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## FORFEITURE AND CRIMINAL PROFITS

The price of a good fishing boat ranges from about that of a substantial house to that of a reasonable farm. Following a conviction for unlawful fishing the boat involved is forfeited and will be disposed of as the Minister of Fisheries thinks fit. Unlawful fishing includes fishing in a prohibited area and it makes no difference how slight the incursion may be. In 1976 Mr DB Wilson SM had before him a defendant charged with fishing in prohibited waters. The incursion was slight. Conviction would have meant forfeiture of his \$65,000 fishing boat. It is understandable that the Magistrate elected to discharge the defendant without conviction under s 42 of the Criminal Justice Act 1954. He was in a position where he could not see justice done between the State and the citizen and so elected the course that he thought was least unjust. History provides ample precedent for that approach.

His decision was challenged on the basis that the forfeiture provision (Fisheries Act 1908, s 53) was a minimum penalty and therefore the Magistrate had no jurisdiction to dismiss the charge without conviction. The case came before the Court of Appeal (*Department of Agriculture and Fisheries v Turner*, Court of Appeal 18 May 1978 (CA75/77)). Woodhouse, Richardson and Somers JJ) where a distinction was drawn between penalties imposed by the Court and the forfeiture that follows as a statutory consequence of conviction. It was held that the type of statutory forfeiture in the fisheries legislation was not a minimum penalty and the Magistrate's jurisdiction to make the order he did was confirmed.

The consequences of conviction would probably not have been as Draconian as the forfeiture provisions would suggest for it emerged in the course of judgment that a practice has developed whereby the owner of a forfeited vessel is invited to make submissions to the minister who after considering them sets the price at which the boat may be redeemed. The maximum fine that may be

imposed by the Court is \$4,000. The minister may impose a monetary penalty up to the value of the boat which in this case was \$65,000. This leaves the Court in an invidious position. It can only do half-justice by ensuring a fair trial. As to the other half, the sentencing, the reality of the matter is that that is done by the minister. It is not suggested for a moment that the minister is doing anything wrong or unlawful. He is not. It is just that this inversion of values between fine and forfeiture has reversed tradition according to which the Courts penalise and the Executive may pardon.

The present situation is not satisfactory. The Courts are in an impossible position when it comes to sentencing and the minister can hardly be happy with the Court of Appeal's decision. As for the defendant, he remains in a state of complete uncertainty and has no appeal against the minister's decision. Amending legislation would come as no surprise. The importance of our fisheries, policing difficulties and the need for deterrent penalties is not disputed. But there are wider issues that need to be taken into account and not the least of these is that the imposition of penalties is a matter for the Courts, acting within statutory limits and imposing sentences that are subject to appeal.

In his judgment Mr Justice Richardson reviewed the statutory provisions for forfeiture of property and disqualification from certain activities as a result of criminal conduct. He divided them into four categories and it is worth setting these out in full:

"(i) Where the forfeiture of property or disqualification is a statutory consequence of involvement in unlawful activity. Examples are the forfeiture provisions of the Distillation Act 1971, especially s 93, and of Part XII of the Customs Act 1966, s 54 (5) of the National Parks Act 1952 relating to animals taken into a park and s 53 of the Fisheries Act before its amendment in 1948. In such a case the forfeiture is not dependent upon the institution of criminal proceedings and is en-

tirely separate from penalties imposed by the Court. This is made clear in s 89 of the Distillation Act which provides that all penalties under the Act are in addition to and independent of any forfeiture, and all forfeitures under the Act are independent of any proceedings in respect of an offence. Section 265 of the Customs Act 1966 is to the same effect.

"(ii) Where the forfeiture or disqualification is a statutory consequence of *conviction* rather than of the *commission* of an offence. Examples of forfeiture of property in this category, in addition to s 53 of the Fisheries Act as amended, are s 24 of the Territorial Sea and Exclusive Economic Zone Act 1977 (foreign fishing craft engaged in unlawful fishing), s 52 of the Reserve Bank of New Zealand Act 1964 (the currency involved in a currency offence which is the property of the person convicted), ss 11, 15 and 28 of the Explosives Act 1957 (explosives and containers involved in the offence) and s 32 of the Misuse of Drugs Act 1975 (articles in respect of which the offence was committed and which are in the possession of the offender). Disqualification from office is a statutory consequence of a conviction under a number of statutes, for example, the Electoral Act 1956, s 32 (e) and the Municipal Corporations Act 1954, s 57. Disqualification under the demerit points system in s 48 of the Transport Act 1962 is a further example in this category. In some cases, too, a conviction affects the civil liberties of the person concerned. By way of illustration, he may be automatically disqualified from jury service under s 5 of the Juries Act 1908, or barred from entry to a racecourse under rules approved by the Minister of Internal Affairs under s 101 of the Racing Act 1971.

"(iii) Where the forfeiture or disqualification is imposed by the Court as part of its judgment pursuant to a provision requiring the Court to impose that penalty on conviction. An example is a deportation order under s 20 of the Immigration Act 1964.

"(iv) Where the Court has a discretion to impose forfeiture or disqualification. In some enactments the Court is expressly given a discretion to impose forfeiture on or as part of the conviction of the offender. Examples are s 29 of the Arms Act 1958, s 60 of the Explosives Act 1957, s 40 of the Food and Drug Act 1969, s 123 of the Gaming and Lotteries Act 1977 and ss 44A-F of the Criminal Justice Act 1954. In other cases it may have a qualified obligation. Thus, under s 30 of the Transport Act 1962, on conviction for certain driving offences, the Court is obliged to order disqualification from holding or obtaining a driver's licence 'unless the Court for special reasons

relating to the offence thinks fit to order otherwise'."

Later in his judgment his Honour commented that this division shows two different approaches to forfeiture and disqualification. "In (iii) and (iv) [Parliament] has treated it as part of the sentence to be imposed by the Court: in some cases leaving it to the Court's discretion and in other cases requiring the Court to impose a particular penalty. In (i) and (ii) it has treated it as not part of the Court's function; so in one it is entirely independent of any criminal proceeding and in two it is a statutory consequence of conviction, not part of the judgment of the Court . . ."

Essentially, the provisions relating to forfeiture have been incorporated in legislation on a subject by subject basis and one wonders whether it is not time to consider rationalising the principles underlying forfeiture and incorporating them all in the general sentencing process. This suggestion is made not only because the difficulties that arise when the value of the property forfeited is out of all proportion to the offence committed but also because indications are that the principles underlying forfeiture are likely to be further extended with the proposed amendment to the Misuse of Drugs Act 1975. The proposal is that the Court be empowered to increase the amount of a fine that would otherwise be imposed to take into account assets of the offender that had been acquired wholly or partially from drug trafficking. This is a form of forfeiture in that the fine that would otherwise have been imposed relates to the nature of the offence while the additional fine is in effect confiscation of the profits of crime.

Here again we see a continuation of the subject by subject approach to forfeiture. Drug trafficking is not the only source of criminal profit. Profit is made also from prostitution, purveying pornography, theft, receiving and numerous other criminal activities. According to the *New Yorker* an action has been commenced in America in an attempt to prevent HR Haldeman from receiving the profits of his book *The Ends of Power*, it being felt that no one should benefit at all from their own criminal acts. It seems a pity not to take the opportunity to consider whether this principle or something similar should have more general application.

Once the property of convicted felons was forfeited to the Crown. Felons endured torture to avoid that consequence. Maybe the modern equivalent will be fishing boat skippers leaping over the stern for the sake of the company's assets.

## CIVIL RIGHTS

## AMERICAN CASE NOTE—REGENTS OF THE UNIVERSITY OF CALIFORNIA v BAKKE<sup>(a)</sup>

The *Bakke* decision has been heard round the world. It has important and world-wide significance for those who are interested in race relations law. But it is a case which is very likely to be misunderstood. The judgment is more important for what it did not say than for what it did say especially since lawyers and laymen alike are drawing conclusions from it which are simply not warranted.

### Background

Briefly, the background to the case is as follows:

The Medical School of the University of California at Davis had two admission programmes for the entering class of 100 students — the regular admissions programme and a special admissions programme.

It should be noted that in the United States, a four year undergraduate university degree, either a BA or a BSc is a prerequisite for admission to medical school. Consequently admission is based on performance in the undergraduate programme, scores on a nationwide Medical Aptitude Test (MCAT) and a variety of other criteria. But under the regular programme, candidates whose undergraduate performance fell below a specific numerical standard were summarily rejected. About one out of six remaining applicants were then given an interview on the basis of which ratings from 1–100 were assigned to each based on a variety of criteria.

A separate Committee made up of a majority of minority group members (Blacks, Chicanos, Native Americans and Asians) operated the special admissions programme. If a minority group applicant was found to be disadvantaged, he (or she) would be rated in the same way as the other applicants. But he would not have to meet the regular undergraduate scholastic criteria and he would not be ranked against all other applicants, but only against others seeking admission through the special programme. Sixteen special admissions selections would be made in this way.

Bakke, the respondent, was rejected in two

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succeeding years even though special admissions applicants with substantially lower ratings and academic performance were admitted. He filed suit originally in a California State Court alleging that the special admissions programme operated to exclude him on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment to the US Constitution and s 601 of the Civil Rights Act of 1964 which provides inter alia that no person shall on the ground of race or colour be excluded from participating in any programme receiving federal financial assistance (b).

We will not here detail its progress through the trial Court and the California Supreme Court except to state that the California Supreme Court held that the admissions programme violated the "Equal Protection Clause", ordered Bakke's admission to Davis and enjoined Davis from taking race into account in any further admissions programmes.

The United States Supreme Court affirmed the judgment of the California Court in so far as it ordered Bakke's admission to Davis and invalidated the special admissions programme. But it reversed the California Court in so far as it prohibited Davis from taking race into account as a factor in its future admissions decisions.

Because of the complex nature of the order there was no full dissent. The Court's judgment is culminated from the opinion of Mr Justice Powell and a separate opinion by Mr Justice Stevens joined by Chief Justice Burger, Mr Justice Stewart and Mr Justice Rhenquist.

Of the nine Justices *only* Mr Justice Powell was willing to hold that the Davis special admission programme was a violation of the "Equal Protection Clause" of the United States Constitution although he affirmed that the Constitution was not colourblind and held that Davis could take race into account in future admissions programmes.

He was particularly impressed with the Harvard College admissions programme, which, in the name of diversity, specifically attempted to recruit Blacks, Chicanos and other minority students

(a) US Supreme Court No 76-811, 28 June 1978.

(b) This statute is discussed in Elkind, "Race Relations — Repeated Intervention" in Elkind (ed) *The Impact of American Law on English and Commonwealth Law*, pp 44, 52 (West, 1978).

without setting an actual quota.

Mr Justice Stevens, joined by Chief Justice Burger, Mr Justice Stewart and Mr Justice Rhenquist concurred in part and dissented in part. They agreed that Davis should admit Bakke and that the special programme should be invalidated so that, together with Mr Justice Powell they formed a majority on those issues. But they based their argument entirely on s 601. They did not reach the constitutional issue. They dissented from the judgment however in the sense that they took the view that the question of whether race could ever be a factor in admissions policies was not an issue before the Court.

This opinion is perhaps the most surprising opinion. Section 601 of the Civil Rights Act is the first section of Title VI of that Act. The piece of legislation is concerned with institutions receiving federal financial assistance. It is concerned mainly with federal administrative action to strip discriminating recipients of financial assistance. Section 602 for instance provides that every federal department providing such assistance is to implement the prescription by appropriate rules or regulations each of which requires approval by the President. Termination of funding can only occur after a hearing before a Federal Hearing Examiner and after 30 days have elapsed after a full report of the proceedings is filed with appropriate committee in each House of Congress.

The present author was involved in the enforcement of that Act for five years. At no point was it ever suggested that it created a private right of action for injunctive relief. Yet that is what four Justices of the Supreme Court held. Mr Justice White in a separate opinion heatedly dissented from this holding. The point here which is relevant to New Zealand is that the Civil Rights Act of 1964 is ordinary legislation similar to the New Zealand Race Relations Act 1971. But there is nothing in Title VI like s 9 of the Race Relations Act which permits programmes specifically designed to aid disadvantaged minorities who are in need of such aid.

The author who was involved in drafting some of the Administrative Regulations under Title VI strongly supported a regulation to the effect that "Discrimination for the purpose of reversing the effects of past discrimination shall not be deemed to be discrimination" (c). This regulation was intended to serve the same remedial purpose as s 9 of the New Zealand Act does. However it is subordinate legislation and it will probably have to be altered somewhat under the Court's decision. But on the whole, institutions with a history of discrimination may, pursuant to the Court's

opinion, still be required to practice remedial discrimination (including the use of racial quotas) to reverse the effects of their own past policy. Davis did not have such a history. Where the Court divided was over whether Davis, having no discriminatory history of its own, could voluntarily undertake such a programme to remedy what it saw to be a general social evil. The majority held that it could not.

Mr Justice Brennan, Mr Justice White, Mr Justice Marshall, and Mr Justice Blackmun also concurred in part and dissented in part. They joined in an opinion written by Mr Justice Brennan in which they declared their opposition to the judgment ordering Bakke admitted to the University of California. They felt the "Equal Protection Clause" was designed to ensure equality. Consequently, while racial classifications required strict judicial scrutiny, the purpose of overcoming substantial minority under-representation in the medical profession was sufficient to justify remedial use of race. They supported the Davis admissions programme. Together with Mr Justice Powell, they formed a majority for that part of the order reversing the California Court in so far as it held that petitioners were prohibited from taking race into account in future admissions decisions.

### Conclusion

In summary then:

- (1) Four Justices held that the Davis programme was a violation of s 601 of the Civil Rights Act.
- (2) One Justice held that it was unconstitutional.
- (3) Four Justices held that neither Title VI nor the Constitution prohibited remedial programmes of the Davis type.
- (4) Four Justices held that the question of whether race could ever be taken into account was not in issue before the Court.
- (5) One Justice held that while the strict quota system at Davis was invalid, race could be taken into account as an admission criterion along with other factors.

Mr Justice Marshall and Mr Justice Blackmun, in separate decisions of their own even more strongly supported the idea that the Constitution permits remedial discrimination. Perhaps the most relevant quotation for New Zealand may be found in Mr Justice Blackmun's opinion:

"I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is in truth, only a relic of the past . . . At some time, however, beyond any period of what some would claim is only transitional inequality, the United

(c) 45 CFR ss 80.3 (b) (6) (i) and (ii), 80.5 (i) and (j).

States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address to-

day will be an ugly feature of history that is instructive but that is behind us."

Can anyone honestly say that New Zealand has already reached that point?

## EQUITABLE REMEDIES

# THE MAREVA INJUNCTION WITH A HYMN

At[1977] NZLJ 246 reference was made to the Mareva injunction to describe a principle confirmed by the Court of Appeal in England to the effect that the Court has power before judgment to grant an interlocutory injunction against a defendant outside the jurisdiction, who has property within the jurisdiction, restraining him from dealing with it or moving it out of the jurisdiction, pending the plaintiff obtaining judgment.

The principle was considered by the House of Lords in *The Siskina* [1977] 3 All ER 803, 821, and we now have authoritative acceptance of the principle but with an important limitation. Simplified the facts in *Siskina* were that her owners had insured her in London; they were Greek nationals and she was chartered to Italians for a voyage from Italy to Jeddah, Saudi Arabia. She was loaded with cargo for Saudi Arabian consignees who had purchased their goods on freight prepaid contracts. She sailed for Suez but was there detained by the ship owners who claimed that full charter hire had not been paid to them. After some delay the owners directed her to sail to Cyprus and issued proceedings there (which were not served on the cargo owners) and obtained an order that the cargo be discharged and stored. The ship then left Cyprus but sank in Greek waters, a total loss. The insurance proceeds in London, about US\$700,000 were the only assets of the shipowners. In England, the cargo owners, who had, as mentioned prepaid their freight, applied ex parte under O 11 r 1 for leave to issue a writ against the shipowners claiming damages and for an injunction to restrain them from disposing of the insurance money or taking it out of the jurisdiction (ie a Mareva injunction). An order was made accordingly but the ship owners applied for an order to set aside the writ and injunction, contending that the Court, under the above Order had jurisdiction to grant leave and the injunction only where the claim was justiciable in England, and or if the injunction was the principal remedy sought, the Court had jurisdiction to grant it, or it was part of the substantive relief claimed which the Court could grant. It was accepted that the cargo owner's claim for damages against the shipowners was not within O 11. This submission was

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By GORDON CAIN

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accepted; the ex parte order was set aside. The cargo owners appealed and were there successful. Lord Denning MR, in finding for them, considered, 814, that the grant of injunction would harmonise the laws of the Common Market countries; it had been suggested that so to find would be to legislate and that it should be left to the rule committee to amend the law; he asked:

"Why should the judges wait for the Rule Committee. The judges have an inherent jurisdiction to lay down the practice and procedure of the courts, and we can invoke it now to restrain the removal of these insurance moneys. To timorous souls I would say in the words of William Cowper:

"Ye fearful saints fresh courage take  
The clouds ye so much dread  
Are big with mercy and shall break  
In blessings on your head.

Instead of 'saints' read 'Judges'. Instead of 'mercy' read 'justice'. And you will find a good way to law reform".

Lawton LJ concurred, but Bridge LJ did not; he observed, 817, that in the three Mareva cases the defendant was amenable to the jurisdiction of the Court independently of the injunction; he considered, 818, authority indecisive as to the true construction of O 11 r 1 and whether it was sufficient that the injunction was ancillary only but any doubt should be resolved in favour of the foreigner. As to bolder spirits calling for enlargement of powers where legislative reform is not possible for lack of Parliamentary time, that consideration did not apply here; there was no pressure to extend O 11 and "our forensic horizons are necessarily limited". On the question of harmonising with the Common Market countries, their laws appeared to be the other way, but as no argument had been presented on this aspect, the Court could not express a considered opinion on the point and there was a danger that the Court might proceed on false assumptions in that regard. The Court should not assume the mantle of legislators. "The clouds in my Lord's adaptation of William Cowper may be big with justice,

but we are neither midwives nor rainmakers".

The House of Lords, while confirming the *Mareva* principle, unanimously allowed the shipowners appeal and refused the injunction. Lord Diplock observed, 824, that the contracts for breach of which the cargo owners claimed damages were not made in England but in Italy. They were not governed by English law and the breaches alleged were not committed in England nor was any tort alleged to have been committed there. There was nothing on which to found an action within the jurisdiction of the High Court to which an injunction could attach. Nor did the cargo owners have any legal or equitable right in the insurance moneys; all they had was a claim to monetary compensation arising from a cause of action against the shipowners which is not justiciable in the High Court without the shipowners' consent, which they withheld. As to harmonising the laws of the member states in the European community, there was little encouragement here for judges of national courts of member states to jump the gun by introducing their own notions of what would be suitable harmonisation. This is to be done not by individual member states but by compliance with the articles of the treaty. Lord Hailsham referred, 829, to the comparatively favourable position accorded in the *Mareva* cases to the plaintiff suing a foreign based defendant with assets in England to whom O 11 can

apply, as contrasted with that of a similar plaintiff with a claim against an English based defendant served in the ordinary way. On the quotation from "Hymns Ancient and Modern", the jurisdiction of the rule committee is statutory, and for judges of first instance or on appeal to preempt its functions is for the courts to usurp the function of the legislature, and apart from this, the committee is a far more suitable vehicle for discharging that function than a panel of three judges, however eminent, deciding an individual case.

*Position in New Zealand:* Our Code R 48 (d) permits the writ to be served out of New Zealand with leave of Court

(d) Where it is sought to compel or restrain the performance of any act in New Zealand.

The wording is not identical with the corresponding provision in O 11 but the *Siskina* principle appears to apply nevertheless, and if the question were to come before our courts, it is suggested that the decision would be that unless the claim for injunction was all or part of the substantive relief claimed, and the claim were able to be brought within R 48, an injunction on *Mareva* lines would be refused, for then it would be ancillary only to a substantive claim not justiciable here.

## LEGAL PROFESSION

### LAWYERS AND THE LEGAL SYSTEM

#### The Work of the Royal Commission in England, Wales and Northern Ireland

While on a recent visit to England one had the opportunity of inquiring into the progress of the work of the Royal Commission on Legal Services. This Commission, the first of its kind for nearly one hundred years in England, was announced in February and appointed in June 1976. Not long afterwards the Commission issued their first circular and then a second one. These circulars provided a list of subjects upon which the Commission were prepared to hear evidence and many organisations responded.

This Royal Commission, which was chaired by Sir Henry Benson, GBE, FCA, consisted of 15 members, the terms of reference being:

"To inquire into the law and practice relating to the provision of legal services in England, Wales and Northern Ireland and to consider whether any, and if so what, changes are desirable in the public interest in the structure, organisation, training, regulation of and entry to the legal profession, including

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Mr DJ HEWITT, *Barrister*, has recently returned from an overseas trip and has forwarded these observations on the Royal Commission established in the UK to look into the control of the legal profession.

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tion, whether from private sources or public funds, and in the rules which prevent persons who are neither barristers nor solicitors from undertaking conveyancing and other legal business on behalf of other persons".

A memorandum was sent to everyone who had expressed a wish to give evidence to the Royal Commission or an interest in the work and to a number of persons and organisations who might wish to submit evidence. The Commission sent requests for evidence to the Law Society and to the Senate of the Inns of Court and the Bar, and to a number of other professional bodies. The Commission invited anyone wishing to do so to

terms of reference. The Commission's terms of reference called upon them to review the present position and to make future recommendations. The Commission were not required and had no power to intervene in individual cases. The Commission decided that, in the first instance, all evidence should be submitted in writing. However, they might call for oral evidence from a number of witnesses subsequently. Such written evidence should consist of a short statement of the facts and any comment and specific recommendations. Where a change was felt to be desirable, its timing and financial implications should be mentioned in the recommendations.

The main headings and related topics which were of concern to the Royal Commission were as follows:

1 *Legal Services* — Needs for legal services; lack of lawyers; difficulty in finding lawyers; assessment of needs; methods of providing legal services; duty solicitor schemes; legal aid; law centres.

11 *The Legal Profession* — Structure and organisation; regulation, entry and training; the work of the profession; remuneration.

### **Outline of the evidence given by the International Commission of Jurists**

The British section of the International Commission of Jurists, commonly known as "JUSTICE" a most active body, felt that they should prepare a Memorandum of Evidence for submission to the Royal Commission. Accordingly, a steering committee which included barristers, solicitors and teachers of law made their submissions in April 1977. "Justice" looked at the provision of legal services in general and the legal profession in particular, as they are seen from the point of view of the ordinary man concerned with his rights. These may be in relation to his immediate neighbour, or to central or local government or to other organisations exercising power over him.

And so, the submissions which were made might be outlined as follows:

#### **Legal services**

The continued existence of an independent legal profession was an essential condition for the maintenance of the Rule of Law and the protection of human rights. Independence meant the ability to represent, press and advocate a client's case without any limitations other than those set by the demands of justice and integrity, subject to no pressure or influence (or fear of it), however subtle or indirect, from any other quarter. "JUSTICE" therefore opposed a National Legal Service, if that meant a national service of state-employed lawyers dispensing legal services to the community at public expense.

Our system of law, centred on the rights and

was better means of ensuring that those rights were known, perceived and understood, and better access to the procedures for enforcing them. "JUSTICE" therefore favoured basic education in law at secondary schools; the development of Citizens' Advice Bureaux as local advice and referral centres; the creation of more law centres in deprived areas; the raising of the civil legal aid limits; and the extension of legal aid to all contentious matters before civil courts, criminal courts, or administrative tribunals. Proper provision should also be made for the disposal of small claims.

For the intractable "casualties of the law", "JUSTICE" recommended a "rescue service" operated by the Law Society, and paid for partly by the clients, partly by the profession, and partly by the State. There was a strong case for concentrating all Government responsibilities for the state of the law, the administration of justice, and legal services in one single Department of Justice. But the head of that Department should be the Lord Chancellor, and not a Minister sitting in the House of Commons.

Judges and chairmen of tribunals should have statutory power to certify the need for legal aid for unrepresented parties and moreover, legal aid should be available for an appeal to an Area Committee from a refusal by a Local Committee to grant legal aid; and a single Advisory Committee should advise Ministers on, and supervise, both civil and criminal legal aid.

#### **Organisation of the profession**

"JUSTICE" held a variety of views on "total fusion". A few favoured it: most opposed it. But some, while believing that a separate Bar confers substantial benefits on the public, saw merit in a gradual "convergence" of the functions of the two branches of the profession. "JUSTICE" believed that a transfer between the two branches of the profession should be made as easy as possible. However, it was not felt that solicitors should be allowed to enter into partnership with members of other professions or to form themselves into limited companies; but it was believed that barristers should be allowed to enter into partnership with each other, subject to the licence of the Bar Council to ensure that an ample choice of counsel remained open to all the parties who could be engaged in a dispute.

"JUSTICE" thought that there was a case for some non-voting lay representation on the profession's governing bodies, and for a standing Legal Profession Advisory Committee, composed of both lawyers and laymen. The profession's rules of conduct and etiquette should be codified by a single body which included laymen, in consultation with the profession and the public. Professional negligence insur-

yers in private practice, and a majority believed that advocates should be liable for negligent advocacy. A law degree should not be a necessary condition for admission to the legal profession and junior counsel should be free to promote themselves to senior counsel, leaving the title "Queen's Counsel" as an honour, in the gift of the Lord Chancellor, for those who had specially distinguished themselves in the law. It was felt that barristers' clerks should have professional training, and be remunerated largely by salary.

### **Quality of service**

On the whole, the levels of skill, endeavour and dedication of lawyers were high, and the service they collectively rendered was above average for professions in general. Civil litigation was far too slow and far too costly. What was needed was a thorough reform of procedure, such as was recommended in the report "Going to Law:" moreover, in criminal cases, heads of chambers and senior partners should ensure that clients saw their counsel in conference, received advice on evidence, and were not represented at the trial by counsel who had been inadequately briefed.

Legal aid in criminal cases should cover all necessary steps to pursue an application for leave to appeal to the Full Court and it should also be available after a criminal appeal to support an application for a Home Office reference. In principle, only lawyers should be entitled to act as paid advocates, but lay representation by some unpaid members of the family might sometimes be allowed; and a company director should be allowed to represent his company. The two branches of the profession could improve their working relationship in several respects. "JUSTICE" did not favour contingency fees, but did favour a Contingency Legal Aid Fund, and believed this proposal should be further studied.

### **Outline of some of the evidence given by the Law Society**

Substantial increases were needed in the fees solicitors were allowed to charge for conducting litigation for clients, the Law Society told the Royal Commission. Failure to increase fees, which were set mostly by committee under Government control, would lead to a lowering of standards and to many firms giving up that type of business.

A survey of solicitors' remuneration conducted for the Commission showed that in 1976 half the solicitors in private practice, including principals, salaried partners and assistant solicitors, had "real" earnings of less than £7,050 a year before tax. The "real" income was calculated by deducting from gross earnings the costs of financing capital tied up in every firm and costs of providing pensions. Sole practitioners, who made up 32 percent of all solicitors' firms, had median real

earnings of only £5,750 a year — a cause for considerable concern. At the top of the scale the median share of pre-tax income of principals in the few firms with 20 or more partners was £40,000 a year. But their real earnings after taking into account working capital and pensions were very much lower. Almost all these firms were in the City of London and their business was not typical of the profession as a whole.

Comparing average incomes of solicitors in private practice with incomes of other lawyers and professional people such as doctors and dentists, it was clear that the profession was "inadequately rewarded". The problem of earning a reasonable income was especially difficult for smaller firms that provided an irreplaceable service to the public particularly in rural areas.

The report confirmed that the profession still relied heavily on conveyancing to provide the greater part of its income. About 76 percent of fees came from non-contentious work, including wills, trusts, probate and conveyancing. Describing what it claimed was the gross inadequacy of fees for court work, the society stated that the scale allowance for a full day's attendance at a High Court trial was £20.25, while time per hour of principals, assistant solicitors and legal executives worked out at respectively £15, £12 and £10.

### **Conclusion**

Provided that the ordinary citizen could enforce or defend his rights as simply, quickly and cheaply as possible and, of course, as was consistent with a just result, the British section of the International Commission of Jurists were not bound to any particular structure or organisation of the legal profession. Nevertheless, experience had shown that reforms which were built up on existing institutions were more likely to succeed than those which began by destroying what was already there.

In the legal history of England as well as in that of some other countries, the rules of procedure in both civil and criminal matters had more than once been radically reformed. The natural formalism and traditionalism of lawyers (particularly in a Common Law system which worked by precedent) tended to produce a gradual process of hardening and rigidity. This applied until the reformed system had once again become so complex that its formality and high cost and low speed again caused public concern. At this point, a further reform had to be made, usually following the Report of a Royal Commission or its equivalent.

The Royal Commission are now completing their hearing of the evidence and their Report will no doubt be eagerly awaited.



## DEFAMATION REFORM: NEW ZEALAND AND AUSTRALIAN STYLE

By The HON MR JUSTICE M D KIRBY *Chairman of the Australian Law Reform Commission. A paper presented at the 1978 NZ Law Conference. Recent proposals for reform of defamation law and procedure in Australia and New Zealand are compared and contrasted in this paper. After stating a number of reservations which arise from the fact that the Australian exercise is not yet complete, that the publishing environment in each country is different and that a principal theme of the Australian project is to secure a uniform law, Mr Justice Kirby proceeds to identify the points of similarity and difference in the two reform proposals.*

Each starts with a common theme. Defamation law must strike a balance between protection of reputation and the free flow of information. It is agreed that the current law is unsatisfactory, particularly in the balance it strikes. A number of approaches are rejected: eg the introduction of a "public figure" category and remitting complaints to the Press Council. A major innovation in each scheme is an expanded defence for the publishing media but at a price of the media allowing, for the first time, a statutory "right of reply". In each proposal it is suggested that the defence of justification should be truth alone.

The approaches differ in the Australian emphasis upon reform of procedures. All defamation actions will be returned before the court

within fourteen days of issue. In this way it is hoped to tackle the "stop writ" or "gagging writ" problem. It is also suggested that courts should have power to make correction orders where facts are found to be false. Furthermore, the Australian proposals develop a concept of "wrongful publication". This will embrace not only defamation but protection against publication of certain specified "private facts". The approaches to unintentional defamation, punitive damages and criminal libel are also different in each case.

The New Zealand and Australian reformers are equally divided on the retention of jury trial in defamation cases. The adoption of new court ordered correction procedures creates a special problem for retaining jury trial in the Australian scheme.

Many points of similarity and difference are identified in the paper. The author suggests that a comparison of the two reports should assist the respective Parliaments to modernise and simplify this area of the law and, in the Australian federation, to replace eight different laws with a single uniform code.

The Australian Commission sees its exercise, particularly in the happy coincidence of its defamation and privacy references, as an opportunity, rarely afforded, to escape from the toils of legal history and to deal in a harmonious way with a new legal concept, that of wrongful publication.

### Introduction

Recently in Sri Lanka an editor's nightmare occurred. Almost 1,000 copies of the Monday edition of the *Observer* went on the street in Colombo before a mistaken caption to a photograph on page 1 was discovered. The photograph portrayed Hollywood actors Peter Fonda and Susan St John sporting on a pleasure yacht off the coast of Texas. The caption said that the photograph showed the Foreign Minister of Sri Lanka, the Hon Shahul Hameed inspecting an industrial complex in South Korea. The hapless editors of Sri Lanka's oldest English language newspaper were summoned before the National Assembly. They pleaded mistake and were fined more than \$1,000. Later the President reduced

this to about \$400 and ordered a front page apology to the Honourable the Foreign Minister (a). Life for editors was not meant to be easy. Those who would reform the law of defamation are inclined to agree but to ask whether it was meant to be so hard.

In mid 1975 the then Minister of Justice of New Zealand, Dr Finlay, appointed a Committee to "study and make recommendations on the law of defamation" (b). Subsequently, the present Minister in mid 1976 extended the terms of reference to include an examination of the law of contempt of Court (c). In June 1976 the Commonwealth Attorney-General in Australia gave the Australian Law Reform Commission a reference to review the law of defamation in areas of the

*Law of Defamation*, Dec 1977, 5. The report is hereafter referred to as "NZ report".

(c) *Id* 6.

(a) Reported in *The Australian*; 4 February 1978, 2.

(b) The Committee on Defamation (NZ) (Mr IL McKay, Chairman). Report: *Recommendations on the*

Commonwealth's responsibilities (d). This reference came shortly after an earlier comprehensive reference requiring the Commission to report on a review of the law relating to privacy in Australia (e). The New Zealand Committee's report has recently become available. The Australian Law Reform Commission's discussion papers sketch our thinking (f). The purpose of this paper is to outline some points of similarity and others of difference in the approaches being taken for defamation reform in our respective countries.

### Reservations

Before embarking on the tasks of comparison and contrast I must note a number of reservations. Although the New Zealand report has been published, the final report of the Australian Commission has not yet been completed. That report should be delivered to the Attorney-General by mid 1978. At the time of writing, a number of critical decisions have still to be made. Any views stated are therefore tentative and personal, at this stage. The Commission has developed its thinking in this and other projects in the open. We have had public sittings at which expert groups and members of the general public have been encouraged to state their experience and views. We have held seminars involving, especially, representatives of the media, lawyers and practising journalists. We have discussed our proposals on radio and television, in talk-back programmes and in national broadcasts. We have put out discussion papers sketching our developing ideas. We have circulated a draft Bill. We have listened closely to the public debate. Needless to say, editors and commentators have had a field day. With this background, it will not be inappropriate to continue the debate. It would be inappropriate and premature to state the final conclusions of the Australian Commission.

The second reservation is one of general applicability to comparative law. Despite the identical legal traditional and similar social histories of Australia and New Zealand there are plain dangers in the transplantation of legal ideas from one country to another. In essence, this is the point made on the second page of New Zealand Committee's report. The English law of defamation has been substantially inherited in our respective countries but with little modifi-

cation for the quite different publishing environment in each.

"The publishing environment in New Zealand is unique. It cannot be compared directly with that in the United Kingdom which boasts a national press that is better able to resist threats of action, to afford the defence of proceedings, and to pay the damages if found liable . . . Although awards of damages are not as high as appears to be commonly believed, we nevertheless accept that the smaller newspapers and printers in New Zealand do not have the financial resources to sustain, and therefore risk, even moderate awards of damages" (g).

In Australia, the publishing industry is differently organised. It has a larger market and is generally more prosperous. But it has problems of its own. Each country must design defamation laws suitable to its own legal and social environment. That there are differences between the approaches in New Zealand and Australia may reflect nothing more than the differences between our respective problems and opportunities. What we suggest as suitable for Australia may not necessarily be suitable for New Zealand and vice versa (h).

The third reservation relates to the focus of our respective inquiries. The defamation reference in Australia was expended by the concurrent project on privacy protection. In New Zealand it was expanded, at the suggestion of the Committee, by study of the law of contempt of court. The latter was not within our terms of reference. We have accordingly tackled the social problem raised by contempt proceedings in a somewhat different way. Privacy protection, on the other hand, was not within the scope of the New Zealand Committee's terms of reference and so, apart from being noted, has not been dealt with in this context (i). Connected with this is an important difference which lies at the heart of the effort of the Australian Commission. Australia is a federation. The law of defamation was not assigned, under our Constitution, to the Commonwealth. Accordingly, with one possible exception (j), the laws and practices governing defamation remain substantially those of the States and Territories of Australia. There are therefore eight different defamation laws, nine if the Commonwealth's

(d) For the terms of reference and some discussion (1976) 50 ALJ 541.

(e) (1976) 50 ALJ 201.

(f) Australian Law Reform Commission, Discn P 1, *Defamation - Options for Reform*, 1976 (hereafter ALDP 1); Discn P 2, *Privacy and Publication - Proposals for Protection*, 1977 (hereafter ALDP 2); Discn P 3, *Defamation and Publication Privacy - A Draft Uniform Bill*,

1977 (hereafter ALDP 3).

(g) NZ report, 8. The order of the sentences has been transposed.

(h) Cf O Kahn-Freund "On Uses and Misuses of Comparative Law" (1974) 37 Mod L Rev 1.

(i) NZ report, 35.

(j) *Broadcasting and Television Act*, 1942 (Cth), s 124.

jurisdiction over the broadcasting and television service is counted. These systems may be categorised in three classes:

- \* Those jurisdictions which substantially retain the common law of defamation (*k*).
- \* Those jurisdictions which have adopted a defamation code (*l*).
- \* Those jurisdictions in a mixed position where the law is partly governed by statute and partly by the common law (*m*).

The publication industry in Australia is now substantially organised on a national basis. Broadcasts of radio and television are reticulated across State borders, frequently, on a national grid. Some publications are even reproduced simultaneously in different States. The confusion and uncertainty of so many differing defamation standards is a major blight on free speech and free press in our country. It is a problem which does not confront the reformer in Britain or New Zealand. It must be seen as a principal problem of the reformer in Australia. The Constitutional Conventions have lately agreed to the urgency of a national defamation law (*n*). Achieving it, is not without difficulty in view of the sensitive nature of the issue, the different legal and historical traditions in the various jurisdictions of the country and the absence of clear constitutional power in the Commonwealth, outside the Territories. The principal aim of the Australian Commissioner's project is to secure a uniform defamation law in Australia. Much else flows from this unique, urgent domestic necessity.

### Points of similarity

*The problem of balance.* Defamation laws affect the balance that is struck in society between the flow of information and the proper protection of honour and reputation. Different jurisdictions strike the balance at different points. In the United States, as a result of the American tradition of "rights", enshrined in the Bill of Rights (and particularly Article 1), there is a firmly entrenched and legally protected prohibition upon the abridgement of freedom of speech or of the press (*o*). The result of this constitutional guarantee, and the attitudes which it nurtures, is the striking of a balance which is weighted heavily in

favour of the free flow of information at some cost to protections for reputation and honour. One result is seen in the development of the "public figure" rule. A "public official" or "public figure" may not succeed in an action for defamation relating to his conduct, unless it is proved that the defendant made the statement complained of knowing that it was false or with reckless disregard as to whether it was true or false (*p*).

Neither Australia nor New Zealand has developed such an approach. Doubtless as a result of our different legal and constitutional traditions (and possibly as a consequence of our Parliamentary system of government), we have never embraced the "public official" rule in the name of free speech and the free flow of information. Our lawmakers, and probably the majority of our respective communities, are content with a different approach. Even a "public figure" is entitled to protection against false defamatory statements.

The fundamental issue facing those who draft a defamation law is, therefore, where the balance should lie. This issue is plainly acknowledged in the first pages of the New Zealand report (*q*). We both accept as a basic principle that damage to reputation can cause financial and social hurt as well as distress and outrage. Likewise we both accept that our kind of society ought to enjoy general free speech and a free press which provides the necessary information for "a full life, informed decision-making and effective democratic government" (*r*). Our starting points are therefore identical. The recognition of the tension between competing values is common. So is the recognition that the present standard is unsatisfactory principally because it strikes a mean which is, generally speaking, insufficiently sensitive to the community's right to accurate information (*s*). The New Zealand report, in common with the Australian proposals, expresses concern about the problems of the "gagging writ" (*t*) and the "chilling effect" which defamation law has, particularly upon the small media publisher.

The scrutiny of the Australian and New Zealand approaches can therefore be made upon the assumption that our fundamentals are the

(k) Victoria, South Australia and the Northern Territory of Australia.

(l) Queensland and Tasmania.

(m) New South Wales, The Australian Capital Territory and (in criminal libel) Western Australia. Some of the inconveniences are outlined in ALDP 1.5. They are well illustrated in *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181, a case involving a former Prime Minister.

(n) Australian Constitutional Convention, *Minutes*

of *Proceedings and Official Record of Debate*, Hobart, 1976, xvii-xx (Minutes); 19ff (Official Record).

(o) *The Constitution* (USA), Article One of the Amendments.

(p) *New York Times v Sullivan*, 376 US 254 (1964); *Gertz v Robert Welch Inc*, 418 US 323 (1974). See also ALDP 2, 15-16.

(q) NZ report, 7-9.

(r) *Ibid*, 7.

(s) ALDP 1, 4; NZ report, 8.

same and that the general object (with the special Australian problem of uniformity to one side) is identical. It is the adjustment of the law and procedure of defamation actions, so that a new balance is struck which is somewhat more favourable to free speech and a free press. In doing so we have both been careful to preserve reasonable protection for reputation and "not to give licence to the careless or vindictive" (u).

*Approaches rejected.* Two approaches for this new balance are rejected by each of us. The first is the "public figure" category of the United States, just described. Each proposal rejects this approach (v).

A proposal that, as an alternative to actions against media defendants, such matters should be handled by the Press Council was also rejected (w). In the view of both reform bodies, the Press Councils were an unsatisfactory alternative to the courts, both in terms of their current composition and in terms of principle:

"This idea is novel. However, we do not consider that the Press Council is constituted as a suitable body for this purpose . . . . We could not agree to the placing of individuals' reputations in the hands of a non-judicial authority especially when there is no facility for cross examination" (x).

An early proposal of the Australian Commission for an expanded defence of reasonable inquiry drew some criticism from the New Zealand Committee (y). It provided, in essence, for a defence where the defendant in fact believed the truth of all statements of fact contained in the matter published and did so on reasonable grounds and after making all inquiries reasonably open to him in the circumstances. The price of this expanded defence was an obligation upon the defendant to afford the person defamed a "full and adequate right of reply" at the earliest opportunity following a request to do so.

The New Zealand Committee (and the Australian Commission on reflection) considered this defence to have tipped the balance too far against the proper protection of reputation (z). The

extension of general qualified privilege to newspaper and other media with their wide and indiscriminate circulation was resisted by the common law (aa), and by earlier reviews of the law of defamation in England (ab).

*Expanded defences for the media: The right of reply.* The most novel proposal of the New Zealand report is clearly the suggestion of a special, limited qualified privilege for the media. The Australian scheme, even as reconsidered, contains an expanded defence of fair report for general publishers (ie those publishing beyond particular persons). Each approach expands protection for the publication of material later held to be defamatory and untrue. The price of this defence includes, in each case, proof that the defendant offered the complainant an adequate and prompt right of reply. True it is, the proposals are hedged about by different limitations. The New Zealand scheme is limited to the media. The Australian proposal makes no distinction between different defendants (ac). The New Zealand proposal requires that the subject matter should be one of public interest at the time of publication, and that the publisher should have acted "with reasonable care . . . and believe on reasonable grounds" the truth of statements of fact (ad). The Australian proposal requires attribution of a statement to a particular person, who has not been influenced by the publisher where the defendant's publication "having regard to its nature and the circumstances surrounding its making, was reasonable". The machinery of the right of reply is also different. The Australian proposal requires the defendant to publish the reply "at the earliest reasonable opportunity available after a request by the plaintiff". The New Zealand scheme fixes a specific time limit of 30 days and imposes specific obligation to pay costs and expenses (ae). The New Zealand proposal contents itself with an obligation to publish "with adequate prominence". The Australian draft expands this to oblige publication "in such form and manner as is likely to reach the same general audience as the attributed statement reached" (af). So, there are differences. But there is a

(t) NZ report, 8 Cf ALDP 1, 14. See also the fuller discussion in Australian Law Reform Commission, Background Paper, *Defamation*, 1977, 164-180.

(u) NZ report, 8.

(v) NZ report, 9; ALDP 2, 15-16.

(w) NZ report, 86; ALDP 2, 13-14. A more detailed critique of the Press Council is to be found in the writer's *Defamation and Publication Privacy*, a note on Sir Frank Kitto's paper *The Press Council and the Law*, mimeo, 1978.

(x) NZ report, 86.

(y) NZ report, 9.

(z) NZ report, Chapter 10.

(aa) *Truth (NZ) Ltd v Holloway* [1960] NZLR 69; *Dunford Publicity Studios Ltd v New Medias Ownership Ltd* [1971] NZLR 961; *Brooks v Muldoon* [1973] 1 NZLR 1. In Australia see *Wright v The Australian Broadcasting Commission*, (CA) [1977] 1 NSWLR 697.

(ab) The Committee on Defamation (England) (Mr Justice Faulks, Chairman). *Report*, 1975, Cmnd 5909, paras 202-3. This report is hereafter referred to as "Faulks". See discussion NZ report, 57.

(ac) *Ibid*, ALDP 3, 9.

(ad) NZ report, 58.

(ae) Cf ALDP 3, 9; NZ report, 58-9.

(af) *Loc cit*.

common theme here and a common rationale for it. It is that the public has a legitimate interest to have reported to it, in certain circumstances, allegations that are made about particular persons and an equal interest to hear both sides of the story (*ag*). The English law of the defamation, in common with the English law of torts generally, has relied substantially on the stick of awarded damages. There has been inadequate use in the law of the carrot of voluntary or court-encouraged recompense (*ah*). This is not the case in civil law systems. As the New Zealand report points out, the "right of reply" is an important and long-standing remedy in France, Germany and other European countries for the injury done by untruthful or inaccurate statements (*ai*). The research done by the Commission indicates that it is far the most usual remedy for this complaint throughout continental Europe. It usually has a compulsory element which the proposed Australian and New Zealand defences mentioned above would not involve. Each of them depends upon the voluntary initiative of the publisher to afford a person who claims to have been wronged, the opportunity of putting forward his version of the facts. Naturally, most news outlets already do this as a matter of course both because it is right to do so and because it promotes news and public discussion. The provision of a statutory endorsement for this procedure should encourage publication of replies in *all* appropriate cases and ensure that they are published promptly and in an adequate form. It is interesting to note that the Supreme Court of the United States has struck down as unconstitutional a statute in Florida which said, essentially, that where a personal attack was made upon an individual in a newspaper, that individual had a right to equal space for a reply (*aj*). But that is not the proposal here. Nor are we in Australia or New Zealand impeded by absolutist constitutional guarantees in favour of free speech and the free press (*ak*).

**Defamatory matter.** Without elaborating the matter, the Australian and New Zealand proposals are basically at one in their treatment of defamatory matter. The criterion for deciding the natural and ordinary meaning of the words complained of

is proposed to be the meaning which the "ordinary reader" or "ordinary persons" (*al*), would place upon the words in their context. Each proposal obliges the plaintiff to give particulars of defamatory imputations relied upon and of any extrinsic facts relied upon to establish a legal innuendo (*am*). The same approach is taken to identification of the plaintiff. Each proposal contents itself with the law as expressed in *Hulton v Jones* (*an*).

**Justification: Truth alone.** The proposals also agree that a defence to a defamation action should be established if the defendant can prove that the defamatory imputations are true. Each proposes a minor extension of "truth" to include matter which is in substance true or not materially different from the truth (*ao*). Each proposal rejects the additional requirement that the defendant should prove that his publication was made "for the public benefit" or "in the public interest". Such an additional requirement, in its differing forms, has never been a feature of the civil law of defamation in the United Kingdom or in New Zealand (*ap*).

Here the superficial similarity between the two approaches ends. In several jurisdictions in Australia, the defence of justification requires, and has long required, proof by the defendant of an additional public interest or benefit, in order to justify the publication of defamatory matter. The history of this is clear. In 1843 a Select Committee of the House of Lords recommended that in both civil and criminal proceedings truth should be a defence if, but only if, the publication was for the public benefit (*aq*). This proposal was embodied in Lord Campbell's Libel Bill of 1843. In respect to civil actions, the proposal was rejected by the House of Commons. In New South Wales, however, the Committee's full recommendations were adopted in 1847 thus transplanting in Australia the English proposal that made "public benefit" as well as truth, essential to the plea of justification. The English Committee's suggestion was also adopted, via the Indian Criminal Code, in the defamation codes of Queensland and Tasmania. It was inherited in the Australian Capital Territory. Its adoption in England has been rejected by successive recent committees (*ar*). In New South

(ag) ALDP 1, 10.

(ah) I do not overlook the settlement of actions but these occur without facilitating legal provisions.

(ai) NZ report, 111.

(aj) *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974).

(ak) J Kaplan, "Free Press/Fair Trial. Rights in Conflict. Freedom of Press and the Right of the Individual". 29 *Oklahoma L Rev* 361, 366ff (1976).

(al) NZ report, 28; ALDP 3, 6. (clause 6 (1) (a) (iii)).

(am) NZ report, 29; ALDP 3, 24 (Rule 8 (e)).

(an) [1910] AC 20; Cf NZ report, 30; ALDP 3, 7 (clause 6 (3)).

(ao) NZ report, 32; ALDP 3, 8. (clause 12).

(ap) As pointed out by the NZ Committee, it is at present a requirement of criminal libel and slander in New Zealand. Crimes Act 1961 (NZ), s 214.

(aq) Report of the Select Committee of the House of Lords on the Law of Defamation and Libel, 1843. See Background Paper, 160ff.

(ar) Faulks, para 138 Cf the earlier Porter Committee, para 85.

Wales the Defamation Act 1974 was modified to drop the requirement of "public benefit" and to substitute for it the requirement that the subject matter should be one of "public interest" (*as*), the latter to be determined by the Judge, not the jury.

The Law Reform Commission took the view that the legitimate operation of the "public benefit" requirement was the provision of some degree of privacy protection against "muck-raking", such as the revival of a "true but unfortunate and damaging event in the person's past" (*at*).

"These are really privacy protections first introduced into Australian law in 1847 and designed to guard people against the publication of even true statements of purely private concern; details of their family life, sexual relationships, personal friendships or distant criminal history" (*au*).

Both the New Zealand Committee and the Australian Commission took the same view that defamation law was not the appropriate vehicle to protect privacy. Each condemned the vagueness of the notion of "public benefit" and the difficulty it posed for publishers having to make a decision, often to a strict deadline, as to whether a matter that was undoubtedly defamatory should be published or not. If truth alone is the defence, the decision is easier. Can the matter be proved, if necessary? If the additional component of "public benefit" or "public interest" is required, the decision is difficult because of the more nebulous test and the uncertainty of the view that will be taken of it by the ultimate trial tribunal, Judge or jury. Each proposal therefore suggests truth alone as the requirement for justification. However, whilst noting the Australian Commission's conclusion that public benefit was essentially "a privacy protection and should be treated as a separate matter" (*av*) the New Zealand Committee (doubtless because of its terms of reference and a different historical and constitutional background) did not go on, as the Australian Commission has, to try to plug the gap which would be left, in the law of Australia, by simply dropping the "public benefit" notion altogether out of defamation law. That notion has endured in a good part of Australia for more than a century. It is probably considered the correct approach by a great number of practitioners, brought up in its tradition. No attempt to strike a uniform law in Australia, without dealing with this issue, could, in my view, hope to secure

the unanimous support of the States. Equally, any attempt to impose the "public" element on those jurisdictions which did not have it, would be bound to fail. It is this reason that the Australian Commission has proposed a co-ordinate protection against the publication of "private facts" which is not to be found in the New Zealand Committee's scheme. With our different legal history and constitutional problems, it would be wrong to assume that our suggestion should necessarily be considered as appropriate for New Zealand. Similarly, it would be wrong to take in isolation the Australian Commission's proposal that truth alone should be the defence of justification in defamation. That proposal was put forward only in the context of a limited but definite protection of the private realm. This is intellectually acceptable if we release ourselves from the common law's category of "defamation" and consider the remedies that should be available for a more general tort of wrongful publication. It may be wrong to publish matter on a person which damages his reputation and is false. It may equally be wrong to publish facts which, though true, invade a person's private realm and are of no legitimate concern to the public. The Australian Commission sees its exercise, particularly in the happy coincidence of its defamation and privacy references, as an opportunity, rarely afforded, to escape from the toils of differing legal history and to deal in a harmonious way with a new legal concept, viz wrongful publication. Needless to say we have our supporters, including some among the media who are much concerned about the problems of discomformity in Australia's defamation laws and the needs for, and requirements of, a uniform law (*aw*). We have our critics (*ax*).

*Defamation of the dead and limitations.* The two proposals strike much the same standard in relation to any other points of detail. For example it is proposed that a limited cause of action should be introduced to redress defamation of a dead person. In New Zealand it is proposed that there should be a limitation period of six years from the date of death (in addition to a general limitation period of two years from the date of publication to obtain in all cases) (*ay*). The Australian proposal would limit the period after death when defamatory matter may not be published to three years only (*az*). It limits the cause of action to the same members of the intimate family of

(*as*) Defamation Act 1974 (NSW), s 15.

(*at*) This explanation by the NZ Committee (NZ Report, 33) is accepted as one reason for the Australian Commission's approach.

(*au*) ALDP 1, 6.

(*av*) ALDP 1, 8. See also ALDP 2, 3-4 ALDP 3, 4. (clauses 20ff).

(*aw*) *The Age*, 4 November 1977, 9. ("Towards a sane defamation law").

(*ax*) *Esp Sydney Morning Herald*, 31 January 1978, 6 ("Law reform on the wrong track"); *ibid*, 6 February 1978, 6 ("More privacy").

(*ay*) NZ report, 99.

(*az*) ALDP 3, clause 7 (2). Note that another dif-

the deceased, whilst including siblings, who are not included in the New Zealand suggestion (*ba*).

Each proposal is firm on the need to reduce the general period of limitation within which a defamation action must be brought (*bb*). In some parts of Australia this is still six years, with provision for extension in circumstances, including discovery of new "material facts". The Australian Commission's suggestion is for a severe limitation to the expiration of six months after the date on which the plaintiff first learnt of the publication or three years after the date of the publication, whichever is earlier (*bc*). The New Zealand proposal is that the limitation period should be reduced to a period of two years. Each proposal envisages extensions of time in certain circumstances (*bd*). This reduction from the norm is justified by reference to principle and practicalities. The major effort of a law of defamation must be to restore a reputation wrongfully damaged. It ought not to be just the provision of compensatory verdicts, though often this may be all that can be done. If a plaintiff does not move with speed, it will normally signal not only a lack of hurt but an unconcern with the basic social evils which the law is seeking to remedy, viz damage to his reputation not personal enrichment. Additionally, the practicalities of the electronic media and the difficulties of keeping stored vast quantities of recorded broadcasts of radio and television necessitate a reduction of potential liability and the provision, in the normal case, of an early and final bar against belated action.

### Points of difference

*Privacy protection.* The major points of difference between the results of the New Zealand and Australian exercises are two. The first is the decision in the Australian proposal to develop a new concept which includes provision of limited protection for the publication of "private facts" as defined. The second arises from the different approaches to a matter of common concern, viz the "gagging writ" or "stop writ" as it is called in Australia. The New Zealand approach is to tackle the law of contempt of Court. The Australian approach has been to lay emphasis upon the reform of defamation procedures and to provide for the obligatory early return of a case before the court. The former difference has already been noted and its origins, in Australia, explained. The provisions

of certain protections for privacy already exists, however conceptually uncomfortable, in the defamation laws of several of the jurisdictions of Australia. There is no such history or problem in New Zealand. The matter was probably beyond the terms of reference to the Committee. Whether limited protection against the publication of private facts should be provided in New Zealand is, I can well imagine, a matter upon which there would be differences of view and a vigorous debate. The fact remains that this is a major point of difference in the two proposals. It is one which New Zealanders, released from the thrall of federalism, may simply ascribe to the constitutional eccentricities and legal history of Australia. It is one which we would hope to justify by reference to the development of new legal concepts which are inherently desirable.

*Remedies and the stop writ.* The Australian Commission came to an early view that defamation reform required reform of defamation procedures. To some extent a similar view in New Zealand is reflected by a number of proposals:

- \* The provision of a simple procedure for the establishment of the defence of unintentional defamation (*be*).

- \* The introduction of clear entitlement to bring an action for a declaration alone in defamation proceedings (*bf*).

- \* The enlargement of the Court's general power to dismiss an action by the provision that a defamation action not set down and in which no step has been taken by either party for one year shall, on the option of the defendant, be dismissed unless the court otherwise orders (*bg*).

- \* The prohibition upon the specification of an amount of damages claim where the defendant is a member of the news media (*bh*) and the enactment of a provision entitling the judge to award solicitor and client costs to the defendant where, in his opinion the amount claimed in a defamation action is "grossly out of proportion to the amount recovered or the damages caused" (*bi*).

The Australian approach is different. It rests upon the rapid return of defamation actions before the Court. It has seemed to us from the outset that the law has made the mistake of treating defamation actions as simply another variety of tort proceedings. Complaints about the law's delay are

ference is that in the ALRC proposals, actions in respect to defamation of the dead do not have available to them the remedy of damages. The principal remedies envisaged are orders for correction or an injunction (clause 7 (2)).

(*ba*) *Ibid* Cf NZ report, 99.

(*bb*) NZ report, 108.

(*bc*) ALDP 3, 15 (clause 34).

(*bd*) NZ report, 13, 108; ALDP 3, 15 (clause 34).

(*be*) NZ report, 11, 72-3.

(*bf*) NZ report, 91.

(*bg*) NZ report, 109.

(*bh*) NZ report, 95-6.

(*bi*) NZ report, 96.

endemic and not confined to defamation cases. In the case of defamation, however, where the "wrong" complained of is a wrong to a person's reputation, there must be an element of urgency in the delivery of relief or the law fails to achieve its social purpose. If reputation is ever to be restored following an alleged defamation, it is probable that it can only be restored within a very short time after publication of the defamatory matter. If time is allowed to pass, the chances of actually restoring a hurt reputation diminish. All that the law can do is to provide a solatium in the form of money damages or, in some jurisdictions, punishment. Given this view of the problem, the Australian Commission's attention has been riveted from the first upon improvements in defamation procedures. The draft Bill already includes certain principles to which regard must be had in proceedings under the Act. These include the principle that:

"reputation and privacy are valued private rights, delay in the vindication of which tends to exacerbate the original damage".

**Correction orders.** The draft Bill already published (and even more the final draft upon which we are presently working) contains provisions for the prompt return of defamation proceedings before the court. The rules which are scheduled to the draft Bill include a provision which reflects the urgency to be attached to the despatch of defamation cases. For example, the return date to be stated on a summons shall, unless fixed by the Court, be a date "not later than fourteen days after the date of filing of the summons" (b). Upon return of the summons before the court a number of remedies are to be available. Most of them are common to both the Australian and New Zealand schemes. One, however, is not. The Australian proposals permit in both defamation and privacy actions the making by a court of "an order for correction". This will permit the court, facts having been found to be untrue, to order a defendant to correct the untrue fact and to do so publicly. Once the element of "public interest" or "public benefit" is removed from the notion of justification and the principal issue is simply the truth or otherwise of a statement made, it seemed to us apt to provide for an order for correction and particularly apt in the case of media defendants. The draft Bill empowers the Court to specify the content of the correction and to give directions concerning the time, form, extent and manner of its publication. Unless the plaintiff otherwise requests, the Court is to be empowered to so give its directions as to ensure that the correction "will, as far as practicable, be brought to

the notice of persons who were recipients of the matter" (bk). The object of this provision is to afford the court a new remedy and one which, whilst not replacing damages entirely, will often be the most appropriate means of remedying a false and damaging statement.

Experience in industrial cases in Australia and, in certain jurisdictions, in equity cases, suggests that many parties, faced with litigation, need little more than the provision of a venue and a mechanism for saving face. It may well be so in the area of defamation. If we consider the Sri Lanka mistake which opened this paper, there is little doubt that had a person less august than the Foreign Minister been involved (and the rapid intervention of the National Assembly not been available) the most appropriate remedy for the wrong done would be a prompt public correction, suitably worded and placed. A damages verdict two years later, when everybody had forgotten the wrong (and where there was no guarantee of its public statement and correction) would be, so it seems to us, less apt.

Much evidence has been given to the Australian Commission by its expert consultants and in public sittings and seminars to the effect that a majority of defamation cases fall either into the category of frank mistake or into the class of case where the plaintiff might have been satisfied if his point of view could have been promptly and fairly published. For the former class of case, the Australian Commission has proposed orders for correction which may, in the ultimate, be settled by the Court. In the latter class of case, the commission has proposed a defence which will be available in certain circumstances if an adequate right of reply is promptly afforded to the plaintiff. The New Zealand approach embraces the latter suggestion but the notion of compulsion, inherent in Court ordered corrections, did not find favour. Some correction orders under the Australian scheme would follow the failure of a defence in a contested case. Some would be consensual. It is envisaged that in many cases, the Court will simply inquire, whilst the issue is still alive and the hurt is still fresh, as to whether the matter can be resolved, either in whole or in part, by an appropriate correction, apology or reply. In many cases one can imagine that counsel will, between them, work to assist the Court in reducing to agreement the form and content of the correction. In some cases the defendant, acknowledging the mistake, may invite the prompt resolution of differences as to content and form by the court itself. This machinery has worked in other areas of the law's operation in Australia. Time will

(b) Rule 7 (1) (b) (ALDP 3, 24).

(bk) See clauses 8 (i) (Defamation) and 23 (c)

(Privacy) and 27 in ALDP 3 Cf Clauses 28 (Comment) and 42 (Appeal).



tell whether it will work in this area. Much will depend, as we recognise, upon the initiative and imagination of the Judges. It must be emphasised that there is no provision for the summary resolution in a contested case of disputed questions of fact in order that they can be rapidly corrected. But machinery will be provided for the prompt return of matters before the Court and an opportunity, which may be reinforced by a statutory duty on the Judge, to explore and exhaust the possibilities of correction, in an appropriate way, of incorrect or mistaken facts.

One consequence of this procedure may also be the diminution in the number of "gagging writs", and vexatious or trivial proceedings. The remedial effect of promptly returning all defamation cases before the Court ought not, we think, to be under-estimated. It may be appropriate, as an inducement to the frank acknowledgement of publishing mistaken facts or carelessly reporting or editing material, to provide that where the defendant acknowledges that there is no defence, the Court, consisting of a Judge only, could proceed at once to order a correction and provide for the damages, if any, that will be suffered by the plaintiff, notwithstanding the correction ordered. This is a matter which the Australian Commission is still debating.

*Codification and definition.* Passing from the important differences, there are many other issues upon which the New Zealand and Australian reformers would appear to differ. The New Zealand draft Bill does not, for example, purport to codify the law of defamation, whilst the Australian draft Bill does (*bl*). This is not the occasion to debate the merits of codification. Obviously, with such a diversity of approach in Australia, the only safe way of achieving a truly uniform defamation law is by way of codification. As is pointed out "New Zealand has always had a national and uniform law of defamation" (*bm*). With nine or more jurisdictions in Australia, the opportunities for diversity of approach are reduced by the adoption of a uniform code (and uniform procedures) which will be evenly applied throughout the country. That is why the New Zealand decision to reject codification cannot be adopted in the context of the Australian exercise (*bn*). Likewise, the decision not to recommend a definition of defamation (*bo*) and not to codify the categories of absolute privilege are entirely understandable in the New Zealand context but unacceptable in an Australian uniform law. We copied from New Zealand the live broadcast of proceedings in Parliament, al-

though we have the added pleasure of hearing our Senate on Wednesdays and at other odd times. Whereas the New Zealand proposal is to attach absolute privilege to live radio and television broadcasts of parliamentary proceedings (*bp*) no such extension is proposed in the Commission's draft. The actual proceedings of a Parliament itself are, of course, absolutely privileged (*bq*). The broadcast would, however, fall to be dealt with under the proposed defence of fair report. If accepted, this would provide a plaintiff, identified in a defamatory broadcast of parliamentary proceedings, with the opportunity to give a "full and adequate reply". The Commission received a great number of complaints by citizens alleging the abuse of parliamentary privilege, its repetition in printed and electronic form and the total absence of any *right* to respond and have their version put before the same public. Views on this matter will no doubt differ. Some may suggest that the provision of a right for reply is itself an inhibition upon the absolute privilege of Parliament. Others see it as the only means of ensuring proper public debate of issues of general importance raised in the Parliament.

*Qualified privilege.* A fundamental difference emerges in the treatment of qualified privilege. Put shortly, the New Zealand scheme is to identify certain specified occasions and reports to which qualified privilege attaches, such privileges being lost where it is proved that the defendant was actuated by spite or ill-will or otherwise took improper advantage of the occasion (*br*). Because of the constant expansion of the categories to which it is considered appropriate to attach qualified privilege and its desire to get away from the concept of "malice" which is critically analysed in the New Zealand report, the Australian Commission has adopted a different approach. It has proposed limiting this defence to communication to particular persons or groups (thereby excluding the media) and providing the privilege where:

- (a) the defendant believed on reasonable grounds that the recipient has an interest or duty to receive the information;
- (b) the publication was made in the course of giving the recipient information of the kind which he had an interest to receive, and;
- (c) the matter represented the genuine belief of the defendant or, in all the circumstances, the conduct of the defendant in publishing it was reasonable (*bs*).

The approach to publication by the media is,

(bl) ALDP 3, 4 (Clause 3 (2)).

(bm) NZ report, 22.

(bn) *Id*

(bo) *Loc cit*

(bp) NZ report, 48.

(bq) ALDP 3, 8 (clause 14 (a)).

(br) NZ report, 124.

(bs) This is a new approach which is still subject to

as already noted, different. The New Zealand approach is the provision of a new statutory defence of qualified privilege subject to the following four requirements:

- (1) that the subject-matter of the publication was one of public interest;
- (2) that the publisher acted with reasonable care in relation to the facts he published and believed them to be true;
- (3) any comment was capable of being supported by the facts as stated or other known facts and was the genuine opinion of the person who made it; and
- (4) the publisher gave the person claiming to be defamed the right to have a reasonable statement of explanation and/or rebuttal published in the same medium with adequate prominence and without undue delay (*bt*).

The Australian Commission's approach is also to give the media a special new protection but not in the form of qualified privilege. Instead, the media are given the right to publish an attributed statement so long as it was uninfluenced and "reasonable" in the circumstances to do so and an opportunity of reply was given to the complainant "at the earliest opportunity reasonably available" after a request.

The difference of approach has already been noted. Some of the differences have already been described. The essential difference is that the Australian scheme is limited to fair reportage of certain classified proceedings (*bu*) and attributed statements which have not been manufactured by the defendant. The New Zealand approach is not limited to attributed reports but may include any statement of the class mentioned published in the media. In practical terms, in many cases, the difference may be more apparent than real. There are common features, most importantly the obligation to act reasonably and to afford a prompt opportunity of reply to an aggrieved complainant. The advantage of our proposal as we see it is the requirement of attribution of statements to identified persons. This way the public can know and assess the source of the defamatory matter. Unattributed smears ought not to be permitted.

*Unintentional defamation.* Section 6 of the Defamation Act 1954 (NZ) was designed to mitigate the hardship on defendants who did not intend to hurt the plaintiff or did not know or

circumstances which would make words, not defamatory on the face of them, defamatory of the plaintiff (*bv*). The new New Zealand report proposes repeal of that section the provision of an "offer of apology" in the place of the "offer of amends" and machinery provision designed to encourage the use of the procedure. One provision recommended is that an unaccepted offer of apology should not constitute an admission of liability and should not be referred to in evidence except by consent of the defendant (*bw*). No reference was made in the draft Australian Bill to procedures for apology or amends. Although this matter is under reconsideration, the reasons for omitting such provisions can be briefly stated. They are three. In the first place, apology machinery already available is rarely, if ever, used in Australia. In the second place, it is always open to parties to resolve their differences by settlement. Much defamation litigation is disposed of in this way. Thirdly, the Commission's hope was that the prompt return of proceedings before the Court would provide the venue and the opportunity to explore this question, in conjunction with consent orders for correction and/or rights of reply. The matter will be reviewed in the light of the New Zealand report.

*Damages.* It is perhaps inevitable that a different approach has been taken to "exemplary damages". The High Court of Australia (*bx*) adopted an approach to exemplary damages different from that adopted by the House of Lords (*by*). As a result, the New South Wales Law Reform Commission recommended that exemplary damages be abolished by statute (*bz*). This recommendation was implemented by s 46 (3) of the New South Wales Act. Alone of the Australian jurisdiction, New South Wales has done away with exemplary damages. Of course, aggravated damages can still be awarded. Generally damages are compensatory. The Australian Commission was persuaded by the New South Wales Law Reform Commission's argument and those of the Faulks Committee (*ca*). The latter did not "like the idea of fining a defendant in a civil action and presenting the fine not to the State but to the plaintiff who has already received aggravated compensatory damages" (*cb*).

The New Zealand Committee, however, felt that there was a place for punitive damages in the law of defamation "where one person has deliber-

discussion within the Commission. Cf clause 15 (1) in ALDP 3, 9.

(bt) NZ report, 125.

(bu) ALDP 3, 22 (schedule 2).

(bv) NZ report, 69.

(bw) NZ report, 73.

(bx) *Uren v John Fairfax & Sons Ltd* (1966) 117

CLR 118.

(by) *Rookes v Barnard* [1964] AC 1129; *Cassell v Broome* [1972] AC 1027, 1087.

(bz) Law Reform Commission (NSW) *Report on Defamation* (LRC 11) 13-14.

(ca) Faulks, 94-97.

(cb) *Ibid*, 96 (para 356).

ately defamed another". Nevertheless, it was considered more appropriate for the award of punitive damages to be left "to the experience and knowledge of a Judge" rather than to the jury (*cc*). It was noted 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 which was concerned with a different matter (*cd*). Punitive damages have been awarded in Australia and the Australian Commission's approach is to leave punishment to a narrow class of criminal defamation. Civil defamation is to be restricted to compensatory damages, in the knowledge that these will include "aggravated compensatory damages".

**Criminal defamation.** It is appropriate to mention here the New Zealand proposal for the abolition of offences involving criminal libel in New Zealand (*ce*). Many reasons are advanced. First among these is the fact that prosecutions for criminal defamation are rare in New Zealand. There have been only seven reported decisions, the most recent of which was in 1951 (*cf*). This branch of New Zealand law is to be taken to have fallen into desuetude. It is not so in Australia.

The Australian Commission has had urged upon it the ill-defined and repressive potential of criminal defamation. We live, it is said, in a more resilient age when criminal penalties for utterances are anachronistic (*cg*).

Although criminal libel actions are rare in Australia, it cannot be said that the offence has fallen into disuse. As recently as 1977, a number of persons who were alleged to have made false and defamatory complaints against police in Western Australia were convicted by juries and received lengthy terms of imprisonment (*ch*). Representatives of a number of States have drawn attention to the futility and inadequacy of civil defamation remedies where the defamer is a man of straw and bent upon the repeated, malicious, public assault upon another citizen's reputation.

The Australian Commission's solution to this dilemma is the preservation of a redefined and circumscribed species of criminal defamation. The scheme proposes the repeal of existing laws of criminal libel. The ingredients in the proposed substitute offence knowledge that the matter published was false (or reckless indifference to

its truth or falsity) and intent to cause serious harm or the knowledge of the probability that it would cause such harm to a living person (*ci*).

The abolition of criminal libel is a robust move which commands much sympathy. In the circumstances of the recent use of the offence in Australia and the arguments advanced against its abolition, it is possible that uniform legislation should still provide for it. Otherwise it is likely that the present wide ranging offence will survive in the criminal law of the States, despite reforms in the civil law effected by a uniform Act.

### A point of indecision: Judge or juries?

Upon one point the New Zealand Committee was unable to agree. The Australian Commission will most likely be in exactly the same position. This point relates to the mode of trial of defamation proceedings. The argument for the against juries in defamation cases are nowhere more clearly and succinctly catalogued than in the New Zealand report (*cj*). The Faulks Committee recommended that juries should be retained in defamation cases. Their role in the assessment of damages should, however, be restricted to the categorisation of awards as "substantial", "moderate", "nominal" or "contemptuous". It would then be up to the Judge alone to fix the actual amount (*ck*). Three members of the New Zealand Committee favoured complete abolition of juries in defamation cases. Three were equally strongly of the view that they should be retained, including to assess damages. The remaining member was against the retention of civil juries. However, he believed that so long as they were generally available in civil actions, they should be retained in defamation cases. No artificial distinction should be drawn (*cl*).

Particular problems face the Australian Commission in dealing with this question. Some of them relate to the history of civil procedure in the various Australian jurisdictions. In at least one State, there has never been a jury trial of a civil defamation case. In other States, not only is it usual to have a civil jury of four. It is quite common to have summoned a special jury of 12, particularly where the plaintiff is a public figure (*cm*). One approach in the quest for a uniform law is simply to leave the mode of trial to the election of the plaintiff. In this way the uniform law will not usurp differing practices that have been developed

(cc) NZ report, 89.

(cd) *Fogg v McKnight* [1968] NZLR 330 (Damages for assault).

(ce) NZ report, 103.

(cf) *Edwards v Barnes* (1951) 46 MCR 87; NZ report, 100.

(cg) ALDP 1, 15.

(ch) *Australian Law Reform Commission, Transcript*

of *Public Sitings*, Perth, 17 May 1977, 26.

(ci) ALDP 3, 21 (clause 52). This approach is based on the NSWLR report, 17, 68.

(cj) NZ report, 104-5.

(ck) Faulks, 143 (para 513) *Cf* NZ report, 106.

(cl) NZ report, 106.

(cm) *Jury Act* 1912 (NSW, s 30); *McCrane v Slater* [1965] NSWLR 1200.

in the scattered Australian communities. It will respect the different traditions that have developed and be consistent with modern notions of "co-operative Federalism".

There is, however, a special difficulty which arises from the proposed machinery for court-ordered corrections. It will be recalled that a major element of the Australian Commission's scheme is a provision of a facility by which the Court, finding facts to be false, can order their correction in an appropriate way. It is difficult to imagine a jury, even one specially instructed, being able to settle the form of a correction and the manner and prominence of its publication. Yet any damages that may be awarded must obviously take into account the form of the correction, the currency given to it and the likelihood that it will reach the same audience.

The easy way around this problem (and one consistent with the effort of the Australian Commission to promote promptness in all defamation proceedings) is the abolition of jury trial. If the whole defamation action is passed to the Judge, it would be a relatively simple matter for him to fix the orders for correction and then, perhaps later, assess appropriate damages. Some members of the Commission, however, share the view of those in New Zealand who would keep jury trials, if at all, in defamation cases. It may be necessary to leave the mode of trial to the parties but provide that it is for the Judge alone to settle the form of a correction when it is found that the matters complained of are defamatory, containing false facts. In these circumstances, where a jury tried the matter, the Judge would have to instruct the jury to assess any monetary damages upon the hypothesis that the correction was published at the time and in the "form, extent and manner" ordered by him and shown to the jury.

Australian experience suggests that those who call loudest for the abolition of jury trial in defamation cases are invariably the news media who feel they have suffered unfairly and been punished unjustly by successive defamation juries. Those who defend the jury system most vocally are frequently the Judges "conscious of the manifest defaults of each other".

### Summary

A common concern about the inhibiting effects of our inherited defamation law caused the New Zealand and Australian Law Ministers to initiate reviews of that law and to invite suggestions for reform. The New Zealand report is now before us. The Australian report shortly will be. We have some notion already of the points of similarity and

difference in their respective approaches.

Each starts with a concern that the present laws and practices in defamation may strike a balance which unduly favours the protection of reputation and unreasonably inhibits the free flow of information, freedom of speech and the free press. Neither of our countries has a constitutional guarantee of free speech. Both of our countries count this as an important part of our legal tradition. There is a general recognition that a new balance must be struck. It must provide slightly greater freedom for the publication of some matter which is currently suppressed.

The thrust of the two proposals is somewhat different. A major aim in Australia is to secure a uniform law. Furthermore the Law Reform Commission has a relevant concurrent reference on privacy protection. The major thrust of the New Zealand report, expansion of the defences of the media aside, is the clarification and limitation of the inhibiting effect of the rules governing contempt of court.

Each report suggest that the principal defence to defamation actions, that of justification, should be truth alone. But this involves no real change in New Zealand. In the context of a quest for a uniform law in Australia, it amounts to the abandonment of a "public benefit" or "public interest" component which for more than a century has endured in half of the jurisdiction. That "public" component in the defence of justification has hitherto provided certain protection against the publication of private facts which are not of general public concern. These include matters relating to a person's private behaviour, home life, personal or family relationships, health and spent criminal offences (*cn*). For this reason, and as part of its endeavour to develop a new concept of "wrongful publication" the Australian Commission has suggested dealing in the one Act with the wrong of defamation and the wrong of publishing private facts, as defined. Defamation deals with honour and reputation. To it, truth is a defence. The private realm is different. Publication of intimate facts here is not properly met by a defence of truth. The offence is in the publication itself, without adequate and public justification.

The New Zealand Committee did not deal with the publication of private facts. It acknowledged that "the question of a remedy for the publication of true statements involving the invasion of privacy is a separate issue" (*co*).

Many points of similarity have been identified, notably the introduction for the first time of a right of reply, the provision of qualified action for defamation of a dead person, the rejection of the

Press Council as a viable alternative to provision of legal remedies and the significant reduction in limitation periods in all defamation cases.

The Australian Commission's papers have laid greater emphasis upon the need for reform of defamation procedures. Rightly or wrongly, great reliance is placed upon getting this class of action promptly before the courts. Not only is this necessary to work the new machinery of correction orders (suggested in the Australian proposals). It is also hoped that it will provide an inhibition upon stop writs, the abuse of Court procedures and the professional litigant who tries to turn defamation cases into a second source of income.

Different approaches are taken with respect to multiple publications, innocent dissemination, the preservation of punitive damages and the abolition of criminal libel.

Upon the one matter in respect of which the New Zealand Committee was divided (the retention of juries) the Australian Commission is also divided. For the Australian Commission there are particular difficulties in the retention of juries, notably the different traditions of the several jurisdictions of Australia and the operation of the court-ordered correction procedures, an innovation not contained in the New Zealand proposals.

I cannot leave this paper without a special

word of commendation for one aspect of the New Zealand report which may otherwise go unnoted. Appended to the report is not only the draft Bill which has become the indispensable weapon of the law reformer seeking to combat parliamentary pigeonholes. There is also in Appendix II and III a detailed analysis of actual defamation litigation in New Zealand during this decade. True law reform, if it is to be more than a thing of shreds and patches, must be based not only upon well thought out principles publicly ventilated. It must have available to it empirical and evaluative data which identifies the problem areas in the current operation of the law. The New Zealand Committee set out to collect this information and to list it. Those who have the ultimate responsibility of passing on the proposals can only be advantaged by the consideration of surveys of this kind (*cp*). The Australian Law Reform Commission will learn much from the deliberations of the New Zealand Committee. Ultimately the law of Australia may, by the processes of legal osmosis, take advantage of the comprehensive and clearly presented material contained in the New Zealand report.

(*cp*) Cf Australian Law Reform Commission, *Insolvency: The Regular Payment of Debts* (ALRC 6), 1977, 54-64 (A survey of the operation of the *Bankruptcy Act*.)

## CONTRACT: TORT

# CONCURRENT REMEDIES IN CONTRACT AND TORT

There has become apparent a rift between the English and the New Zealand Courts on the question of the availability to a plaintiff of a choice between an action in contract, and one in tort, on the same set of facts. The English Court of Appeal has adopted a more liberal stand, while the Courts of this country have preferred a narrow, technical approach.

The matter will be examined in the context of actions against architects, property developers, other "professional" occupations, and builders and contractors, for it is here that most of the recent developments have taken place.

It is the premise of this article that the liberal view is preferable, and that the narrow view is ill-founded and undesirable in an era when technical rules of practice are rapidly disappearing.

## (1) New Zealand

The cases which will be mentioned are all comparatively recent, and all are unanimous in their acceptance of the view that in actions involving the negligent breach of a contractual term

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by one of the above-mentioned classes of persons, the only cause of action which a plaintiff is to be allowed to pursue is one in contract.

All these cases seem to be based on the case of *Bagot v Stevens Scanlan & Co* [1966] 1 QB 197. In that case the defendants were architects employed by the plaintiff to be responsible for the supervision of building works, which included the laying out of a drainage system. As a consequence of the defendants' negligent supervision the drains broke and water escaped, causing damage to the plaintiff's property. It was held by Diplock LJ (as he then was), sitting as an additional Judge of the Queens Bench Division, that the action lay solely in contract. He said:

"It seems to me that in this case, the relationship which created the duty of exercising reasonable skill and care by the architects to their clients arose out of the contract and

not otherwise. The complaint that is made against them is that of a failure to do the very thing which they contracted to do. That was the relationship which gave rise to the duty of care which was broken. It was a contractual relationship, a contractual duty, and any action brought for failure to comply with that duty is in my view an action founded on contract. It is also, in my view, an action founded upon contract alone" (p 204).

The decision was applied in *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA). Here the respondent had been sued in respect of the breach of an implied warranty in a contract for the sale of land. The respondent had issued a third party notice against the appellant, alleging breach of contract as consulting engineers in supervising and testing the work under construction. The Court of Appeal held that the respondent's action against the appellant lay solely in contract, and in so doing followed the statement of Diplock LJ without qualification (per Richmond J, p 116).

In *Karori Properties Ltd v Jelichich Austin Smith and Davies* [1969] NZLR 698, the plaintiff sued the defendant architects alleging faults in a block of flats erected in accordance with plans and specifications prepared by them and under their supervision. The architects issued third party notices against the engineers and the builders. Speight J held that:

"The builder's defective workmanship would constitute a tort at the hands of some outsider suffering physical injury . . . but qua the employer is a breach of contract. Similarly, the architects relationship with the employer is contractual (*Bagot* (supra)). Hence they are not joint tortfeasors . . ." (p 702).

A review of the New Zealand cases can conclude with reference to two recent unreported decisions: (1) *J W Harris & Son Ltd v Demolition and Road- ing Contractors (NZ) Ltd* (a); and *Moore v Russell Going Ltd* (b). In the first case the claim was by a landowner against a builder for the negligent construction of a wall, and in the second by land- owners against architects. In both cases it was found that the action lay in contract only.

It is noticeable that in all of the cases mentioned there was minimal discussion of the under- lying policy, if any, to an adoption of the narrower view. The courts may have felt themselves bound by *McLaren Maycroft* (supra), but it is submitted that the whole body of New Zealand case law here

has come from a case which must be seriously doubted today.

## (2) England

In view of the emphatic nature of the state- ment of principle in *Bagot*, it is not a little sur- prising to discover that the law was by no means clear on the point, and that there were cases allowing the existence of concurrent remedies, long before the decision in *Esso Petroleum v Mardon* [1976] 1 QB 801 (CA), which will shortly be referred to. Certainly, since the decision in *Esso* there appear to be the beginnings of some unified judicial thought on the matter, at least in England.

It should be mentioned here that Diplock LJ did recognise that there were certain situa- tions in which there could be concurrent liability in contract and tort, but there these were con- fined to the so-called "common callings", and to the master/servant relationship. But this principle could not apply where there is a professional rela- tionship "where someone undertakes to exercise by contract his professional skill in relation to the matter".

In reaching his main conclusion, the learned Judge was clearly influenced by the case of *Jarvis v Moy, Davies, Smith, Vandervell & Co* [1936] 1 KB 399, wherein Greer LJ said:

"where the breach of duty alleged arises out of liability independently of the personal ob- ligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that con- tract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract" (p 405).

As will shortly be seen, this distinction is not so clear-cut as it might at first seem, and may even tend to mislead. Quite apart from this, there are indications that it has not been accepted recently as representing the law. For example, in *Evans, Marshall & Co Ltd v Bertola SA* [1975] 2 Lloyd's Rep 373, the Court of Appeal held a defendant liable for breach of a contract to sell and deliver goods to the plaintiff, and in tort for conspiring with another defendant not to deliver the goods in question. Surely it would be stretching the words of Greer LJ too far to class the tort as "independent". Surely it connected with the per- formance of the contract?

That there was authority on the books to sup- port the extension of concurrent liability to the classes of people with whom we are concerned has already been indicated. As long ago as 1842, in *Boorman v Brown* (1842) 3 QB 511, 525-526, Tindal CJ felt able to say:

(a) A 289/76. Christchurch. 23 March 1978. Somers

(b) A 951/75. Auckland. 7 September 1977. Barker

"That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render . . . the principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action upon a tort".

It is to be noticed that even at this early stage there is no mention of the principle being restricted to the common callings. *Boorman* was referred to in *Jarvis* (supra), but it is submitted that the treatment given to it in that case does not justify the inference that it was therein abrogated.

The liberal view received its biggest boost in *Esso Petroleum v Mardon* (supra). In this case there had been a negligent pre-contractual representation which had induced the contract. In the court below, Lawson J had found for the plaintiff in negligence but had felt bound by the decision in *Bagot* not to also find for the plaintiff in breach of warranty. Lord Denning MR had no such qualms. He was of the opinion that the cases showing that there could only be contractual liability where the negotiations between the parties had resulted in a contract between them were in conflict with other decisions of high authority which were not cited in them. At page 819, he said:

"These decisions show that, in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract, and is therefore actionable in tort. It is comparable to the duty of reasonable care which is owed by a master to his servant, and vice versa (*Matthews v Kuwait Bechtel Corp* [1959] 2 QB 57)".

And at p 820:

"A professional man may give advice under a contract for reward; or without a contract . . . gratuitously without reward. In either case he is under one and the same duty to use reasonable care".

These statements were not contradicted by the other members of the Court. It is clear that subsequently this case has been treated in England

as representing the law, at the expense of *Bagot*.

In the very recent case of *Batty v Metropolitan Property Realisations Ltd* [1978] 2 WLR 500, a firm of land developers sold land and buildings to the plaintiff. In the contract of sale they made a warranty that the house in question had been built properly. A slip in the land later rendered the land valueless. It was held in the Court of Appeal that the defendants could be liable both for breach of the warranty and in negligence. Megaw LJ regarded *Bagot*, as Lord Denning MR had done, as having been decided without a full consideration of all the relevant authorities. He went on to say that he could see no reason why the principle of concurrent liability should be confined to the common callings or to professional people.

It should be said at this point that there is some difference in terminology in the English cases. Some speak of concurrent liability being available in the case of professional people, while others, such as *Batty*, extend the principle beyond that. However, that is not to negative the argument for adoption of the principle in all cases where there is a negligent breach of contract, which is what this article aims to put forward. In any case, the New Zealand courts have not adverted to this possible distinction (*c*) in adopting the narrow view, but have applied the *Bagot* case in all of the occupations with which the article is particularly concerned. It is submitted that the arguments for allowing concurrent liability are equally viable whether one is looking at architects or builders.

### (3) Arguments for concurrent remedies

When one is advocating this liberalisation of the law, it must be remembered that the result of it is to allow a plaintiff to elect which cause of action he wishes to pursue. Therefore, the argument is confined to those cases where the facts admit of possible concurrent liability. Concurrent liability would mean that the courts would no longer be required to find the gist, or gravamen of the action, in order to be able to decide which cause of action, contractual or tortious, will lie.

If there was little or no difference in the consequences of choosing between the two causes of action, then this article would be of purely academic value. That there are great differences in the consequences is quite plain. One of the most basic comes from the rule that damage is essential for there to be tortious negligence. The result of this is that the cause of action will not accrue until the damage has occurred. Thus, it is then that the limitation period runs from, and not from the date of the negligent act: see *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1974] QB 858 (CA).

(c) With one exception, *J W Harris & Son v DRC Ltd* (supra), where Somers J; referred to *Dominion Chain Co v Eastern Construction Co* (1976) 68 DLR 385, where the distinction was drawn between professional people and builders.

Obviously, this tortious rule favours a plaintiff, compared with the contractual limitation period, which runs from the date of the breach, since in the latter case some time may elapse between the breach and the time when the damage which results from it becomes apparent to the plaintiff.

There are other differences, for example, the question of contribution (the Law Reform Act 1936 only allows contribution between joint tortfeasors); the liability of infants; the survival of actions; and the measure of damages, to name only a few. The consequences of election are thus not merely procedural.

Is there, then, anything wrong in allowing a plaintiff to choose? Those who say that there is base their stand on the idea that while a tortious duty is owed to the world at large, contractual obligations are imposed only upon those who voluntarily undertake to fulfil them. Thus, an architect, for example, who breaks his contractual obligations, albeit negligently, is liable only to his other contracting party, and it is seen as inappropriate to impose upon him the wider tortious obligation.

This appears to accord with authority. However, it is subject to another interpretation. It is submitted that it in fact obscures the reality of the situation. In the case of tort, is the breach not a breach of a duty that is owed to a particular individual, even if he is to be regarded only as a particular object of the general duty? In deciding whether or not a duty of care extends to a particular plaintiff, do not the courts have regard to his individual circumstances?

Similarly, where the breach of obligation is breach of a contractual obligation, although the object is a particular person, does not everyone have a general duty to keep their contractual promises? Taken in this way, the distinction loses much of its force, and becomes less clear than at first might have seemed.

It is submitted that there is no good reason why a plaintiff should not be allowed to choose his remedy, if the facts in issue are decided in his favour. Has not the defendant accepted the risk of such liability by his behaviour?

It could be said, and it has been said, that the distinction may lie in this way: Concurrent remedies are only available where there has been caused physical damage to persons or property, and not where there is only loss of an economic nature. Had this been an operative part of the reasoning of the courts more regard might be had to it, but even in *Bagot* there was physical damage to the plaintiff's property by reason of the faulty drains, and yet the action was held to be contractual only.

A further examination of the statement of Diplock LJ in that case reveals basic misconceptions. The statement could be taken as meaning one of two things: Either it means that the mere presence of a contract excludes a tortious duty which would otherwise exist to the parties to the contract, which is to apply *Winterbottom v Wright* (1842) 10 M & W 109 in reverse, or it must refer to cases in which the tortious duty is not created by the very act of negligence complained of. Taken in the latter sense, it would mean that only contractual of "status" (common callings) relationships are capable of creating obligations to take care. This runs counter to the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. Mention might also be made of *Clay v Crump & Sons* [1964] 1 QB 533, where an architect was held liable to a workman for the collapse of a wall. There was neither a contractual nor a status relationship between the parties in that case.

The result of the narrow view is that a third party who suffers damage as the result of an architect's negligence may be better off, for — as far as damages and limitation are concerned, than the client of the architect. That is a strange result indeed.

Concurrent remedies would obviate the need for the courts, as they must do under the narrow rule, to undertake a search for the gravamen of the action, so as to be able to state which of the alternative remedies must be sought in the action. It is unfair to insist that a man who acts gratuitously can be liable in the wider sphere of tort, while a man who acts for reward can insist that he be sued in contract.

It is submitted finally that to continue with the narrow policy is to remain out of step with the modern policy of allowing a plaintiff to cumulate causes of action and to proceed with that which is most favourable to him. The English Court of Appeal has indicated that it does not regard the allowance of concurrent liability was either novel or dangerous. On the other hand, it is respectfully submitted that the Courts of this country have followed English authority which was either doubtful at the outset or must now be considered to be obsolete.

The wider approach would eliminate much of the hair-splitting and questionable legal argument that is still with us. A defendant may still plead whatever defences are open to him in tort or contract, but he would no longer be able to dictate the kind of claim which the plaintiff is entitled to bring, thereby preventing the plaintiff from achieving the result to which he should be entitled on the merits of the case.