the plaintiff,

(2) *Physical proximity* between the property damaged by the defendant and the person (s) or property of the plaintiff, and,

(3) *Knowledge*, either actual or constructive, of a *specific individual* who will suffer economic loss as a result of the defendant's conduct.

When addressing the nineteenth Australian Legal Convention, Glass J, after a cautious allusion to the "almost fugal complexity" of the judgments in the *Caltex Oil* case, noted that the "decision to recognise a duty to act carefully in order to prevent economic harm was a major judicial innovation ranking in importance with *Hedley Byrne*" (Glass, "Duty to Avoid Economic Loss" (1977) 51 ALJ 372, 384). But exactly how significant is *Caltex Oil*? The following comments may be made.

First, it seems that the decisions of the English Court of Appeal in *SCM (United Kingdom) Ltd v W J Whittal & Son Ltd* [1971] 1 QB 337 and *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27 are no longer good law in Australia. In both those cases it was made clear that there was *generally* no liability for economic loss which was non-consequential upon recoverable physical damage. Recovery will

be allowed where the economic loss is immediately consequential upon foreseeable physical damage to the plaintiff's property but the practical difficulties attendant upon such a formulation are evident in the *Spartan Steel* decision itself. *Caltex Oil* is authority to the contrary.

Second, the decision brings the law regarding recovery for economic loss subsequent upon negligent acts and negligent misstatements closer together; previously recovery was denied in the former but allowed in the latter. While this rationalization is welcome from the point of view of logic and principle, it also means that problems and repercussions of characterization (ie the situation where the court must decide whether it is dealing with a negligent act or a negligent misstatement), are reduced. Further, the requirement of knowledge of the specific individual as a prerequisite for liability echoes the requirement for a special relationship in *Hedley Byrne*.

Third, in tightly delimiting the relevant duty of care, the High Court appears to have steered a sensible midway course between a test based solely on necessarily ill-defined considerations of policy (see *Spartan Steel* (supra) at 37 per Lord Denning) and a number of dissenting judgments in the English Court of Appeal which categorically refuse to recognise a distinction between property loss and economic loss (see eg, the representative remarks of Edmund Davies LJ in *Spartan Steel* (supra) at 45). In this regard, the governing factor in the approach of Mason J to the problem, "apprehension of an indeterminate liability", amounts to a welcome piece of judicial realism.

At this point the ambit of the *Caltex Oil* case remains uncertain; nonetheless, a recollection of the problems raised subsequent to *Hedley Byrne* leaves one only cautiously optimistic as to its reception in the Courts.

ADMINISTRATIVE LAW

"NO EVIDENCE" AND EXCESS OF JURISDICTION IN ADMINISTRATIVE LAW

A reassessment of the cases by R L TOWNER *who was the winner of the 1976 Dr R G McElroy Prize in administrative law.*

1 Introduction

With the Courts continuing to extend the ambit of their supervisory powers, several commentators have recently raised the issue of whether the absence of evidence to support a tribunal's decision is a distinct ground of judicial review *(a)*. The orthodox view that "no evidence" is not an independent ground of review derives from the Privy Council decision in *R v Nat Bell Liquors Ltd (b)* in which it was held that no evidence was not an error going to jurisdiction. In that case the respondent, owners of a large liquor export business, was convicted before a Magistrate of selling liquor in breach of the local Liquor Act. On appeal the conviction was quashed on the ground that the only evidence of the alleged offence was that of an agent provocateur of the police, and the agent's evidence was no evidence since: (a) he had been previously convicted of stealing beer, a fact dishonestly denied during cross-examination; (b) he had an interest in the existence of the facts alleged; (c) he was an accessory before the fact of the sale; and (d) his testimony was uncorroborated.

Both the Supreme Court of Alberta and the Supreme Court of Canada upheld this decision. On appeal to the Privy Council, however, the conviction by the Magistrate was restored on the ground that the absence of evidence did not affect his jurisdiction to convict. In rejecting the respondent's argument that "want of evidence on which to convict is the same as want of jurisdiction to take evidence at all," Lord Sumner stated in a celebrated opinion:

> "This, clearly, is erroneous. A judge who convicts without evidence is doing some-

(a) Wade, *Administrative Law* (3rd ed), 98–102; Elliott, " 'No Evidence': A Ground of Judicial Review in Canadian Administrative Law?" (1972) 37 Saskatchewan L Rev 48; Tracey, "Absence or Insufficiency of Evidence and Jurisdictional Error" (1976) 50 ALJ 568.

(b) [1922] 2AC 128. Surprisingly, their Lordships did not cite the following dicta of an earlier Privy Council decision: "Whether or not the proof advanced was 'reasonable proof' was a question of fact for the designated tribunal, and the decision by the Lieutenant-Governor in Council in the affirmative could not be questioned in any Court so long, at all events, as it was not demonstrated that there was no 'proof' before him which, acting judicially, he could regard as reasonably sufficient". *Wilson v Esquimalt and Nanaimo Ry Co* [1922] 1A C 202, 212; apart from Lord Carson the benches differed in the two cases.

> thing that he ought not to do, but he is doing it as a Judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.... To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all" *(c).*

While there has been a recent attempt to demonstrate that the *Nat Bell* case "was not a case denying the existence of 'no evidence' as a possible ground of judicial review" *(d),* the decision has been generally accepted as direct authority for that proposition.

At the same time, it is well established that "whether or not there is evidence to support a particular decision is always a question of law" *(e).* The significance of this point is that with the revival of error of law on the face of the record in 1951 in *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1951] 1 KB 711 certiorari will now issue to quash any non-jurisdictional error of law if revealed by the record. Thus, a decision made in want of evidence is always reviewable if the absence is apparent on the face of the record. Yet, there are obvious deficiencies to this remedy. First, the error must itself appear on the record. Tribunals are not normally required to give reasons for their decisions, and the "bare" record will rarely indicate whether a decision was or was not supported by any evidence; if the error is not so apparent it will be unreviewable under the orthodox formula. Furthermore, a statutory privative clause will be effective to exclude review of non-jurisdictional error even if apparent on the record. It is in this light that the possibility of no evidence as a separate ground of review assumes its significance.

This paper will survey relevant case law from Canada, Australia, New Zealand and England to assess the varying attitudes in these jurisdictions to the no evidence issue. It will be seen that the decision in *Nat Bell* is not an authority which has attracted the type of universal and unquestioning support that one might have expected from a judgment of the Privy Council; to the contrary there are an increasing number of decisions, particularly in Canada and England, which have contradicted the *Nat Bell* case. Then the original concept of jurisdiction upon which their Lordships directly based their finding on the no evidence question will be examined in light of recent developments in this area of administrative law. It will be submitted that Lord Sumner's conclusion on the supervisory powers of the Courts is at odds with the emerging concept of "excess of jurisdiction". The implications of the House of Lords' decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 suggest that a tribunal which decides in the absence of evidence is acting in excess of jurisdiction. While it will be seen that no evidence is essentially a species of grounds of review explicitly accepted by their Lordships in *Anisminic,* nevertheless, it will be suggested that no evidence remains valuable as a label with which a supervisory court can describe a certain type of jurisdictional defect.

2 A Survey of the case law

(a) *The Canadian cases*

The numerous Canadian decisions since *Nat Bell* which have considered whether a tribunal's order need be supported by evidence have been thoroughly analyzed in a recent article by D W Elliott *(f).* As against the "score or so" of cases which might be construed as purporting to deny that no evidence is a separate basis for review, Elliott has categorised the following cases which appear to conflict with the Privy Council decision *(g):*

> "(a) Twelve decisions invalidating an order on the basis of 'no evidence' and indicating that this lack of evidence went to jurisdiction;
>
> "(b) Three decisions invalidating an order on the basis of 'no evidence' and indicating that this basis of review was not jurisdictional in nature;
>
> "(c) Seven decisions invalidating an order on the basis of 'no evidence' and not indicating whether this basis of review was jurisdictional in nature or not;
>
> "(d) Twenty-three decisions holding that there was some evidence in the particular case at hand, and thus implicitly supporting 'no evidence' as a possible basis of review".

(c) Ibid, 151.

(d) Elliott, loc cit, 58.

(e) *R v Governor of Brixton Prison, ex parte Armah* [1968] AC 192, 234, per Lord Reid. Cf "Whether there is sufficient evidence to support a particular finding of fact is a question of law". *R v Metropolitan Fair Rents Board, ex parte Camestral* [1961] VR 89, 93.

(f) Loc cit.

(g) Ibid, 65-66.

Indeed, the trend of the Canadian cases in recent years has been to circumvent the decision in *Nat Bell* with or without express statements of disagreement with the case, and one commentator has stated *(h)*:

> "The Courts have been increasingly prepared to uphold attacks where there was no evidence at all adduced upon which the tribunal could base its decision ... the tendency is to speak in terms of invalidity or nullity, expressions indicating that the error is a jurisdictional one".

For instance, in *Re Ontario Labour Relations Board and Bradley v Canadian General Electric Co Ltd* (1957) 8 DLR (2d) 65 Roach J A, delivering the judgment of the Ontario Court of Appeal, made the following comment in the context of a preliminary or collateral matter:

> "When the jurisdiction of an inferior tribunal to decide what I will call the main question before it, depends upon a collateral matter it must, of course, decide that preliminary or collateral matter. It can decide it only on evidence. If there is no evidence then the existence of the facts on which the tribunal's jurisdiction to proceed further depends, has not been established and the tribunal is without jurisdiction to proceed further" (p 81).

In a recent case in the British Columbia Supreme Court, the Judge, although finding that there was evidence on which the tribunal based its decision, expressly criticised the decision in the *Nat Bell* case, contending:

> "I think that no evidence is an error of law going to jurisdiction. In this province it has been held that evidence entirely apart from the record may be brought before the court to show that a statutory tribunal had no evidence to support the finding made" *(i)*.

A continuing difficulty since the *Northumberland* case in classifying no evidence error as either jurisdictional or non-jurisdictional is in knowing whether the supervisory court has relied solely on the face of the record to impugn the tribunal's order. That is, a tribunal's order may be impugned either as a jurisdictional error in which case the supervisory court is not restricted to the record or as a non-jurisdictional error in which case it is so restricted; it follows that a court's attitude to the face of the record may directly reveal its evaluation of the nature of no evidence. Unfortunately, many of the post-1951 decisions which have vitiated an order for no evidence have not clearly recognised that these are two distinct remedies available in different situations for different types of error. That Elliott could not accurately classify 30 cases (groups c and d) out of the 45 which he analysed demonstrates that the judgments have been less than illuminating. Indeed, Elliott himself commits the mistake of identifying one pre-*Northumberland* case *(j)* as an example of no evidence as a *non-jurisdictional* error; surely an error of such a character can only be reviewed if apparent on the face of the record, and this remedy was not revived until 1951!

The imprecise judicial analysis in this area is illustrated by *Labour Relations Board for British Columbia v Canada Safeway Ltd* [1953] 3 DLR 641, in which the Supreme Court of Canada seems to have analysed the evidence before the tribunal in reaching its decision. The point which is unclear is whether the court was merely examining the face of the record to determine if the tribunal had erred in law by deciding without any evidence or whether the Court did not consider itself confined to the record but rather saw any possible lack of evidence as a jurisdictional defect. None of the Judges in the majority cite the *Nat Bell* case. It is suggested in the judgment of Cartwright J (with whom Ester J concurred) that the respondent's case had been argued as an error of law "apparent on the face of the proceedings" and therefore amenable to certiorari (at p 652). Yet, this comment is suspect as the discussion of the record in the report suggests that there was no evidence on the record which would have indicated whether or not the board had erred in law. Accordingly, Kerwin J based his finding that the tribunal had come to the right conclusion on the evidence not on the record of the tribunal but rather on a letter from the board to the respondent's solicitor giving the reasons for the decision. There is no indication that the reasons were incorporated into the record of the proceedings, and Kerwin J himself refers to the letter as part of the "records of the Respondent" (at p 643). Hence it is reasonable to deduce that Kerwin J did not see the issue as error of law on the face of the record. Taschereau J found there was "sufficient evidence" to justify the tribunal's decision (at p 646). Again, the only evidence on which such a conclusion could be based did not form part of the formal record. Rand J held that the tribunal's decision could not be impugned as it was "consonant with a rational appreciation of the situation" (at p 649). "Rational appreciation of the situation" seems to imply some evidential basis, not *necessarily* restricted to the record, from which a reasoning mind could reach a decision. On this interpretation, three Judges of the majority did not confine themselves to the face of the record which suggests

(h) Molot, "Annual Survey of Administrative Law" (1975) 7 Ottawa L Rev 514, 547.

(i) [1973] 6W WR 451, 455, per Berger J.

(j) *R v McMicken* (1923) 41 CCC 156.

that any want of evidence would have been considered a jurisdictional error. Admittedly, such a deduction is speculative, but the fact that the Court found it necessary to look at extrinsic evidence leads to a reasonable inference that any possible error would have been considered jurisdictional in nature. That such analysis may seem strained merely reflects that the judgments are unsatisfactory.

The inconsistency in the Canadian cases is manifested by the fact that the most recent Canadian decision to examine this issue has applied the *Nat Bell* case. In *Woodward Stores (Westmont) Ltd v Alberta Assessment Appeal Board Division No 1* (1976) 5 WWR 496. McDonald J in the Alberta Supreme Court concluded that the absence of evidence, although an error of law, was not a jurisdictional defect and was only amenable to certiorari if the error appeared on the record. McDonald J stated that the *Ontario Labour Relations Board* case (1957) (2d) 65 "cannot be taken to have destroyed the authority of the *Nat Bell* case" (p 5071), and he distinguished the Supreme Court decision in the *Canada Safeway* case (wrongly, it is submitted, in view of the above analysis) as a case concerning merely non-jurisdictional error of law on the face of the record (p 508). Thus, while McDonald J approached the problem in the proper manner by clearly distinguishing between the two remedies, his conclusion may be disputed.

(b) *The Australian cases*

Benjafield and Whitmore have accepted *Nat Bell* as having firmly established that, in Australia, "the making of a decision which is not supported by evidence does not establish jurisdictional error" *(k)*. The pre-*Nat Bell* cases on absence of evidence involved review of decisions of inferior Courts. While the weight of authority in New South Wales was against review for no evidence *(l)*, decisions of other state Supreme Courts supported the view that a Judge had acted without jurisdiction if there was a want of evidence *(m)*. For example, in *Woods v Waterman* it was stated by Booth J:

> "Now, there is no doubt in my mind ... that the Magistrate had jurisdiction to commit, but if he committed without any evidence at all he would be exceeding that jurisdiction, and this Court would prohibit him" (p 77).

The influence of *Nat Bell* appears to be generally pervasive in Australia as there is apparently no reported case since *Woods v Waterman* in which it has been explicitly stated that no evidence is a jurisdictional error. Yet, it has recently been commented that several post-*Nat Bell* Australian cases have indicated:

> "... that Courts which are accustomed to dealing with appeals in which it is claimed that there is no evidence are going to be reluctant to refuse to consider similar arguments in cases coming within their supervisory jurisdiction in which gross errors are involved" *(n)*.

This attitude is reflected in the High Court decision in *R v Australian Stevedoring Industry Board* (1953) 88 CLR 100. An employer of waterside workers sought prohibition against the tribunal exercising a statutory power to cancel or suspend the employer's registration on the ground that there was no proper basis on which the board could be satisfied that the employer was "unfit to continue to be registered". In granting the writ the High Court clearly saw the issue whether there was evidence to support a decision as directly relevant to the tribunal's jurisdiction. In a joint judgment, Dixon C J, Williams, Webb and Fullagar JJ stated:

> "... the chief point of difficulty in the case lies in the distinction between on the one hand a mere insufficiency of evidence or other material to support a conclusion of fact when the function of finding the fact has been committed to the tribunal and on the other hand the absence of any foundation in fact for the fulfilment of the conditions upon which in point of law the existence of the power depends ... The inadequacy of the material is not in itself a ground for prohibition. But it is a circumstance which may support the inference that the tribunal is applying the wrong test or is not in reality satisfied of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to the tribunal is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact.
>
> "What appears in evidence before us discloses no affirmative ground for thinking that the prosecutor company is in truth 'unfit to continue to be registered as an employer ...'" (pp 119–120).

(k) *Principles of Australian Administrative Law* (4th ed), 180.

(l) Eg *Purcell v P T Co Ltd* (1894) 15 NSWR 385; *Ex parte Jordan* (1898) 19 NSWR 25; cf *Ex parte Cohen* (1890) 7 WN 5.

(m) *Evans v Thomas* (1866) 1 SALR 82; *Overgaard v Licensing Magistrates of the Murray District* (1906) 9 WALR 31; *Woods v Waterman* (1908) 10 WALR 75.

(n) Tracey, loc cit, 572–573.

Thus, as the evidence afforded "no possible basis for such a conclusion" (p 921), the High Court inferred from the absence of evidence that the tribunal was using its power for an improper purpose. In other words, the underlying reason why the tribunal's order was vitiated was an absence of evidence as it was on this fact that the High Court directly based its conclusion. To say that there is a jurisdictional error because there is an improper purpose because there is an absence of evidence is tantamount to concluding there is jurisdictional error for want of evidence. At the same time, it must be remembered that the High Court seems to have felt obliged to go beyond a finding of no evidence.

It has been suggested that a more recent decision of the High Court supports the view that a jurisdictional error can be inferred from an absence of evidence *(o)*. In *Sinclair v Mining Warden at Maryborough* (1975) 49 ALJR 166 a mining company applied for four mining leases. The applicant objected to the applications on the ground, inter alia, that a grant of the leases would be against the public interest. The warden was required by a regulation to reject any application if he was of the opinion that the public interest would be prejudicially affected by the granting of the application. At the hearing of the objection it was accepted that there was no evidence of the existence of minerals in two of the areas and evidence of minerals in only sixty of the 640 acres covered by the other two areas. The leases were granted on the ground that "until it can be shown to be against the public interest as a whole the applicant is entitled to a recommendation ... that the leases be granted".

A unanimous High Court granted mandamus on two grounds. First, the tribunal had erred in deciding that the appellant represented so limited a section of the public that its evidence could not be accepted as supporting a conclusion that the public interest "as a whole" would be prejudicially affected by the granting of the applications. Furthermore, three of the Judges found that the warden had failed to appreciate that he was not bound to recommend that the applications be granted, merely on being satisfied as to the due observance of formalities and the absence of prejudice to the public interest; he needed also to be affirmatively satisfied on the material before him that the leases should be granted. Barwick C J, with whom Murphy J concurred, found that "there was no material whatever upon which the warden could recommend the acceptance of applications" (p 169). Yet a closer examination of the judgment reveals that the warden had misconceived his legal duty because he had asked himself the wrong question by failing to be affirmatively satisfied. It is submitted that this is the actual basis for the conclusion that Barwick CJ draws, and the issue of evidence appears to have been raised merely to support this finding. While Gibbs J agreed that the warden had misconceived his duty by concluding that the applicants were necessarily entitled to the leases if no prejudice to the public interest was caused thereby, he merely saw the absence of evidence of mineralisation as only one of "other matters" which the warden was bound to consider (p 170). Jacobs J, however, felt that the leases should be recommended unless the grant would be against the public interest. As to the issue of supportive evidence, he considered that evidence of mineralisation was only a factor to be considered in determining "where the public interest lies" (p 172). Hence only Barwick C J and Murphy J thought that the absence of supportive evidence was relevant to the issue of the leases; this, however, was not the basis for their finding but only supported the conclusion. In any event, similarly to the *Canada Safeway* case the High Court decision is difficult to categorise.

(c) *The New Zealand cases*

There are few New Zealand cases which have directly raised the possibility of want of evidence as a possible ground for review. *In re Collett* (1897) 15 NZLR 425 was a case in which the plaintiff argued that his conviction for common assault was not based on any evidence as the original information was a charge of indecent assault, and he had objected to amendment of the information. Prendergast C J considered that the effect of a provision which allowed a conviction to be drawn up without stating any supportive evidence was to make the conviction immune from certiorari on the ground of lack of evidence. He concluded that if certiorari were taken away, the conviction "though it was irregular and improper, was not without jurisdiction" (p 431). The Judge expressed some unease that there could be jurisdiction to convict without evidence but was fortified by two English cases *(p)* in which it had been held that "the absence of evidence was not a matter on which a conviction could be quashed for want of jurisdiction" (p 431). Similarly, in *Van de Water v Bailey & Russell* [1921] NZLR 122 where it was argued that a Magistrate's order for ejectment made without any evidence amounted to an excess of jurisdiction, Salmond J held that while the order might well reflect an error of law it was not "an

(o) Tracey, loc cit, 572.

(p) *Ex parte Hopwood* 15 QB 121; *Ex parte Blewitt* 14 LT 598.

erroneous assumption of jurisdiction".

The decision in *Nat Bell* reinforced the prevailing attitude of New Zealand Courts to accept a tribunal's decision made in the absence of evidence as a determination made within the body's competence. In *Hami Paihana v Tokerau Maori Land Board* [1955] NZLR 315, F B Adams J did not dispute that the Privy Council decision was authority for the proposition that "where the evidence is not made part of the record, the superior Court cannot entertain on certiorari the question whether there was evidence of every matter requiring to be proved" (p 322). In *Rural Co-operative Society Ltd v Thomson* [1969] NZLR 300 it was argued that a licensing authority had acted without jurisdiction because of no supporting evidence in refusing to transfer a licence. Wilson J accepted the *Nat Bell* case as binding authority, and while English courts were "entitled to be critical of a judgment of the Privy Council", he, as a New Zealand Judge, was not allowed such liberties (p 303). These comments of Wilson J, however, were obiter as he appears to have accepted that there was some evidence before the tribunal.

Yet, a recent judgment of Casey J reflects the possible emergence of a different attitude in New Zealand Courts as well. In *Raceway Motors Ltd v Canterbury Regional Planning Authority* Casey J stated *(q)*:

> "This Court can only interfere with the board's decision if it has acted on no evidence; or if it has come to a conclusion to which on the evidence it could not reasonably come; or if it has taken into consideration matters which it ought not to have taken into account, and vice versa".

The Judge does not cite the *Nat Bell* case and makes no mention of error on the face of the record. Perhaps most importantly, he has equated no evidence with irrelevant considerations which is now accepted as an instance of jurisdictional error.

(d) *The English cases*

Professor Wade has recently asserted that the "canonical doctrine" of *Nat Bell* embodies "an abuse of power which Judges are naturally loath to tolerate" and suggests that "change is now in the wind for there are signs that the Courts may be ready to assert control over findings of fact based on no evidence" *(r)*. Indeed, there are several recent English cases which support the view that want of evidence goes to jurisdiction, and hence is reviewable by a supervisory Court even if not apparent on the record. There are dicta in habeas corpus cases to the effect that the Court will quash decisions made in an absence of evidence without reference to the record *(s)*. In addition, no evidence now appears to be a breach of natural justice. In *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456 the commissioner dismissed a claim for an industrial injury benefit after hearing evidence of similar injuries in two previous cases before other commissioners. The claimant appealed on the grounds that the commissioner had erred in law and that his decision was contrary to natural justice in that he had treated as evidence in the case before him matter which was actually not evidence (namely, the medical opinions expressed in previous cases). The Court of Appeal held that there was no breach of natural justice as both parties had had full opportunity of commenting upon the opinions expressed in the previous cases. Yet, their Lordships made the novel suggestion that the rules of natural justice require a tribunal to base its decision on evidence of some "probative value". Willmer J argued that if the evidence was of no probative value, ie the opinions expressed were so worthless as to have no weight at all, this would be a question of law justifying certiorari. Diplock L J elaborated:

> "The requirement that a person ... must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue" (p 488).

(q) [1976] 2 NZLR 605, 609 citing a dictum by Lord Denning MR in *Ashbridge Investments Ltd v Minister of Housing and Local* Government [1965] 1 WLR 1320, 1326.

(r) *Op cit*, 99; cf de Smith, *Judicial Review of Administrative Action* (3rd ed), 96-97: A tribunal "does not lose its jurisdiction even if its conclusion on any aspect of its proper field of inquiry is entirely without evidential support".

(s) Eg *R v Board of Control, ex parte Rutty* [1956] 2 QB 109, 124; *Armah* case [1968] AC 192, 231, where the House of Lords seems to have gone further and weighed conflicting evidence. Wade suggests that these cases may be a special category: op cit, 101, note (a).

Although the decision in *Nat Bell* is not cited, neither is the *Northumberland* case which would have indicated a limitation of the dicta only to instances where apparent on the record. Yet, this is only reasonable as it has never been suggested that a remedy for breach of natural justice depended on the error being manifested on the face of the record. Breaches of natural justice have always been regarded as occasioning a want of jurisdiction, and there is no logical reason why the dicta of Diplock L J could not be generalised.

The Court of Appeal has been equally assertive on two other recent occasions. In familiar fashion, Lord Denning M R has turned a blind eye to contrary authority (ie *Nat Bell*) to his view of the Courts' proper supervisory powers. In *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320 the Master of the Rolls stated obiter:

> "Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law" (p 1326).

Lord Denning's formulation (upon which Casey J relied in the *Raceway Motors* case is significant not only because he aligns no evidence with other recognised grounds of review but also because the scope of judicial review has been potentially extended by the requirement that the evidence must form a reasonable basis for a tribunal's decision.

The dictum was subsequently applied by the Court of Appeal (Lord Denning M R sitting with Sachs and Buckley LJJ) in *Coleen Properties Ltd v Minister of Housing and Local Government (t)*. Contrary to an inspector's advice, the Minister had extended a compulsory purchase order for a clearance area so as to include a building which was in perfectly good condition. The Minister was empowered to do so only if it was "reasonably necessary" in relation to the entire clearance scheme. The Court quashed the Minister's decision on the ground that there was no evidence of necessity before the Minister (ie non-fulfilment of a condition precedent), his order consequently being ultra vires. Sachs J, as well as Lord Denning himself, cited the Master of the Roll's dicta in the *Ashbridge* case and concluded that "there was no evidence whatsoever establishing that Clark House fell within the ambit of section 42 (3)" (p 440).

(t) [1971] 1 WLR 433; noted (1971) 87 LQR 318.

3 No evidence and excess of jurisdiction

Apart from the New Zealand cases, the decisions of various jurisdictions generally manifest the supervisory courts' readiness to upset a tribunal's order if made in the absence of any possible supportive evidence. While some Canadian Judges have been openly critical of *Nat Bell* by expressly categorising no evidence as a jurisdictional error, recent judgments of the English Court of Appeal have merely turned a blind eye to the Privy Council decision with Lord Denning even suggesting a standard of reasonableness. The Australian High Court decision in the *Australian Stevedoring* case reveals more guarded reasoning with no evidence serving as a basis for concluding an improper purpose or misconception of statutory duty. This last attitude raises the question of the relationship of want of evidence to other recognised grounds of review such as irrelevant considerations or asking the wrong question. Furthermore, the expansion of the concept of jurisdiction by the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 suggests that the basis for the Privy Council decision in *Nat Bell* needs to be reconsidered. The specific issues to be addressed are: first, the nature of "jurisdiction" after *Anisminic* and the consequences for the no evidence question; and secondly, whether no evidence has been subsumed by other accepted grounds of review.

The orthodox concept of jurisdiction upon which the decision in *Nat Bell* is clearly based is that a tribunal is given a general field of competence, and a supervisory court has power only to ensure that the tribunal has properly entered that field. For example, a tribunal having authority to award accident compensation which purports to grant a divorce is liable to have its decision impugned on review. Yet, once having correctly entered its authorised field of jurisdiction, the tribunal has jurisdiction to award whatever amount of compensation it considers appropriate. As the Privy Council stated in the nineteenth century case *Colonial Bank of Australasia v Willan*, (1897) LR 5 PC 417 "the question is whether the inferior Court had jurisdiction to enter upon the inquiry and not whether there has been a miscarriage in the course of the inquiry" (p 444). Or as Lord Sumner himself stated in *Nat Bell:*

> ". . . if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. . ." (p 151).

Hence jurisdictional error not dependent on the face of the record could only occur for *want* of

jurisdiction and never because a tribunal had committed a serious error of law *in the course* of its inquiry.

The decision in *Anisminic* exploded this original concept of jurisdictional error by holding that where a tribunal correctly embarks on its inquiry (and therefore there is no question of want of jurisdiction), it will, nevertheless, act in *excess* of jurisdiction if it misinterprets the meaning of any term or criteria in the empowering statute which it has to apply. As Lord Reid stated in *Anisminic:*

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity" (p 171).

As a result of misconstruing the expression "successor in title" the commission had inquired into the existence of facts which the applicant was not required to establish. It had thus entered into an inquiry which it was not authorised to make.

This extended concept of jurisdictional error can be expressed in several ways: the tribunal took into account irrelevant considerations or failed to take into account relevant considerations; or it asked itself the wrong question; or it used its power for an improper purpose. Such categorisations avoid technical distinctions between what is the record which the Court may examine for the purpose of detecting error of law as well as between questions of law and questions of fact *(u).* Hence even if a tribunal correctly commences its inquiry by not mistaking its general field or assuming a jurisdiction it does not possess by wrongly determining a "jurisdictional fact", it may still act in excess of jurisdiction at some later stage of its inquiry by moving outside the specific limitations of the enabling statute. The essence of the extended concept of jurisdiction is that the enabling statute defines the limits of the precise area of a tribunal's jurisdiction outside of which it must not step.

To return to the decision in *Nat Bell,* Lord Sumner's opinion that any error committed during the course of an inquiry is unimpeachable must now be considered irreconcilable with the prevailing concept of jurisdiction and the consequent breadth of jurisdictional error. As the extract from Lord Reid's judgment in *Anisminic* demonstrates, there will be a variety of situations in which a supervisory court may impugn a tribunal's order. Thus, it is submitted that Lord Sumner's statements are of questionable validity today: an error of a tribunal committed during the course of its inquiry *may* be open to review; to say that "there is no jurisdiction to convict without evidence" is *not* the same as saying that "there is jurisdiction if the decision is right, and none if it is wrong;" if a tribunal's decision is set aside the "real conclusion" is *not* that "there never was any jurisdiction at all". In other words, a tribunal may properly assume its jurisdiction by entering its given field of competence but subsequently err in law, and such an error may be reviewable without recourse to the record. The remaining question, however, is whether no evidence is the type of error which their Lordships envisaged in *Anisminic* as capable of invalidating a tribunal's order. No evidence is not included in any of their Lordships' lists of jurisdictional error, but as Lord Reid pointed out in his judgment the lists were not intended to be "exhaustive". If a tribunal makes an order unsupported by evidence, has it "done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity?"

There is little certainty in attempting to answer this question directly. On the one hand, it might be said that Parliament's intention is invariably that a tribunal should not act arbitrarily and, therefore, its decisions should always be supported by at least some evidence. Yet, it can be just as readily asserted that no evidence is an example of the residual area of non-jurisdictional error as it was not adverted to by any of their Lordships in *Anisminic* and logic does not necessarily dictate that no evidence be classified as a jurisdictional error. There is, however, another way out of the woods which can be reached by addressing the above question in a less direct manner. To begin with, it can be said that a tribunal which makes a determination based on no evidence does so for either of two reasons: first, the decision may be completely arbitrary in that the tribunal acts capriciously or does not reason at all in reaching its decision; secondly, the tribunal may be motivated by extraneous considerations which either are not part of the evidence presented during the inquiry or not required to be considered by the enabling statute. The former category is

(u) See Lord Diplock, "Judicial Control of the Administrative Process' (1971) 24 Current Legal Problems 1, 11–12.

really only a theoretical possibility as a decison-maker can be expected to decide for some reason, be that reason right or wrong, logical or illogical, rational or irrational. Hence a tribunal in such a case is influenced by some other factor which it improperly considers germane to the determination. That factor may form part of evidence presented to the decider but which he is not allowed to consider (as in *Nat Bell* and *In re Collett* (1897) 15 NZLR 425 but more likely will be a factor of which there is no indication at all during the inquiry. In other words, the decision-maker has taken into account irrelevant considerations or has asked himself the wrong question! This must be so for if the decider has based his determination on facts which the empowering statute did not authorise him to consider, he has been motivated by considerations that are "extraneous" or "irrelevant".

It follows that any decision made in want of evidence can invariably be impugned for either irrelevant considerations or asking the wrong question. Therefore, it seems that there is little need for a supervisory Court to directly ponder whether a tribunal's order based on no evidence is "of such a nature that its decision is a nullity". The area is already covered by recognised grounds of review which may give rise to a remedy regardless of whether the error is apparent on the record. It is submitted that no evidence has been subsumed by irrelevant considerations or asking a wrong question and is now merely an element of these more generalised grounds. Accordingly, it is this writer's contention that no evidence errors are undoubtedly jurisdictional in character, and a supervisory court need not confine its review to the face of the record. If such an error is in any way apparent to the Court, the order can be quashed.

4 Conclusion

Given that a tribunal which decides on no evidence (ie is motivated by extraneous factors) may have its order impugned for irrelevant considerations or asking the wrong question, it is unnecessary for the Courts in their supervisory capacity to press for no evidence as an independent ground of review. Accordingly, there is now little value in continuing to sift through the reports in search of judgments or dicta which support a particular view; that exercise has been performed in this paper to show the continuing inconsistency in the cases. A more worthwhile approach is to grasp the implications of the extended concept of jurisdiction for this issue, and to reason from this basis. The position reached in this paper is that a tribunal that makes an order unsupported by evidence acts in excess of jurisdiction.

Yet, this is not to say that no evidence should be dropped from judicial terminology altogether. Indeed, the first thing that may strike a supervisory court about a tribunal's order is that it has been made in the absence of any supportive evidence. Judges may still prefer to refer to such an error as no evidence and base any remedy on this fault. While the Courts may continue to view no evidence as a useful label and talk in these terms, it should at the same time be realised that no evidence is but a species of other recognised grounds of review.

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