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WHAT IS A COURT?

A recent English decision raises a thought-provoking issue in contempt of Court. Just how far runs the writ of contempt? While it is unquestioned that a superior Court may commit for contempt of an inferior Court nonetheless with the burgeoning growth of administrative and quasi-judicial tribunals it is often far from clear-cut whether a particular body is or is not a Court.

In *Attorney-General v BBC (The Times,* 18 February 1978) the Attorney-General sought to restrain the BBC from repeating a television programme about the Exclusive Brethren. At that time the Exclusive Brethren were having trouble with the rating authority and were seeking to have premises recognised as being a place of public religious worship. The particular question arising was whether the local Valuation Court was or was not a "Court". Although the report of the decision did not specifically mention it the Attorney-General obviously thought the broadcast was likely to prejudice a fair trial. That point was not argued as the BBC had agreed not to broadcast the programme if the Land Valuation Court was indeed held to be a Court.

Earlier authority gave modest guidance. Lord Justice Fry in 1892 had said "Courts are for the most part controlled and presided over by some person selected as specially qualified for the purpose and they have generally a fixed and dignified course of procedure". Later in 1932 Mr Justice Scrutton flipped the obverse and said that it weighed against being a Court that a body did not hear evidence on oath nor have any particular rules of procedure.

In the event their Lordships looked at the task performed, the procedure adopted, the method of selection of members, and how far its creation and duties were consistent with the general idea of a Court. Its conclusion was that the Valuation Court in England was a clear example of an inferior Court.

The BBC decision focuses on the traditional purpose of criminal contempt which is to restrain by sanctions conduct likely to interfere with the fair administration of justice, the dispensing of which may be regarded as the function of the Courts and in that context concerns the determination of competing rights.

In New Zealand a particularly fuzzy area concerns those bodies whose proceedings are governed by the Commissions of Inquiry Act 1908. These range from those that are clearly inferior Courts, such as the Equal Opportunities Tribunal established by the Human Rights Commission Act 1977, to those that are quite clearly not, such as Royal Commissions or commissions of inquiry charged with the traditional function of providing information. Despite the marked differences in function the same rules apply to each type of body. Thus if a Judge of the Supreme Court heads the Commission then the Commission shall "have the same powers, privileges and immunities as are possessed by a Judge of the Supreme Court in the exercise of his civil jurisdiction". Otherwise the Commission "shall have the powers of a Magistrate's Court, in the exercise of its civil jurisdiction, in respect of citing parties, summoning witnesses, administering oaths, giving evidence, and conducting and maintaining order at the inquiry". How far these powers extend to enable a person to be committed for contempt in respect of Royal Commission hearings is by no means clear. Were the power limited to control of proceedings, compelling attendance of witnesses and the like (as is the case in England) there would be little objection. However, one wonders to what extent a deliberate attempt to influence the opinion of the Commission could be regarded as a contempt.

In the case of a Royal Commission it is unthinkable that it should be a contempt at all. The debates that rage before Royal Commissions are commonly and properly carried into the community and nowhere has this been truer than in the case of recent Royal Commissions concerning Contraception, Sterilisation and Abortion, and Nuclear Power. But what of a commission of inquiry into an industrial disaster? While the inquiry will not determine rights, the findings may well have a bearing on later litigation and because of that there could be a temptation to use contempt procedures to inhibit comment in the news media.

From the responsible news media point of view the division between being a Court and not being a Court is an important one. For that reason it is a pity legislation intended to govern inquiries is also being used to govern the procedures of inferior Courts. Using it that way blurs the distinction and could encourage the use or threat, of contempt procedures in circumstances where they are entirely inappropriate.

In New Zealand the grounds on which a commission of inquiry may commit for contempt are not limited. In England they are – to specific matters relating to evidence and witnesses. Our Act should contain a similar limitation.

Tony Black

CASE AND COMMENT

Road closure – Validity of proclamation – Ministerial direction – Planning Consequences.

The decision of Mahon J. in *Cook County Council v Attorney-General, Supreme Court, Gisborne, 30 September 1977 (M 31/76)* provides a reminder of the unpredictability of ministerial discretion. The case stated concerned the validity of a proclamation revoking the reservation of land acquired from Maori owners in 1944 to provide for the Centennial Marine Drive, Gisborne, such land being unused land between the road actually formed and the foreshore. In 1969, the Cook Country had approached the Minister of Lands and requested that the surplus land be added to an adjoining Marine domain. The Minister had agreed in principle to the proposal and issued a proclamation under s 29 of the Public Works Amendment Act 1948. As the proclamation took effect early in 1972, before road lands in counties were vested in the councils, the surplus land (35 acres) remained vested in the Crown free of the road purpose. Following a change of government, certain of the original Maori owners requested the then Minister to return the land to their ownership free of costs as no compensation had been originally paid due to the enhancement of adjoining land values. Eventually the Land Settlement Board applied to the Maori Land Court to revest the land in the owners under s 436 of the Maori Affairs Act 1953.

The Council, for obvious reasons, now sought to have the revoking proclamation declared invalid due to an error in land description. However, the learned Judge ruled that as the proclamation incorporated by reference the Survey Office plan, which showed the correct area, and no party was mislead, the proclamation was valid. Consideration of the hypothetical effect of a later correction under s 330A of the Public Works Act 1928 was not necessary.

Secondly, the Judge ruled that the Land Settlement Board was entitled at law to make the application to the Maori Land Court, and although it could note the history of the approach by the Council to the government, it was bound to give effect to any decision of the current Minister conveyed in writing. The Judge acknowledged "the present Government proposal approaches very closely the boundary of breach of an agreement previously made", but he also accepted "the wishes of the Council in relation to this land were necessarily subordinated at all times to a future executive decision of central Government which might be at variance with the Council's wishes, it being remembered that the executive decision was likely to be controlled by the dictates of national policy as opposed to local considerations".

Assuming that this judgment stands and the foreshore land is revested in the Maori owners, a number of interesting alternatives and issues could arise. In the first place, the owners could erect fences and prevent public access across the land. If the Council wished to acquire the property it could designate the area for reserve purposes and then acquire the land compulsorily, subject to objection and appeal rights, and subject to payment of compensation. Alternatively, it could zone the land for rural or recreational purposes incorporating ordinances which would prevent any subdivision or building on the land. It would be unlikely that any compensation claim could succeed under the Town and Country

Planning Act 1953 (or 1977) for loss of use rights, as no real change in potential would be involved.

However, in the case of designation for acquisition as a reserve or zoning for a rural purpose preventing development, the new 1977 Planning Act states in s 3 (1) two matters of national importance which must be recognised and provided for, but which could be in conflict in this case. Namely, under subs (1) (c), "the preservation of the natural character of the coastal environment ... and the protection of [it] from unnecessary subdivision and development", and subs (1) (g), "the relationship of the Maori people and their culture and traditions with their ancestral land". More specifically, the new second schedule to the Planning Act requires a council to include in the district scheme under cl 3 "provision for marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses". Accordingly, the use of the Gisborne marine foreshore, if revested in the Maori owners, could become an interesting test case as to the application of the new planning objectives which give overdue recognition to the fact that New Zealand is a multi-race and multi-cultural society with appropriate obligations and responsibilities.

Similar issues arise as to the future of Bastion Point, Auckland, which in regional planning terms could test the resolve of the Crown which is to be bound by regional schemes. However, under regional schemes, the Minister of Works and Development is to have the final say and his decision as to the relative strengths and priorities of national objectives may well overshadow Planning Tribunal control, and consequentially dictate the content of a district scheme. One can only hope for consistency or sound reason where ministerial discretion is involved.

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TORT

MEDICAL PRACTITIONERS' LIABILITY FOR PERSONAL INJURY CAUSED BY NEGLIGENCE

By CHRISTOPHER R CRIPPS, *LLM, Dip Legal Studies (Camb), Lecturer in Commercial Law, Faculty of Commerce and Administration, Victoria University of Wellington.*

There has been some justifiable uncertainty amongst medical practitioners as to the extent of their liability in situations where personal injury to patients has been caused by negligent acts or omissions. Recent decisions by the Accident Compensation Appeal Authority and the Supreme Court have demonstrated that the Accident Compensation Act 1972 does not abolish the potential for personal injury claims based on negligence.

The proposition that personal injury caused by negligence is not synonymous with personal injury caused by accident, and hence may not be covered by the Act, has been accepted by the Authority and by the Courts. Although such acceptance appears at first sight to run contrary to the intention of the legislation to abolish the negligence proceeding for personal injury, it illustrates yet again the difficulties involved in clearly defining the term "accident" for the purposes of the Act.

The matter was discussed in some detail in a case brought before the Accident Compensation Appeal Authority in June 1976 *(a)*. The appeal was brought by the widow of a Mr Collier who had died of heart failure resulting from haemorrhage and shock due to an infarction of the small bowel. He had been admitted to hospital complaining of stomach pains and his appendix had been removed. The condition which caused his death was neither diagnosed during his period in the hospital nor during the operation. It was argued on behalf of his widow that the deceased had died as a result of personal injury by accident and that his condition should have been diagnosed and a remedial operation carried out. In his judgment Blair J noted that the Act deliberately excluded cover in respect of disease and that therefore there must be an inquiry into whether death was indeed by accident or merely by disease and thus outside the Act. To succeed, the appellant would have to show that the failure to diagnose the true illness during the operation was a personal injury by accident and that furthermore there was a causal connection between the failure to diagnose and death. In the Act personal injury by accident is defined as including "medical misadventure" *(b)* although the meaning of the phrase is not elucidated. The

(a) Decision No 9 (1977) 1 NZAR 130.
(b) Section 2 (1).

authority noted the rule as to causation in *Smith v Auckland Hospital Board (c)* where it was held that negligence need not be the only cause of injury. It is sufficient if it is connected in such a way as to be a contributing factor. Blair J decided that this rule was applicable under the Act if the term "medical misadventure" was substituted for "negligence".

On the evidence presented it was found that there was no proven causal link between the failure to diagnose and death. At the most a correct diagnosis might possibly have prevented death but the Appeal Authority was unwilling to go further and find that a failure to diagnose caused the death. However, Blair J accepted that, "the expression – 'personal injury by accident' – might well cover sometimes more and sometimes less than personal injury by negligence". He also accepted that, "the two expressions are not necessarily interchangeable" *(d)*. The *Collier* decision demonstrates that if the omission can be shown to be a cause of the injury suffered, then the Commission would probably accept responsibility. The difficulty arises in acute form when the disability is partly caused by some omission and partly as a result of some natural physiological process *(e)*.

The potential divergence between such situations was recently highlighted in the Supreme Court in *T and T v R (f)*. In that case the female plaintiff had become pregnant after a sterilisation operation. The gynaecologist concerned had failed to coagulate the fallopian tubes by a diathermy process and had instead merely scarred the surrounding ligature. Damages were sought for the cost of rearing the child and as compensation for the physical and mental distress occasioned by its birth. In his defence the gynaecologist had argued that the provisions of the Accident Compensation Act had abolished the right to bring such proceedings. The hearing dealt with a notice of motion brought by the defendant to stay the action on these grounds.

Several allegations of negligence had been made by the plaintiffs. Their statement of claim contended that the defendant was in breach of the duty of care that he owed to the plaintiffs;

(a) In failing to warn the plaintiffs that the operation might not be successful;
(b) in failing to explain that there was a risk of pregnancy despite the operation;
(c) in failing correctly to identify the tubes which were to be sealed before attempting the diathermy procedure;
(d) in applying the diathermy procedure to the wrong area;
(e) in failing to properly X-ray the plaintiff after the operation;
(f) in failing to advise the plaintiffs that there was no X-ray evidence of the condition following the operation.

O'Regan J decided that although the plaintiffs were barred by s 5 of the Accident Compensation Act from bringing proceedings in the Courts under ground (d), this being within the definition of personal injury by accident, the damages claimed under the other grounds did not arise directly or indirectly out of any personal injury by "accident" Therefore the plaintiffs could proceed with their action at common law under those grounds.

Although the question of what amounted to "accident" for the purposes of the Act was not discussed in any detail, the case shows that the Courts are still prepared to entertain certain categories of action involving personal injury by negligence if the circumstances surrounding the injury cannot be seen as an accident.

The meaning of "accident" for the purposes of the Act has been a fundamental problem which has not been simplified by legislative definition. However it is clear that merely because an injury is unexpected and caused by negligence it will not necessarily be covered by the Act. An unexpected and unwanted pregnancy will not be regarded as an accident even though it may be an unexpected misfortune in some cases. This point was made clear in an Accident Compensation Appeal Authority *(g)* decision handed down on 8 September 1977 and cited in *T and T v R* (supra). In that case a Mrs S also had a sterilisation operation performed on her. The operation was unsuccessful and an ectopic pregnancy resulted. It was necessary to carry out a remedial operation. The appellant claimed that, as a result, she had psychological problems and an abnormal fear of sexual relations. Although Blair J recognised that Mrs S had suffered personal injury and that there was a causal relationship between this injury and the operation which had been performed on her she was still required to show that there had been an "accident". No argument was presented to the effect that the operation itself was the accident or misadventure. It was merely claimed that pregnancy following a sterilisation operation was the identifiable accident. Blair J refused to accept that pregnancy in such circumstances was an "accident". Pregnancy, he concluded, was a "natural physiological change or process". It was not something "external which has some

(c) [1965] NZLR 191.
(d) *Collier* op cit 3. 131.
(e) For comment on this problem see Willy, "Personal Injury by Accident", [1975] NZLJ 770, 774.
(f) [1977] Butterworths Current Law 943.
(g) Decision No 66 (1977) 1 NZAR 297.

psychological or physiological effects on that part of the sufferer's anatomy which sustains the actual trauma" *(h)*.

Hence even though unexpected and unintended conception was not an accident in terms of the legislation. It should be noted that no allegation of negligence was made in the case but it might be assumed that had there been negligence the result would have been similar.

These cases reveal a grey area in the Accident Compensation Act particularly where medical omission is involved. In *T and T v R* the omissions which allegedly occurred – the failure to advice, the failure adequately to identify anatomical structures and the failure to follow up with X-rays were held to be outside the Act. Yet such circumstances might lead to a successful action at common law.

Of particular interest is the potential liability for personal injury caused by negligent statements. Where such personal injury is not caused by accident within the definition adopted by the Appeal Authority and by the Supreme Court, common law liability still remains *(i)*. Medical practitioners and other persons whose positions are such that their negligent advice might lead to personal injury (not being by accident) should be aware of this potential liability. Equally it seems unjust that those who have suffered personal injury as a result of another's negligent act should be denied compensation and be forced to seek redress in the Courts.

A chasm of liability has been opened before medical practitioners and others against whom personal injury actions based on professional negligence may be brought irrespective of the provisions of the Act. The survival of actions for personal injury caused by negligence but not by "accident" runs contrary to the spirit and intent of the Accident Compensation Act. Urgent consideration should be given to passing amending legislation which would fill this fissure in the solid foundations of the Act. The definition of what will amount to an accident for the purposes of the Act and in particular those situations which are embraced by the term "medical misadventure" must be clarified, and in the light of the narrow view taken in the decisions cited in this article, expanded.

(h) Citing Lord Diplock's definition of personal injury in *Secretary of State for Social Services v Jones* [1972] 1 All ER 145, 185.

(i) For example the hospital board and the surgeon in *Smith v Auckland Hospital Board* (supra.,) would appear to be unprotected by the provisions of the Accident Compensation Act and liable at common law if a similar case were to recur today.

RECENT ADMISSIONS

Barristers and Solicitors

Baggott, LGA	Auckland	3 Feb 1978
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Bayliss, CW	Auckland	3 Feb 1978
Baxter, GJG	Auckland	3 Feb 1978
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Charan, VL	Auckland	3 Feb 1978
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Henshaw, RJ	Auckland	3 Feb 1978
Hopkins, WP	Auckland	3 Feb 1978
Johnston, CA	Auckland	3 Feb 1978
Jones, DO	Auckland	3 Feb 1978
Long, JE	Auckland	3 Feb 1978
Loo, A	Auckland	3 Feb 1978
MacKay, WB	Auckland	3 Feb 1978
Madsen, JF	Auckland	3 Feb 1978
Magill, TM	Auckland	3 Feb 1978
Maharaj, DC	Christchurch	15 Dec 1977
Mills, VJ	Auckland	3 Feb 1978
Milne, DG	Auckland	3 Feb 1978
Milsom, LM	Auckland	3 Feb 1978
Molloy, PM	Auckland	3 Feb 1978
Moore, CPE	Auckland	3 Feb 1978
Murphy, KP	Auckland	3 Feb 1978
Parmenter, RO	Auckland	3 Feb 1978
Pollard, SF	Auckland	3 Feb 1978
Pratt, TA	Auckland	3 Feb 1978
Puriru, TKWHK	Auckland	3 Feb 1978
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Rishworth, PT	Auckland	3 Feb 1978
Rishworth, R	Auckland	3 Feb 1978
Ross, JC	Auckland	3 Feb 1978
Sheehan, NM	Auckland	3 Feb 1978

FAMILY LAW

PROPERTY DIVISION ON A SHORT SECOND MARRIAGE

By WR ATKIN, *Lecturer, Victoria University of Wellington.*

The decision of Casey J in *Armon v Armon* (Supreme Court, Christchurch, 14 September 1977) raises several points worthy of comment. The case involved an application dealt with under the Matrimonial Property Act 1976 by a former husband for a share in a flat owned by the former wife and $8,800 held in a solicitor's trust account. Both items represented the proceeds of the sale of a house under construction which had been intended as the matrimonial home.

For each spouse the marriage was a second one, but hardly more successful than their previous ones. They ceased living together a little over two years after they had been married, although prior to the marriage they had lived together in a de facto relationship for about a year. As part of the settlement of her first marriage the wife received the former matrimonial home, given by her first husband "on the understanding that she would leave it to their children, and deal in the same way with the proceeds of sale, or of any other house purchased". This house became the matrimonial home of the Armons, was subsequently sold and the proceeds appeared finally, after further purchases and sales, as the property which was the subject of the husband's application.

Post-marital acquisitions

One of the first questions dealt with by his Honour was the classification of the flat which the wife owned and occupied. This flat was purchased with part of the proceeds of the last matrimonial home after the couple had separated. Ostensibly the flat was the wife's separate property since, having been purchased while they were not living together, it fell outside the scope of s 8 (e) of the Matrimonial Property Act 1976 and within s 9 (4). His Honour however, without objection by the husband's counsel, exercised the discretion contained in the second part of s 9 (4) and thought it just to treat the flat as matrimonial property.

It is submitted that this approach is quite correct and lends further support to the view of Fisher *(a)* that the discretion should be exercised where "the source and circumstances of the acquisition preserve the essential character of common property or product of the marriage notwithstanding the separation". Without the exercise of the discretion in such circumstances, it would be far too easy for less scrupulous spouses to avoid the provisions and purpose of the Act by selling matrimonial property in their possession and spending the proceeds. As Somers J said in *Barron v Barron* [1977] 1 NZLR 454, 457 of the purchase of a new car:

> "It would, I think, frustrate the legislative intent if a husband could on separation take a family chattel without agreement, sell it, and use the proceeds to acquire some other asset without liability to account."

There is no reason however to limit the test to deliberate attempts to avoid the Act. It should apply just as rigorously to the situation where property is bought with the proceeds of matrimonial property for quite genuine reasons, or merely for the convenience of the parties.

Short duration marriage

Despite the fact that there was no matrimonial home in existence at the time of the proceedings, the last such home having been sold, the Court still had to consider whether the rules in s 13 relating to marriages of short duration applied to defeat the rule of equal division under s 11. This was because where there is no matrimonial home, the Court is to grant the spouses an equal share in some other item of matrimonial property in accordance with s 11 (3).

The first point to note is that the Armon's marriage was a "short duration" marriage within 13 (3) even though they had lived together for the specified period of three years. The first year of this period was spent by the couple in a de facto union and as such must be discounted in calculating the length of time the couple had lived together "as husband and wife". It is submitted that where reference in legislation is made to "marriage", that word must be given its usual and traditional meaning, unless the contrary is expressly provided for. In no way does the increasing but piecemeal statutory recognition of de facto unions

(a) *The Matrimonial Property Act 1976* (Wellington, 1977), 78.

justify altering the accepted understanding of "marriage" (nor likewise of "husband", "wife" and "spouse") *(b)*. To do so, in particular in the context of the Matrimonial Property Act 1976, would bring about recognition of de facto unions by the back door in direct contravention of the conscious exclusion of them from the 1976 Act by Parliament *(c)*.

A somewhat similar stance has been adopted in England by Sir George Baker, President of the Family Division of the High Court. In *Campbell v Campbell* [1977] 1 All ER 1, a case concerning financial provision, the Court was required to take into account "the duration of the marriage under s 25 (1) (d) of the Matrimonial Causes Act 1973 and in so doing, his Lordship refused to consider a period of premarital cohabitation in order to extend the period of marriage. His Lordship put forward his reasons in very strong terms:

> "It is the ceremony of marriage and the sanctity of marriage which count; rights, duties and obligations begin on the marriage and not before. It is a complete cheapening of the marriage relationship, which I believe, and I am sure many share this belief, is essential to the well-being of our society as we understand it, to suggest that premarital periods, particularly in the circumstances of this case, should, as it were, by a doctrine of relation back of matrimony, be taken as a part of marriage to count in favour of the wife performing, as it is put, 'wifely duties before marriage' " (p6).

Adopting this approach to the question, there can be no doubt that the Armon's marriage was of short duration. Even if this approach is rejected, the Armon's situation would seem to be a classic example of where the discretion in 13 (3) should be used to extend the three year period.

This however raises a further broader question and that is the extent to which a period of premarital cohabitation should affect the exercise of the s 13 (3) discretion. It is suggested that it might properly do so in a negative way, where a marriage had been viable for the necessary three years but was preceded by a de facto relationship lasting several years. In this situation the three year period should not be extended. The purpose of s 13 is to take outside the scope of the Matrimonial Property Act 1976 those marriages which have never really got off the ground, three years being the guideline to test this. A relationship which has endured three years of marriage and several prior years as a de facto union has proved itself viable and the parties should not be able to escape the application of the rules in the Act.

What, it is submitted, is not permissible is to deny that there has been a marriage of short duration where the necessary three years of marriage have *not* elapsed. Thus the relationship of a couple who have lived together for, say, 10 years outside marriage, but only one year within marriage is a short duration marriage even though by most standards the relationship had been viable and had lasted eleven years in total.

If it is true that more people are living in de facto relationships, the Courts may be increasingly faced with the kind of problem just discussed. Furthermore, if at any time the Matrimonial Property Act 1976 should be extended to include stable de facto unions, some consideration will have to be given to the meaning of "marriage", "husband" and "wife" in sections such as s 13.

Section 13 (1)

Once the Court accepts that there is a marriage of short duration, it does not follow automatically that the equal division rule is obviated. As shown in *Armon's* case, it is also necessary to come within one of the paragraphs in s 13 (1).

No assets in the *Armon* case had come by way of succession, survivorship, trust or gift after the date of marriage, so that para (b) was inapplicable. The property in dispute, however, could be traced directly back to the house which the wife had received on the termination of her first marriage and appeared ostensibly to be an asset owned wholly by her at the date of the second marriage as required by para (a). Casey J did not agree with this line of reasoning and any process of tracing back is therefore not legitimate. The paragraph refers to "any asset" and does not include "proceeds". To come within the paragraph the asset must therefore be owned at the date of marriage and also at the time of proceedings under the Act.

That left para (c) for the Court to deal with. The rule of equal division shall not apply "Where the contribution of one spouse to the marriage partnership has clearly been disproportionately greater than that of the other spouse." The words "disproportionately" does not appear in s 15 (1) where the Court is required to look at respective contributions for the purpose of dividing up the matrimonial property other than the home and chattels. Fisher says *(d)*: "Presumably this is intended to indicate a greater disparity in the contributions than is the case with s 15 (1)." This view finds support to the judgment of Casey J who states that: " 'Clearly disproportionately greater' goes much further . . . It is not just a clear difference between the contributions that will quality

(b) Cf the definition of "marriage" in s 2 (1) of the Act and the judgment of White J in *Stallinger v Stallinger (No 2)* [1977] NZ Current Law 582.

(c) Cf cls 16 and 49 of the Matrimonial Property Bill 1975, which were dropped from the final legislation.

(d) Ibid, 64. Cf ibid, 86.

under this section." His Honour further says that "the disproportion between the spouses' contributions must 'compel recognition', bearing in mind that the Act envisages equal division as the norm." The difficulty with this is that the "compelling recognition" test is one borrowed from the judgment of Somers J in *Barron v Barron* [1977] 1 NZLR 454, 460 who uses it in the context of s 15 (1). With respect, it is somewhat unhelpful to know that the tests for ss 13 (1) (c) and 15 (1) are the same, yet one "goes much further" than the other. It might also be wondered what "compelling recognition" adds to "clearly greater".

Another point of comparison with *Barron v Barron* should be noted. In this latter case, Somers J held that, under s 15, the onus of proving or disproving a disparity of contributions lay on the person seeking an unequal share *(e)*. Casey J in *Armon v Armon* adopted this view for the purposes of s 13 (1) (c). Thus the onus of proving a clearly disproportionately greater contribution rested upon Mrs Armon.

"Marriage partnership"

For the purposes of s 13 (1) (c), the contributions to be dealt with are those made to "the marriage partnership". *Armon's* case raises two points in this connection.

First, contributions made during the course of a de facto relationship cannot be taken into account. Thus. expenditure incurred by the Armons during their de facto relationship was regarded as having little relevance in assessing what came into their marriage partnership. *(f)*. Furthermore, property acquired by either spouse during the course of a de facto relationship (other than that which subsequently became the matrimonial home or family chattels) would not be matrimonial property by virtue of s 8 (e) but would be the owning spouse's separate property. A number of dealings by Mr Armon would fall into this category. The reasons for excluding reference to the period of de facto relationship have already been canvassed in the context of short duration marriages and do not need to be repeated.

Secondly, contributions made after the parties have ceased living together or after an earlier application to the Court are excluded. There were two reasons why Casey J rejected the submission that "marriage partnerships" continued until a decree absolute. If the submission was correct "marriage partnership" would mean the same thing as "marriage" and therefore reference to "partnership" in the Act would have been unnecessary. Further, s 2 (3) required the parties' shares to be calculated as at the date of separation and to take contributions after separation into account would be in conflict with this provision.

Section 2 (3) has caused considerable problems in the context of s 14 although decisive judicial attitudes have yet to be settled *(g)*. It may well be that s 2 (3) is an unfortunate obstacle in the way of taking post-separation contributions into account as well. It is submitted with respect however that there is no reason why a restrictive interpretation need be put upon the phrase "marriage partnership". From a legal point of view, husband and wife are still "partners in marriage" up until the time the marriage is formally terminated. Even in real terms, a couple's lives are still very much intertwined after they have separated, during the period when they work out their new domestic and economic circumstances. In this respect, the writer agrees with the view of Collins that "the marriage partnership must end when the marriage ceases, regardless of the actual nature of the parties' relationship prior to that time" *(h)*.

The children of the first marriage

A matter which is given only scant reference in *Armon v Armon* is the position of the children of Mrs Armon's first marriage. It will be recalled that as part of the settlement of this first marriage Mrs Armon received the family home "on the understanding that she would leave it to their children". In the event Mr Armon became entitled to a fifth share in the proceeds and, had it not been a short duration marriage, would probably have been entitled to a half share. The effect of the second marriage was therefore to defeat in part the "understanding" at the end of the first marriage and in a much broader sense it calls attention to the pitfalls which may be encountered by not paying sufficient regard to the way in which a second marriage may alter rights to property and endanger the interests of children *(i)*.

The question which arises is how best can the wishes of a person such as Mrs Armon's first husband be protected? Several possibilities need consideration.

It might be thought that the use of contract by the parties to the first marriage would solve the problem. Under such a contract the spouse taking control of the property in question might covenant to bequeath that property or dispose of it during his lifetime to a third party, such as a child of the marriage. While such contracts can

(e) At p 460. Cf Fisher, op cit, 86 and *Churcher v Churcher* (unreported, Wanganui Registry, 1976, M1/76 per Quilliam J).

(f) Cf *Stallinger v Stallinger*, supra n (b).

(g) For an excellent discussion, see Collins, "Section 14 – The Bane of the Matrimonial Property Act 1976" [1977] NZLJ 238.

(h) Ibid, 244.

(i) Fisher, op cit, 137.

be made and will operate to restrict the effect of testamentary dispostions to the contrary, they will not fully protect the child concerned. First of all, the child, not being privy to the contract, would be unable to enforce its provisions on his own initiative, but of more telling significance would be the inability to bind the second spouse or to override any rights which might accrue in his favour. In particular, the contract could not prevent the property falling within the pool of the second marriage's matrimonial property (which would simply depend on the provisions of s 8 of the Matrimonial Property Act 1976). As a result, (in the event of the second marriage breaking down and proceedings being commenced under the 1976 Act) the second spouse might well become entitled to an equal share in what was the subject matter of the first marriage settlement. It might even be argued that rights to property exist under the Act simply by virtue of marriage and are not dependent upon an application under the Act. There is some indication of this in ss 20, 42, 43 and 44, although s 19 preserves the owner's right to deal with his property. In either case the property left for the ultimate benefit of children could be markedly reduced.

One possible way of avoiding this is for the remarrying spouse to enter into a property contract with the new spouse under s 21 of the Act. However this assumes that the second spouse is agreeable to the contract, which may be less straightforward after the statutory requirement of receiving independent advice has been fulfilled. Any such contract is also subject to judicial review at a future time in accordance with s 21 (8) (b) and (10). An agreement in which one spouse signs away a major part of his share under the Act may be an instance where the Court would be prepared to intervene in this way.

A far more appropriate solution to the problem would be to settle the property in question on the children as part of the settlement of the first marriage. This could be done either by setting up a trust in the usual way or by invoking the powers of the Court under s 26 (1) to settle property for the benefit of children. Property thus settled would no longer belong to either spouse and would therefore not fall within the pool of matrimonial property to be divided in the event of a breakdown of a second marriage.

The principal disadvantage of this approach is that the spouse using the property would not own the property and so would be unable to deal with it as he wishes in the way that Mrs Armon could. Instead, he might receive something in the nature of a life interest but on the other hand there is no reason why the trustees should not be given power to sell and replace the corpus, as was done in *J v J* [1971] NZLR 1020 under the similar provision of s 53 of the Matrimonial Proceedings Act 1963. If it is really the desire of both parties to protect the position of the children of the first marriage, then it is clearly advisable to adopt the trust device, despite the inconvenience involved.

There is however at least one possible danger in the setting up of a trust and it relates to the question of timing. If the trust is set up after the second marriage has taken place, it might well be regarded as a fraud on the second spouse's rights and be liable to be struck down under s 44 of the Matrimonial Property Act 1976. A disposition is reviewable under this provision if the recipient is a volunteer or has acted with a lack of bona fides. A recipient would be a volunteer in the situation we are considering but it must further be shown that the disposition was made "in order to defeat the claim or rights of any person" under the Act. If the trust was established before the date of the second marriage, then there would be "no claim or rights" to be defeated by the disposition and the section could not apply. If it is established subsequently, then arguably the second spouse has "latent" rights in matrimonial property which exist independently of the filing of a formal claim and which would have arisen by virtue of marriage *(j)*. It may therefore be possible to have an intention to defeat such rights at any stage during the course of a marriage.

The next question is whether the setting up of a trust for the benefit of the children of the first marriage takes a disposition inside or outside the test in s 44. In *Chapman v Chapman* [1973] Recent Law 226 the sale of the matrimonial home was not set aside under the similar section 81 of the Matrimonial Proceedings Act 1963 because it could be explained on the basis of the husband's ill-health. However it seems clear that more than one intention may operate at the same time and so long as there is an intention to defeat a spouse's rights, that is sufficient. Moreover, such an intention need not be the dominant one if the decision of Macarthur J in *Murtagh v Murtagh* [1960] NZLR 890, 896 is also a correct interpretation of s 44.

A trust for the benefit of children is probably quite laudable. It may be regarded as an avoidance scheme that has some moral justification, in contrast to a scheme with no object other than preventing the other spouse from receiving his fair share of the effective property of the marriage. Nevertheless, it is hard to see how an intention to assist children in these circumstances cannot also be coupled with an intention to deprive the second

(j) Fisher, op cit, 139, and Angelo and Atkin, "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237, 253.

spouse of rights to the property. Indeed, the whole purpose of protecting the children's position by means of trust is to prevent that position being jeopardised by a second marriage. The inevitable conclusion is that in order to avoid the operation of s 44 the establishment of the trust before and not after the date of the second marriage is crucial.

While it is clear that there may be an element of inconvenience in legally tidying up the loose ends of a marriage breakdown in the way suggested, it is equally clear that the informal "understanding" between Mrs Armon and her first husband carried the very real risk of failure. Some spouses may consider that this is a risk worth running, but where this is not so, a good deal of thought and care will be needed to ensure that a workable and fair arrangement is entered into.

ADMINISTRATIVE LAW

NATURAL JUSTICE BEFORE THE HIGH COURT OF AUSTRALIA: Three Recent Cases

By GEOFFREY A FLICK, *Lecturer in Law, University of Sydney.*

A series of three cases before the High Court of Australia earlier this year have again dealt with the questions as to when the rules of natural justice regulate the process of administrative decision-making and the content of those rules once it is decided that they do apply. These cases are *Heatley v Tasmanian Racing and Gaming Commission* (1977) 14 ALR 519; *Salemi v Minister for Immigration and Ethnic Affairs* (1977) 14 ALR 1; 51 ALJR 538; and *R v Minister for Immigration and Ethnic Affairs, Ex parte Ratu* (1977) 14 ALR 317.

In the first of these decisions the Tasmanian Racing and Gaming Commission had purported to exercise its powers under s 39 (3) of the Racing and Gaming Act 1952 (Tas) so as to issue a "warning off" notice against Heatley. The effect of that notice was to preclude Heatley from entering any racecourse in Tasmania whilst the notice was current. As the Commission had given no prior notice of its intention to issue the warning-off notice nor provided for an opportunity to make representations, Heatley sought a writ of certiorari alleging that the power granted by s 39 of the Act was qualified by the necessity to observe the requirements of natural justice before any warning-off notice was issued. After failing before the Supreme Court of Tasmania and the Full Court of that Supreme Court, Heatley was ultimately triumphant before the High Court (Barwick CJ dissenting) which had granted special leave to appeal.

Both the second and third of those decisions cited above involved s 18 of the Migration Act 1958 (Cth). In the *Salemi* case the plaintiff was an Italian citizen who had originally entered Australia in October 1974 as a visitor on a permit issued under s 6 of the Act. This permit had been extended once but it ultimately expired in July 1975 and thereafter Salemi's presence in Australia was illegal. Early in 1976, however, the Minister for Immigration and Ethnic Affairs (the Hon MJR Mackellar MP) announced an amnesty for prohibited immigrants provided they met certain standards of health and good character and had no record of serious criminal conduct. Relying upon this announcement Salemi came forth and applied for a grant of resident status in conformity with the offer of amnesty. But in reply to that application the Minister wrote to Salemi stating that he did not come within the eligibility requirements and gave as his reason the alleged fact that Salemi "did not come to Australia on the most recent occasion as a visitor but entered as a temporary resident with authority to engage in specified employment". such a statement was obviously at variance with the facts, and, as Salemi prima facie fell within the conditions of the offer of amnesty, proceedings were begun in the High Court seeking injunctive and declaratory relief. An injunction was sought to restrain the Minister from taking steps to deport the plaintiff under s 18 of the Act and, in addition, a declaration was sought either to the effect that the plaintiff was not liable to be deported as a prohibited immigrant under s 18 or, alternatively, that the Minister in exercising his discretion under that section had to act fairly and in accordance with the principles of natural justice *(a)*. On the issue of natural justice the six-member Court divided equally and the view of the

(a) In addition to his natural justice argument, Salemi also argued: first, that the announcement of the amnesty amounted to an instrument of exemption under s 8 (1) (e); and, second, that the announcement evidenced a determination by the Minister to grant entry permits of indefinite duration permitting all those who satisfied the conditions of the amnesty to remain in Australia. Neither of these arguments was successful.

Chief Justice thus prevailed with the result that relief was withheld.

As has already been stated, *Ex parte Ratu* was another decision involving s 18 of the Migration Act 1958. Unlike the *Salemi* case, *Ex parte Ratu* involved no question of any amnesty but simply involved two Fijian girls who had entered Australia in February 1976. At that time their visas were stamped "employment prohibited" and before they had left Fiji they had in fact signed declarations stating that they would not engage in employment or formal studies in Australia. Contrary to those statements, the two girls enrolled in a nursing course and obtained employment as nursing assistants. Their permission to remain in Australia, however, expired on 13 August 1976 and thereafter (like Salemi) they became prohibited immigrants within the meaning of those words as used in s 18. On 21 February 1977 the Minister ordered their deportation but, prior to making these orders, he had received representations made to him on their behalf. Even after 21 February he received further representations and on 28 March he made a "length reply". The stated reasons for the making of the orders included the girls' status as prohibited immigrants, their lack of acceptable qualifications, and their engagement in employment despite the terms of their original entry. Again proceedings were commenced. This time writs of prohibition and certiorari were sought from the High Court, but again relief was denied.

Whilst few would disagree with the reasons given by the majority in each of these three cases, their present interest lies in the diverging views which they provoked and in some of the comments made by the Judges of the highest Australian Court during the course of their judgments. These matters can best be considered under the following headings:

(1) The rules of natural justice and statutory provisions;
(2) Interests protected by natural justice: rights and legitimate expectations; and
(3) Content of the rules.

(1) The rules of natural justice and statutory provisions

As noted by Aickin J in the *Heatley* case (at 527–529), the basic principles concerning those occasions when the rules of natural justice must be complied with are not in doubt. Thus it can be stated with confidence that those rules apply whenever an administrative determination may affect the rights or property interests of any citizen, and it matters not whether the determination is judicial in nature or even "purely" administrative or executive *(b)*. And where the authority to make the determination is derived from statute, it is equally well settled that, even in the absence of any statutory requirement of notice and an opportunity to be heard, the rules of natural justice may be invoked to supplement the statutory procedure and supply the omission of the legislature *(c)*. To this last proposition one must add the necessary caveat that the legislature may, if it sees fit, exclude both the audi rule *(d)* and the nemo debet rule *(e)*.

The difficulties begin to emerge from these principles when one attempts to apply some statutory provisions to the facts of a particular case. For example, in the *Salemi* case we have already seen that the High Court was divided evenly on whether the functions of the Minister under s 18 of the Migration Act 1958 (Cth) had to be supplemented by the rules of natural justice. That section provided that: "The Minister may order the deportation of a person who is a prohibited immigrant under any provision of this Act". The prevailing view was that of Barwick CJ, Gibbs and Aickin JJ. This view was that the task confronting the Court was one of construing the statutory language and when they did that one of the insurmountable problems confronting Salemi's argument was the presence in the Act of s 14. Section 18 simply provided for the deportation of a prohibited immigrant and specified no procedure to be followed by the Minister before he made the necessary order. By way of contrast, s 14 also provided for the making of deportation orders. But this section only became operative when the Minister had formed an opinion that the conduct or behaviour of the alien had been such that he should not be allowed to remain in Australia *(f)*. And when the Minister wished to proceed under this section the remaining subsections of s 14 provided for the giving of notice and an opportunity to be heard. When these two sections were considered together it was said that Parliament had directed its mind to the question whether an order under s 18 for the deportation of a prohibited immigrant should carry with it similar procedural requirements to those specified for s 14 and had answered that question in the

(b) *Heatley* at 527, citing, inter alia, *Ridge v Baldwin* [1964] AC 40.

(c) *Heatley* at 527–29, citing, inter alia, *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180.

(d) Eg, *Cheatley v The Queen, Yung Yaun Ocean Enterprising Co Ltd* (1972) 127 CLR 291; 47 ALJR 57, See also, *Brettingham-Moore v St Leonard's Municipality* (1969) 121 CLR 509; 43 ALJR 343.

(e) Eg, *Rich v Christchurch Girls' High School Board of Governors (No 1)* [1974] 1 NZLR 1.

(f) Migration Act 1958, s 14 (1) and (2).

negative. These three judges repeated this conclusion in *Ex parte Ratu* where Barwick CJ elaborated his reasons by saying:

> "... [Sections 6 (1), 7 (3) and 8 (3)]... make the immigrant a prohibited immigrant in the various circumstances set out in those sections. All of these sections ... make the status of prohibited immigrants to depend upon an objective fact. In none of them does that status depend upon the opinion of the Minister or of an officer....
>
> "In high contrast to ss 6, 7 and 8, are the provisions of s 14. The Minister may under that section order the deportation simply because it appears to him that the conduct of the immigrant is such that he should not be allowed to remain or that he is such a person who has done any of the things described in s 14 (2) (b). Thus, the Minister's power under s 14 is in the first instance conditioned on his own view not only of the facts but of their relevant quality...
>
> "The distinction between the cases I have instanced of prohibited immigrants and those falling within s 14 are too obvious to need emphasis. In the cases falling within s 18 the status of prohibited immigrant depends on a simple, readily ascertainable objective fact – lack of entry permit [s 6 (1)], expiry or cancellation of entry permit [s 7 (3)], or change in entitlement to enter without an entry permit [s 8 (3)]. It is quite clear, in my opinion, that the Parliament has had in mind and considered in what cases notices should be given of intention to make a deportation order and when grounds should be specified or reasons given for the making of an order for deportation. The statute, having clearly laid down the circumstances in which the status of prohibited immigrant should arise, has seen no need for notice or of specification of grounds. The reasons for such a course on the part of the Parliament are readily understood" (p 320–321).

Further factors which induced the Chief Justice to reach this conclusion were the concern of the Act with a national interest of paramount importance (ie, the composition of the nation) and the fact that all decisions had to be made in conformity with relevant governmental policy and not in conformity with principles laid down by the judiciary *(g)*.

The three dissenting members of the High Court in *Salemi's* case (ie, Stephen, Jacobs and Murphy JJ) apparently placed more weight upon Salemi's reliance upon the offer of amnesty and the somewhat questionable conduct of the Minister than they did upon the statutory scheme set forth in the Migration Act 1958. Of these three Judges Stephen J was the one who gave the most detailed judgment. His Honour conceded that it would be unjustifiable to impose the same formal requirement as those specified for s 14 deportations on proceedings under s 18 *(h)*, but, at least in his opinion, this did not mean that the Minister could proceed under s 18 in disregard of the rules of natural justice. Earlier authority of the High Court had established that these rules were not to be excluded by "indirect inferences, uncertain influences or equivocal considerations" *(i)* and Stephen J concluded that their application here would not be inconsistent with or destructive of the apparent purposes of the Act *(j)*.

Adopting a very similar approach to that of Stephen J, Jacobs J proceeded to hold that the legislature had left it to the Courts to decide when and to what extent the rules of natural justice should be applied in the exercise of the executive power contained in s 18 *(k)*. When the basis for the exercise of that power was a person's status as a prohibited immigrant (as was the case in *Ex parte Ratu)*, the Minister was under no obligation to state his reasons or to provide an opportunity to make submissions *(l)*; but when the basis for the exercise of the power was unclear (as was the case in *Salemi)*, a deportee was entitled to the disclosure of the reasons for his threatened deportation and an opportunity to present such submissions as might displace those reasons and any facts upon which it may be based *(m)*.

Murphy J considered that the effect of the amnesty was to make Salemi not a prohibited immigrant and hence not liable to be deported under s 18. This made it unnecessary for his Honour to discuss the natural justice argument but it is clear from his judgment that he too thought that the Minister was under an obligation to exercise his powers in accordance with the rules of natural justice *(n)*.

Had the seventh member of the High Court, ie, Mason J, sat on the *Salemi* case it is clear from his comments in *Ex parte Ratu* that he would have supported the conclusion of Barwick CJ, Gibbs and Aickin JJ *(o)*.

(g) (1977) 14 ALR at 6; 51 ALJR at 541. See also the comments of Gibbs J, (1977) 14 ALR at 20; 51 ALJR at 548; and the comments of Mason J in *Ex parte Ratu* (1977) 14 ALR at 331–32.

(h) (1977) 14 ALR at 29, 39; 51 ALJR at 553, 558.

(i) (1977) 14 ALR at 35; 51 ALJR at 556, citing *Commissioner of Police v Tanos* (1958) 98 CLR 383, 397. But see the comments of Mason J in *Ex parte Ratu* restricting these words to "judicial proceedings in courts", (1977) 14 ALR at 329.

(j) (1977) 14 ALR at 35–36; 51 ALJR at 556.

(k) (1977) 14 ALR at 44–45; 51 ALJR at 560–61.

(l) (1977) 14 ALR at 334.

(m) (1977) 14 ALR at 45–46; 51 ALJR at 561.

(n) (1977) 14 ALR at 48; 51 ALJR at 562.

(o) (1977) 14 ALR at 331–32.

So far the position has been rendered comparatively simple by the fact that the relevant sections of the statute had all been enacted at the one time. In other cases the statute in issue may be a consolidation of a series of acts or the provision in issue may be an amendment enacted at a period in time later than the original statute. The consequence in such cases is that one may be able to place little weight on the specification of procedural formalities in some sections and their absence in yet other sections. Such was the position in the *Heatley* case where the Racing and Gaming Act 1952 was a consolidation and amendment of a series of acts dealing with bookmakers, totalizators and gaming introduced in the period 1932 to 1951. It followed that the detailed statutory procedural requirements dealing with the suspension and cancellation of bookmakers' licences threw little light upon the power of the Commission to issue a warning-off notice *(p)*.

(2) Interests protected by natural justice: rights and "legitimate expectations"

It is quite common nowadays for it to be said that the rules of natural justice may be invoked to protect rights, property and legitimate expectations. And, despite earlier authority to the contrary *(q)*. It is now firmly established that an existing licence which is controlled by some public authority cannot be revoked without compliance with those rules *(r)*. The words "legitimate expectation" are derived from the judgment of Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 148 where his Lordship indicated that a person who had been granted permission to remain in the United Kingdom for a limited period of time would have a legitimate expectation that he would not be asked to leave before that period expired. Again, in *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 his Lordship indicated that a person who had been elected to the position of shop steward would have a legitimate expectation that his election would be confirmed by the district committee of the union involved.

Beginning with his judgment in *Salemi's* case, however, Barwick CJ has indicated that he is only prepared to give the words "legitimate expectation" an extremely narrow meaning and one that adds little, if anything, to the word "rights". His Honour there stated:

> "It is therefore necessary to examine the eloquent phrase 'legitimate expectation' derived as it is from the reasons for judgment of the Master of the Rolls in *Schmidt v Secretary of State for Home Affairs* (supra), I am bound to say that I appreciate its literary quality better than I perceive its precise meaning and the perimeter of its application. But, no matter how far the phrase may have been intended to reach, at its centre is the concept of legality, that is to say, it is a lawful expectation which is in mind. I cannot attribute any other meaning in the language of a lawyer to the word 'legitimate' than a meaning which expresses the concept of entitlement or recognition by law. So understood, the expression probably adds little, if anything, to the concept of a right" *(s)*.

Applying this view of the law to the facts in *Salemi's* case Barwick CJ found that as a prohibited immigrant Salemi had no right to remain *(t)*. Nor did the announcement of the amnesty alter the position. The amnesty was no more than a statement of policy that could not create legal obligations, although it could "excite human expectations as distinct from lawful expectations" *(u)*. The same statement of the law was repeated by the Chief Justice in *Heatley's* case (at 521–522) and there his Honour classified the right of a member of the public to enter and remain on a racecourse as a "revocable licence, terminable without reason, and instanter" *(v)*. Such an interest,

(p) (1977) 14 ALR at 525 per Murphy J, at 539 per Aickin J.

(q) Eg, *Nakkuda Ali v Jayaratne* [1951] AC 66; *R v Metropolitan Police Commissioner, Ex parte Parker*, [1953] 1 WLR 1150.

(r) See, for example, *Banks v Transport Regulation Board* (1968) 119 CLR 222, 230–31; 42 ALJR 64, 66–67 per Barwick CJ.

(s) (1977) 14 ALR at 7; 51 ALJR at 542.

(t) Id.

(u) (1977) 14 ALR at 9; 51 ALJR at 543. Compare the comments of Aickin J, (1977) 14 ALR at 50; 51 ALJR at 563: "That, however, was a political and not a legal promise, not an offer capable of acceptance so as to produce some legal result".

(v) *Heatley* at 522. Obviously Barwick CJ had no intention of retracting anything he said in *Banks v Transport Regulation Board* (1968) 119 CLR 222; 42 ALJR 64, since in the present case he was directing his attention to the right to enter a "privately owned racecourse" and not a statutory licence. Should one wish to support the non-applicability of the rules of natural justice on the facts of *Heatley's* case one could argue that natural justice does not extend to protect rights if they are too trivial or if their monetary value is too small to warrant procedural formality: SA de Smith, *Judicial Review of Administrative Action* at 170 (3rd ed, 1973), citing *In re Hammersmith Rent-Charge* (1849) 4 Ex 87, 92 per Alderson B. On occasions the Courts have protected seemingly unusual rights (eg, *R v McArthur, Ex parte Cornish* [1966] Tas SR 157), but perhaps one should say that the mere right to go on to a racecourse to watch a race should not come within the purview of natural justice.

in his opinion, need not be protected by the rules of natural justice.

On both occasions the above conclusions were challenged. In the *Salemi* case, for example, Stephen J believed that, irrespective of what the position under s 18 was in the absence of an amnesty *(w)*, the effect of the amnesty here was to confer upon Salemi a "legitimate expectation". According to Stephen J the amnesty was an assurance given by a Minister of the Crown as to the way in which the discretionary power conferred upon him by statute would be exercised *(x)* and, whilst Salemi could not seek to hold the Minister to his promise not to deport and instead to grant resident status, a plaintiff could point to that promise as having given rise to such an expectation on his part as would entitle him to complain of a want of natural justice unless he was accorded an opportunity to present his case *(y)*. Had the 1958 Act not contained s 14, it is submitted that this would have been a persuasive viewpoint.

And in the *Heatley* case, as has already been noted, Barwick CJ dissented and the main judgment of the majority was that delivered by Aickin J *(z)*. It would appear that the main difference between these two members of the High Court was that the Chief Justice was only prepared to equate the expectation of a member of the public to enter a racecourse to the right of such a person to enter a private home *(aa)*. No one would doubt that such private sorts of expectations are not to be hamstrung in their exercise by procedural formalities. But where one is dealing with statutory powers the rules of natural justice do apply and they continue to apply even though the statutory scheme may be supplementing the exercise of private rights. According to the majority, this was the position on the facts of the present case. A further factor which also aided the implication of the rules of natural justice was the aspersion a warning-off notice would cast on Heatley's character *(ab)*.

(3) Content of the rules

At the outset it should be noted that comments of Gibbs J in the *Salemi* case offer further support for the proposition that there is no distinction between the concepts of fairness and natural justice. It will be recalled that the former concept received its modern day impetus from Lord Parker CJ in *In re HK (An Infant)* [1967] 2 QB 617 and it will be further recalled that on at least two subsequent occasions it was thought that where the functions in issue were administrative or executive in nature recourse could be had to the principle of fairness to justify a degree of procedural regularity less stringent than that demanded by natural justice *(ac)*. Such a view, irrespective of other authorities, now has to meet the following statement of Gibbs J.

> "... Some judgments suggest that the duty to act fairly arises from a principle separate from, although analogous to, the principles of natural justice (see De Smith: *Judicial Review of Administrative Action*, 3rd ed, 1973, at pp 208–09) but I would prefer to regard the duty to act fairly as simply flowing from the duty to observe the principles of natural justice. 'Natural justice is but fairness writ large and juridically. It has been described as "fair play in action"': *Furnell v Whangarei High Schools Board* [1973] AC 660, at p 679" *(ad)*.

In addition to these comments, the three cases under discussion also make some observations on the content of the rules of natural justice.

Take first of all the *Heatley* case. There Stephen, Mason, Murphy and Aickin JJ held that the Racing Commission was obliged to afford Heatley natural justice before issuing a warning-off notice. And, according to those judges, natural justice would here require notice by the Commission of its intention to issue a warning-off notice and notice of the grounds for that proposed action and an opportunity to make representations to the Commission before it took any action *(ae)*. An oral hearing was not necessarily required but Aickin J foresaw that the Commission might well find that it could not resolve inconsistencies between its own information and written submissions received from the person concerned without such a hearing *(af)*. Had the Chief Justice formed a contrary view than he did as to the applicability of

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(w) (1977) 14 ALR at 29–32; 51 ALJR at 553–54. This was, of course, the position in *Ex parte Ratu*.

(x) (1977) 14 ALR at 34–35; 51 ALJR at 555, citing *R v Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

(y) (1977) 14 ALR at 37; 51 ALJR at 557.

(z) With this judgment Stephen and Mason JJ expressed agreement.

(aa) (1977) 14 ALR at 522.

(ab) See, (1977) 14 ALR at 525 per Murphy J and at 538 per Aickin J. See also, *In re Pergamon Press Ltd* [1971] 1 Ch 388.

(ac) *Pearlberg v Varty* [1972] 1 WLR 534, at 547 per Lord Pearson; *Dunlop v Woollahra Municipal Council* [1975] 2 NSWLR 446, at 472 per Wotten J.

(ad) (1977) 14 ALR at 18; 51 ALJR at 547.

(ae) (1977) 14 ALR at 525 per Murphy J; at 541 per Aickin J.

(af) Id at 541–42.

natural justice he gave a tentative indication that he would not require the Commission to disclose the reasons which had prompted it to issue the notice, although his Honour did realise that this could well limit the right to make representations *(ag)*.

Take next the *Salemi* case. Of the three minority Judges who held natural justice was applicable, the views of Stephen J were again the most detailed. Proceeding from the basis that the announcement of the amnesty gave rise to an expectation from which the Minister could not depart without according Salemi natural justice, Stephen J held that, whilst an oral hearing before the Minister for s 18 deportations would distort the legislative pattern manifest in the terms of the Act *(ah)*, natural justice would still require the disclosure of those grounds upon which the Minister was contemplating the exclusion of Salemi from the amnesty and that this disclosure would have to contain sufficient detail as to permit Salemi to properly present his case. Consistent with this, if the Minister was satisfied that Salemi had not met one of the conditions upon which the amnesty rested (such as good health or lack of criminal convictions) he would be obliged to disclose adequate particulars of the information in his possession which had led him to that conclusion *(ai)*. Reasons for the final decision of the Minister were said to be not required *(aj)* but if a reason extraneous to the exercise of the power of deportation was made to appear it is implicit in his Honour's judgment that judicial review would be permitted *(ak)*. Although expressed in a more summary manner, Justices Jacobs *(al)* and Murphy *(am)* stated similar requirements, Jacobs J, in particular, noted that normally the ground upon which the Minister would be relying would be the status of the applicant as a prohibited immigrant and that in such cases it would seldom be necessary to have recourse to natural justice; but where there was an amnesty which appeared to extend to the applicant the latter would be entitled to know why the Minister considered that it did not apply *(an)*.

Finally there is *Ex parte Ratu*. Although the members of the High Court there adopted the same lines of division on the construction of s 18 as they had in *Salemi's* case, all members agreed that if natural justice was applicable it had here been satisfied. The plaintiffs in *Ex parte Ratu* sought to argue that natural justice had been violated because they were not made aware of the contents of the departmental reports. Had the Minister proceeded on the basis of some undisclosed materials contained in these reports it is probable that this argument would have succeeded, but on the facts before the Court such was not the position. As was stated by Stephen J, the Minister had explained in some detail his reasons for rejecting the representations made to him on behalf of the two girls and had fully and frankly disclosed in his letter of 28 March the grounds upon which the deportation orders were made *(ao)*. Where, as here, a party received a greater degree of procedural protection than was strictly called for, perhaps one should not be too critical, but one may be permitted to speculate that in proceedings under s 14 of the Act disclosure of departmental files would be insisted upon, provided, of course, they did not contain materials which were prejudicial to (for example) the national security.

Conclusions

Regardless of the many comments that could be directed to the rather questionable conduct of the Minister in *Salemi's* case, little doubt can be felt that the view of the majority as to the construction of the Migration Act 1958 was correct. In retrospect it is regrettable that the Bland Committee failed to direct any of their recommendations to s 18 *(ap)*, but comfort may be felt in the intention of the Administrative Review Council to give priority to a review of immigration and citizenship powers *(aq)*.

Note also that the divergence of views between the Chief Justice and Aickin J in *Heatley's* case as to the application of the rules of natural justice will give rise to future problems.

(ag) Id at 542.

(ah) (1977) 14 ALR at 39; 51 ALJR at 558.

(ai) For an outline of the requirements of administrative notices, see, Flick, "Notices and Administrative Pleadings", [1977] Univ WA L Rev.

(aj) For a contrary view as to the duty to give reasons, see, Flick, "The Duty To Give Reasons In Administrative Adjudications", [1978] Public Law.

(ak) (1977) 14 ALR at 40; 51 ALJR at 558.

(al) (1977) 14 ALR at 45–46; 51 ALJR at 561.

(am) (1977) 14 ALR at 48–49; 51 ALJR at 562.

(an) (1977) 14 ALR at 45–46; 51 ALJR at 561.

(ao) (1977) 14 ALR at 327–28.

(ap) Committee on Administrative Discretion at paras 87–95 (Aust Parlt Paper No 316, 1973).

(aq) Administrative Review Council, First Annual Report at para 37 (1977).

TORTS

DEFAMATION, THE COMMITTEE REPORTS

By TG GODDARD, *a Wellington practitioner.*

In December last the Committee on Defamation *(a)* published its report entitled "Recommendations on the Law of Defamation".

This Committee was appointed on 30 July 1975 by the then Minister of Justice *(b)* following an almost hysterical outcry emanating mainly from the press lobby about "the chilling effect" of the law of defamation.

If there were any substance in the complaints of newspaper proprietors one would have expected sweeping and imaginative changes to be recommended. The limited nature and extent of reform proposed tends to suggest that in fact the criticisms which have from time to time been levelled at the law of libel are without foundation.

However, it is not necessary to rely on speculation because the Committee undertook its own researches into the cost of the news media of libel actions (actual and threatened) and in doing so it performed a most valuable service. A comprehensive questionnaire was sent out to 71 newspapers, 18 magazines and 13 radio and television stations, and of these 102 organs of mass communication, 71 responded by completing the questionnaire. Some of the statistical topics dealt with were the number of threats of action received, the number of actions commenced, the degree of involvement in Court proceedings, the number and outcome of cases which went to trial and the cost of defamation to the industry.

The Committee has appended to its report in tabulated form the results of its researches. An analysis of these results is most illuminating.

During the five years 1970 to 1974, 67 organs received between them a total of 355 threats of action – an average of 71 for each year. This means that each received on average just one threat of action per year. These threats resulted in 131 actions being commenced (26 per year) of which 42 were settled out of Court, 16 went to trial, 50 appeared to have been abandoned and 23 were still pending. Of the 16 that went to trial, 7 were won by the defendant.

During this period the total cost to the news industry of defamation, including damages, settlements and the industry's own legal fees was $251,979 which is an average of $752 per annum for each of the 67 organs. Looked at in terms of threats received, the cost can be expressed as $709 for each alleged libel.

These are scarcely chilling figures; there is no evidence that the news media are in danger of being crippled by the costs attributable to the law of defamation.

Unfortunately the questionnaire did not ask how many threatened actions were settled by apology or otherwise without a writ being issued and all editors may not have appreciated the need for including these under the heading of out of Court settlements. This would account in part for the great disparity between the number of threats received and actions issued. Unfortunately, no statistics of total apologies published have been collected.

It would also have been interesting to know in how many cases unsuccessful defendants had, prior to trial, an offer from the plaintiff to accept an apology, and refused it.

The large number of actions which have apparently been abandoned (38 percent) has prompted the Committee to conclude that these must include "gagging writs" issued to prevent further comment but without any real intention on the part of the plaintiff of proceeding to trial. Just how effective such writs are in "gagging" the Press is a matter of considerable doubt. The Committee's statistics show that in 1975 out of a total of 127 threats of action received by the industry, 48 were considered to be of a "gagging" nature. It is not stated how many of these threats resulted in the issue of a writ, but of the 32 actions commenced in 1975, none appeared to have been abandoned.

The Committee mentions eleven writs issued in the years 1973 to 1975 in which $100,000 or more was claimed and which did not go to trial, and, as the Committee points out, there have been larger claims since that period.

There is very little evidence of the wholesale use of writs for the purpose of inhibiting the Press. A plaintiff resorting to this stratagem always runs the risk that a defendant intent upon justifying,

(a) Composed of three barristers, a professor of law, and journalist, a director of a newspaper proprietor and the Secretary of the Journalists' Union.

(b) Hon AM Finlay.

will set the action down for trial, with obvious consequences on the plaintiff's reputation whether he discontinues to save costs or allows the trial to proceed.

The Committee's report deals substantively with the law of defamation under 23 separate headings *(c)*. One of these is a chapter devoted to summarising existing law. In respect of seven headings no change is recommended, and in respect of a further seven minor changes only are mooted. That leaves eight areas in which substantial law reform is proposed.

Major changes

1. Abolition of criminal libel

This is the most important of the Committee's recommendations. Prosecutions for criminal libel have always been unpopular with juries and the provisions of ss 211-6 of the Crimes Act 1961 are rarely invoked. The Committee thought it was no longer appropriate that defamatory statements should give rise to a criminal offence punishable by imprisonment. The Committee rejected the argument that this is the only means of punishing an impecunious defendant without cost to the person defamed. It was apparently not suggested to the Committee that in times of war or national emergency a libel can cause damage which it may be impossible to repair by the slow means of a civil libel action. A false statement that a person is an enemy alien could fall into this category. On the whole, however, the Committee's conclusion that the criminal action is superfluous is a laudable one and should be put into effect. Because the law of criminal libel "has fallen into a state of desuetude" it no longer offers any effective protection for people who in the distant past have committed an indiscretion, the disclosure of which would embarrass them today. That would be the strongest reason for retaining the criminal sanction, for a defendant charged with criminal libel, in order to succeed on a defence of justification, must prove not only that what he said was true, but also that publication was for the public benefit. This latter requirement does not exist in New Zealand in civil actions and the harshness of the criminal law in its effect on the freedom of speech weighed heavily with the Committee.

2. Fair comment

As the Committee correctly points out, the defence of fair comment under the existing law protects expressions of opinion on any matter of public interest and for the defence to apply the defendant must establish that:

(a) The facts alleged, if any, are true or at any rate that the comment is fair having regard to such of the facts alleged or referred to in the words complained of as are proved.
(b) The expression of opinion is one that an honest man holding strong, exaggerated, or even prejudiced views could have made.
(c) The subject matter of the comment is of public interest.
(d) The facts relied on as founding the comment were in the defendant's mind when he made it.

The Committee takes the view that the title "fair comment" is misleading because the word "fair" may be equated with the word "reasonable" and that, as the essence of the defence is honest comment rather than comment which is objectively fair in the sense of reasonable, the title of the defence is apt to confuse and for that reason it should be re-styled "comment". The Committee also recommends that a defendant should not be limited to the facts set out in the article complained of. The amendment proposed would extend the defence to include any other facts that are proved to be true "being facts that do not differ from the facts alleged or referred to in the matter in respect of which the action has been brought to a degree that is material so far as any question of injury to the reputation of the plaintiff is concerned".

The concept of malice which, under the present law defeats the defence of fair comment, according to the Committee gives rise to a number of difficulties. The legal meaning of malice denotes something quite different from the ordinary meaning of the word, and is said to be a particularly difficult concept to grasp, especially for lay jurors, and the Committee recommends that the expression "malice" be abolished altogether, and that it should instead be provided that in an action for defamation in respect of matter that includes or consists of an expression of opinion, a defence of comment should fail, unless the defendant proves that the opinion expressed was his genuine opinion, or that where the defendant was not the author, the defendant believed that the opinion expressed was the genuine opinion of the author.

This shifts the onus of proof from the plaintiff to the defendant, but it confers greater protection on defendants, other than authors, because all they would have to prove is a belief that the author's opinion was genuinely held. It will not be necessary to prove that it was in fact held.

The Committee also tackled the halfway house between fair comment and privilege on the

(c) The report also deals with some aspects of the law of contempt of Court.

one hand, which protects the publication, and malice on the other which destroys the protection. That halfway house, of which one example is *Finlay v News Media Ownership Ltd (d)*, relates to the situation where the expression of opinion imputes dishonourable or corrupt motives to the plaintiff. The Committee, quite rightly, recommends that this requirement, if it exists, should be abolished, and this will remove the uneasy feeling which has existed about the correctness of the decision in *Finlay's* case and some of its predecessors, which is in sharp conflict with decisions made by the House of Lords in many leading cases, notably *Adam v Ward* [1917] AC 309.

Finally, the Committee recommends that where a defendant intends to rely on both justification and comment each should be separately pleaded. This is already a requirement of practice and the Committee's suggestion is limited to recommending that this practice be given statutory recognition.

3. New statutory defence for the media

This is probably the most complex of the recommendations. Broadly speaking, matter published in a news medium, (which is defined as a medium for the dissemination of public news or observations on public news, or advertisements to the public,) will be protected by qualified privilege if the subject matter of the publication was one of public interest at the time of publication, and so far as the matter consists of statements of fact, the publisher acted with reasonable care in all the circumstances and believed on reasonable grounds that the statements of fact were true, and so far as the matter consists of expression of opinion, the opinion was at the time of publication the genuine opinion of the publisher and was capable of being supported by the statements of fact published or known at the time of publication to the person to whom the publication was made, and the publisher has given the person claiming to have been defamed an opportunity to have a reasonable statement of explanation or of rebuttal published in the same medium, with adequate prominence, and without undue delay. A defence under this provision is to fail unless the defendant has supplied to the person complaining of the publication within 30 days after receiving the complaint, a statement in writing specifying the grounds on which the defendant believed that the statements of fact in the publication were true, and the steps, if any, that the defendant had taken to verify the accuracy of those statements of fact. A very essential feature of the new defence, according to the Committee, is that a newspaper shall enjoy qualified privilege where the publisher has acted with reasonable care and has given the person defamed an opportunity of rebuttal. It is said that the value of the new defence is that it will give both the plaintiff and the defendant an incentive to resolve the matter in the way proposed by enabling the plaintiff to have his explanation published and by relieving the defendant of liability for damages.

Will the defence in fact work in this way, or at all?

It is most unlikely that it will. In the first place, statements of explanation or rebuttal are almost invariably unacceptable to the publisher in the form in which they are submitted. Moreover, in order to avail itself of this defence the publisher will need to disclose his grounds of belief that the statements are true, and the steps he took to verify their accuracy. That involves, among other things, a disclosure of the sources of information, something which is traditionally unacceptable to newspapers and journalists. The recommendation also contains a provision that, in a jury trial, where a defence of qualified privilege under the proposed provision is raised, it shall be for the Judge alone to determine whether the defence is established. It is therefore unlikely that this defence will be of any benefit to the news media. It will certainly be of no benefit to plaintiffs because a statement by the plaintiff is not, and can never be, a substitute for an apology, particularly as the manner of publication of the statement is very much in the hands of the defendant, and the defendant would not be precluded by publishing such a statement, from repeating the libel later.

4. Unintentional or innocent defamation

At present there is a statutory defence limited to unintentional defamation and contained in s 6 of the Defamation Act 1954. This is designed to deal with the sort of situation in which a newspaper publishes a statement concerning a fictitious person, who happens to have the same name as a real person, or where there is in existence more than one person of the same name and description and the words are capable of referring to either and are true of one, but false as far as the other is concerned. The present procedure is an extremely complex one and has proved to be quite unworkable because it imposes on the publisher the requirement of showing that he exercised all reasonable care. No newspaper can establish this unless, at least every time that it publishes an article concerning a named person, it goes to the trouble of checking telephone and other directories to ensure that no other person of the same name exists. This is not, for obvious reasons, a

(d) [1970] NZLR 1089. The plaintiff and the person named in footnote (b) (supra) are one and the same person.

common practice employed by newspapers.

The Committee has recommended that s 6 should be repealed, and that provision should be made for an offer of apology in respect of which a complex procedure is involved. The draft provision contains 7 subsections, one of which contains 5 paragraphs and 3 subparagraphs. Basically the scheme is that in certain circumstances a publisher can claim that he has published matter innocently, that is to say:

(a) where neither the publisher nor his servants intended to publish the matter of and concerning the plaintiff, or knew of any circumstances by virtue of which the publication might be understood to refer to the plaintiff, or

(b) the publication of the matter was not, on its face, defamatory, and

(c) in either case that the publisher and its servants exercised all reasonable care in relation to the publication.

The procedure which then follows requires the publisher to make an offer of apology in writing, which must be expressed to be for the purposes of the section. It must contain a statement specifying the facts on which the publisher relies to show that the matter was published innocently: it must be made as soon as possible: it must include an offer to publish a suitable correction and a sufficient apology without undue delay and it must include an offer to pay certain costs. If the apology is accepted, then it constitutes a defence to a subsequent action for defamation, and also, "where an offer is not accepted and the Court is satisfied prima facie that the plaintiff's complaint is of an insubstantial nature, it may order him to give security for costs". Further, the offer of apology is not to be construed as an admission of liability and shall not be referred to in the action, except by the publisher, or with his consent, and no evidence other than the statement contained in the offer of apology shall be admissible on behalf of the publisher for the purposes of a defence under this section.

How will this work in practice?

An offer of apology is made complying with all the requirements, and it is not accepted. The plaintiff proceeds in his action and the publisher pleads the defence under the section while at the same time denying reference to the plaintiff and traversing the innuendo. The jury will then be directed that they can have regard to the offer of apology for the purpose of deciding the issues of fact, such as whether reasonable care was exercised, but they must not regard the offer of apology as an admission of liability. Such mental gymnastics have been shown by experience to be entirely beyond the comprehension of juries. It is unlikely that this defence will be resorted to any more frequently than the present defence of unintentional defamation. It is strange that in its draft proposal in this instance the Committee has not specified which issues can be decided by the Judge, and which by the jury.

5. Damages

The Committee declined to set a ceiling on the amount of damages which may be claimed or awarded in defamation actions. It thought that the power of Judges to set aside verdicts as being excessive was an effective restraint in practice, as is also the procedure for payment into Court with denial of liability. It recommended no change in the method of assessing compensatory damages, including aggravated compensatory damages, but it recommended that the assessment of punitive damages should be reserved for the Judge, and such damages should not be awarded except in exceptional cases where the defendant had acted in flagrant and contumelious disregard of the plaintiff's rights. This is in sharp contrast with the present state of the law as far as it can be said to be certain, because there is at present a conflict between the House of Lords *(e)* and the Privy Council on appeal from Australia *(f)*, and it is generally considered that the Privy Council decision, being binding in New Zealand, will be followed.

In dealing with the state of the present law, the Committee states in para 388 that punitive damages have never been awarded in an action for defamation in New Zealand, and have only received judicial consideration in one reported case concerned with a different area of the law *(g)*. This statement is incorrect *(h)*. Prior to 1964 when *Rookes v Barnard (e)* was decided, it was customary for juries to award punitive damages. There may be no reported cases on the subject, but it was well settled then that it was open to the plaintiff's counsel to address the jury on punitive damages, and this was done almost without exception in every libel action. There then followed an interregnum between 1964 and 1966 during which time the *Rookes v Barnard* test was applied permitting punitive damages only where there had

(e) *Rookes v Barnard* [1964] AC 1129. *Cassell v Broome* [1972] AC 1027.

(f) *Australian Consolidated Press v Uren* [1969] 1 AC 590.

(g) Assault: *Fogg v McKnight* [1968] NZLR 330. $60.

(h) In at least one jury trial, *Meredith v NZ Broadcasting Corporation (Wellington)* (1 November 1967, A62/67), the jury fixed separate awards of compensatory and punitive damages.

(i) Rule 559. See also r 557.

been oppressive, arbitrary or unconstitutional action by the servants of the Government, or where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff. A third category recognised was where punitive damages were expressly authorised by statute but there is probably no such statutory provision in New Zealand.

The Privy Council in *Australian Consolidated Press v Uren (f)* took the view that, in Australia, where traditionally punitive damages were allowed, such awards could continue to be made, but to justify an award of punitive damages, there must be evidence of conduct by the defendant which was highhanded, insolent, vindictive or malicious or in some other way exhibiting contumelious disregard for the plaintiff's rights. When malice is considered, proof of malice of a high degree is required.

The Committee said "We consider that there is a place for punitive damages in the law of defamation in cases where one person has deliberately defamed another. We do not, however, consider that it is appropriate for a jury to make a decision on what is, in fact, a punitive measure. We believe that the award of punitive damages would be better left to the experience and knowledge of a Judge". This ignores several vital issues:

(a) That the jury is the constitutional tribunal for the assessment of damages.

(b) That it is inappropriate for the assessment of damages to be left to Judges because of their excessive familiarity with other types of cases in which damages are awarded, and their tendency to compare damage to reputation with damage arising in such other cases.

(c) The only reported case of a Judge awarding punitive damages resulted in the plaintiff obtaining $150 damages for assault.

(d) The expression "punitive damages" is a misnomer. This head of damages has also been called vindictive damages and exemplary damages, and the latter phrase is perhaps the most appropriate. By awarding damages under this head, the Court marks its displeasure of the defendant's conduct, and for this purpose it is entitled to take into account the defendant's conduct right down to the moment of the verdict. When a Judge approaches this question he is more likely to take an unfavourable view of a defendant who, far from apologising for the original libel, takes the opportunity to repeat it publicly in open Court, to the world at large including persons who may not have heard of the original libel.

(e) Difficulties will be caused because Judges may feel that the jury's verdict already contains a punitive element and they will, therefore, be reluctant to add to the damages. It is perhaps with this in mind that the Committee has recommended that the Judge should be given an express power in a case in which punitive damages are warranted, to direct instead, or in addition, that the defendant should pay the plaintiff's solicitor and client costs.

6. Mitigation of damages

At present the defendant is entitled to lead evidence in mitigation of damages, but this right is limited to showing that the plaintiff had a generally bad reputation prior to the publication of the defamatory statement. It does not permit a defendant to give evidence of specific acts of misconduct. The Committee has recommended that this rule should be abolished, and that a defendant should be entitled to rely on specific instances of misconduct provided they have a bearing on that aspect of the plaintiff's reputation with which the defamation is concerned. Notice of the specific incidents to be adduced is to be given to the plaintiff.

The existing rule has been framed for the purpose of ensuring that a libel action should not become a trial of the plaintiff. Where a person is defamed, he should not be expected to come into Court ready to justify his whole life. There is scarcely a person in existence who has not somewhere in his past life committed some indiscretion of which he is ashamed, but generally, such matters are forgotten and are not known to the persons to whom the libel is published. They should not constitute a reason for depriving the plaintiff of damages to the reputation which he in fact possesses. This is what the law of libel is all about. A libel action is not supposed to be an enquiry into the reputation which the plaintiff deserves to possess, and whether that has been damaged. It is an enquiry into his actual reputation. Specific acts of misconduct do not affect a person's actual reputation unless they are known, generally speaking, they are not. The limitation proposed by the Committee that the evidence should be limited to that aspect of the plaintiff's reputation with which the defamation is concerned, is of no assistance because very often it will be difficult to draw the line. Where evidence of generally bad reputation is called, it usually takes the form of witnesses, such as policemen, being called to say that they know the plaintiff, are aware of his reputation, and that he

has a bad reputation generally. The plaintiff is then entitled to call witnesses in rebuttal, who say that he has a good reputation generally. The fact that the plaintiff may have been convicted in his youth of converting a steamroller, can bear only on the question of what reputation he deserves to possess, and must have a prejudicial effect that would far outweigh its probative value.

7. "Gagging writs"

I have already dealt in some detail with the alleged prevalence of the "gagging writ". It is important to bear in mind that the issue of a writ does not preclude further comment concerning the facts in the statement complained of. It only inhibits, as a contempt of Court, comment on the writ itself, the likely outcome of the action, or publication of the pleadings. The inhibiting factor of any writ is that by continuing to publish further articles about the same subject matter, the publisher exposes himself to an allegation that he was actuated by malice from the start. Recent history shows that in fact the issue of a writ in many cases has not prevented further publication, particularly in those cases where the articles have been concerned with the financial stability of public companies. The real truth of the matter is that where a newspaper has got its facts right in the first instance, it will generally continue to publish, but where there is doubt as to the accuracy of its information, it will not. To this extent and to this extent only can a writ or threat of action be said to be gagging and, of course, in such situations it is desirable that further misleading comment should be avoided.

The Committee has associated "gagging writs" with those actions in which high damages are claimed. There has been a recent increase in the amount claimed, due partly to inflation and partly to comparison with recent personal injury claims. As the Committee itself points out, the damages awarded to PN Holloway against the publishers of *Truth* in 1959 are equivalent to $71,450 today.

The Committee's first solution is to insert a provision preventing the plaintiff in an action in which there is a news media defendant from specifying in his statement of claim the amount of damages which he claims. The second solution is to provide that where, in the opinion of the Judge, the amount claimed is grossly out of proportion to the amount recovered or the damage caused, the Judge should award solicitor and client costs to the defendant, and finally, that the issue of a writ for damages for defamation with no intention of pursuing it to trial shall be deemed to be a vexatious proceeding.

It is highly questionable whether some defendants should be placed in the position of not having the amount of damages specified in the writ. In other jurisdictions the practice is in all actions for the plaintiff simply to claim damages without specifying the amount, and if this practice is to be adopted at all in New Zealand, it should be adopted uniformly in all actions.

The second solution proposed would place Judges in an impossible position; it is difficult to justify an award of solicitor and client costs to the defendant where the plaintiff succeeds (irrespective of the amount claimed) in obtaining a substantial award. There is still sufficient protection for defendants in those cases where the plaintiff obtains an amount that would have been within the jurisdiction of a Magistrate's Court in the power to award the plaintiff costs on the Magistrate's Court scale *(i)*. Lastly, it would be almost impossible to establish positively that any writ was issued with no intention of pursuing the matter to trial. The problem with gagging writs is more imaginary than real, but if it exists, the Committee's proposals fail to deal with the situation. It is important that intending plaintiffs should not be inhibited from the ordinary citizen's right of recourse to the Courts of the land by the type of sanctions which the Committee has proposed.

8. Defamation of the dead

Actio personalis moritur cum persona. The effect of this principle is that it is possible, with impunity, to publish statements to the discredit of deceased persons. Families of politicians are particularly prone to suffer in this way. The Committee, in proposing to reform the law, said that its recommendations were intended to inhibit the scurrilous and unfair writers, and not the historian, and they have recommended the enactment of a provision that when publishing a defamatory statement of a deceased person the publisher knew that the words published were untrue, the parents, spouse or children of the deceased person shall be entitled to a declaration, injunction and costs. It is also provided that where a plaintiff in a defamation action dies before judgment, his personal representatives should be entitled to carry on the action to the extent of recovering special damages and injunction and costs.

This recommendation, if it is necessary at all, does not go far enough towards providing an effective remedy. Lord Gladstone, the son of the Prime Minister of Victorian times, found the solution where an author published defamatory statements about his father which he knew to be untrue. He resorted to the stratagem of having a letter published in the London *Times* stating that the author was a coward and a liar, and then left it to the author to sue him, whereupon he successfully justified. The remedy of self help, therefore, deals

with the sort of situation which was concerning the Committee.

8. Striking out

The Committee has recommended that if an action for defamation has not been set down and no step has been taken by either party for one year, the defendant shall be entitled to have the action dismissed, unless the Court shall otherwise order, and if a defamation action is struck out or dismissed, no further writ in respect of the same cause of action may be issued without the leave of the Court. There does not appear to be any warrant for singling out defamation actions as opposed to, say, building disputes for this peremptory treatment. The Court's inherent jurisdiction and its powers under the Rules of Court are a sufficient deterrent. Moreover, a plaintiff could sidestep this requirement by setting the action down for trial and then not showing great diligence in applying for a fixture.

I turn now to the minor changes.

9. Meaning of words

It is pleasing to note the Committee's recommendation that the Judge's ruling on whether words are or are not capable of a defamatory meaning should be made in the absence of the jury. The present practice is for Judges in their summing up to explain to the jury the respective functions of the trial Judge, and the jury, and to tell the jury that he has held that the words complained of are capable of a defamatory meaning. Sometimes this has been reinforced by some Judges by giving an example that the Judge's ruling means that a particular horse is capable of winning the Melbourne Cup, but that it is for the jury to say whether in fact it did win it or will win it. Such examples do not, I submit, assist the jury and there is a good deal in what the Committee says about the effect on a jury of hearing from the Judge that in his view the words are at least capable of a defamatory meaning.

The same principle should be extended to other rulings, such as whether there is evidence of unfairness in comment to go to a jury, or whether there is evidence of malice fit for the jury's consideration, and it is highly desirable that the practice of informing juries of the Judge's views should be discontinued.

10. Justification

A plea that the words complained of are true is a complete answer to the plaintiff's claim and the Committee has recommended that this defence should be renamed "truth" on the ground that this title would be simple and accurate, and that it is desirable to make no change in the present law which serves to clarify it to the layman. With respect to the Committee, it seems to me that changes of this sort are simply changes for the sake of change and constitute tinkering with the problem.

Defamation is the tort of publishing without lawful justification an untrue statement to the discredit of another person. When that statement is true, it is not published without lawful justification, and hence the title of the defence. Other recommendations made by the Committee under this heading are of a procedural nature and space does not permit me to enter upon the technicalities. The recommendations, if implemented, will unfortunately tend further to complicate the pleadings.

11. Privilege

No real change is suggested to the law governing the statements protected by absolute privilege, and qualified privilege generally is also largely unaffected except that the First Schedule to the Defamation Act 1954 is brought up to date. The Committee does, however, recommend that the common law concept of malice which destroys a defence of qualified privilege should be replaced by a statutory provision that would exclude the word malice itself, but make it clear that the defence shall be defeated, where it is proved that the defendant was actuated by spite or ill will, or took any other improper advantage of the action giving rise to the privilege. Malice may take many forms and it would be most unfortunate if its application were to be confined by statutory definition. The present flexibility allows for the vagaries of human nature and the ingenuity of mankind. Statutory definition could inhibit the Court from finding malice. The reason for the confusion about malice in defamation actions is that the word is used in two senses. When alleging publication the plaintiff traditionally but unnecessarily says that the words complained of were published "falsely and maliciously". Falsity is presumed and malice, in the sense of the deliberate as opposed to the accidental act of publication, is also presumed, and as long as this use of malice is discontinued by requiring that the allegation shall no longer be made, then the confusion will have disappeared and juries will no longer be told on the one hand that malice (in relation to publication) is presumed, but that malice (in relation to a plea of qualified privilege or fair comment) must be proved by the plaintiff, who is then said to be tied to the particulars of malice which he has given. The present form of pleading "(falsely and maliciously)" results in confusion. Every defendant denies the allegation of falsely and maliciously even if publication is admitted. If the defendant does not then plead any substantive defences, he runs the risk that his statement of defence will be struck out as being

evasive in accordance with the rule in *Leersnyder v Truth NZ Ltd* [1963] NZLR 129. This places defendants in the position of either not pleading to the allegation of publication at all (in which case they would be deemed to admit it), or of having to admit that the publication was made "falsely and maliciously" which is unpalatable.

Defendants should not be placed in this position by an allegation which is not necessary to the plaintiff's case but is simply traditional. As far as actual malice is concerned, the subject should be left free from statutory restrictions.

12. Multiple Publication of the same Libel

The present statutory provisions relating to publications by newspapers should in the Committee's view understandably be extended to include news agencies, radio and television broadcasting stations and cinemas.

13. Publishers requiring special consideration

The Committee has recommended that the defence of innocent dissemination should be given statutory form and its application to booksellers and distributors should be specified and that it should be extended to include printers, platemakers and type-printers, but that no special defence shoul be created for publishers of live radio and television broadcasts.

14. Corporate bodies

In actions by companies and other corporations the term "special damage" should be abolished, and the term "pecuniary loss" substituted. Presumably this change would not preclude a company from recovering damages for loss of goodwill.

15. Limitation of actions

The Committee has recommended that the limitation period for defamation actions be reduced to a period of two years and that the Court have power to extend this up to a period of six years on grounds of mistake or other reasonable cause. It is not unknown for libel actions to have been issued after a lapse of two years from the date of publication and there have been cases where juries have treated such actions seriously and awarded substantial damages. It is clear that this sort of delay can prejudice a defendant. On the other hand, it is undesirable to introduce special limitation periods for different classes of actions. This type of innovation introduces complications, particularly for law practitioners, which far outweigh the consequences of prejudice to defendants in those fairly rare cases in which there has been substantial delay in issuing a writ. Usually the defendant will have had prior warning in the form of a complaint shortly after the publication, and a prudent defendant will have taken immediate steps to gather its main evidence.

16. Conclusion

Wiring in 1967, the editors of the Sixth Edition of *Gatley On Libel and Slander* referred to some recent criticisms of the law and pointed out that there had been a tendency to devalue the importance of a man's reputation. They explained that the basis of the law of defamation is not the smart or insult or some technical notion of honour: it is injury to a man's standing as seen by the eyes of the jury.

> "Cases in which an unworthy plaintiff receives an evidently excessive emolument, tax free, as the result of bringing a libel action, cast doubt on the law's operation, not its principle. It may well be that juries should be directed more carefully to compensate the plaintiff for the actual injury he has received, but the law ought not to view lightly injuries to a man's character."

The editors of the Seventh Edition in 1973 referred to the general feeling of malaise over the position in which the law of defamation at present finds itself. Their view was that the substance of the law is sound, procedure, however, in their opinion was a different affair and had become very technical. While conceding that there was no quick or easy answer to this problem, the learned editors suggested that what might be needed was an effort to self-abnegation on the part of Judges and lawyers and a willingness to leave matters to juries in as simple a form as possible.

The Committee recognises that the essential function of the law of defamation is to protect a person's reputation against unjustifiable attack. At the same time it recognises the rights of free speech and a free press. The Committee says that in the course of its deliberations it carefully assessed where the balance between the two competing interests arose under the present law, and its recommendations reflect its conclusion that a new balance should be struck between reputation and freedom of speech. It states in para 15 that certain features of the existing law have led the Committee to the conclusion that the balance between reputation and freedom of speech in New Zealand requires some adjustment in favour of free speech and a free press. "At the same time we have affirmed the principle that reputation deserves reasonable protection. In making our recommendations we have been careful not to give licence to the careless or vindictive". Then the Committee refers to the complexity of the law and says "We have attempted at every stage to simplify and clarify the law of defamation as well as to amend, repeal or add to the law where that has appeared to us to be desirable. Thus, we have recommended

that several common law principles be enacted in statutory form for all to see. We have redesigned concepts which at present are apt to cause confusion . . . We have also recommended several changes to Court procedure which serve either to streamline the progress of an action or improve the position of the parties in the course of the action."

It is quite clear that the Committee has not succeeded in its aim of simplifying the law. It has prepared a draft bill of 45 clauses and 3 schedules which is far from being a codification of the law of defamation. Some of the clauses are so long and complicated that either they can have no practical application at all or else will encourage endless appeals and interlocutory skirmishings which add to the now notorious cost of libel actions.

The same reasoning leads me to doubt whether the recommendations in fact would, if implemented, have the effect of tilting the balance in favour of the freedom of the press. The new statutory defence is no more workable than the existing defence of unintentional defamation.

The Committee has not really come to grips with the procedural problems. Its solution has been to add new technical rules designed to make it easier for defendants to defend and harder and more expensive for plaintiffs to claim. Pleadings will become more prolix and involved than they are already and will be overloaded with particulars.

I agree with Gatley that there is no easy solution to the procedural difficulties. Many of the problems, however, arise out of the division of labour (as it were) between the Judge and the jury in a libel action. In some cases functions which are left to the Judge are often not exercised, or at any rate deferred until after the jury's verdict is taken (an undesirable practice) when the verdict very often makes their exercise unnecessary.

In these areas trial procedure could have been simplified by leaving it to the jury to decide the issues of fact without calling for a prior decision by the Judge whether there was any evidence fit to go to the jury on such issues. Such objections could still be raised on a non-suit application at the close of the plaintiff's case. There is another area in which the duration and complexity of trials could be reduced and this is in those cases where the publication is on its face defamatory, but the plaintiff is not identified by name but only by description, office or photograph. In those cases it is necessary to allege that the publication was understood as referring to the plaintiff and the plaintiff himself cannot give evidence to that effect, with the result that a succession of witnesses are called who say that they understood the publication to refer to the plaintiff, and then they go on to say what they understood the publication as meaning. If the plaintiff had been named, evidence of the sense in which the words were understood would be neither necessary nor admissible. The need for the sort of evidence that I have described should be abolished, and evidence of that type should be needed only where there is a real doubt about reference to the plaintiff, or where words which are on their face innocent, turn out to be defamatory of some person. On the whole, however, the rules of evidence which have been developed in defamation actions over the centuries are there for a good purpose. They ensure a fair trial by providing the defendant with the opportunity to put forward reasonable defences and evidence in mitigation of damages without permitting the libel action to become a trial of the plaintiff. The recent tendency to sweep away rules of evidence and to admit any evidence which may seem to be relevant has resulted in unsatisfactory and unfair practices. Once the rules of evidence are swept away, there is a risk that not only hearsay, but bare assertions of opinion, will be accepted as a substitute for facts, and witnesses will not receive the protection from harrassment to which they are at present entitled under both the common law and under statutory provisions such as ss 13 and 14 of the Evidence Act 1908.

The fact remains that the law of defamation probably is incapable of being simplified because it is concerned with two intangibles. The first of these is the meaning of words. The same words may well mean different things to different people or even to the same people at different times. The second is the concept of the value of personal reputation. It is not generally appreciated (except by people who have themselves been the subject of obloquy) that even the narrow publication of a libel can have deep seated and lasting effects on the person libelled and his reputation which even he cannot gauge fully at the time of publication.

Really, it comes down to this narrow question: are newspapers and radio and television stations to be permitted to publish rumours, or are they to be confined to facts, and where appropriate, honest comments on those facts? The Committee acted rightly in opting for the latter alternative. Good investigative journalism in New Zealand will not be created out of thin air by statutory amendments to the law of defamation. In almost every case of alleged investigative writing which has come before the Court in the last 20 years, the unsuccessful defendant has fallen down through a failure to separate the functions of reporting facts on the one hand, and commenting on them editorially on the other. The solution to the difficulties which are said to confront the press at the present time is in the hands of the news media themselves. The answer lies not in law reform, but in the education and training of responsible jour-