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LAW GRADUATE UNEMPLOYMENT

Unemployment rates amongst law students are nearly triple the rate for all other graduates. At the recent Law Society Conference one of the major worries expressed was the increasing number of law graduates and the inability of the profession to absorb them all.

It would be unrealistic to expect private practice to absorb *all* graduates. Students and the profession itself need accept that the situation must necessarily evolve whereby private practice is not the natural destination but rather one of the several destinations a law graduate may choose. The move away from the "private practice" orientation of the degree requires a change in both law student expectations and in the attitude of the employing community (apart from private practice) towards what both largely and incorrectly tend to view as a rather narrow professional degree.

Somewhat paradoxically practitioners have long been complaining that law graduates are not much use upon graduation because of insufficient practical training within the degree and professional units. In the past that was never an insuperable problem. However the downturn in the economy has meant that law firms cannot afford to take on law graduates unless they become "paying propositions" from the time they enter the firm. That has meant that the intake of law graduates into firms has (compared with earlier times) decreased. Not only is there insufficient work within the firms but the firm cannot afford to "carry" the graduate until he can pay his own way.

The profession is not aware as perhaps it might be of a scheme run by the Department of Labour called the Additional Jobs Programme. This Programme can, to a certain extent, be utilized to overcome the "non paying proposition" that the law graduate represents.

Employers taking part in the Additional Jobs Programme receive a wage subsidy in respect of each person employed under the scheme. The subsidy is $40 per person per week for six months starting from the date the person is engaged. Payment is made every four weeks in respect of those weeks for which the employer has paid wages. However there are a number of aspects to note:

(1) Employers participating in the scheme can engage staff only from those referred to them by the Department. However they are under no obligation if none are suitable.

(2) The position filled must be *additional* to normal staff requirements, ie, further to those currently employed or over the average staff numbers for the past 12 months (whichever is the higher).

(3) The subsidy lasts for six months only – probably insufficient time to "transform" the law graduate.

Law firms seeking to take advantage of the scheme can therefore select a likely employee, refer him to the Department of Labour who will then refer the person back to the firm which has enlisted itself under the Programme. This is a way of saving $40 per week in wages and as long as the Department's requirements are met there should be little trouble.

It would be naive to suggest that this Programme comes anywhere near solving the problem of practical training but it is, at least for the interim, one device open to minimise the problem. It can provide openings for graduates and can ease the strain on the firm's coffers.

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ENVIRONMENT

COUNTRYSIDE ACCESS IN NEW ZEALAND: A NEW APPROACH

By MARK P NEESON, *barrister, solicitor and Secretary to the New Zealand Walkways Commission.*

Concept

Although New Zealand offers unparalled opportunities for specialised forms of outdoor sport and recreation (tramping, hunting and fishing) in more remote backcountry areas, little has been done to provide and protect paths and tracks for trouble-free walking through the countryside.

The position in New Zealand contrasts with that in England and Wales, where the main problem in recent years has been to define and actively protect public access, such access having been acquired over a period of years by open and consistent use. Accordingly, under the National Parks and Access to the Countryside Act 1949 (UK), a careful and lengthy procedure was prescribed whereby highway authorities were required to survey and record all public footpaths and bridle paths. These are now shown on a Definitive Map and Statement which must be searched by those dealing in property to ensure whether, and if so, where, it showed a public footpath across the land.

In New Zealand, however, the adoption of the Land Transfer system at a comparatively early stage in the development of the country prevented any appreciable acquisition of public easements, bridle paths or foot paths by way of long established user or prescription (see s 57 Land Transfer Act 1885 as amended and re-enacted in Section 64 Land Transfer Act 1952). With public lands, s 14, Land Act 1892 (as amended and re-enacted in s 172 (1) Land Act 1948), also prevented the acquisition of similar interests as against the Crown or against persons or bodies holding lands for any public work or similar purpose.

In an attempt to overcome this difficulty and to provide care-free, varied walks in rural surroundings, the New Zealand Walkways Act 1975 (NZWA) was passed "to establish a system of walking tracks over public and private land for the public to have safe, unimpeded and free access through the countryside . . ." (s 3(1)). This article explains the method of acquiring walkways, the administration of them, and the rights and safeguards accorded to landholders who agree to walkways crossing their land.

Implementation

The NZWA established a Commission, the primary function of which is "to initate, prepare, investigate and consider proposals for the establishment, administration, control, maintenance and improvement of a system of walkways . . ." (s 10 (1) (a)).

The Commission's role is to formulate policy and supervise the activities of district committees and controlling authorities so that walking tracts are made available to the public under proper conditions. The Commission draws together representatives from the Government departments most directly concerned, local government administrators and members representing farming and outdoor recreation interests. Because a district committee or controlling authority of a walkway has only such powers and functions as the Commission may delegate the Commission must remain responsible for all the activities of these bodies. Only the Commission may make bylaws and this power cannot be subdelegated to district committees or others. Where a section of walkway traverses (by arrangement) national park, state forest or land administered by a local authority, it is envisaged that the existing administering body of the land would accept responsibility for control and maintenance of that section of walkway and the normal conditions applicable to use of that land would apply.

Where there is no administering authority (for example, where private land is involved) or, if an adminstering authority does not wish to be deemed the controlling authority for the purpose of the Act, then in both instances any department of state, local authority or other statutory body may be appointed the "controlling authority". A "statutory body" means a body the accounts of which are required by any Act to be audited by the Audit Office, voluntary and incorporated societies thereby being excluded from appointment as controlling authorities. The responsibility of a controlling authority is essentially to implement, develop and maintain a particular walkway(s) and establish on walkways facilities approved by the Commission. Generally, the

controlling authority "shall have all such powers as may be reasonably necessary to enable it to carry out its functions" (s 27 (2)).

Legislative requirements into administrative action

Negotiation of access rights

Where it is necessary to cross privately owned land to give continutiy on selected routes, the success of the whole concept relies heavily on the mutual co-operation and respect of landowners and users. Private land can be declared a walkway only with the full consent of the landowners, and this is obtained by the purchase or gift of an easement or lease. Where it is desired to gazette unformed legal road as part of a walkway this, again, can only be achieved with the consent of affected adjoining owners. Any special conditions that the owner may wish to impose, setting limitations on use including closure of a walkway or part of a walkway during particular times of the year such as periods of high fire risk or the lambing season, can be included in the easement or lease document. The conditions included in the agreement will depend on the purpose of the walkway, but in all cases the conditions would not be affect the existing rights of the landholder for example: off-road vehicles could be prohibited except those used by the landholder.

Two issues in the creation of walkways must be emphasised:

(a) the concept relies on voluntary co-operation and participation on the part of the landholder and therefore,
(b) there is no power of purchase of land, whether by agreement or by compulsory purchase order.

When the Commissioner of Crown Lands (as Chairman of the district committee) commences negotiations or approaches a landholder he will be seeking reasonable access across the land – not necessarily the best available as this reduces the primary use of the land to a secondary consideration. The Commission recognises that it is receiving a privilege to use the land for a walkway and will meet the cost of survey and associated legal costs. In a walkway in Westland, the Commission provided funds for a deer fence which bordered the line of a walkway.

When agreement has been reached as to the route of and conditions for the walkway, maintenance and closure, a copy of the easement or lease is registered against the certificate of title or other instrument of title affected. Subsequent to registration, and after survey (s 22 (7)) the Minister (of Lands) notifies the existence, name and conditions of use of the walkway in the *Gazette*.

Rights

The public has gained a privilege in being able "to pass or repass on foot over any walkway without charge" and coupled with this privilege are duties and obligations. These are found in s 39 and s 40 (offences). Offences are committed where an act or omission occurs without lawful authority. Lawful authority may be conferred in any of the following ways:

(a) where permission is granted by a regulation or bylaw in force under the Act.
(b) where the owner/occupier of the adjoining land has granted permission.
(c) where the activity within defined limits, concerned is conducted by the owner or occupier of the land on which the walkway is situated.

The provisions are designed to protect the walkway user and the farming operations of the adjoining occupier/owner, to prevent disturbance or otherwise interfere with the enjoyment of the walkway by other users.

Trespass

Section 40 relates to trespass onto private land from a walkway with a firearm or dog without the authority of the occupier. The law relating to trespass in NZ does not make trespass per se an offence: some *other* mischief must occur in conjunction with the act of trespass for example: trespass plus failure to leave after a warning. Under s 40 it is an offence to leave a walkway with a gun or a dog and to go onto the adjacent private land without the authority of the occupier – a situation not allowed for in the Trespass Act. A walkway over private land exposes a landholder to an extra degree of risk which would not have occurred had he not voluntarily agreed to its being established. In return for this co-operation a more severe code of trespass is established for trespass from a walkway.

Closure and revocation

A walkway, once created, may not necessarily last in perpetuity because a definite expiry time may be stipulated in a lease or easement agreement, or lack of use or the need to re-route part of a walkway may necessitate a change. The walkway is extinguished by a notice of revocation published in the *Gazette* and registered against the certificate of title or other affected instrument. Temporary closure may occur:

(i) for reasons of safety, during emergencies or for maintenance or development purposes or,
(ii) at the request of the occupier of the adjoining land.

Landholders should specify conditions of use and periods of closure when negotiating agreements. Should any situation occur after registration, a

landholder may request the controlling authority to close the walkway (or part) but cannot compel closure. Thus all foreseeable reasons for closure should be stipulated in the registered agreement.

Conflict with other Acts (s 21)

The intent is to ensure that public land with an existing specified use retains full legislative protection if a walkway is established over it.

This section again emphasises voluntary participation – the Commission does not purport to be a further organisation "interfering" in the management of land and for this reason the NZWA has been deliberately made subordinate to other Acts.

Town and Country Planning Act 1977

Section 73 of the above Act provides:

> "where any land is specifically identified in the district scheme as being used for purposes of value to the community but not intended to be owned by the Crown, the Council, or any local authority, then . . .
>
> "(c) The use of that land for any purpose which is inconsistent with the identified purpose – shall, in the absence of anything to the contrary in the district scheme, be deemed to be a conditional use of that land and shall not be permitted unless the consent of the Council is given . . ."

It has been suggested that this provision could be used for prior identification and protection of walkways, but it is felt that this provision would not enable the Commission, any district committee or controlling authority (including a local authority) to include desired routes on district schemes as "proposed public walkway under the NZWA", because the words "as being used" clearly indicate that it applies to existing uses, not proposed uses. The use of Section 73 for walkway purposes would certainly be extending its ambit beyond its original intended scope, which is presumably, to cover such uses as privately owned sports grounds and schools.

Section 22 NZWA specifically provides for prior consultation and negotiation with owners, and requires the Commissioner to "treat and agree" for an easement or lease. It would not be appropriate to use district schemes to attempt to prescribe future routes which have not already received approval of landowners, and which would require the owner to take some interest in or part in the district scheme processes to protect his land from prescriptions or plans for walkways. Any provision under a district scheme which places some potential restriction on an owners' use of his land must be construed as a constraint on his rights.

However, it is desirable that a district scheme recognise the existence of walkways as a land use element, and that proposals for walkways are in some way made apparent through the district scheme. Dicta by Treadwell SM in *Fiordland National Park Board v Wallace County Council* (1978) 6 NZTPA 379 are relevant: there is a need

> "to establish some compatability between the local authority and the National Parks Board because the activities of the National Parks Board can have a very real effect upon the activities of landowners within the boundaries of the territorial local authority . . ."

and

> "Such matters as are expressed on National Parks Board policy or which, although not part of that policy, are clearly under consideration should be expressed in the scheme for the purpose of allowing interested inhabitants to obtain an overall picture of projected park activities . . ."

A similar principle should apply to walkways, which are similarly administered from a national level through local committees. A possible means of achieving this is to illustrate and label existing walkways on district scheme maps, with policy and proposals being described in broad terms in the scheme statement.

Initial assessment

The NZWA has been in force for two and a half years, and to date eight walkways have been opened under the auspices of the Commission and 42 approved for development. Walkways are known to exist or be under development by local authorities working within their own territorial boundaries. These walkways have increased recreational opportunities and public access to the countryside which is the primary ideal of the Act. Its effectiveness cannot be measured in purely quantitative terms but must also consider the qualitative aspect in the extent to which walkways have increased recreational opportunities in their region. Although some regions may not have many walkways to use as a yardstick of success, those walkways that do exist will provide a resource that will play an important part in a region's recreational framework. The Commission has necessarily adopted a cautious approach so as to protect landholder interests and ensure public safety.

The Commission has recognised the need to increase the extent of protection to a landholder and sees the need for compensation where damage has occurred as a direct result of the walkway being over the property. It is hoped that an amendment to the Act will be made soon so that compensation is available on the recommendation of the district committee. A conviction will not be a pre-condition that compensation be paid; pay-

ment would be made as soon as possible so as to achieve minimum disruption to farm management.

Because the objectives are broadly stated and its approach and concept experimental in the context of NZ recreation, it is important that legal advisers to landowners and occupiers be fully aware of the possible implications a walkway could have for their clients. The emphasis is on voluntary participation and if the initiator of a walkway and the landholders approach the concept in this light, a mutually beneficial relationship should develop.

Acknowledgments

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CASE AND COMMENT

Landlocked land – Agreement subject to planning scheme change

In *Murray v Devonport Borough Council and Others (No 2)* (Supreme Court, Auckland, 19 September 1978 (M 546/76)), Barker J presided over a resumed hearing concerning the applicant's "landlocked" property.

In the first hearing (noted [1977] Current Law, para 769), Speight J held that the plaintiff was entitled to relief under s 129B of the Property Law Act 1952 in order to provide vehicular access to his property at Cheltenham Beach, which had a 3-foot accessway only. The access envisaged was to grant an easement over Council "reserve" land, but this was later declined by the Council as contrary to town planning principles. Speight J then issued a memorandum requesting further proposals.

Subsequently, the Council agreed to exchange a 10ft access strip over its land for a 10ft strip from the frontage of the applicant's land adjoining the beach, and this proposal was before Barker J at the resumed hearing. However, two other nearby residents objected to the proposed exchange claiming the new driveway would spoil views and reduce property values. The status of these residents to object under s 129B (3) (b) was challenged as the access strip did not adjoin their properties, but his Honour ruled that the phrase "every person having an estate or interest . . . in any other piece of land . . . that may be affected if the application is granted" should be widely interpreted and the residents were entitled to be heard. The weight to be placed on the "planning" type of objection was another matter.

As to the legality of the proposed agreement, his Honour noted that this was specifically authorised now by s 58 of the Town and Country Planning Act 1977, and the Court was not entitled to intervene until appeal rights had been exhausted under s 166. His Honour observed:

> "These sections, in my view, show an intention by the Legislature to legitimate what in my experience has been a frequent practice of Councils to act as a property owner on the one hand and as an independent quasi-judicial tribunal on the other".

However, as to the relationship between the Court's power under s 129B of the Property Law Act and the consequential changes to the planning scheme, subject to objection and appeal rights, the following comment was made:

> "It appears that the Court's order in favour of a worthy applicant under section 129B could be frustrated by a local body or by a Planning Tribunal on appeal therefrom, even though considerations of town planning may well have been canvassed and dismissed at the hearing before the Court. I do not think that there is any easy solution to this lack of liaison between the two pieces of legislation".

This problem was commended to the Legislature for study, but in conclusion his Honour approved the agreement as the best solution to a difficult problem. In effect, the agreement formalised a pre-existing practice of driving across the Council land.

With reference to the planning scheme problem, one can comment that in most cases involving landlocked land the zoning of the land in question will not be an issue as vehicle access is implicit in or ancillary to residential, commercial or industrial predominant uses. But in the present case, involving "reserve" land, a scheme change (or specified departure consent) was necessary to validate the ultimate use of the exchanged areas. As objection rights concerning uses are given to a wider group under s 2 (3) of the Town and Country Planning Act 1977 ("any body or person representing some relevant aspect of the public interest") it is appropriate that the Court order under s 129B should not override or bypass these rights. However,

provided all the facts, issues and alternatives are before the Supreme Court, it is most unlikely that a Council or Planning Tribunal would reject (in the absence of compelling grounds) the most reasonable solution arrived at by the Judge. If such a case did arise, the matter could ultimately get back to the Court on a point of law stated under s 162 of the Planning Act, as the discretionary powers to approve scheme changes or give planning consents must be exercised in the public interest and not in an unreasonable manner.

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Domestic Proceedings Act 1968 – appeal against separation order

Hunt v Hunt (Supreme Court, Auckland; 11 October 1978 (No 1112/78). Chilwell J) was an appeal against the making of, inter alia, a separation order. The continuing relevance of this case remains, however, to be seen, for, if the Family Proceedings Bill 1978 is enacted in its present form, separation orders will be a thing of the past.

Chilwell J made the following important preliminary point:

> "An observation which ought to be made in that the making of a separation order is a serious matter. More often than not, one finds that the parties have consented to the making of such an order. There have been occasions when I have had cause to reflect upon the appropriateness of a consent in the circumstances. I have not discussed this with my brother Judges but I had occasions during my experience on the Bench to wonder if sometimes consent orders are extracted through pressures exerted upon the parties rather than on a basis of reflective and due consideration. On the one hand, parties are to be encouraged to resolve their difficulties. On the other hand, the Court should always be zealous to make its time available for the determination of this type of case. One sometimes gets the impression, possibility wrongly, from the large number of consent orders, that the separation order aspect of the jurisdiction in the lower Court has taken on an appearance of mere formality."

Turning to the case itself, Chilwell J found that it was on the basis of the evidence of the wife that the Magistrate had made the order, though he had accepted all the husband's evidence including that to the effect that he did not wish the marriage to come to an end. It appeared to his Honour that Magistrates were relying on *Cleary v Cleary* [1977] NZ Recent Law 135, which caused his Honour to observe that he did not consider Jeffries J "intended to lay down any principle that it was only necessary to accept the version put forward by one party. If this is the view of their Worships then they must be reminded of their duty to *consider* the whole of the evidence from both sides. From the short digest available to me, it appears that all that Jeffries J purported to determine was that the existence of a state of serious disharmony is purely a matter of fact. In resolving that matter of fact questions of fault are irrelevant. The issue is: whether there is a serious state of disharmony however it may have come about." Chilwell J then observed that: "I pause at this stage to observe that the making of a separation order is discretionary. I am not suggesting that the facts of this case fit the example I am about to give. Assume for the moment a marriage of some 30 years. Assume that the children have grown up and left home. Assume that the parties have lived together in a reasonably contended state. Then assume that for some reason, such as the wife deciding to take a course in social studies or psychology, she then begins to question the worthwhileness of her life with the husband. She forms the conclusion that she has wasted the best part of her years. She decides that she is not going to waste what is left for her in life. She decides that what is left for her in life does not include any room for her husband. She removes herself from the matrimonial bed; she commences to make life difficult in the home. It does not take long for disharmony to result and it does not take long for that disharmony to become serious. The example I have given records roughly a set of facts which I had in a case involving people of professional standing in the community. The issue between them was matrimonial property but there was no doubt that the wife, in that case, got tired of her husband and she wanted a new life.

"If separation orders are going to be made on facts such as those in the example I have given, then in my view there is no element of justice in the Domestic Proceedings Act. I cannot believe that that is the position. I cannot believe that in such circumstances a Magistrate would exercise his discretion in favour of making a separation order."

His Honour then traversed the facts of the case before him, saying they were not on all fours with his example just given but that they began to approach it. The marriage had lasted 28 years. There were four children, two of whom had grown up and left home, the other two sons being 17 and 14. On the evidence, a "degree of unhappiness" emerged. The wife said, without explaining what the unhappiness was, that it had gone on for 10 years and had come to a head two years ago. She had, she said, talked to her husband

to try and reach some understanding – upon what, she did not say. She further said she continued to live with the husband because of the children and that he had replied: "Well, stay on as housekeeper". She also said they did not speak; she complained that he liked to belittle people and spoke of one case where he allegedly insulted a guest. She complained that, when she was recently in hospital, he had not moved 'with alacrity to visit her'. Sexual relations had ceased 18 months ago and the wife had no feelings for her husband and they had nothing in common. She did not consider a time would come when they might grow together again and she referred to the existence of childish behaviour between them following the filing of her application. Cross-examination of the wife elicited that her main aim was to evict the husband so that she could "live a comfortable life without having the 'nark' in her family around".

Chilwell J went on to say: "The symptoms present that of a menopausal person affected by the fact that her children are leaving home. She denies that she has that medical condition or that it in any way has affected the marriage. In the face of her denial it is probably speculation on my part to be referring to such matters except for the fact that Mr Skelton put forward, as one of his submissions, the probability that menopausal problems are the seat of the problem between this couple. It one accepts the husband's evidence, as the learned Magistrate appeared to do, there is some corroboration to be found in his evidence that the wife's attitude to him is the result of menopausal change. I do not propose to determine the issue, menopausal change or not, because the evidence is not sufficiently conclusive on the point."

"Putting that aside, when one examines the wife's evidence, there seems to be a surpising lack of matters of real criticism of the husband. I am left with the view that the disharmony in this household are probably within the mind and attitudes of the wife. When one looks at the husband's evidence, the impression one gets is of a husband who has been a good provider; who has been a good family man, who has devoted himself to his home and family. One only needs to examine the photographs of the house to draw the conclusion that he is a worthwhile husband. There is no evidence at all of excessive drinking, of philandering, of over-spending, of meaness, or any of the other things that wives commonly complain about, and husbands too."

Having observed that the Court below had been wrong to make orders the effect of which was to evict the husband from his home, his Honour returned to the matter of serious disharmony in the context of s 19 (1) (a) of the 1968 Act, saying: "Unfortunately, I have only the Concise Oxford Dictionary in this courtroom. 'Disharmony' is defined as 'discord, dissonance'. There can be no doubt of discord in this household. It existed. Was it serious? I turn to the same dictionary. One has to be a little selective in extracting from the dictionary how the word 'serious' fits the context of this particular statute. The phrases I have selected are 'not frivolous or reckless or given to trifling'. Alternatively, 'Important, demanding consideration, not to be trifled with, not slight'.

"One cannot generalise about human conduct particularly in the matrimonial state. When people reach the age of this couple, now 55 and 46 respectively, the falling off of sexual intercourse is not necessarily a serious matter. It must depend upon the desires of the parties. The evidence does not indicate really that either party was particularly fussed about the lack of it. Married people who are not having sexual relations are not necessarily people in a state of serious disharmony. The lack of sexual relations is merely a pointer to the existence of a state of disharmony and can be a pointer to the seriousness of it."

His Honour concluded by saying that ". . . I do not think one can determine whether a state of disharmony is serious by considering the evidence of only one party. There are always two sides to any story presented to the Court. Anyone engaged in forensic issues knows that when the second side of the story is heard the first quite often takes upon itself a fresh complexion. I am disturbed that the learned Magistrate appears to have made his assessment solely on the wife's evidence. If I am wrong in that view then I am not persuaded that the disharmony between this couple, taking an overall view of their marriage, is serious. I further take the view that even if a state of serious disharmony was the correct view of the facts, the evidence is curiously lacking as to the unreasonableness of requiring these people to live under the same roof. I am just not satisfied that it was proved that it was unreasonable for the wife to continue to live with the husband. On that ground alone, the judgment in the Court below must go. However, if I am wrong in my assessment of that jurisdictional question, the husband clearly wanted a reconciliation. The Magistrate believed the husband. That being so, how could the learned Magistrate find that the parties were unlikely to be reconciled except by putting entirely to one side the evidence of the husband and, by doing what he did in fact do, and that is, determine the matter solely on the evidence of the wife.

"In my judgment, the wife failed lamentably to establish the facts necessary to found the jurisdiction of the Court to make a separation order under Section 19(1) (a) of the Domestic Proceedings Act 1968. Even if I am wrong in that view it is

my view, taking an overall view of the evidence, that the learned Magistrate should have exercised his overall discretion against the making of a separation order. The result is that the appeal is allowed in full and I quash all the orders made in the Court below."

No order for costs was made.

PRHW

ACCIDENT COMPENSATION

PUNISHING THE WORDS OF SECTION 5 (1) THE OTHER SCHOOL OF THOUGHT REPLIES

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In recent months three cases have raised the question as to whether those who have suffered personal injury by accident may, despite s 5 (1) of the Accident Compensation Act 1972, recover punitive damages *(a)* from the person who causes the accident. The first two cases held not *(b)*, but in the third, *Howse v Attorney-General (c)*, O'Regan J, after fuller argument than that presented in the previous two cases, held that such a proceeding was still maintainable. His conclusion was supported by Mr D Collins who, in a recent issue of the New Zealand Law Journal *(d)*, canvassed the cases in question, the nature of punitive damages, functional questions in relation to the Law of Torts, and the interpretation of s 5 (1). It is the latter which is the prime concern of this article, the present writer being of the opinion that the interpretation of s 5 (1) adopted by O'Regan J and by Mr Collins is incorrect. The aim of this article is to offer that which the writer considers to be the true interpretation of s 5 (1), namely that it bars proceedings for punitive damages in situations of personal injury by accident.

(a) The plain words of s 5 (1)

Section 5 (1) in its present form provides as follows:

> "Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or by any other person, and whether under any rule of law or any enactment".

The issue at present under consideration is simply this: do punitive damages arise directly or indirectly out of injury to the plaintiff: It is the contention of the writer that punitive damages *do* arise out of injury to the plaintiff seeking them, and as a consequence where such injury constitutes personal injury by accident within the meaning of the Accident Compensation Act, proceedings for punitive damages are barred by s 5 (1). The contrary view taken by O'Regan J and Mr Collins stresses the fact, not disputed by the writer, that punitive damages are awarded not to compensate the plaintiff, but rather to punish the defendant. This view may be fairly illustrated by the following passage taken from the judgment of O'Regan J in *Howse*.

> "In my view, punitive damages arise, if they arise at all, from the acts done contrary to law and not from the harm to the plaintiff caused by such acts".

With all due respect, the writer would submit that this is erroneous in so far as it suggests that punitive damages arise solely from the acts contrary to law. A further step should have been taken by O'Regan J – do the acts contrary to law manifest themselves in injury to the person seeking to recover punitive damages?

In order for a claim to punitive damages to succeed it is necessary that the plaintiff be the victim of those acts in respect of which the punitive damages are sought. This somewhat elementary, yet too often forgotten, point is made clearly by Lord Devlin in *Rookes v Barnard* [1964] AC

(a) In this article the phrase "punitive damages" is used, rather than the equally common "exemplary damages", largely for reasons of consistency with Collins and O'Regan J.

(b) *Donselaar v Donselaar*, unreported, (1977) Wellington Registry, A 454/76; *Koolman v Attorney-General*, unreported (1977) Wellington Registry, A 519/76.

(c) Unreported (1977) Palmerston North Registry, A 132/75.

(d) "Proceedings for Punitive Damages in the Regeme of Accident Compensation", [1978] NZLJ 158.

1129, 1227 where he said "The plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour".

While the decision in *Rookes v Barnard* has been greeted with either displeasure or equivocation in most parts of the Commonwealth *(e)*, the principle contained in the previously quoted remarks of Lord Devlin has never been dissented from. Thus a Canadian Judge has said in relation to punitive damages "The basis of such an award is actionable injury to the plaintiff . . ." *(f)*.

While such observations may appear trite in that it would be novel, to say the least, for a person who is unaffected by the acts of the defendant to claim punitive damages, they are of crucial importance when considering s 5 (1). Were there no one affected by the actions of the defendant, there could be no possibility of a punitive damages action. Punitive damages arise *not* because the defendant's conduct is contrary to law and deserving of censure, but rather because that type of conduct has affected the plaintiff. That the plaintiff be the victim of the defendant's acts is a sine qua non so far as punitive damages are concerned. If the plaintiff were not the victim, no punitive damages can be awarded, despite the fact that the conduct of the defendant may remain nonetheless contrary to law and deserving of censure via the medium of punitive damages. The proper course for such an unaffected plaintiff to follow is to bring a private prosecution.

Viewed in the light of the above, it is readily apparent that punitive damages arise *not* solely because of the defendant's actions contrary to law, but also because the actions have had a victim, who must be the plaintiff. Because the plaintiff is the victim, it usually follows that he has suffered injury. Section 5 (1) does not require that this injury be the sole or most direct factor from which the damages arise, as is shown by the use of the word "indirectly". It is only necessary that the damages in question arise in some way from injury to the plaintiff. As shown above, a punitive damages claim cannot succeed without the plaintiff having been the victim of the acts in question. Punitive damages arise if and only if the plaintiff has suffered injury. Thus punitive damages arise in some way "out of the injury".

It therefore follows that where the plaintiff in a punitive damages action has been affected by the defendant's acts in such a way as to constitute "personal injury by accident", the action is barred by s 5 (1), being a proceeding for damages arising directly or indirectly out of the injury.

(b) The effect of the 1973 amendment

Section 5 (1) as originally enacted barred actions for "damages in respect of injury or death". In 1973 an amendment reconstituted the section in its present form, barring "proceedings for damages arising directly or indirectly out of the injury or death" *(g)*. The change in statutory language effected by this amendment is, to the writer, significant. While the reasons for the change in language have already been the subject of speculation and may well have been to cover consequential damage arising from the injury *(h)*, in the opinion of the writer the words used have the effect of extending the barred proceedings beyond the area of consequential damage. Whereas "damages in respect of the injury" clearly connotes compensatory damages directly related to the injury, and thus focuses on the *purposes* for which the damages are awarded, "damages arising directly or indirectly out of the injury" does not focus the inquiry on the purposes of the damages award. Rather it directs the inquiry to the fact from which the right to claim damages flows.

It is suggested, with respect, that where O'Regan J and Mr Collins fell into error was in failing to realise that while s 5 (1) as first enacted directed an inquiry into the purposes of the damages award, the section as amended in 1973 now directs the inquiry to the source of the right to claim damages – that which the damages arise out of. In so far as they suggest that the purpose of punitive damages is to punish for acts committed contrary to law the writer can only agree, but with punitive damages the purpose of the damages award is not, unlike compensatory damages, to be found in the same fact as the source of the right to claim damages. In compensatory damages the purpose is to compensate for injury, and the right to sue arises from the fact of the injury. In punitive damages the purpose is punishment of unlawful conduct, but the fact of the unlawful conduct alone does not give the right to damages. The punitive aspect is *why* they arise, but not *where* they arise from. The punitive damages sought arise, indirectly if not directly, from the fact that the plaintiff has been affected, and usually injured, by the defendant's conduct. The injury is the source of the damages, the punishment the purpose.

(e) Most telling is the judgment of the High Court of Australia in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

(f) *Paragon Properties Ltd v Magna Envestments* (1972) 24 DLR (3d) 156, 167 per Clement J A (Alberta Appeals Division).

(g) Accident Compensation Amendment Act (No 2) 1973, s 5.

(h) See Collins, op cit, p 163; Vennell, "Some Kiwi Kite Flying", [1975] NZLJ 254, 255.

Thus the inquiry directed by s 5 (1) has changed subtly, and this change of emphasis results inexorably in the barring of punitive damages actions. Nor can it be claimed that the change was fortuitous and unintended – when emphasising the purposive aspects of a damages award Parliament invariably uses "damages in respect of" *(i)* or the equally common "damages for" *(j)*. Its failure to use the accepted formulae in this instance can only mean a reoriented inquiry, the changed nature of which, when combined with the anomalous creature that is punitive damages *(k)*, has served to confuse. This confusion of different inquiries can be seen in the previously quoted passage from *Howse*, where O'Regan J apparently considers the course of the punitive damages action to be the same as the purpose of the award, but is better illustrated by Collins. The single most important sentence of his article reads as follows:

> "Thus, because punitive damages are not awarded in respect of the injury suffered by the victim, s 5 (1) does not necessarily bar proceedings to recover this species of damages" *(l)*.

So far as this goes to suggest that compensation for personal injury is not the purpose for the imposition of punitive damages it is, of course, absolutely correct. But it is the wrong inquiry. The reasoning of Collins employs exactly those words which ceased to form part of s 5 (1) in 1973 – "in respect of". Rather than asking himself what punitive damages are awarded "in respect of" it is submitted that Mr Collins ought to have asked himself what punitive damages arise out of, as required by the amended s 5 (1). Clearly it is a failure to fully appreciate the changed nature of the inquiry directed by s 5 (1) that has led into error.

It is the hope of the writer that the preceding discussion has demonstrated two points; first that it is not the purpose of punitive damages that is important in considering s 5 (1) but rather the source of the right to claim such damages, and second, that the said source is the effect the defendant's actions have on the plaintiff, not the defendant's actions alone. Where the effect of the defendant's actions is to cause personal injury by accident, the damages in question arise out of that injury and are consequently barred. As Quilliam J said in *Donselaar v Donselaar (m)* "The foundation of the right to claim exemplary damages is still assault which has caused injury". This, it is submitted, represents the correct approach.

(c) The consequences of a possible ambiguity

By this stage the writer hopes that it will have become clear that the plain words of s 5 (1) operate to bar proceedings for punitive damages in situations of personal injury by accident. This conclusion is centred on the words "arise out of", the writer taking the view that they direct the inquiry to the factual situations giving the right to claim punitive damages, and, the fact of injury to the plaintiff being an essential prerequisite to a successful punitive damages claim, punitive damages are accordingly barred. It should also have become apparent that this definition is one with which some appear to disagree. Thus O'Regan J finds that punitive damages arise "from the acts done contrary to law". Clearly O'Regan J feels that the words "arise out of" mean something akin to "arise by operation of law" and thus seeks the fact which makes the law operate to award punitive damages, this being the reprehensible conduct of the defendant. Thus he reads s 5 (1) as requiring him to seek the reasons why the law imposes punitive damages while the writer reads s 5 (1) as requiring an inquiry into the necessary factual situation before the law will operate in that way, as does Quilliam J who seeks the "foundation of the right to claim" rather than the reasons why the claim succeeds. There is thus disagreement as to the true nature of the inquiry in s 5 (1).

In the preceding pages the writer has given reasons why the inquiry ought to be that pursued by Quilliam J, these reasons being basically that it is necessitated by the changed wording of s 5 (1) plus the fact that punitive damages will never arise unless the plaintiff is the victim of the acts in question. If, however, the reader does not accept these views it ought at least to be apparent that there is a possible ambiguity in the words "arise out of". To the consequences of such an ambiquity we now turn.

The starting point is the presumption that Parliament intends to act reasonably. Thus in situations of statutory ambiguity the interpretation with the more reasonable consequences is presumed to be that which Parliament intended, and prevails accordingly *(n)*. To the writer the interpretation with the more reasonable consequences is that already pressed in this article. For this view the writer has two main reasons.

First, one of the aims of the Accident Compensation Act was to establish a compensatory scheme featuring a type of structural equity,

(i) Eg, Companies Act 1955, s 187 (6).

(j) Eg, Sale of Goods Act 1908, ss 51, 52.

(k) Anomalous in that, unlike most other types of damages, the purpose of the award does not lie in the same fact as does the right to claim such an award.

(l) Op cit, p 164.

(m) Op cit.

(n) *IRC v Hinchy* [1960] AC 748, 768 per Lord Reid.

this equity being based on the idea of earnings related compensation. Those with similar earnings who are similarly incapacitated ought to receive similar compensation. This simple equity focusing on the degree of incapacity suffered by the victim is destroyed by the continued existence of punitive damages in situations of personal injury by accident. If punitive damages are to be awarded the simple equity goes, to be replaced by the somewhat inequitable idea that he who is the victim of a more morally blameworthy act will receive more than one who, although incapacitated to the same degree, was not the victim of the type of actions necessary for a punitive damages claim to succeed. The needs of each generated by the accident are equal, but the financial consequences are not. It is manifest that punitive damages, focusing as they do on the guilt of the person at fault, are totally inconsistent with a compensatory scheme in which fault liability plays no part, and the focus is the needs of the victim. Parliament in enacting the Accident Compensation Act gave tacit yet obvious approval to the equities outlined above and suggested by the Woodhouse Report *(o)*. If Parliament is presumed to act reasonably then it follows that its approval of the above equity stamps that equity with presumed reasonableness. It further follows that if the consequences of allowing punitive damages actions to function as suggested above conflict with that equity then those consequences must, in their turn, be presumed unreasonable. The interpretation of s 5 (1) which prevents such a situation from arising ought to be adopted.

Perhaps the argument just put forward is the unjustified "windfall" argument identified by Mr Collins who, significantly, is prepared to admit that it does have some validity. If it is indeed the same argument it cannot, in the opinion of the writer, be answered as Mr Collins seeks to, by reference to the fact that the plaintiff in a punitive damages action has spent large sums in pursuing the action. Such considerations are properly the concern of costs, not of damages, especially not punitive damages, which are in no respect compensatory.

The writer's second reason for arguing that the consequences of the interpretation put forward by him are the more reasonable lies in the perennial debate as to whether or not punishment and deterrence are legitimate functions of the Law of Torts. Much of this debate has been ably canvassed by Mr Collins, and because of this the writer has no intention of reopening the functional issues here, save to say that he agrees with the English view, that such functions are more properly the province of the criminal law *(p)*. There are, however, areas on the periphery of this debate of some concern to the writer. The fact that in most cases where punishment is the aim of proceedings the criminal law gives the accused the protection of a higher standard of proof than that in the civil cases is rejected by Mr Collins as "superficial" on the grounds that the differing standards mean nothing to the average juryman. Whether or not this is so can only be the subject of speculation, and such speculation is a poor justification for ignoring the deeply rooted traditions of the law that a man should only be punished when proved guilty beyond a reasonable doubt. To allow actions which have substantially the same goals to be subject to different rules of law is to take a step backward to the days when the forms of actions were all important. One is reminded of the remarks of Lord Reid, spoken in a different context, but nevertheless persuasive here – "The law may sometimes be an ass, but it cannot be so asinine as that" *(q)*.

Even if the criminal standard is rejected as not appropriate in cases of punitive damages, what standard is? Is it to be that vague, ill-defined creature already identified in this country *(r)* when what are in substance allegations of crime are made in civil proceedings?

Then there are the problems of double jeopardy, the possibility that punitive damages may mean a man could be punished twice for the same act. Mr Collins seeks to avoid these problems by reference to the Canadian case of *Radovskis v Tomm (s)* where it was held that an action for punitive damages was not maintainable once the defendant had been punished in the Criminal Courts. But what of the opposite situation, in which the civil action preceded the criminal *(t)*? Would an award of punitive damages preclude the possibility of those orders which can only be made in criminal cases, such as imprisonment, probation, periodic detention or psychiatric treatment, orders that may well be more in the interests of society and the defendant than an award of punitive damages? It may be that the application of the maxim expressio unius, exclusio alterius to s 358 of the Crimes Act *(u)*

(o) Report of the Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand, paras 279 (e), 484 (2), 488 (4).

(p) The view propounded most clearly by Lord Reid in *Cassels v Broome* [1972] AC 1027, 1086.

(q) *Haughton v Smith* [1974] 2 WLR 1, 14.

(r) See *Middleditch v Hinds* [1963] NZLR 570.

(s) (1957) 9 DLR (2d) 751 (Manitoba QB).

(t) Admittedly a rare situation, yet conceivable. For example, other facts are discovered at the civil trial previously unknown to the prosecution.

(u) Which deals with the special plea of autrefois convict in criminal cases.

would prevent such a situation from arising, but even if this is so the problem of double jeopardy remains. Few could view this possibility as desirable or as being other than unreasonable.

Then there are the evidentiary problems that arise from such a situation – would *Jorgensen v News Media (v)* operate in this situation, or would the doctrine of issue estoppel? Are the protections of the Evidence Act regarding the past history of the defendant *(w)* available to the defence in a punitive damages action?

As if this were not enough, Constitutional issues are also raised. The punishment of conduct contrary to law has long been the right of society alone. Even the individual's right to initiate a private prosecution is subject to the overriding dictates of the public interest, vested in the Attorney-General and his power of nolle prosequi *(x)*. Similarly the discretionary powers of the police in relation to the initiation of prosecutions have long been regarded unreviewable *(y)*. Are the overriding public interests represented by these powers to be effectively sidestepped by the use of a punitive damages action? The law does not allow private opinions as to the need for something to triumph over the public interest in other areas, for example indecent publications, and there is no good reason why it should do so in the field of punishment.

These potential problems and more arise from an interpretation of s 5 (1) that allows the continued existence of punitive damages. Clearly the consequences of the interpretation put forward in this article are the more reasonable in that they reduce almost to vanishing point the possible problems outlined in the preceding paragraphs, since punitive damages would only remain in situations which do not constitute personal injury by accident, and in many of those situations, for example defamation, there is no concurrent criminal liability.

(d) Conclusion

Punitive damages have, in recent years, been the subject of considerable debate, both in terms of the functional issues they raise and in terms of the applicable rules of law given their undoubted existence. It is the opinion of the writer that so much of this debate as concerned New Zealand is now of greatly reduced significance, since s 5 (1) of the Accident Compensation Act operates to bar them, in situations of personal injury by accident, being "proceedings for damages arising directly or indirectly out of the injury".

A consequence of this conclusion is that punitive damages only remain possible in situations that are not personal injury by accident. Recognition of this situation by the Court of Appeal would be welcomed, as punitive damages are not only inconsistent with the traditions of the criminal law but also utterly incompatible with a modern system of injury law which is non-fault oriented and avowedly compensatory.

Faced with the many and varied problems arising from the continued existence of punitive damages in situations of personal injury by accident it is clear that the reasonable thing to do, if a choice was to be made between continuing the problems and removing them, was to remove them so far as possible. Since Parliament is presumed to act reasonably, this, it is submitted, is what it must have intended s 5 (1) to do. Nor is this to attribute fanciful intentions to Parliament. It is worth remembering that it was the existence of many and varied problems in the common law process that provided the basis from which the Accident Compensation Act grew. It is therefore submitted that the wider of the two possible meanings, that which would bar punitive damages, should be adopted. A further indication that such a wider reading is what Parliament intended may be found in the closing words of s 5 (1) – "whether under any rule of law or any enactment".

It is thus apparent that, on the assumption that s 5 (1) contains an ambiguity, that ambiguity ought to be resolved against the continued existence of punitive damages claims in this area. To do otherwise is to allow the unreasonable to prevail over the reasonable.

(v) [1969] NZLR 961. (The proof of a conviction is evidence in civil proceedings of the facts on which it is based). Cf *Hollington v Hewthorn* [1943] KB 587.

(w) Section 5 (2) (d). Such protections seem clearly to be only available in criminal proceedings. To deny them in civil proceedings concerning the same issue seems unreasonable.

(x) Recently exercised by Mr Wilkinson to prevent prosecutions for offences under the NZ Superannuation Act 1975. See *Evening Post*, 1 April 1976.

(y) Predictably the exception is provided by Lord Denning MR. See *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118.

"Mistress", having lost its respectable, if not reverential, significance, came to mean a woman installed, in a clandestine way, by someone of substance, normally married, for his intermittent sexual enjoyment. This class of woman, if indeed she still exists, is not dealt with by the 1976 Act at all . . . I do not know a single English word which will accurately describe the unmarried housewife, but that is what Parliament is talking about – *Lord Kilbrandon in the New Law Journal.*

INDUSTRIAL LAW

WRONGFUL AND UNJUSTIFIED DISMISSAL: DAMAGES AND COMPENSATION, A CASE FOR REFORM

The principle laid down by the House of Lords 70 years ago in *Addis v Gramophone Company Ltd* [1909] AC 488, that in case of a wrongful dismissal without notice damages claimed cannot include compensation for injured feelings has recently been reiterated by the Supreme Court in *Bertram v Bechtel Pacific Corporation Ltd* (unrep A6/78, Whang) The combined effect of *Addis'* case and *Baker v Denkara Ashanti Mining Corporation Ltd* (1903) 20 TLR 37, an even earlier decision, is that damages may not be more than the amount of remuneration that the employee would have earned during the period of notice. In *Bertram's* case the defendant moved for orders striking out certain parts of the statement of claim, including among others loss of "prospect of executive appointments".

Barker J quoted *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, *Clark v Independent Broadcasting Co Ltd* [1974] 2 NZLR 595, *Cowles v Prudential Assurance Co Ltd* [1957] NZLR 152 and, of course, *Addis'* case. He restated the law in the following words:

> "I do not think that the claim [relating to prospect of executive appointment] is sustainable in law. It is quite clear from the authorities that an employee is not entitled to damages for the injury caused by the dismissal to his existing reputation and that no damages can normally be given in an action for wrongful dismissal for injury to the employee's feelings, his distress, social discredit or loss of reputation or for the extra difficulty in finding other employment which was caused by the circumstances of his dismissal."

In concluding his judgment His Honour briefly but significantly alluded to the difference between wrongful dismissal at common law and unjustifiable dismissal under the Industrial Relations Act 1973. He said:

> "It is perhaps a matter of comment in these days of sensitive industrial relations that the law in relation to damages properly claimable for unlawful dismissal has not moved from the rather intransigent position of *Addis v Gramophone Co Ltd* (supra). In areas where changes to industrial law is happening, such damages are possibly not quite so important. However, for persons in executive positions, summary and unfair dismmissal can work injustice and there may be a case for reform of the law."

The *Addis* rule has also expressly been upheld by English Courts, though the legislative introduction of the concept of unfair dismissal has substantially diminished its relevance. Even in *Cox v Phillips Industries Ltd* [1976] ICR 138, QB, a common law claim, Lawson J, notwithstanding that he paid lip service to the principle, on the narrow basis of the particular facts of the case, succeeded in circumventing it. In his view "if a situation arises which within the contemplation of the parties would have given rise to vexation, distress and general disappointment and frustration, the person who is injured by a contractual breach" should be "compensated in damages for that breach" (146). A learned commentator remarked that "the sturdy independence of the law of unfair dismissal from the old rules of wrongful dismissal has been emphasised" *(a)* by the decision of the House of Lords in *W Davis & Sons Ltd v Atkins* [1977] 3 WLR 214. Indeed, one may add, the distinctness of the two approaches has clearly been established.

Similarly, the categories of wrongful and unjustifiable dismissal are far from coinciding in New Zealand. Claims which would not lie at common law, as due notice has been given, may succeed under the statutory grievance, or victimisation, procedure *(b)*. The principal difference lies, nevertheless, in the range of remedies. Putting aside reinstatement which can be regarded as an institutionalised form of specific performance, the monetary recompense in the nature of damages for unjustified dismissal far exceeds the instransigent, not to call tight-fisted, attitude so firmly established by the *Addis* decision. Two kinds of "damages" may be awarded: reimbursement and compensation. The first is expressly defined as the granting of "a sum equal to the whole or any part of the wages lost" by the worker: para (a) of s 117(7) of the IR Act. Paragraph (c) of the same subsection merely provides for "payment to [the worker] of compensation", but does not give any guidance what it should be. This point was emphasised in *McHardy v St John Ambulance Assn* (1976) Ind Ct 217. The Industrial Court observed

(a) Napier, *Note* in (1977) Camb LJ 235.
(b) See [1977] NZLJ 319 and [1977] NZLJ 348.

that a wide discretion is entrusted to a grievance committee and the Court "to decide whether, even if unjustifiable dismissal be found, any order should be made in respect of lost wages and compensation, and as to the quantum of both if an order is made" (221). When exercising this discretion a committee or the Court "should take a broad view of all the facts of the case", among others, the conduct of the worker. Such facts, as can be discerned from judgments of the former Industrial Court and those of the re-established Arbitration Court, include hurt feelings, humiliation, loss of dignity and like grounds. Thus, while "reimbursement" may be equated with damages claimable at common law, "compensation" obviously signifies further categories of damages outside the ambit of the *Addis* rule.

Decisions of the Court, however, have not always apportioned the amounts awarded between the two headings. In *McHardy's* case (supra) the amount of $2250 was clearly divided into $1000 as reimbursement and $1250 as compensation. It is of interest that the Court obliquely recognised the relevance of hurt feelings as a matter of principle when stating that in the circumstances the behaviour of the applicant made it inapposite to consider them. Compensation was awarded on recognition of the fact that the applicant, an ambulance driver, had to shift to another city "and make a fresh start elsewhere. This is something which costs money". The sum of $500 granted in *Dee v Kensington, Haynes and White* (1977) Ind Ct 67, however, expressly represented "full settlement of wage lost and of compensation". Likewise, in *McDonald v Hubber* (1976) Ind Ct 161, the amount of $200 was "calculated to allow for the one week's wages . . . lost, plus the deficiency in wages . . . and in addition to allow some compensation for the undoubted distress of mind with this lady must have suffered." The Court found that Miss McDonald after her dismissal suffered a good deal of distress, because of her age and difficulties in securing other employment. She also lost leave and sick pay entitlement. The recompense for loss of wages and for distress of mind, nevertheless, was not distinctly apportioned, though the decision considered "some small recognition" of mental suffering justified.

In *Begumanya v Night Security Service Ltd* (1977) Ind Ct 119, the element of humiliation played an important part in granting compensation. The employer (in fact the night supervisor as representative of the employer) habitually used "colourful language" and abusive terms in addressing the dismissed worker calling him "bastard", "thief" and "tramp". The Court ordered payment of $600 as compensation which appears to have covered also wages lost, but no part of the amount was described as reimbursement. At this juncture it may be convenient to point out that in victimisation actions under s 150 of the IR Act the granting of reimbursement is mandatory, while in a grievance procedure it may be ordered together or separately with the other remedies at the discretion of the committee or the Court. In *General Motors Ltd v Lilomaiava* (1977) Ind Ct 109, only reimbursement of wages lost was ordered in conjunction with reinstatement.

A similar progmatic approach characterises other grievance decisions. In *Wellington Amalg Society of Shop Assistants etc IUW v Wardell Bros & Co Ltd* (1977) Ind Ct 13, two shop assistants falsely charged with pilfering goods after acquittal were reinstated. The Court granted to each of them a compensation of $50 recognising their hurt feelings, though "the workers themselves have contributed to the situation by their foolishness, but not . . . dishonesty". In *Boswell v Wellington Hydatids Control Authority* (1977) Ind Ct 141, however, the sum called compensation was fixed as the equivalent of one month's salary and it rather has the character of reinbursement. In *Harpur v NZ Aluminium Smelters Ltd* (1977) Ind Ct 215, the Court stated that no order should be made regarding payment of wages lost, but in addition to reinstatement, in a somewhat self-contradictory manner, awarded $1000 "by way of compensation including economic loss during the period off work and all other factors". It may be argued, nevertheless, that there is no contradiction at all but an implicit distinction between wages lost and other ecomomic loss.

The restructured Arbitration Court seems to have extended the meaning of compensation to cover reimbursement for wages lost beside other economic loss. Thus, in *Baker v Universal Business Directories* (unrep AC 21/78) $2000 was awarded "by way of compensation for wages lost" and $1000 "to compensate for the loss of employment". Similarly, in *Loader v Guardian Royal Exchange Ass Co Ltd* (unrep AC 28/78) the apportionment was $3000 as "compensation for loss of wages" and $1000 "for loss of employment and expenses". In *Case v Barretts Hotel Ltd* (unrep AC 30/78) $800 was granted for loss of wages and a further $250 because the Court thought that "the circumstances [did] justify a payment by way of compensation". In *Randall v Shrimpi's Fashions Ltd* (unrep AC 35/78) the order to pay $400 was "compensation for loss of wages". In *Oakley v Tile Centre Ltd* (unrep AC 46/78) the Court ordered the payment of "the sum of $350 as compensation, it being understood that any loss of wages over and above the original four weeks paid is being included in this sum".

The conclusion can be drawn that reimburse-

ment represents a more restricted category of recompense based on wages, estimated overtime, holiday pay and allowances lost by the worker as a result of the dismissal, whereas compensation embraces a wider variety of grounds in reparation for both economic and non-economic loss. Thus, economic loss includes expenses of shifting, cost of litigation and other outgoings consequent on the termination of employment or necessary to the finding of a new position; non-economic loss covers injury to feelings, humiliation, distress of mind, impairment of reputation and all other similar matters for which the common law under the rigid *Addis* principle denies redress.

Refusal by the Court to draw a firm line between reimbursement and compensation must be recognised from a practical point of view as being perfectly justified, for the variety of facts and circumstances taken into consideration in a dismissal case cannot always be brought clearly under either heading. One may wonder whether the statutory distinction is really warranted. Legislation in Britain *(c)* provides for compensation only, but gives a clear method of assessment under two main heads. basic award and compensatory award. The basic award is a minimum of two weeks' pay, subject to deductions as prescribed. The compensatory award will be calculated under four heads: expenses, benefits lost up to date of hearing, estimated future loss of benefits and loss of pension rights. The third head includes recompense for loss arising from the manner of dismissal which make the complainant less acceptable to potential employers; in other words injury to reputation and humiliation. Here also certain deductions must be made *(d)*. By providing more detailed rules for assessing compensation the British legislation on the other hand deprives industrial tribunals from that discretion which grievance committees, and ultimately the Arbitration Court in New Zealand have power to exercise.

There can be no doubt that industrial law provides more satisfactory remedies than the common law process by making permissible monetary recompense on grounds rigidly excluded by the intransigent *Addis* principle. Only a limited number of employees can resort, however, to the procedures under the Industrial Relations Act 1973. Persons in executive positions must commence ordinary court action and the dismissal, though unfair, will not not necessarily be found unlawful. Furthermore, even though the plaintiff succeeds, the damages properly claimable and granted do not give real restitution for all the adverse consequences of the wrongful dismissal. As Barker J remarked in the *Bertram's* decision (supra) such dismissal "can work injustice and there may be a case for reform of the law".

The present writer has suggested several times that the role of the Arbitration Court should be broadened giving it, amoung others, exclusive jurisdiction in all termination of employment disputes *(e)*. If this aim cannot be achieved without a major restructuring of the present industrial law framework, then the law of wrongful dismissal should be brought in line, at least in respect of damages, with that of unjustifiable dismissal. A short statute abolishing the *Addis* rule and setting out broad guidelines in awarding damages, or compensation, under headings at present denied would be a good start. At the same time the Industrial Relations Act 1973 should also be amended by making reimbursement merely an item of compensation which is to be defined with similar guidelines. As a further desirable step the concept of wrongful dismissal needs to be eliminated and replaced with that of unjustifiable termination of employment by the employer, based on the well-known ILO Recommendation *(f)*. The judicial warning that the common law as at present "can work injustice", should not remain unheeded.

Alexander Szakats

(c) Trade Union and Labour Relations Act 1974; Employment Protection Act 1975.

(d) Employment Protection Act, ss 72-76.

(e) *Indroduction to the Law of the Employment* (Butterworths, 1975) ch 24; also "Wage Fixation System Restructured: the Reincarnation ot the Arbitration Court" [1978] 8 NZULR.

(f) Recommendation No 119.

TAX EVASION – VOLUNTARY DISCLOSURES

It has been reported that the Inland Revenue Department has been increasing its audit coverage and many more "tax offenders" are being caught in the tax net. The consequences can be very painful. In addition to payment of back taxes and late payment penalties, there can be a Court prosecution with fines and publicity, heavy penal tax with further publicity and financial distress, as well as the embarrassing effects on business, family and social relationships.

The Department advises that "tax offenders" in fear of being caught or with troubled consciences can have the pain substantially eased if a *full and complete voluntary disclosure* is made *before* any enquires are initiated by the tax office. The advantages are:

- No Court action will be instituted.
- The taxpayer's name will not appear in the NZ Gazette or the local newspaper.
- Penal tax imposed will be at a reduced rate equal to nominal interest on the tax evaded.
- The matter will be treated in the strictest confidence by the Department.

Inland Revenue Department

ON BELITTLING THE JUDICIARY

On belittling the judiciary – The independence of the judiciary would be in danger if courts continued to be subjected to criticism from Parliament and the media, Lord Hailsham of St. Marylebone said when delivering the annual Riddell lecture to the Institute of Legal Executives. Lord Hailsham questioned whether it was good that judges were getting an increasingly rough time from critics. Judges could not settle disputes without bias unless their position was absolutely secure.

"If they are constantly subjected to pressure, whether in the form of anonymous telephone calls, abusive speeches on the platform, snide remarks, and, worse still, hostile motions in Parliament, whether from ministers or backbenchers, they will not be able to perform their duties impartially."

"It is essential that a judge should not feel that he is himself on trial in every case he tries, still less in sensitive or difficult ones."

One reason for the increasing tendency of Parliament to criticise the courts was the change that had taken place in the character of Parliament.

"More and more the House of Commons has become the instrument of the executive, whose members all belong to the majority party, who together form the largest single group in the House, who control for the time being all the loyalty and skills of the Civil Service and, in the person of the Prime Minister, the power to call a general election."

In place of three branches of government according to classical theory – legislature, executive and judicature – there was now one powerful branch virtually fusing the functions of legislature and executive, which Lord Hailsham christened the "executature" and, on the other hand, a very small and relatively weak branch, the judiciary, whose function it was to uphold the rule of law.

In a politically sensitive case, whatever the judge did would give rise to controversy.

He said Parliament ought to be defending the independence of the judiciary. "But a tradition has grown up in the Commons of doing everything possible to belittle and denigrate the legal profession, the judges, and the work of the courts."

"This is all part of the process by which the Commons are arrogating to themselves privileges and functions which they have never possessed, and which they ought not now to possess." He cited the naming of Colonel B by four MPs as an example.

There had been those in Parliament who had reacted strongly against judicial creativity, he said. "Bitter jokes, unheard of until recently, have been hurled against the judiciary by jacks in office under cover of parliamentary immunity."

"There have been increasing attempts by the executive to protect itself from judicial criticism by seeking to exclude the jurisdiction of the courts, to which the courts have valiantly, if only partly effectively, replied."

He thought that the increase of judicial sensitivity to the abuse of power had been beneficial and, on balance, popular.

It was increasingly being recognized that judicial independence remained one of the few remaining protections of the individual, minority groups, and the inarticulate and largely helpless mass of citizens against the encroachment of the bureaucracy, mass culture, the oppressiveness of unions, powerful media and great corporations.

Lord Hailsham said there was even a danger to the independence of judges when they took on the chairmanship of public inquiries that might be controversial. How could it be supposed that the reports they produced "will not affect a judge's reputation for impartiality, or his chances of appointment or promotion if he offended some powerful minority, influential minister or popular prejudice or pressure group?"

Lord Hailsham said the rules on the drafting and interpretation of statutes were in urgent need of revision. The present rules and methods "might have been invented to cause friction between Parliament, the public and the Bench".

Our statutes were much wordier, far less intelligible and infinitely more detailed than those of any other country. Our rules of construction were more confused.

The process of draftsmanship in its initial stages was conducted in secrecy. There was no submission of the draft to any real process of discussion outside the government machine before a Bill was introduced into Parliament. The committee procedure after second reading was cumbrous and unreal, and there was no revising process after the Royal Assent.

When the Bill was enacted, the rules of interpretation placed undue emphasis on a literal construction, and the absence of detailed information made it impossible to discover what the draftsman thought he was doing when he used a particular phrase.

"What is wanted is not more legislation but less legislation, more carefully prepared, more fully discussed, and applied by clearer and more consistently defined canons of construction". From *The Times* report (25 May 1978) of the Annual Riddell Lecture delivered by Lord Hailsham to the Institute of Legal Executives, London, on 24 May 1978.