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INTER ALIA

Bastion Point stay of proceedings

Despite what many have said, the decision of the Attorney-General, Mr Wilkinson, to enter a stay of proceedings in respect of the remaining prosecutions arising out of the Bastion Point arrests was thoroughly sensible.

Our Courts at the moment are all overworked and to have insisted that the remaining 170 defendants were solemnly processed, convicted and discharged would have clogged them with trivia and delayed access by others with more pressing causes. It was not a case of numbers causing a breakdown in the Court system but one where no further purpose would have been served by continuing.

Those of a critical bent have said that the stay is unjust to those who were convicted. "Unjust" is a little strong. In this imperfect world we all meet a degree of unfairness and it is something to live with. The same feeling of unfairness arises in the minds of many recipients of notices of prosecution when they discover that they are being prosecuted but the person who collided with their car is not. It is nothing new.

In the Bastion Point case, the unfairness to those who have been prosecuted must be weighed against the unfairness to those whose cases are delayed by a parade of purposeless proceedings that would do no more than confirm that all had equally offended in a manner that touched society so slightly that no penalty need be imposed.

The Courts do not dispense absolute justice. The scrutiny of every misdemeanour is best reserved to judgment day leaving the Courts to deal with those cases of relevance to the orderly running of society. Selecting those cases is an administrative responsibility checked in general by the power of private prosecution on the one hand and the power of the Court to deal with allegations of partiality or bias on the other. Whether it be from the impact of legal aid or other causes both Courts of first instance and those on appeal are facing an avalanche of trifling criminal or quasi-criminal cases. Given that the manpower and money that can reasonably be expected to be devoted to the legal process is limited, at some stage a halt must be called and decisions made as to what offences are of sufficient importance to justify the attention of the Courts. Ultimately that is the Attorney-General's responsibility. If he is to be condemned for staying such pointless prosecutions as these, then when may he enter a stay?

It is interesting that the earlier defendants were convicted and discharged in respect of offences that had their genesis in Maori land claims. Recently ([1978] NZLJ 199) we published the decision *Police v Minhinnick*. The defendant, who was motivated by his deep feelings for the mana of his ancestors had taken, without colour of right, a New Zealand Cross awarded during the Maori Wars. He was discharged without conviction. The Maori land marchers were not prevented from walking along the motorway to Wellington. This contrasts with the treatment accorded a small, respectable group of cyclists who, at the opening of the Wellington motorway extension attempted to ride through the tunnel in protest at the lack of provision for cycles. They were peremptorily and rather rudely ordered off by the police. Do we detect a conscience pricking?

Retrospective legislation vacating a judicial decision

The following letter was written by the President of the New Zealand Law Society, Mr L H Southwick QC, to the Minister of Transport, the Hon Mr McLachlan:

"I have seen the Transport Amendment (No 2) Bill. Because of my concern with the content of the Bill I am writing to you at once and at the same time releasing a copy of my letter to the news media.

"In my opinion the Bill is legally bad for a number of reasons. It is retrospective in its action; it does not exclude from its operation decisions of a competent local appeal authority; it vacates by legislative action a properly made decision of a judicial body; it interferes by legislative action with rights in a party which have already accrued as a consequence of a judicial decision.

"The explanatory note to the Bill is misleading. It provides that a new subsection is added to the Transport Act 1962

> " 'to clarify the provisions determining the appropriate licensing authority for a harbour-ferry service operated in the vicinity of a regional district. The new subsection provides that a harbour-ferry service that is operated between termini all of which are within, or in the close vicinity of, the boundaries of a regional district shall be deemed to be operated within that district.
>
> " 'The Bill also contains consequential provisions relating to validations and the review of certain Licensing Appeal Authority decisions'.

"As I understand the position, the circumstances leading to this Bill are that a Regional Transport Licensing Authority granted a ferry service licence. One who opposed the application took this decision on appeal and a Transport Licensing Appeal Authority allowed the appeal on the grounds that the Regional Transport Licensing Appeal lacked jurisdiction.

"I refer in more detail to the points I have already outlined.

"(1)The Bill is retrospective in its action. It provides that every decision of a Regional Transport Licensing Authority relating to a harbour-ferry service made prior to the Bill becoming law shall be as valid as if the Bill had become law on 29 October 1974. As I understand it, this date is prior to the Regional Transport Licensing Authority decision found by the Transport Licensing Appeal Authority to lack jurisdiction. Broadly retrospective legislation is bad. It can be countenanced in the most exceptional circumstances only. I cannot see those circumstances existing in this case.

"(2)Where retrospective legislative action is justified I believe that it should exclude decisions already made in terms of existing law. In this case, a decision of the Transport Licensing Appeal Authority has been made. That decision is not excluded from the operation of the Bill.

"(3)What is worse, however, is that the Bill vacates by legislative action a properly made decision of a judicial body.

"(4)The Bill interferes with rights accrued to a party in terms of a judicial decision. The Bill cannot be said to be one which corrects an earlier error only because it interferes with rights. If it were a Bill to 'patch up' what is seen as an error in an earlier Act let that be so but it should exclude decisions already taken. The saving power in the Bill does not have this effect.

"In my opinion this Bill should be withdrawn in its present form and I earnestly entreat you to take that action".

The Minister's proposal in this case is particularly serious. Those presenting a case before a judicial body are entitled to a decision according to law and also to enjoy the fruits of that decision. A licence to conduct a business is a valuable asset. The effect of this decision is to deprive a person of a licence properly granted in terms of the existing legislation. It smacks of confiscation without compensation.

One further observation could be added to those of Mr Southwick. Administrative tribunals are established to deal with the detailed application and administration of legislative policy. The type of Executive interference that is occurring here and that we also saw in respect of the Broadcasting Rules Committee ([1978] NZLJ 274) saps confidence in the body concerned, cannot but affect its morale (could we perhaps mention the Local Government Commission) and defeats the whole purpose of vesting tribunals with discretionary authority.

Tony Black

"Look at those idle workmen leaning on their shovels!" is an observation common enough among office-workers. I have never yet seen workmen peering censoriously through the windows behind which executives and typists find time to watch and time them – *From a letter to the Editor in The Times.*

CASE AND COMMENT

Natural justice and prison discipline

The decision of the English Court of Appeal in *R v Hull Prison Board of Visitors, ex parte St Germain* [1978] 2 All ER 198 is of interest to New Zealand practitioners. The applicant sought certiorari (in New Zealand it would have been an application for review) to quash a decision of the Visitors on the ground that in taking their decision imposing punishment, the Visitors had failed to comply with natural justice. A preliminary point was taken that the Visitors were not amenable to certiorari. Surprisingly, the objection was upheld.

There can be no doubt, and in fact the Court of Appeal decided, that the Visitors had been exercising a judicial function. They had also determined a question affecting the applicant and had, if the breach of natural justice was established, exceeded their jurisdiction. On the basis of the *Electricity Commissioners* case [1924] 1 KB 171 and hundreds of later cases the decision of the Visitors would be quashed unless they were shown to be outside the jurisdiction of the Queen's Bench. That in fact was what the case decided. The principal authority, and one which hitherto has been much criticised, was *Ex parte Fry* [1954] 1 WLR 730; [1954] 2 All ER 118 where the Court of Appeal in their discretion refused relief to a fireman who claimed certiorari to quash a decision of the chief fire officer who was responsible for discipline within the fire brigade. The Visitors were seen as a body comparable to other disciplinary bodies such as army commanders and the governor of a prison responsible for maintaining discipline.

In New Zealand a Visitor who errs when exercising disciplinary powers has been held to be answerable for an excess of jurisdiction. Two recent decisions, both of which are unreported, have recognised this. See *Reithmiller v Crutchley* and *Daemar v Hall*, noted respectively in [1976] NZ Recent Law 50 and [1978] NZ Recent Law 37. That note cites Australian and Canadian authorities dealing with prisons, where the court martial analogy was rejected.

The Court of Appeal consisted of Lord Widgery CJ, Cumming-Bruce LJ (who will be remembered for his extraordinary courage in *Commissioners of Customs and Excise v Cure and Deeley Ltd* [1962] 1 QB 340; [1961] 3 All ER 641), and Parke J. The judgment of the learned Chief Justice contains these three sentences in the course of his judgment. At p 202:

> "One knows nowadays that it is not necessary to show a judicial act in order to get certiorari . . . ."

And at p 203:

> " . . . I approach this on the footing that the board of visitors have a judicial task to perform . . . ."

He then cited Lord Parker CJ in the *Lain* case, [1967] 2 QB 864, 882; [1967] 2 All ER 770, 778:

> "The only constant limits throughout [to granting certiorari] were that the body concerned was under a duty to act judicially . . . ."

and concluded that:

> "if one wanted encouragement to extend the scope of certiorari, one could hardly find a more powerful phrase to constitute that encouragement . . . ."

Certainly, Lord Parker was encouraging the extension of the scope of certiorari, but he had insisted that those amenable to the writ be under a duty to act judicially. This limitation was clearly ignored by Lord Widgery. In passing, it should perhaps be pointed out that the amendment made last year to the Judicature Act 1972, s 4, enables an application for review to succeed and for relief in the nature of certiorari to be granted even if the function is not judicial.

Cumming-Bruce LJ expressed himself as having "derived a growing delight" at the extention of the rule of law by the great writ of certiorari. He obviously was reluctant to exclude the Visitors from the scope of the writ. His reasoning appears to have been that because the Governor and others with disciplinary powers are exempt, the Visitors should also be beyond review. There is, as is conceded, a sense of urgency in some cases where disciplinary powers are exercised, but urgency cannot in itself be the basis for the immunity.

In *De Verteuil v Knaggs* [1918] AC 557 the Privy Council itself rejected such an assertion and the House of Lords in *Vine v National Dock Labour Board* [1957] AC 488 decided that disciplinary powers affecting dock workers were reviewable. It is to be hoped that New Zealand will prefer those authorities to the *Hull Prison Board of Visitors* case. The conclusion there was not justified by *ex parte Fry* where relief was

refused in the discretion of the court, not because the defendant was outside the scope of the remedy. There is also the judgment of *Daemar v Hall* and the authorities there cited which reach the opposite conclusion.

JFN

LEGAL PROFESSION

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

The International Commission of Jurists has decided to establish at its headquarters in Geneva a Centre for the Independence of Judges and Lawyers (CIJL).

The International Commission of Jurists is a non-political non-governmental organisation having consultative status with the United Nations, UNESCO, ILO, and the Council of Europe. It has been working in the international field for over 25 years in the promotion of the Rule of Law and the legal protection of human rights. It has always considered the independence of the legal profession and of the judiciary to be of primary importance for maintenance of the Rule of Law.

Unfortunately in an increasing number of countries, and on an increasing scale, serious inroads have been made into the independence of the judiciary, and practising advocates–particularly those who have been engaged in the defence of persons accused of political offences–have been harassed, victimised, arrested, imprisoned, exiled and even assassinated by reason of carrying out their profession with the courage and independence that our profession expects. In some countries this has resulted in a situation where it is virtually impossible for political prisoners to secure the services of an experienced defence lawyer.

The objects of the Centre are:

(1) to collect reliable information from as many countries as possible about

(a) the legal guarantees for the independence of the legal profession and the judiciary;

(b) any inroads which have been made into their independence;

(c) particulars of cases of harassment, repression or victimisation of individual Judges and lawyers;

(2) to distribute this information to Judges and lawyers and organisations of Judges and lawyers throughout the world;

(3) to invite these organisations in appropriate cases to make representations to the authorities of the country concerned, or otherwise take such action as they see fit to assist their colleagues.

There are many possible actions which organisations could take. The following are some examples:

- writing or cabling to the Minister of Justice of the country expressing concern and asking for further information;
- writing or sending a deputation to the Ambassador of the country;
- making representations to one's own government or members of parliament asking them to make known the concern of the members of the organisation;
- passing resolutions at annual or other meetings and forwarding them to the government concerned;
- writing to lawyers' organisations in the country expressing concern and support;
- sending an observer to the trial, if there is one, of the persecuted lawyer;
- sending one or more members to the country concerned to contact lawyers, ascertain the facts more fully and make representations to the government;
- in most cases, press statements could be issued outlining the facts of the case and the action taken.

An initial grant has been secured from the Rockefeller Brothers Fund in New York to launch this project.

The International Commission of Jurists is glad to invite your organisation, or one of its committees, to co-operate in this project, either by supplying information about erosions of the independence of lawyers and judges in your own or in other countries, or by taking action in appropriate cases brought to your attention.

If your organisation is willing in principle to participate, could you please write and state the name and address of the person to whom communications upon this subject should be addressed. A favourable reply does not, of course, commit your organisation to take action in any particular case. That will have to be considered at the appropriate time on a case by case basis. Replies should be addressed to

Secretary, CILJ
International Commission of Jurists
P O Box 120
1224 Chene-Bougeries/Geneva
Switzerland.

ACCIDENT COMPENSATION

OCCUPATIONAL DISEASE AND ACCIDENT COMPENSATION

By DAVID J COCHRANE, *solicitor.*

The Accident Compensation Act 1972 did not depart substantially from the provisions of the Workers' Compensation Act 1956 (as amended) in dealing with occupational disease. The essential elements of the tests under s 67 of the Accident Compensation Act and s 19 of the Workers' Compensation Act are the same, namely that to be compensable the disease must have been "due to the nature of any employment in which the earner was employed". There are various tests and formulae to be applied such as prescribed periods during which the disease must have been contracted and determining the date which is to be taken as the date of the accident but the point of greatest interest is the interpretation of the phrase quoted above.

The Commission applies a test said to be derived from two Australian High Court decisions. *Commonwealth v Bourne* (1959–60) 104 CLR 32 and *Commonwealth v Thompson* (1959–60) 104 CLR 48. That test, as set out in Appeal Authority Decision No 40 [1977] 1 NZAR 377 is:

> "A disease is 'due to the nature of' a claimant's employment only if the following tests are met:
>
> "(a) The work engaged in by the employee must have an inherent tendency to cause or aggravate that particular disease.
>
> "(b) This tendency must exist because the work itself possesses, or contains, a particular property or characteristic which gives rise to that disease.
>
> "(c) Such tendency, property or characteristic must be peculiar to that work and not found in employment generally.
>
> "(d) Because of that peculiar and distinctive tendency, property or characteristic, an employee is faced with a special risk of contracting that disease, a risk that is not similarly faced in other employment.
>
> "(e) This tendency, property or characteristic does not have to be present throughout the whole of the employee's work, but may exist only at a particular time or in a particular place" *(a).*

(a) Although those tests refer to employees only the section in fact applies equally to the self- employed. The actual term used in s 67 is "earner" and that term is defined in s 2 of the Act as meaning an employee or self-employed person.

In fact the test developed by the Commission from the test laid down in the Australian cases may have to be interpreted in a manner closer to the more subjective test adopted by Archer J in *Lynch v Attorney General* [1959] NZLR 445 since the tests permit recognition as occupational disease of a disease which is peculiar to the particular employment of the individual. However the source of the test is not as important as its terms and application. To date there have been six Appeal Authority decisions on s 67. Four have been decided in favour of the Commission and two against, and it is one of the latter decisions which is of most interest because it contains an analysis in some detail of the tests the Appeal Authority considers appropriate.

However before examining these cases it is necessary to examine the *Lynch* case in some depth as well as the *Bourne* and *Thompson* decisions in order fully to understand the basis for the Commission's test and the approach taken by Blair J in the cases which have come before him as the Accident Compensation Appeal Authority.

New Zealand workers' compensation

The *Lynch* case involved a claim under s 19 of the Workers' Compensation Act by a miner who was suffering from dermatitis. Archer J rejected a contention that the plaintiff had to show that dermatitis was an inherent risk of the occupation of mining in addition to having to show that in his particular case the dermatitis was due to the conditions of his employment.

Because of this ruling it was necessary to explain what was meant by the words "due to the nature of" and this Archer J did by reference to the origins of s 19. Prior to 1947 the Act contained a schedule of conditions which could, in appropriate cases, constitute disease due to the nature of employment. As from 1 April 1948 the provisions were liberalised by the removal of the schedule and thenceforth the words "due to the nature of" retained their significance but in a slightly different context. Their true importance lay in that they enabled an employee to claim compensation where he had been employed in an industry or occupation within the relevant

period even though he had had a number of employers. This mattered only if he could not show that the disease was due to the employment with the latest or current employer. The very nature of some conditions means that they cannot be attributed to any one employer but may readily be attributable to a type of employment as they build up over a period.

The employer, in this case the Crown, had contended that Archer J was constrained to accept the argument he rejected by the authority of *Blatchford v Stadden and Founds* [1927] AC 461 but Archer J distinguished that case from the one before him:

> "The effect of *Blatchford's* case, as I understand it, was that where owing to the nature of the disease and the circumstances of his employment a worker could not identify the time when or the employment in which the disease was contracted, it was sufficient for him to show that he had been last employed by the defendant during the preceding twelve months in work of a kind to which the disease could be attributed. The Court had no occasion to consider, and did not say or, I think, imply that a worker could not succeed against his only employer if he has satisfied the Court that his industrial disease was, in fact, caused by his employment with that employer, though not an inherent risk of that employment".

Archer J thus concluded that *Blatchford's* case did not support the contention that the employee must satisfy the Court not only that the disease was due to the nature of his particular employment but also that it was due to the nature or an inherent risk of that type of employment in general.

Archer J said of the onus which the Crown claimed rested on the plaintiff:

> "I cannot believe that the Legislature intended to place such an intolerable onus on a claimant for compensation .... I do not believe the Legislature intended to make the task of a claimant more difficult than before by requiring him now to prove that the disease was an inherent risk of the occupation within which he was employed".

Australian workers' compensation

Mr Bourne was a Sales Tax Inspector who died of heart disease which his widow contended was aggravated or accelerated by his work and in particular one investigation which had seemed to worry him a lot.

Dixon CJ ruled out the claim for three reasons:

(i) The evidence simply did not support the contention that there was any link between the occupation and any psychological condition of worry that might have contributed to or aggravated the disease.

(ii) It was not established that there was any acceleration of the disease due to the nature of the plaintiff's work.

(iii) He did not consider that the phrase "due to the nature of employment in which the employee is engaged" covered an employment which had no particular tendency to give rise to a disease and had no incident adjunct or quality which rendered those employed in it particularly susceptible to the contraction, acceleration or aggravation of the disease.

It should be noted that the learned Chief Justice stopped short of holding that if an individual's particular employment gave rise to a disease he would still have to show that employment in general had the tendency to cause that disease. Indeed as Archer J pointed out there have been a number of cases in which an individual has recovered compensation for disease due to his particular employment even though there was no way it could be said that disease was in any way connected with that type of employment in general.

Incidentally the explanation given by the learned Chief Justice as to why the words "due to the nature of" were used accords with that given by Archer J in *Lynch's* case. However, it must be remembered that an employee only had to invoke the general nature of the employment test if he had had a number of employers within the same broad occupational category and could not properly attribute the disease to employment with any particular employer.

Fullagar J, without resort to authority, concluded that the claim must fail because it was not a feature of employment as a taxation officer to cause or affect a pre-existing heart condition. That tendency was no more of the nature of that employment than of any other responsible employment.

Taylor J held that a disease could not be said to be due to the nature of employment merely by showing that a disease which afflicted a particular individual was aggravated or accelerated by his employment. However, the next step in the learned Judge's reasoning is a little difficult to accept for he concluded that to hold other than he did would be to admit conditions such as worry and anxiety leading to aggravation or acceleration of the disease when these were properly due to the "nature" of the employee. With great respect, it would appear that this approach ignores a basic principle of workers' compensation, namely that an employer had to

take his employee as he found him complete with pre-existing conditions and predispositions, and overlooks the question of whether the disease was due to the nature of employment.

Taylor J concluded that the history and substance of the provision leads inevitably to the conclusion that it deals with "occupational diseases" and few would disagree with that proposition but the question still remains as to whether it is necessary to show that the employment in general possesses the tendency as well as the particular employment of the individual.

Menzies J had this to say of the words in question:

> "The words 'the nature of the employment' are significant and indicate that the appropriate enquiry is concerned with the nature of the employment and its relationship with the disease which brought about death rather than how the disease was, in the particular case, contracted or accelerated".

However, the only authority cited by Menzies J is *Blatchford's* case which Archer J successfully distinguished and it is arguable that while the words are indeed significant their significance could equally be that the enquiry must be whether the nature of the particular employment as opposed to some peripheral matter, (such as working beside an employee with a contagious disease), can be incriminated.

Finally, Windeyer J decided the issues on the preliminary point that the facts were insufficient to require argument as to the proper legal interpretation to be applied.

Thompson's case

The facts in this case were not materially dissimilar to those before the same High Court in *Bourne's* case.

Dixon CJ held that the plaintiff could not succeed for the same reasons as he had given in *Bourne's* case. In the course of his decision the Chief Justice lent cautious support to the proposition put forward by counsel that it is not necessary to show that the actual employment caused the disease if it could be shown that the disease was attributable to the nature of the employment in which the employee worked.

Fullagar J in a very brief judgment merely stated that his reasons for dismissing the plaintiff's case were the same as they were in *Bourne's* case and Taylor J took a similar approach to the situation.

Menzies J restated his approach which was that even if the responsibilities of his employment did aggravate or accelerate the disease, the disease which eventually caused the death was not due to the nature of his employment. His Honour remained of the view that the claim would have to fail because it could not be said that the disease which killed the deceased was incidental to the class of employment in which he was employed.

Windeyer J concurred in finding against the plaintiff. His reasoning was that since coronary disease was not a disease due to the nature of the work of tax collectors, the claim must fail. His Honour's judgment was considered in some depth by Blair J in the *Dryden* case.

Observations *(b)*

There are some problems involved in determining the proper weight to be given to the decisions of the Australian High Court in the New Zealand situation.

Although such decisions are normally of high persuasive authority there are certain features which reduce the applicability of these particular cases to New Zealand law.

Firstly, it can be argued that the observations as to the law are mere obiter dicta, being prefaced on almost all occasions by a finding that in any event the necessary evidence as to causation was lacking.

Secondly, as Blair J points out in the *Dryden* case, the wording of the Australian and New Zealand statutes differ in at least one significant respect.

Thirdly, the Australian Judges, and Archer J in *Lynch's* case have given great emphasis to the changes made to the legislation some 30 years ago in each jurisdiction. Since then the New Zealand system has undergone another change with the Accident Compensation Act, for although that Act substantially re-enacts earlier provisions, there are some changes, the most important being that the self-employed are now included as well as employees.

Fourthly, there is the decision of Archer J in *Lynch's* case which gives an analysis of the history and meaning of the term "due to the nature of employment" and reaches a conclusion which, with all respect to Windeyer J is not periphrastic. Blair J in *Dryden's* case has also produced an interpretation which could not be said to fall into that category.

On the other hand, Blair J in *Dryden's* case purported to give such weight to these Australian decisions that he went so far as to suggest that if Archer J's decision in *Lynch's* case had been given after the Australian decisions instead of before them then he would have qualified his statement that the Act intended to allow a claim to be made if a disease could be shown by appropriate evidence

(b) For a detailed discussion of the standing of Australian decisions in New Zealand see "Australian Precedents in New Zealand Courts", DL Mathieson, 1 NZULR 77.

to have resulted from the person's employment.

The problem of the proper weight to be given to the Australian decisions is to some extent compounded by the fact that while Blair J suggested that the *Lynch* approach may not be wholly appropriate without some qualification he seemed to adopt and apply that approach in *Dryden's* case itself. A similar approach can also be seen in *Johnstone's* case (Decision No 120) and perhaps even in the earlier decision in *Rosson's* case (Decision No 50).

It is submitted that the approach adopted in *Dryden's* case and subsequently followed is more appropriate than the one derived from the Australian cases. As has been shown the reasoning in the Australian cases is by no means unanimous and it is the writer's view that because of the different approaches taken by the Judges and the nature of the conditions involved these cases are of little precedent value in New Zealand. It is pertinent to observe that both cases involved cardio-vascular episodes, a condition for which a special statutory provision has been made in New Zealand. It is true that the statutory definition in s 2 is subject to an exception in respect of occupational diseases. The inter-relationship of s 67 and the special definition of personal injury by accident has never been tested before a judicial authority in New Zealand and it must be conceded that, by virtue of s 67 (8) and the terms of partial definition of "personal injury by accident" itself it would be possible to present a claim for a cardio-vascular episode under s 67 and its success or failure would depend upon the strength of the evidence rather than the points of law.

Decisions of Appeal Authority on s 67 *(c)*

Decision No 40: Sprott

The appellant had developed a severe carpel tunnel syndrome and claimed this was caused by her having to lift heavy film projectors several times a month in the course of her employment. Blair J accepted, apparently without hearing any argument on the point, that the incapacity was caused by disease. However, he rejected the appeal against the Commission's refusal to accept the claim on the grounds that the work did not contain a peculiar property or characteristic which gave rise to the disease. The carrying of heavy weights was acknowledged as common in many types of employment and Blair J pointed out that it could not be suggested that such jobs necessarily carried with them a tendency to cause the condition. There was no special risk created by the employment, nor was there anything unusual in the system of work which could give rise to an inference that the disease originated there.

The point of greatest significance in the decision is that Blair J accepted and adopted the interpretation given in the Commission's Medical Newsletter and in particular accepted the statement of the test set out above.

Decision No 50: Rosson

This decision against the appellant depended very much on the evidence, or rather the lack of evidence provided. The appellant had been a cleaner for many years and the claim was in respect of dermatitis allegedly caused by the detergents used. The appeal failed because Blair J found that the work situation as described to him did not disclose a situation of special risk of dermatitis. His Honour emphasised that he was not ruling that cleaners in general could not sustain claims for dermatitis under s 67 but merely that the evidence in this particular case did not disclose a sufficient connection. Indeed in a later case (Decision No 79) he used a similar situation as an example of a condition which could in different circumstances attract entitlement.

In the course of his decision Blair J laid great emphasis on the point that it is not sufficient to merely show that the disease was due to employment since effect must also be given to the words "the nature of". Support for this was found in three passages from the Australian cases cited earlier. In those cases themselves and in a House of Lords speech by Lord Sumner cited in those cases it was stressed that there must be something in that class of employment generally which tend to cause the disease before a disease could properly be said to be due to the nature of employment.

Dixon CJ in *Bourne's* case cited and speech of Lord Sumner in *Blatchford v Staddon & Founds* [1927] AC 461 where Lord Sumner said

> "In construing the Act effect must be given to the words "to the nature of". Their meaning cannot be the same as if the section had simply said "is due to" any employment. I think they are inserted because this part of the section is not concerned with something arising out of the particular service of the particular employer sued, but with results which are incidental to the class of employment *in which the workman has served several employers".*

The words in italics do not appear in the passage as cited by Blair J in Decision No 50 but they appear in the passage cited by Dixon CJ and are crucial to an understanding of the likely reason

(c) References to reports of the decisions are footnoted at the end of the article.

why the words "the nature of" appear in the statutory provision. Archer J in the case of *Lynch v Attorney General* [1959] NZLR 445 gives an interesting analysis of the history of what is now s 67 and demonstrates that the use of the words "due to the nature of" were inserted so as to clarify the position where various employers or employments within the same industry were involved. This became a matter of some importance in workers' compensation law in deciding questions of onus of proof once the schedule system for occupational disease was abolished.

Decision No 79: Dryden

This is by far the most significant decision under s 67. The appellant was a radio and television show host who lost his voice during or shortly after one of his daily three hour radio talkback shows. The condition was subsequently diagnosed as laryngitis. The appellant based his claim not on any inherent characteristic of broadcasting but on the nature of his particular employment. At the appeal hearing counsel for the Commission conceded that laryngitis was a disease.

The particular question Blair J posed himself was "Whether in the particular circumstances of this case the disease of laryngitis suffered by Mr Dryden was 'due to the nature of [his] employment' ". It can be observed that this is indeed a very subjective approach and may not be entirely consistent with the passages from the House of Lords and Australian High Court cases upon which his Honour relied in *Rosson's* case.

Blair J was certainly alert to this point, for after an analysis of the history of s 67 he commented on what he considered to be an important distinction between the Australian and New Zealand provisions and gave his interpretation of the New Zealand provision.

> "Our Act requires the interpreter to have regard to the nature of *any* employment in which the employee was engaged at the particular time, while the Australian Act refers to *the* employment. My opinion is that the words 'of any employment' have a less restrictive meaning than 'the employment'. In other words, in Australia an employee can recover only if the particular class of employment has properties which tend to infect persons with a disease, whereas, *in New Zealand it is sufficient if any particular employment has this tendency and the employee will not be debarred from recovering because other employments in the same class do not have this tendency*. In any event it is plain that in New Zealand it is a condition precedent to the recovery of compensation that the employee establishes that his particular employment has a certain property or characteristic which tends to cause the disease complained of".

It is submitted that the approach taken by Blair J is not consistent with the interpretations given by the Australian High Court, and, of course, there is no compelling reason why this should not be so.

Blair J specifically rejected the proposition that it was in the nature of broadcasting to cause laryngitis and held that proof that a broadcaster contracted laryngitis in the course of his work did not automatically entitle him to cover under s 67. However, his Honour ruled that the present claim was acceptable because the particular employment of the appellant was of such a nature that it caused the disease. On the facts there were found to be special features of the appellant's employment, which though not abnormal for him did cause the disease.

The Commission's tests, laid down in its medical newsletter, are capable of a construction consistent with the approach taken by Blair J, though it is doubtful if the Australian High Court decisions can fairly be described as their inspiration. It should be noted that item (a) of the Commission's test requires that the work engaged in must have an inherent tendency to cause or aggravate the particular disease. As Blair J observed in *Rosson's* case the words "inherent tendency" were not specifically used in the earlier Court judgments and the tests laid down in the newsletter are relevant only in so far as they reflect the relevant law. However, this part of the test is not inconsistent with the approach taken by Blair J so long as it is read as applying to the particular work of the individual and not to that type of work in general. Paragraph (e) of the test certainly lends weight to such an interpretation.

Decision No 83: Cvitoka

This was a laryngitis claim by a schoolteacher and Blair J summarised and applied the interpretation of s 67 that he had developed in Decision No 79. As part of that summary it was said:

> "It follows I think that in New Zealand a worker may recover for a 'disease injury' provided he can show that the work he was engaged in had characteristics in it which tended to cause the disease complained of".

In the particular case it was held that there was insufficient evidence presented to establish a causal connection between the employment and the disabling condition and the appeal failed on that ground.

Decision No 103: Owen

This decision highlights the confusion surrounding the proper approach to s 67. Mr Owen

suffered a nervous breakdown and it was accepted that his illness was a disease and that worry associated with his work contributed to it. Counsel for the appellant urged that the law as stated in *Lynch's* case should govern the position and one might have thought that in view of the Authority's decision in *Dryden* he was on fairly safe ground. After all, in that case the Authority had found that it was not in the nature of broadcasting to cause laryngitis but nevertheless allowed the particular claim as being due to the nature of that broadcaster's particular employment and in the course of so doing had said:

> "I think that if there is something in the nature of a particular piece of work which an earner is doing which will have the effect of triggering off a disease then that earner will be within section 67 even though in ordinary circumstances his kind of work will not have the effect of promoting the disease".

Such an approach can scarcely be regarded as consistent with the *Bourne* and *Thompson* approach and indeed in both *Dryden* and the present case the Authority had put forward reasons why the Australian cases might not have direct application in New Zealand. Nevertheless, the appellant in this case failed. Blair J noted that the significance of the Australian cases is that they show there is a need to give meaning to the words "the nature of" as well as "due to" and ruled that the views taken by the Australian Judges on the meaning of "in the nature of" were applicable to the New Zealand statute and should be considered as supplementing the views taken in *Lynch's* case.

His Honour found that a nervous breakdown must be regarded as a common feature of personal and business life. He then held that even if the appellant's nervous breakdown was due in part to the effect on his particular personality of stress encountered at work it could not be regarded as due to "the nature of" his employment and the appeal was dismissed.

Decision No 120: Johnstone

This case involved dermatitis which is one of the most troublesome conditions encountered under section 67. The appellant developed dermatitis and attributed the cause to a liquid encountered in his engineering employment. The Commission rejected the claim and the appellant did not succeed at the review hearing apparently because it was thought that the work may have aggravated the condition but was not the primary cause. On this basis it was held that the condition was due to the nature of his constitution rather than the nature of his employment.

Blair J gave a different interpretation of the facts and the law. He concluded that the evidence that the work provoked the dermatitis was strong, and that there was a relationship between the work and the dermatitis. This was not necessarily a total contradiction of the findings of the Commission and Hearing Officer but it was certainly a strong shift of emphasis.

On the question of law His Honour restated the view expressed in *Dryden's* case that *Bourne* and *Thompson* must be applied cautiously to the New Zealand provision in view of the slightly different wording and stated:

> "In my opinion the effect of s 67 read in the light of its history and particular phraseology gives cover to an earner who can establish that 'any' employment in which he was engaged had some characteristic or property in it which in fact produces the disease complained of. I accept that in this case the 'emulus coolant' will not necessarily cause a worker to contract dermatitis. However, I am driven to find that as regards this particular appellant it did in fact provoke the condition and in my opinion the appellant is brought within the protection of the Act".

Conclusion

It is submitted that the meaning being given to the words "the nature of" is that while the disease may be peculiar to the particular employment of the individual rather than having to be commonly found in that employment, it must still be something peculiar to that employment and not merely incidental to it. Blair J clearly illustrated this with an example in *Dryden's* case. His Honour took the case of a bank clerk who contracts influenza from those working with him. It is true that the disease was due to his employment in the sense that had he not gone to work he would not have caught the disease. However, the influenza could not be said to be due to "the nature of" his employment because his employment had no special characteristics likely to promote the disease.

There can be little doubt that the interpretation given by Blair J is the more sensible and acceptable one. The alternative seems to involve an approach which could deny cover to a person whose disease was undeniably due to the nature of his particular employment merely because it could not be said that, in general, that disease could be due to the nature of that type of employment.

It may well be that the difference between the two approaches is more apparent than real. It may be no more than a matter of semantics. For example, an electrician who contracts rabies while working at a dog pound might appear to be included under the *Dryden* case approach but excluded under the Australian approach on the grounds that it is not

in the nature of employment as an electrician to contract rabies. However, if the approach is refined and one asks "Is it in the nature of employment as an electrician in a dog pound that rabies might be contracted" the answer may well be different and the decision the same as under the test formulated by Blair J.

Whether or not this is the case, the approach taken by Blair J is to be applauded as the careful steering of a steady and recognisable course between the extremes of allowing all claims in which employment is even remotely implicated and disallowing claims which warrant coverage merely because of adherence to an objective but potentially unrealistic test which, in the words of Archer J, would place an "intolerable onus" on the claimant.

ACC Appeal Authority citations

No 40 Sprott:	1 NZAR 377
No 50 Rosson:	1 NZAR 295: ACC Report March 1978, p 47
No 79 Dryden:	1 NZAR 355: ACC Report March 1978, p 44
No 83 Cvitoka:	1 NZAR 359: ACC Report March 1978, p 46
No 103 Owen:	1 NZAR 446
No 120 Johnstone:	1 NZAR 438

THE WHEELCHAIR

BE D'Silva *reminisces on a lawyer's life in Uganda.*

In using this epitome for ruminating on a personal era that has long terminated, the strains and stresses, the pangs and pleasures and generally the atmosphere of the proceedings in Court are not needlessly heightened or dramatised but the feeling of reliving rather than re-enacting the initial aches and pains, intervening suspense and the final felicity or frustration is recreated.

It was a case of Red Horse Petrol where the accused was a manager. It was owned and run by Indian organisations, over a period of time, and incorporated as a limited company. A prodigious fraud was being perpetrated and was being cunningly continued. Who was that someone purloining a ticket to quick affluence? Our client who had the overall supervision had signed requisitions and was practically the sole individual at whom an admonitory finger could be pointed for everything that went wrong. A finger of guilt is a different kettle of fish from proof of the offence of theft and criminal fraud these being the subject matter of several Counts. All such crimes, whatever the amount, were tried before a Senior Magistrate or a Chief Magistrate and not before the High Court on an indictment. En passant, though I conducted a practice before civil, criminal Courts and miscellaneous tribunals, the fees were paid to my employer. He was briefed in this instance. I got all the available information from the accused and his witnesses and perused whatever correspondence had been exchanged between him and the directors of the company. Absence of any knowledge of what the prosecution might produce at the trial was an unsettling feature.

Just a week before the trial a contretemps appeared. My employer's personal business affairs and domestic problems entailed a short trip to London. He tried his level best to postpone his flight. Our client's interest was undoubtedly paramount. The dilemma was – If the visit to the UK could not be cancelled who would defend the accused. The obvious solution was to apply for an adjournment on the day of the trial. The Office of the Director of Public Prosecutions was verbally notified that we would move the Court. I could not make such an application because I was going to be before the Chief Justice to receive judgment in a murder case. If convicted, capital punishment being mandatory, he would pronounce sentence of death with the Black Cap on his head. Sanguine expectation of conviction of manslaughter, if not an outright acquittal, would be a fair reckoning.

Fortunately for me the prisoner was found guilty of manslaughter. A short prison sentence was imposed after hearing the Crown Counsel and me in mitigation. On my return to my office at about 11 am, the law clerk in charge informed me that the prosecution had opposed our application and adjournment was refused. My colleague from the office had appeared in the Magistrate's Court that morning.

Main grounds for adjournment – (1) accused was suffering from heart ailment but the medical certificate had stated that he could face his trial in a wheelchair; (2) accused wished to be defended only by my senior who suddenly had to fly to the UK; (3) counsel did not know the facts of the case and his instructions were limited to applying for the adjournment only. Prosecution had opposed on the ground that another lawyer could easily de-

fend our client. The Court not having granted the application, counsel applied for leave to withdraw. The trial proceeded without a defence advocate. I thought this was outrageous especially because we had been paid our fees. He had a right to be defended by a barrister of his choice.

The law clerk and the accused were from the same section of the Indian community. He felt that if I was willing to take over his defence at the eleventh hour he would persuade our client to signify his consent. There was no time or room to manoeuvre except to come in myself. The office rang up the Registrar to say that I would apply for another adjournment with a view to defending the accused. By the time I arrived in Court it was about 11.30 am. The counsel was my friend. He only agreed to an adjournment if it was for a day. By the way, the prosecutorial system before a Magistrate did not need a qualified lawyer to represent the state. He appeared as a rule whenever a charge was serious, involving law points or when a prisoner had a legal adviser.

When I walked into the Court I could not believe my eyes. Our client was in a wheelchair all wrapped up in two or three blankets as if he had high fever and required their warmth. His prestidigitation did not hoodwink his doctor who certified him reasonably fit to take his trial in a wheelchair, though he was really suffering from heart complaint, nor did elaborate masquerade fool the Magistrate in Court. I did not think he looked moribund with all his malingering tactics. He had, I was told, ignored advice coming cavalierly from the Bench to engage another counsel.

I accumulate here my musings as much as possible in the form and manner the scene could be depicted as if a reporter had been present.

Defence I apply for leave to defend the accused. I am conversant with all the facts because I have a recorded statement from him and his witnesses.

Court This is unprecedented. One member of the same firm is in the UK. Another member applies for leave to withdraw after the application for adjournment failed. Yet again, you, another member of the same firm apply for leave to be placed back on record. This is like a farce (he had exquisite sense of humour and hyperbole). Even if I am indulgent, will your client agree. I had indicated to him that I would grant an adjournment to enable him to engage another counsel.

Accused Yes your honour. I accept him.

Defence It is almost noon and if the Court could adjourn the trial till 9 am tomorrow I could study the brief fully and get ready.

Prosecution I have no objection if the trial will definitely resume tomorrow.

Court I am aware of the difficult predicament this defence counsel is in. Application granted. Trial tomorrow at 9 am. Accused's bail extended till then.

If it was a charade, it had paid off. My office held the view that we respect the medical certificate and treat him as a sick person. If the prophet will not come to the mountain, the mountain must got to the prophet. So I landed in his house. We had a long conference. I collected all documents in his possession including a letter in Urdu for translation in English. Wait-and-see was my approach.

Next day after two or three formal witnesses gave evidence a physician who was one of the directors testified at great length incriminating the accused deeper and deeper. In his litany of allegations and accusations, he swore that he had absolutely nothing to do with the business of the limited company. He was not aware of any defalcations during the management by his nephew from whom the accused had taken over. Trial went on for a week. In the meantime a search with the Registrar of Companies disclosed that at least once this archvillain had signed company's return. Authenticity of the signature was vouched for by our client. On the other hand it could have been a facsimile of his signature. If so it would be a forgery. In cross-examination he insisted that he had not signed any returns at any time. Before confronting him with his signature I showed the document to the counsel for State. It was touch and go for me. The witness fumbled, faltered, hummed and hawed literally whispering his answer "Yes, I signed it but I had forgotten." With this pièce de résistance the monumental liar, before allowing himself to be further enmeshed, admitted writing the Urdu letter to his nephew from which additional inferences adverse to the prosecution and the witness could be drawn. This uncorroborated evidence alone from one who was prepared to swear black was white was not sufficient. Prosecution revealed superficial investigation in the flagitious activities either of the company or its directors. Accused testified on his own behalf and called witnesses.

Paradoxically enough my leader flew back to Entebbe within two weeks in time before the defence closed and even though the accused wished me to carry on I brought him in, however, for summing up which was indeed impeccable.

This spectacle years later revived itself before me on the Bench. In a quasi-criminal proceeding under the Public Health Act certain major structural alterations had to be carried out by a certain date. Failure to obey the Court order could entail a fine per diem until the work was completed to the satisfaction of the Health Officer. Two o'clock in the afternoon was normally a time for new pleas in criminal cases and any other serious contraventions. A person with his one leg in plaster was

seated in a wheelchair. I inquired if he was in a criminal case and the reply was that he was representing an absentee landlord who was abroad on a holiday. Instead of walking on crutches he preferred to be pushed in a wheelchair by his relations.

Theft, burglaries, robberies, rapes and homicides were quite frequent. With pleas of "not guilty" recorded in some 10 cases, further remand for two weeks ordered, next case, offence of rape was mentioned. Prisoner's name was called more than three times. No response from the dock. In a deathlike silence I asked the police prosecutor where the accused was. His answer, "Prison officer should know as the prisoner was remanded in their custody for a fortnight". I addressed the prison warder. One might hear a pin drop. At long last he stood up and looked round paralysed with fear. Still no reply. When he found his voice he muttered in a low tone so that none but I could hear him "Sir, please do not write my name in your file. As usual we walked with the prisoners to the Court. As we were ushering them into the Court cell some military men came to us. One had a gun pointed at us and ordered us to release him. We undid his handcuffs and he was whisked away in a military vehicle against his protest." These were desperate, harrowing hours for the prison, police, and my Court establishment. Prisoners regularly trudged a quarter of a mile from the jail to this cell with left hand of one prisoner fettered to right hand of another for lack of transport.

I remember this cell very well. It was directly under my Court with a staircase leading from it to the dock. It was also a microcosm where remand prisoners in their privacy when no prison officials could eavesdrop discussed their defences in keeping with their unwritten code of tricks and artifices or invented their escape routes. The official who kept surveillance over his charges had to capitulate to the menacing firearm. Whether this was an abduction to liberate the prisoner from the clutches of the law or to despatch him on the mandates of the self-proclaimed executioners in the name of martial law still retains grandeur of inpenetrable mystery. I meticulously avoided any reference to the name of the prison representative in the Court record to save his skin from any show of Lex Talionis. I felt everyone had a passage through hell. On such inflammatory issues reticence was golden.

The monstrous truth is that this is not an apocryphal tale but all this is recorded in the relevant Court file open for inspection by anyone on payment of fees. I would not breathe a word even in New Zealand if this was a confidential communication. It was a grim reminder to a Magistrate there of dangers lurking in the prison cell beneath his Court or round the corners of the Courts in the course of his functions. Any picture of the second wheelchair inextricably part of the same day's work would, surely, be mutilated without talking about the Court prisoner held captive.

The explosion of the Mercedes Benz with petrol murderously poured over it in which Michael Kagwa, President of Industrial Court, his hands clutching the steering column was incinerated unrecognisably save for the gold tooth to establish his identity, was still reverberating, as the first casualty in the Judiciary. The late Chief Justice Benedicto K Kiwanuka who invoked the weight of his office in the pursuit of inquiries into the unheard of capture of the remand prisoner from Court premises, instituted by his British predecessor, was himself carried away at gun point from his chambers and allegedly put to death. Not long ago Cabinet Minister Oryema who was Inspector General of Police under Dr Millan Obote and before the coup d'etat by President Amin, and with whom I had a few brushes and skirmishes when he was prosecuting criminal cases as Sub Inspector of Police was reported dead. My close association with them in the Courts of law makes such tragedies all the more poignant, and professional education had advanced apace.

The offender in the wheelchair on a fraud charge was acquitted of all counts due to lack of evidence of juggling of accounts. He was always profuse on his expression of thanks. The defendant in the wheelchair, an eye witness to the menacing future for the peace-loving, no less than law-abiding residents got his adjournment to comply with the requirements of the Health Office. He went home happy. To my staff any military uniform was a bête noire. There was a je ne sais quoi about this sinister operation which rendered my chair uneasy to sit upon, to continue to administer justice "without fear or favour". It is fair to admit that I had police protection when I asked for it. My nightmare has lingered only to magnify to a savage reality of remorseless extermination of innocent villagers, tribes, civil servants and Africans by the insatiable appetite of killers.

Nemesis, goddess of retributive justice overtakes all evildoers as history, eloquently demonstrates, but for those who ask "when" and "how" I recite with the Ugandans in the supplication for return of law and order:

> "Though the mills of God grind slowly,
> yet they grind exceeding small;
> Though with patience He stands waiting,
> with exactness grinds He all" (Longfellow).

Stuttgart: A judge ruled today that lawyers at the trial of the left-wing lawyer Klaus Croissant must undo their trousers and turn out their pockets for security checks before entering court – *The Times.*

CONSTITUTIONAL LAW

THE ATTORNEY-GENERAL*

In Robert Bolt's "A Man for All Seasons", Sir Thomas More remarks to Richard Rich, made Attorney-General for Wales in return for perjured testimony *(a)* at More's trial, "Why, Richard, it profits a man nothing to give his soul for the whole world . . . But for Wales —!" The dramatist's line has (if the jibe against Wales is passed over) some point for a consideration of Attorneys-General. Of all public officers the Attorney-General is expected to keep his soul, even in difficult and compromising circumstances. A politician from the ranks of the majority party in the legislature, and, in New Zealand, a member of the Cabinet, he is expected to represent the public interest, to ensure the criminal law is properly enforced, and to protect charities. In all but the last he may come to situations where the interests of his political party and of the administration of which he is a member may not be easily reconciled with the public interest as a whole. Yet he is expected on coming to office and in its performance to keep his integrity – his soul – so that, among other things, the administration of the criminal law never becomes merely the tool of a powerful and unscrupulous executive, as it was against More.

This paper seeks to look very briefly at the origins of the office of the Attorney-General and then to consider particular areas where his powers have recently come into controversy. We shall be concerned with his control of prosecutions and his necessary participation in relator proceedings; and finally with the difficulties that arise from the duality of his position – that of an active politician appointed to a semi-judicial office.

I. THE OFFICE

Introduction: the Attorney-General of England

Lord Elwyn Jones, when Attorney-General of England, has in discussing his office *(b)* summarised its history with convenient brevity, drawing as he acknowledged on the authoritative and learned work of Professor John Edwards *(c)*. Here one may scarcely attempt even to summarise the summary. Beginning in medieval times as the King's Attorney whose duty was to appear for the Sovereign in the Sovereign's Courts, the Attorney-General has since 1461 (when the title first came to be used) come to exercise his office in legal and political contexts outside the Courts also. Since the seventeenth century constitutional practice has required him to hold a seat in the House of Commons. Since the end of the last century the Attorney-General has moved away from Court to ministerial work. Together with the other Law Officer, the Solicitor-General, he advises the government and its various departments. Though some Attorneys-General have been members of the Cabinet, it is the preferred practice that they are not. This practice is seen to be consistent with the independence from political pressure that is expected of an Attorney-General as the officer ultimately responsible for the administration of the criminal law and for representing the public interest in the Courts. This paper is only incidentally concerned with the Solicitor-General. Of the English model it is enough to say that, like his senior colleague, he is appointed under the Royal Prerogative, is required by constitutional practice to sit in the House of Commons and is not a member of the Cabinet.

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(a) Rich, also Solicitor-General at the time, set a bad example for future Law Officers.

(b) "The Office of Attorney-General" [1969] CLJ 43.

(c) J LI L Edwards, *The Law Officers of the Crown* (1964) (cited as Edwards). For a further, brief, discussion of the office see Lord MacDermott, *Protection from Power in English Law* (Hamlyn Lectures 1957) 25 et seq.

(d) See *Crown Law Practice in New Zealand* (1961) ed EJ Haughey (cited as *"Crown Law Practice"*; upon which this section of the paper is largely based) which in turn relies partly on the anonymous article in (1929) 4 NZLJ 352.

The Attorney-General of New Zealand *(d)*

It is trite law that the Crown on acquiring sovereignty of New Zealand necessarily brought with it its prerogatives which, in the words of Williams J in *Solicitor-General ex rel Cargill v Dunedin City Corporation* (1875) 1 Jur NS 1, 14,

> "... unless limited by Act of the Imperial Parliament, or by an Act of the General Assembly made under the powers of some Act of the Imperial Parliament *(e)*, are the same as in England".

In the case before him Williams J upheld the office of Solicitor-General in New Zealand as an office created under the prerogative but his statement of the law covers the senior office as well (at 15):

> "Here, therefore, unless taken away by legislation, the Crown has the power of appointing an Attorney and Solicitor-General; and I apprehend that the duties of the persons appointed would be similar to those of persons filling corresponding offices at Home; and that there would be no necessity to specify by statute or otherwise, the nature and extent of duties already sufficiently defined by long usage".

So it was as a prerogative officer that the first Attorney-General was appointed in 1840. In the country's period as a Crown Colony and in its first years of representative government that followed the Constitution Act of 1852, the Attorney-General was one of the three permanent officials who under the Governor comprised the Executive Council of the Colony. With the establishment of responsible government in 1856 a practice of political appointments began: the successive Attorneys-General sat in one or other of the Houses of Assembly and were members of the Ministries.

Under the Attorney-General's Act 1866 the Attorney-General became a statutory officer, appointed by the Governor, with tenure during good behaviour and a salary fixed by the statute. He was given in effect the security and independence of a Supreme Court Judge. Further, the statute separated the Attorney-General from politics: he was disqualified for membership, of the Executive Council and of either House of the General Assembly. But this experiment with a non-political office was a brief one. By the Attorney-General's Act 1876 *(f)* the statutory nature of the office was retained but tenure was at the Governor's pleasure and the appointee might or might not be a member of the Executive Council or hold a seat in the General Assembly. In fact, ever since 1876 the office when occupied has always been held by a person who is both a member of the General Assembly and of the Executive Council *(g)*.

In 1920 the office ceased to be statutory *(h)* and reverted to its original prerogative nature. In a word. the Attorney-General is, after the English model, a prerogative officer appointed by the Governor-General on the advice of the Prime Minister from the latter's following in the House of Representatives. He invariably is appointed also to a seat in the Executive Council (much as the English Attorney-General is appointed to the Privy Council). So far the parallel with the English position is maintained. But, contrary to the usual English practice, the New Zealand Attorney-General sits in the Cabinet and usually holds other ministerial offices, especially of course (though not invariably), the office of Minister of Justice.

By way of completeness the contrast may be made with the office of Solicitor-General *(i)*. It also, as the passage quoted above from *Solicitor-General v Dunedin City Corporation* shows, is a prerogative office. Except for the few months of its first period of existence in 1867, it has (since its re-establishment in 1875 and in contrast to the English model) always been dissociated from politics. It is important to note however that in New Zealand as in England it is constitutional practice and not law in the strict sense which dictates the political or non-political nature of appointments to the two offices.

Finally, the practice by which the various functions of the Attorney-General in New Zealand are in most matters exercised by the Solicitor-General should be noted. This is as authorised by statute *(j)* and the reasons for the practice and for the exceptions to it are obvious. The day to day duties of a Law Officer are best undertaken by the Solicitor-General, who holds office indefinitely and is dissociated from politics (though nevertheless subject to the Attorney-General as the Minister responsible to Parliament). However, where the action may draw political criticism, there is a case for its being taken by the Attorney-General himself (indeed the Solicitor-General may be against taking it) who may defend his own action in the House of Representatives.

(e) The prerogative is of course now entirely subject to the legislative powers of the General Assembly.

(f) For the Parliamentary debates on the measure in which some of the arguments for and against the political standing of the office are rehearsed, see (1876) 23 NZPD 20-22, 249-254.

(g) Ministerial membership of the Executive Council and of the Cabinet being of course usually identical in New Zealand.

(h) The Civil List Act 1908, repealed by the Civil List Act 1920, was the last to provide for the office.

(i) See *Crown Law Practice*, chap IV.

(j) Acts Interpretation Act 1924, s 4 and (reprinted after s 25 of that Act) Finance Act (No 2) 1952, s 27; cf Crown Proceeding Act 1950 s 2 (1).

II. FUNCTIONS OF THE OFFICE

The Attorney-General is the Government's principal legal adviser, though in practice, subject to any differing views of his senior, the Solicitor-General exercises the role *(k)*.

Of the particular functions of the office, this paper does not attempt to cover the protection of charities (as to which see the Charitable Trusts Act 1957) and a number of other miscellaneous statutory functions *(l)*.

Control of criminal proceedings

Under common law and under statute this lies ultimately with the Attorney-General, however much this function like others of the office is in practice exercised by the Solicitor-General as virtually his alter ego. This function is to be understood against the background of the common law's traditional reliance on the private prosecutor: the Attorney-General has the ultimate general duty of seeing that prosecutions take place where they should. So he has power (shared with the Crown Solicitors who of course exercise it in the generality of cases and with the private prosecutor) of presenting an indictment where a person has been committed for trial *(m)*. He may also present an indictment where there has been no committal *(n)*. He has no corresponding ex officio power or duty to initiate summary proceedings, in which any person may lay an information in the Magistrate's Court; though, as will be seen below, his power to stay now extends to such proceedings. In regard to a growing number of offences prosecutions may be brought only with the Attorney-General's consent, so that the zeal of private or indeed even of police prosecutors may be curbed in the public interest. Of these matters we shall restrict ourselves to the last mentioned and to the power to stay proceedings, both of which have come recently into controversy.

The consent to prosecute

No detailed or exhaustive treatment is attempted here of offences in respect of which prosecution requires the consent of the Attorney-General *(o)*. It is indeed not possible to ascribe any common characteristics to the areas of the law where the provisions exist other than to say that in most if not all of those areas the criminal law either impinges to a peculiar extent on public affairs or the role of private prosecutor is peculiarly likely to be abused. In some areas, eg that of prosecutions under the Official Secrets Act 1951, both those factors are present.

What principles must guide the Attorney-General in deciding whether to give his consent? Professor Edwards writes that *(p)*:

> "... the basic question ... is whether the particular case falls within the ambit of the mischief at which the Act is directed. This will involve reference not only to the intention of Parliament, *more accurately what was in the mind of the government which introduced the Act,* but also to any judicial interpretation that may have been placed on the relevant legislation ... And in every application, before issuing his fiat the Law Officer will require to be satisfied that the evidence is capable of sustaining a prima facie case against the accused."

Professor Edwards goes on to add that the "expediency" of prosecuting is properly to be considered provided that the word "is interpreted as having reference to the public interest at large" *(q)* and not to the political interests of the party in power. This of course may readily be accepted: expedience in the former sense is inevitably and properly taken into account by either Law Officer and by any police officer or other official called on to consider whether a prosecution should be taken.

Edwards concludes that *(r)*:

> "... the discretion of the Attorney-General and the Solicitor-General is by no means unfettered and they are required to act in accordance with the governing principles. This said, it must also be remembered that regard to the public interest is a pervading principle that provides the necessary flexibility in the Law Officers' exercise of their statutory powers."

(k) See *Crown Law Practice*, 23.

(l) Ibid, 18-20.

(m) Crimes Act 1961, s 345 (1) and (2).

(n) Crimes Act 1961, s 345 (3). For the provisions referred to and the background to them, see *Criminal Law and Practice in New Zealand* ed FB Adams (2nd ed 1971) 705 et seq.

(o) Examples are: Crimes Act 1961, ss 100, 101, 104 and 105 (judicial, ministerial and certain other types of official corruption and bribery), s 123 (blasphemous libel), s 230 (criminal breach of trust) etc; Indecent Publications Act 1963, s 29 (offences against the Act); Official Secrets Act 1951, s 14 (offences against the Act); Companies Act 1955, s 322 (prosecution of delinquent officers of company); Race Relations Act 1971, s 26 (offences against ss 24 and 25). A longer but now partly out-of-date list appears in *Crown Law Practice*, 15-16.

As to procedure where consent of the Attorney-General is required, see Crimes Act 1961, s 314.

(p) Edwards, 245. Emphasis added.

(q) Edwards, 245-246.

(r) Edwards, 246.

The Official Secrets Act 1951: the Sutch case. In New Zealand as in the United Kingdom prosecutions under Official Secrets legislation require the consent of the Attorney-General *(s)*. In the United Kingdom there have been a number of prosecutions under the Acts of 1911 and 1920 and the role of the Attorneys-General in the authorising of these has occasioned some criticism *(t)*; the essence of which is that the widely drawn Acts, though initially directed against espionage, have been "found both convenient and useful to punish or deter several forms of conduct [specifically against anti-nuclear demonstrators] which fall short of espionage and yet should be punished or deterred in the public interest" *(u)*. In New Zealand's notable and only prosecution under the Official Secrets Act 1951, *R v Sutch* [1975] 2 NZLR 1, the Attorney-General's consent to the prosecution occasioned little if any criticism but his mode of announcing it may have occasioned some. Parts of his statement (21 October 1974) may be seen as unnecessary, especially the expressions of personal distaste for the Act which in the context some may find inappropriate. When those criticisms are made, the statement nevertheless sets out in proper fullness the nature of the prima facie case alleged against Dr Sutch which prompted the Attorney-General's granting of his fiat.

Stay of proceedings

At common law the Attorney-General had the power under the prerogative to enter a nolle prosequi in a criminal case on indictment, to direct that all further proceedings be discharged *(v)*. In New Zealand the power is statutory, under s 378 of the Crimes Act 1961.

The power to stay, whether under the prerogative or under s 378 does not extend to summary proceedings *(w)*. It is true that in England the Director of Public Prosecutions (who has no New Zealand counterpart) may under s 2 (3) of the Prosecution of Offences Act 1908 take over summary proceedings from a private prosecutor and apply to the court for leave to withdraw them. But leave to withdraw must be obtained or the alternative course taken of offering no evidence.

The at first sight illogical position in which the Attorney-General has power to stay proceedings on indictment but not summary proceedings had this to be said for it that it was a compromise between competing principles: that the private prosecutor is not to be improperly impeded by the executive but that "there should be some tribunal having authority to say whether it is proper to proceed farther in a prosecution *(x)*".

So in the case of proceedings on indictment the public interest to be served by their termination was in the keeping of the Attorney-General; in the case of summary proceedings the matter was ultimately in the keeping of the Court where, at the least, magisterial disapproval of the prosecutor's application to withdraw or of the offering of no evidence could be registered.

In New Zealand, in the absence of a counterpart to the Director of Public Prosecutions, the legislature has though fit to extend the Attorney-General's power to stay criminal proceedings to those in the lower Court – not, it would seem, to rationalise what some might see as an illogical position *(y)* but to meet specific types of case where the power to stay lower Court proceedings was thought desirable. By s 173 of the Summary Proceedings Act 1957, replacing s 24 of the Statutes Amendment Act 1938, where a defendant is to be proceeded against by indictment the Attorney-General is empowered to stay proceedings at any time after the information has been laid but before the person has been committed for trial or for sentence. The specific purpose was to cover cases of infanticide committed by a mother suffering from puerperal insanity *(z)* but the power is not so limited. Much more seriously, s 2 of the Summary Proceedings Amendment Act 1967 added s 77A to the principal Act:

> "The Attorney-General may, at any time after an information has been laid against any person under this Part of this Act and before that person has been convicted or otherwise dealt with, direct that an entry be made in the Criminal Record Book that the proceedings are stayed by his direction, and on that entry being made the proceedings shall be stayed accordingly."

This very wide provision was justified by the then Attorney-General to the House of Representatives on the ground that it was needed, in view of United Kingdom legislation, to enable the New Zea-

(s) Official Secrets Act 1951 (NZ), s 14: cf Official Secrets Act 1911 (UK), s 8.

(t) D Williams, *Not in the Public Interest* (1965), 101 et seq.

(u) Ibid, 106.

(v) "Nolle Prosequi" [1958] Criminal Law Review 573; Edwards, 227-237.

(w) See the discussion of the Ponomareva case, [1956] Criminal Law Review 725. Cf Edwards, 217-218, 236.

(x) *R v Allen* (1862) 1 B & S 850, 855; 121 ER 929, 931.

(y) See note *(aa)* below.

(z) *Crown Law Practice*, 17; (1938) 253 NZPD 338-339.

land Government to undertake that a fugitive offender surrendered to this country from the United Kingdom would not be prosecuted for any offence other than that for which he was surrendered *(aa)*. It is of course clear that that end could have been achieved by a provision drafted in limited terms and without bringing all proceedings by way of information under the Attorney-General's ultimate control. This wide extension of the Attorney-General's powers was passed by the House without any comment in the least critical.

The Attorney-General's use of s 77A in staying proceedings under the Superannuation Act 1974. By a press statement of 1 April 1976 the Attorney-General announced that he had entered stays of proceedings in six private prosecutions brought in the Magistrate's Court by an employee against his employer for failing to make, as required by the Superannuation Act 1974, deductions from the prosecutor's wages and payment of those deductions and the corresponding employer's contributions to the Superannuation Fund. The background to the prosecutions was that shared with the now celebrated case of *Fitzgerald v Muldoon* [1976] 2 NZLR 615 *(ab)*. The Prime Minister had by statements of 15 and 23 December 1975 suspended the operation of the scheme under the 1974 Act and promised retroactive legislation in the next Parliamentary Session that would abolish the scheme and excuse from the penal provisions of the 1974 Act those who in reliance on his statement failed (pending the new legislation) to comply with their obligations under it.

The next session of Parliament at which the promised legislation was passed did not begin until 22 June 1976. In the meantime the government was faced by attempts to enforce the law under the 1974 Act, in Fitzgerald's proceedings for a declaration and other remedies and in the six private prosecutions. Mr Fitzgerald who was able to establish locus standi was substantially successful. The moves in the Magistrate's Court, on the other hand, failed when the Attorney-General, using his wide power under s 77A of the Summary Proceedings Act, stayed the prosecutions.

The Attorney-General's reasons for exercising his power were set out fully in his press statement of 1 April 1976. The reasons are persuasively urged, sufficiently so for the Council of the Auckland District Law Society to refrain, in its objections to the government's conduct of the matter (in delaying the summoning of Parliament), from any criticisms of the Attorney-General's actions as a law officer *(ac)*.

However, there is a case to be made against the stay of the prosecutions. Both in regard to them and the Supreme Court civil proceedings in *Fitzgerald v Muldoon* there were conflicting principles of public interest. On the one hand there was the law to be upheld (particularly in a situation where the ministry took no urgency in having it repealed) and on the other practicalities of modern party government according to which it was reasonable to anticipate in some degree the legislation that would in all probability – virtual certainty – be passed. In *Fitzgerald v Muldoon* Wild CJ resolved the issues by deciding the law in favour of the plaintiff, granting him his declaration and ultimately a substantial award of costs *(ad)* and by adjourning the application for mandamus long enough to enable the required legislation to be passed at the new Session of Parliament. It is true that the resolution of the issues could not have taken a closely corresponding form in the prosecutions in the Magistrate's Court. The Magistrate might perhaps have taken account of the expected legislation *(ae)* by discharging the defendant employer under s 42 of the Criminal Justice Act 1954 but ordering payment of costs (which no doubt the government would have felt obliged to pay) or by a conviction without penalty. With respect, it might at all events have been better had the Attorney-General left the issues of public interest to be resolved by the Magistrate rather than imposing his own solution of a stay of proceedings *(af)*. Certainly no one would wish to see a practice develop by which the repeal of penal laws is anticipated by the Attorney-General's use of his power of stay until in the government's own time Parliament is summoned and passes the repealing legislation.

Reviewability

Can the Attorney-General's exercise of any of his powers in regard to criminal proceedings be

(aa) (1967) 353 NZPD 3349-3350, 3384-3385. It is true that one Government member speaking in favour of the Bill accepted it as generally correcting an anomaly: ibid, 3385.

(ab) Noted [1976] NZLJ 547 (FM Brookfield).

(ac) [1976] NZLJ 268. The Attorney-General's reply follows, ibid, 269.

(ad) See [1976] NZLJ 547.

(ae) See case note "Judicial Anticipation of Statutes" (1976) 7 NZULR 169 (JF Burrows).

(af) The foregoing is based on discussion with Professor John Edwards in a staff seminar during his 1977 visit to the Auckland Law Faculty.

reviewed? Here a distinction may have to be made between (a) powers which he exercises for the Crown as prerogative powers *(ag)*, or as statutory replacements of them, and (b) powers that are statutory innovations. Thus exercise of his powers to present an indictment under s 345 of the Crimes Act 1961 is undoubtedly unreviewable since the powers correspond to those exercised ex officio on the Crown's behalf at common law. Similarly exercise of the powers could not be enforced by mandamus *(ah)*. So too the entry of a nolle prosequi *(ai)*, whether as strictly so called under the prerogative at common law or under s 378 of the Crimes Act 1961, is unreviewable.

But the position may partly be otherwise with the exercise of statutory powers to consent or refuse consent to prosecutions, as BM Dickens has recently argued *(aj)*. He suggests that a person with sufficient interest may have a refusal brought before the Court in proceedings for mandamus *(ak)*. For example, a person who has suffered harm from a campaign of racial invective and to whom the Attorney-General has refused leave to prosecute privately, may resort to the remedy where the Attorney-General has given unsatisfactory reasons or no reasons for the refusal, at least if it can be shown that the Attorney-General has not considered the matter on its merits but has refused on grounds of policy at variance with the intention of Parliament.

The case urged by Dickens cannot be examined in detail here. Briefly, it may be said to rest chiefly on the grounds (a) that Attorney-General's discretion is not unfettered but should be exercised in accordance with the governing principles mentioned above and (b) that the power to refuse consent "derogates from the common law right of an individual [as private prosecutor] to invoke the ordinary criminal jurisdiction of the Courts" *(al)*.

Similar reasons may perhaps be urged for suggesting that the exercise of the Attorney-General's powers to stay summary proceedings under ss 173 and 77A of the Summary Proceedings Act 1957, for such control of summary proceedings was never part of the prerogative and indeed derogates from the common law rights of private prosecution.

But these matters remain to be decided.

Relator proceedings

The Attorney-General representing the public interest may take proceedings ex officio or on the relation of a member of the public to enforce public rights. Lord Wilberforce set forth the traditional view in *Gouriet v Union of Post Office Workers* [1977] 3 WLR 300, 310; [1977] 3 All ER 70, 80:

> "It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."

That brings us to mention, necessarily briefly, the problem of standing. The private person can maintain an action in his own name and without fiat of the Attorney-General if he has locus standing, that is if (to generalise words used recently by Chilwell J of the plaintiff in *Harder v New Zealand Tramways Union* [1977] 2 NZLR 162, 170):

> "he can point to a statutory provision which is for his protection and which is being interfered with, or if he suffers particular damage over and above that suffered by the general public through infringement of a public right."

The requirements for standing are formulated sometimes widely sometimes narrowly and sometimes the formulation has differed according to the remedy sought. After a full examination of the matter, but writing before *Gouriet*, Professor KJ Keith has shown that in New Zealand, as compared then with England and Canada, the decisions (such as *Collins v Lower Hutt City Corporation* [1961] NZLR 250, *Environmental Defence Society v Agricultural Chemicals Board* [1973] 2 NZLR 758) tend to be restrictive *(am)*. But he concludes

(ag) The exercise of a prerogative power is generally not reviewable: Wade and Phillips, *Constitutional Law* (8th ed 1970), 185.

(ah) R v Secretary of State for War [1891] 2 QB 326 (Cf *VUWSA v Government Printer* [1973] 2 NZLR against the police (who in enforcing the law do not act under the prerogative): *R v Commissioner of Police ex p Blackburn* [1968] 2 QB 118).

(ai) R v Allen (1862) 1 B & S 850, 121 ER 929; *R v Comptroller of Patents* [1899] 1 QB 909, 914.

(aj) "The Attorney-General's Consent to Prosecutions" (1972) 35 MLR 347. The learned writer relies strongly on *Padfield v Minister of Agriculture* [1968] AC 997.

(ak) Dickens, loc cit, 349.

(al) Dickens, loc cit, 352.

(am) "Standing in Administrative Law" – a working paper prepared for the Public and Administrative Law Reform Committee. Generally see SM Thio, *Locus Standi and Judicial Review* (1971).

that there is no binding decision to stop the New Zealand Courts moving towards liberal conceptions of standing – that would, for example, enable a body like the Environmental Defence Society to take proceedings in its concerns without the Attorney-General's fiat. The decision in *Gouriet's* case has to a considerable extent checked the liberal trend in England. That case will be briefly discussed but the main point must first be made that in the absence of liberal rules of standing the power of the Attorney-General at his discretion to grant or to withhold his fiat in relator proceedings is of great importance, since its exercise (again of a prerogative power) is certainly beyond the review of the Courts *(an)*. The contention of Lord Denning MR in the Court of Appeal in *Gouriet's* case *(ao)* that the matter was otherwise could scarcely have succeeded and was left unargued in the House of Lords in the final appeal. However there fell to be dealt with another and rather more arguable issue: where the Attorney-General improperly refuses his fiat or the would-be relator has not time to obtain it, can the matter proceed without the fiat, in particular, where the proceedings are sought to prevent a breach of the criminal law?

The facts of *Gouriet's* case need only be recalled very briefly: Gouriet, as a member of the public, had been refused (without reason given) the Attorney-General's fiat to proceedings for an injunction against the Post Office Workers' Union to prevent the union's intended ban on postal communication with South Africa. The ban would have involved breaches of the criminal law in that legislation made it an offence wilfully to delay mail or to solicit any person so to do. Gouriet attempted to proceed without the Attorney-General, with substantial success in the Court of Appeal where it was held that without the fiat a declaration could be claimed against the defendants that their apprehended action was unlawful and an interim injunction granted pending disposal of the claim, but (Lord Denning MR dissenting) no permanent injunction. The House of Lords unanimously reversed the decision, re-establishing the traditional view that not only is the Attorney-General's refusal of his fiat unreviewable but without it no private citizen without standing in a strict sense could move the Court to declare public rights and grant relief to protect them; and that, specifically, these general rules apply where the private citizen is seeking relief to prevent breaches of the criminal law. The decision checks the liberal development in the law previously suggested by the Master of the Rolls in *Attorney-General ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 692; [1973] 1 All ER 689 where he had remarked (at 649; 698) that

> "... in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the Court itself."

Lord Denning had gone on to say that he "would not restrict the circumstances in which an individual may be held to have a sufficient interest". These wide dicta were expressly disapproved by the House of Lords in *Gouriet (ap)*.

What is the likely effect of all this in New Zealand? Certainly the decision of Chilwell J in *Harder v New Zealand Tramways Union* [1977] 2 NZLR 162, which relied in part on the Court of Appeal decision in *Gouriet* will require to be reconsidered in the light of the reversal by the Lords. will be recalled that in *Harder's* case a member of the public *(aq)* obtained an interim injunction to stop an illegal strike, while he sought the Attorney-General's consent to relator proceedings. Chilwell J generally approved liberal developments of the law as suggested by the English Court of Appeal in *McWhirter's* and *Gouriet's* cases.) But the last word in England will not necessarily be the last in New Zealand, and the traditional views, generally re-established by the House of Lords in *Gouriet*, may yet be abandoned here in favour of liberal rules as to standing that would enable the requirement for the Attorney-General's fiat to be by-passed in many cases. The aid of the legislature might of course be sought to establish such a change.

Commenting on the Lords' decision in *Gouriet* the Australian Law Reform Commission *(ar)* remarks that the basic issue (as to the merits of the decision) is "whether the Attorney-General or the Court is best equipped to make a decision about the public interest" *(as)*. Deciding for the latter, the Commission tentatively recommends that in all public interest suits the private citizen should be able to approach the Court without the Attor-

(an) London City Council v Attorney-General [1902] AC 165, 168-169.

(ao) [1977] 2 WLR 310, 328; [1977] 1 All ER 696, 715.

(ap) [1977] 3 WLR 300, 315, 326, 333, 341-342, 351; [1977] 3 All ER 70, 85, 95, 100, 108, 117.

(aq) In any event held to have standing.

(ar) Access to the Courts – I Standing: Public Interest Suits: The Law Reform Commission Discussion Paper No 4 [1977] (cited as "Access to the Courts I").

(as) Ibid, 13.

ney-General's fiat subject only to the safeguard that in determining the suit the Court may decide against the plaintiff if, applying a single liberal formula as to standing, it is satisfied that he "has no real concern with the issues" *(at)*. Such a solution would, as the Commission points out, leave the Attorney-General with his traditional power to sue in a matter of public interest; "but private persons would not be dependent on him if they had the requisite 'concern' " *(au)*.

Finally, in considering the need for reform one must ask whether there is undue difficulty in New Zealand in obtaining a Law Officer's fiat. Mr Justice Cooke, speaking extra-judicially in 1975 *(av)*, said that in his experience there was not, the fiat being "readily and promptly granted if the papers were in order and there was something akin to a prima facie case". Indeed there does seem little complaint about the Attorney-General's exercise of his power under discussion. However, with respect, the picture may not be entirely clear. It must be doubtful whether, in proceedings to test the validity of a city fluoridation scheme, the fiat was rightly refused in *Collins v Lower Hutt City Corporation* [1961] NZLR 250 where the ground of refusal seems to have been the Attorney-General's "view that the defendant had adequate authority to embark on its scheme". The plaintiffs must clearly have had a prima facie case, as later proceedings to the same end (in which the fiat was granted) showed: *Attorney-General ex rel Lewis v Lower Hutt City Corporation* [1964] NZLR 438. However the making out of a prima facie case has admittedly never in theory been sufficient to obtain the fiat. There are broad grounds of public interest, of which the Attorney-General is at present sole judge, upon which the fiat may be refused – and upon which indeed it might have been if the plaintiff in *Fitzgerald v Muldoon*, lacking standing, had had to apply for it.

III. POLITICS

Answerability to Parliament

Apart from the possibilities of judicial review mentioned above, the House of Representatives, to which the Attorney-General is responsible, is the only forum where the exercise of his powers, prerogative or statutory, can be called in question. How far is his political answerability an effective control upon him? No doubt it is still theoretically possible for a motion of censure to be moved against the Attorney-General (as indeed any Minister of the Crown) for his conduct in office and for the House to consider and vote on the motion otherwise than on party lines. But no one can really suppose that the situation is at all a likely one. Modern developments of party government have left little room for an Attorney-General's personal responsibility to the House for the exercise of his powers to be a fair or effective check upon him, except for the criticism that properly may be made of him in debate. However, the inevitable result of this is the involvement (however contrary to the traditional view) of his party to some extent in any controversial actions he may take. In this way there is, in place of an effective responsibility to the House, some degree of ultimate responsibility to the electorate for what he does.

Attorney-General and the Cabinet

The constitutional convention that the Attorney-General must exercise his powers free from the direction of his ministerial colleagues is a strong one. Belief that it had been broken brought the downfall of the Labour Government in 1924 *(aw)*, in the United Kingdom. In the two statements of Attorney's-General already referred to, in connection with the *Sutch* case and the 1976 stay of proceedings under the Superannuation Act, it is emphasised that the respective decisions were reached without consultation with cabinet colleagues. Nevertheless, the practice in New Zealand and elsewhere in the Commonwealth of the Attorney-General's sitting in the Cabinet surely puts him in a difficult position. He is continually involved in the collective responsibility of the Cabinet for the decisions it takes. If the principle is that the Attorney-General should not only be immune from the pressure of his colleagues but be seen to be so, then his Cabinet membership is scarcely consistent with it.

Nevertheless, even where, as in England and at present in the Commonwealth of Australia, the Attorney-General is not a member of the Cabinet, only a strong convention against his consulting

(at) Ibid, 20. Cf the suggested principle of "sufficient interest" of the English Law Commission (Report on Remedies in Administrative Law, 1976, Cmnd 6407, 32).

(au) Access to the Courts I, 20.

(av) *"The Concept of Environmental Law"* [1975] NZLJ 631, 636.

(aw) The Campbell case. See Edwards chapters 10 and 11; FH Newark "The Campbell Case and The First Labour Government" (1969) 20 Northern Ireland Legal Quarterly 19.

with that body for their views and advice can ensure that his immunity from improper pressure is apparently secured. Such a convention, as will be seen below, is lacking in Australia.

The public interest and politics

The traditionally independent status of the Attorney-General, however difficult it may be to retain entire if he consults with colleagues, requires that in exercising his powers he exclude from his consideration "the repercussion of a given decision upon [his] personal or [his] party's or the government's political fortunes" *(ax)*. The range of matters he may properly consider is wide, from the "juristic" to "those of a less juristic character" *(ay)*. In *Gouriet* the juristic could have included the anomalies of using civil proceedings to enforce the criminal law *(az)*. The "less juristic" could have included the possibility that such proceedings would in fact exacerbate the situation of industrial strife at which they would be directed *(ba)*. More generally, an Attorney-General must always consider the effect that the proceedings "would have upon public morale and order" to adapt Lord Shawcross's remarks in relation to decisions to prosecute *(bb)*.

But the making of a distinction between the wide range of considerations of public interest which the Attorney-General may take into account and those of a party political nature which he may not can be criticised as naive *(bc)*. For the fact is that suspicions will always be aroused where party political interest and general public interest apparently coincide. To say this is certainly not to impugn any Attorney-General's good faith but only to emphasise again the difficulties of an office which is required to be non-political and yet by present practice must be occupied by a member of the Government. After all, the intended relator proceedings to which the English Attorney-General refused his fiat in *Gouriet* and the superannuation scheme prosecutions which the New Zealand Attorney-General stayed in 1976, if allowed to continue, would unquestionably have embarrassed the respective Governments concerned.

The Sankey case (NSW). That brings us finally to the *Sankey* case which shows dramatically the political difficulties of the Attorney-General's office and which led to the resignation of the Australian incumbent in September 1977. In 1975 Mr Sankey began private prosecutions against Messrs Whitlam, Connor (now deceased) and Murphy (by then a High Court Judge) in relation to their conduct as Ministers in the 1974 "loans affair". By the time this paper is delivered the prosecutions may have been finally disposed of one way or another and full examination of the issues will be possible. But some comment may be offered now on the role of the Attorney-General in the matter.

The charges brought by Mr Sankey against the former Commonwealth ministers were that they had (i) conspired to effect overseas borrowing by the Commonwealth in contravention of certain Commonwealth statutes and (ii) conspired to deceive the Governor-General by recommending in the Executive Council the authorisation of improper and illegal borrowing by the Commonwealth. The alleged conspiracies came as to (i) under s 86 (1) of the Commonwealth Crimes Act (which, among other things, makes conspiracy "to effect a purpose that is unlawful under a law of the Commonwealth" an indictable offence) and as to (ii) under common law.

The committal proceedings in the New South Wales Court of Petty Sessions have been long drawn out and attended with successive difficulties. Of the reported litigation it is necessary to mention here only unsuccessful prohibition proceedings of two of the defendants in *Connor v Sankey, Whitlam v Sankey (bd)* where it was held by the New South Wales Court of Appeal that the alleged offences were not offences unknown to the law and that there was no doctrine of ministerial immunity to protect the defendants. Street CJ referred to Chief Justice Coke's famous citation to James I of Bracton's dictum that the King is "sub deo et lege" *(be)*. "No less", added Street CJ," are Ministers of the Crown sub lege."

It is of course difficult to find a possible New Zealand parallel of any exactness, particularly in view of the extraordinary wide terms of s 86 (1) of the Commonwealth Crimes Act and of the fact that the common law criminal conspiracy charge could not be brought here. However it is possible, in New Zealand as elsewhere, that the Crown where bound by a statute might through its Ministers act contrary to the penal provisions of the

(ax) Adapting Lord Shawcross's remarks to the House of Commons, quoted in Edwards, 222-223.

(ay) The distinction made by Lord Diplock in *Gouriet v Union of Post Office Workers* [1977] 3 WLR 300, 330; [1977] 3 All ER 70, 98.

(az) Id.

(ba) [1977] 3 WLR, 314, 321; [1977] 3 All ER, 83, 90.

(bb) Lord Shawcross, quoted in Edwards, 223.

(bc) Access to the Courts I, 13.

(bd) [1976] 2 NSWLR 570.

(be) Ibid, 599-600.

statute. Prosecution otherwise than by a private citizen would be unlikely (except in extraordinary circumstances). What should be the proper role of an Attorney-General when such prosecutions are brought whether against present or former Ministers?

Even where the Crown is expressly bound by the statute, there may still be doubt as to whether the legislature intended to subject the Crown to criminal liability under the penal provisions and as to the resulting liability of Ministers. If, however, any such doubt is resolved as it was (apparently without difficulty) in *Connor v Sankey* against the Ministers, there can as was held be no doctrine of ministerial immunity to protect them if the cases are proved. There may nevertheless be difficult questions of public interest that must be answered before such prosecutions are regarded as desirable. On the one hand the law should not fall into disrepute for lack of enforcement. Politicians must not be above the law. On the other hand, where the alleged offences are matters of administration and the Ministers may well have been ignorant of the legal consequences of their decision and . . . actuated solely by a desire to serve the interests of the [State]" *(bf)*, it may be contended that they should not be harried by private prosecutors. An Attorney-General, on inquiring into the matter, might properly conclude that the proceedings should not continue and exercise his powers to that end *(bg)*.

That, in the present case, is what the Fraser Cabinet thought the Attorney-General, Mr Ellicott, should do and informed him accordingly. The Attorney-General considered that he was being subjected to improper pressure and also disagreed strongly with decisions of the Cabinet that he should not have access to all the evidence he believed would be relevant and that ingly resigned *(bh)*. (For their part, the defendants alleged that the Attorney-General had wrongly pursued the matter in an obsessive effort to justify his personal views of the loans affair, propounded, before he took office, in the course of his political opposition to them) *(bi)*. In commenting on the resignation speech, the Commonwealth Prime Minister *(bj)* affirmed that the Attorney-General had full discretion in the exercise of his powers. But he also defended (a) the practice of consultation, in which an Attorney-General was informed of his colleagues' views, as long-standing and (b) the decision to claim Crown privilege as one for the Government to take and not peculiarly within the law officer's province.

Some comments may be made on these aspects of the *Sankey* case. First, if such a practice of consultation between the Attorney-General and his colleagues is accepted as proper, then even if he himself is outside the Cabinet the position is most delicate. The line between proper efforts at persuasion on the one hand and improper pressure on the other must surely be hard to draw.

Secondly, a Court's affirmation that the Crown and its ministers are under the law and that "the secret counsels of the Crown" are not exempt from the Court's inquiry *(bk)*, though correct in itself, far from completely states the position. The law of Crown privilege may possibly extend so far that it in effect protects those "secret counsels" *(bl)*. And similar principles of public interest to those behind Crown privilege must no doubt be taken account of by the Attorney-General in deciding whether the criminal proceedings in such a case as Sankey's should continue.

Thirdly, in *Sankey's* case the embarrassment of the governing political parties and of the Cabinet is not less because the former Ministers concerned are party political opponents. Indeed the interests of the principal parties apparently tend to be the same – that there should be no undesirable precedent for the over-zealous scrutinising of records of past governments in the light of the law. In these circumstances for an Attorney-General properly to maintain an independent role, neither subservient to his colleagues nor necessarily demanding that the law be enforced though the heavens fall, must be difficult indeed.

Final questions

As a background paper this does not seek to put forward any dogmatic conclusions. However some questions may be asked by way of summarising the matters dealt with, perhaps to point to a

(bf) Cain v Doyle (1946) 72 CLR 409, 425, per Dixon J: quoted by Street CJ in [1976] 2 NSWLR 570, 600.

(bg) In *Sankey's* case, in the absence of an equivalent to the Summary Proceedings Act 1957, s 77A, it appears that the Attorney-General's intervention in the committal proceedings would have to take the form of his presenting an indictment and then entering a nolle prosequi or offering no evidence (Access to the Courts I, 12).

(bh) Mr Ellicott's resignation speech in the House of Representatives and the following speeches of the Prime Minister and of Mr Whitlam, of 6 September 1977, are in 1977 Commonwealth Parliamentary Debates (HR) 721 et seq.

(bi) 1977 Commonwealth Parliamentary Debates (HR) 725, 730.

(bj) Ibid, 727.

(bk) [1976] 2 NSWLR 570, 599.

(bl) Conway v Rimmer [1968] AC 910, 952; [1968] 1 All ER 874, 888.

reassessment of the joint legal/political role of the Attorney-General and of his powers.

(1) Should the status quo be maintained, in view of the comparatively few controversies that have attended the New Zealand Attorney-General's conduct of his office? Is the present safeguard of his answerability to Parliament – or, rather, ultimately to the electorate – adequate?

(2) Should the Attorney-General, while remaining a government minister cease to be a member of the Cabinet? This adoption of the English practice would in effect require the shedding of other ministerial offices (and might in New Zealand leave him under-employed).

(3) Should the Attorney-General be a non-political officer with secure tenure? This would be to repeat an experiment already tried and abandoned a century ago but which might nevertheless succeed today.

(4) Should judicial review be extended? As shown above the exercise of the Attorney-General's powers is, with a few uncertain exceptions, unreviewable by the Courts. If answerability of the Attorney-General to Parliament, either as a Minister of the Crown as at present or as an independent statutory officer, is not thought adequate, the extension of judicial review might be considered.

(5) Should relator proceedings and the Attorney-General's role therein, together with more or less strict rules of standing, be retained? Or should the law move towards liberal rules of standing and the by-passing of the Attorney-General?

Finally, to subject the Attorney-General's exercise of his powers to judicial review or to relax rules of standing would be at least partly to remove from the Attorney-General and place in the keeping of the Courts the determination of matters of public interest that have long been regarded as his preserve. How far, if at all, should that be done and such matters be determined by the Queen's Judges (far separate from party politics) rather than by her Attorney-General (under the present order inevitably to some extent involved in them)? If there is a problem about his role and his powers, how far would it be solved by separating him altogether from party politics? These are the basic questions that underlie those asked above.

Dividing up the farm – "Any Court hearing an application of this kind (matrimonial property – application for share of farming business) naturally has in mind the practical consideration, especially applicable in the case of farms, that it is the husband alone who spends his life under the physical burden of the labour and responsibility which such a venture involves. But the duty of every Court must be to apply the provisions of the statute and to recognise the shift in legislative policy which has given every wife the right to leave her husband and to claim thereafter one-half of the value of a business which he himself built up and maintained. I am not necessarily referring here to the present case, but a wife may leave her husband for just cause or for no cause. She may leave him, bored and discontented after years of marriage, for the sole purpose of starting a new life with another man, but her right to claim one-half the business assets of her husband remains unaffected. She is able to bring to the new marriage a handsome dowry representing half the business assets of her previous husband. While she is basking in the affluent warmth of a last romantic spring-time, her deserted ex-husband is back on the farm struggling with the lawful demands of his mortgagee, his stock company, and his bank.

"I am not sure how far all these factors coincide with the thinking of the ordinary right-minded citizen. Perhaps they demonstrate the gulf which sometimes exists between ideological law reform and the simple concepts of justice which reflect the general understanding of the community as to the functions of the law. A wife has an absolute right to half the matrimonial home and to the domestic chattels, and she may have that right enforced by sale. No one would quarrel with that entitlement. But there may be a case for the introduction of a judicial discretion in the making of other orders under this Act. At the moment, in relation to division of business assets, whether owned by husband or wife, no discretion exists.

"If the respondent in the present case finds in the end that he cannot meet the heavy capital liability imposed by this judgment, and that his farm must be sold, either by him or by his mortgagee, with the consequent destruction of an enterprise to which he has devoted the whole of his working life, then I can only repeat that this is a consequence directed by Parliament, not by me." Mahon J in *Baddeley v Baddeley* (Supreme Court, Wanganui 19 May 1978 (M 34/77)).