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INTER ALIA

Men and monopolies

During the industrial troubles that affected the Southland Freezing Works over the past 12 months and before, the ban imposed by the Southland branch of the Meat Workers Union on the killing of stock from two farmers who had expressed their disapproval of the union's activities in certain and unequivocal terms attracted widespread censure. All has now sorted itself out but it is worth recording the final moves that took place before Mr Justice White in December 1978. Probably because it was delivered just before Christmas and probably because the dispute finally fizzled out about then his judgment in *Buckingham Southland Frozen Meat and Produce Export Co Ltd* (Supreme Court, Invercargill, 19 December 1978, A65/78) passed largely unnoted. That is an undeserved fate for a judgment that strongly affirms the right to exercise a trade without interference – something that is too easily overlooked in these days of monopolistic marketing of primary produce.

The plaintiff, who was one of the farmers involved in the blacklisting, made arrangements to send stock to the defendant's freezing works. The Defendant agreed to receive the stock but refused to slaughter them for export. The plaintiff pointed out that the defendant was the holder of an export slaughterhouse licence, that s 34 of the Meat Act 1964 (as amended) made it a condition of its licence that it receive for slaughter stock intended for export, that he had satisfied all the conditions for the receiving of stock and that there was a clear obligation on the part of the defendant to carry out its duty and that its failure to do so interfered with his business. The defendant argued that the statutory duty was not absolute and that bearing in mind the possible industrial repercussions it was not in the public interest that it should accept the stock for slaughter. Two issues arose. The first was whether the scope and wording of the Meat Act gave rise to a duty owed to and enforceable by the plaintiffs or whether it gave rise to a public duty only. Mr Justice White held that

> "the plaintiff's right and the Defendant's duty under the section are clear on the natural construction of the statute. What will happen to the plaintiff if his sheep are not dealt with is the type of damage the proper application of the section would prevent. There has been a breach of the section and notice of a further breach. In my opinion, 'the scope in wording' of the Meat Act, and in particular, the clearly expressed objects of s 34, show that the plaintiff as a farmer who has fulfilled his duties is entitled to rely on a civil remedy in the present case".

The second issue was more contentious and concerned whether an injunction, the effect of which would be to require the defendant to receive the plaintiff's stock for slaughter and export, should be granted, the particular consideration bearing on this issue being the ban against the plaintiff. On this His Honour said:

> "That there is an industrial background in the present case there is no doubt, but I am satisfied that no question of public interest can be invoked successfully. Here it is clear that the defendant's threat not to comply is in breach of its statutory duty to carry out the terms of a statutory monopoly to receive, slaughter and process the stock of a farmer who has carried out his duties in presenting stock to the works. Undoubtedly there has been discrimination against the plaintiff as a result of the defendant's breach of statutory duty which has affected and is likely to affect very seriously the matters affecting both the public interest and private interest. In my view, that conclusion is underlined in this case where, as between the plaintiff and the defendant, what has been done

by the defendant, and what has been threatened, are actions which are contrary to a guiding principle of the law that:

> "'a man is entitled to exercise any lawful trade or calling as and where he wills, and the law has always regarded jealously any interference with trade . . . at it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the state'

– see *38 Halsbury's Laws of England* (3rd ed), p 15, para 9".

An injunction was granted. It is as well that this case has been quietly received for in more turbulent times it could be lauded as a challenge to union power. As it is, it may be read and accepted for what it is – a quiet reminder that monopolistic marketing organisations exist to serve each producer, that the interests of individual producers are not to be easily sacrificed, and that the law will continue to protect the right of an individual to exercise his trade without unlawful interference.

Granny flats

Building on a little flat for Granny is a marvellous idea – especially if Granny provides the money. But what happens if things don't work out? Is it a case of tough luck, Granny? Or does she get her money back? Or what? And of course complicating it all is that in the general euphoria attending the building and the idea of Granny coming to live nobody anticipates the possibility of later upsets and in fact no one was really sure whether Granny was giving the money or only lending it.

Mr Justice Speight in a recent decision (*Clayton v Green*, Supreme Court, Auckland (A770/78) 19 December 1978) was faced with just this type of problem. Granny had given (not lent) money for materials to enable construction of a flat for her to live in. Her son-in-law built it and also extensively remodelled his house. Later, for reasons that were completely unforeseen and that reflected no discredit on the parties, the arrangement collapsed. Granny then sought a declaration that she was beneficially entitled to an interest in the property proportionate to her contribution. Against that it was contended that there could be judgment only for a sum of money to be secured by an equitable lien. Both parties relied on the recent decision of the English Court of Appeal *Hussey v Palmer* [1972] 1 WLR 1286 in which however all that had been asked for was the return of the exact sum supplied for alterations. The question of a proportionate interest remained open. However Speight J pointed to observations, not only of Lord Denning but also of Phillimore LJ that favoured the idea of a proportionate interest. Lord Denning said:

> "the Court should, and will, impose or impute a trust by which Mr Palmer is to hold the property on terms under which, in the circumstances that have happened, she has an interest in the property proportionate to the £607 which she put into it. She is quite content if he repays her the £607".

Phillimore LJ agreed and in New Zealand Speight J concluded

> "I take this to be authority for the proposition that in an alteration case just as in a purchase where a constructive trust is held to have been created, it is a trust as for interest proportionate to the contribution".

Few would disagree with the equity of the result.

However the decision does underline the desirability of families thinking through the implications of the arrangements they are entering into, even to the extent of a formal agreement. In addition to the usual arguments in favour of recording agreements could be added, in the family context, that in what could prove an unsettling and difficult situation one potential source of discord will be removed.

Tony Black

Sheep may safely graze – "This action is about grazing and other rights over a Down in Hampshire. It has been fought with a pertinacity and vigour which says much for the powers of endurance of the breed of Hampshire sheep farmers to which the plaintiffs belong. The trial has lasted some eighteen days, apart from four days spent on a preliminary point; and when I say that counsel, who have conducted the case with much skill and learning, have referred me to no less than eighty-five volumes of reports and text-books, including a very large number of authorities, ranging in date from the last years of the seventeenth century to the present time, it will be appreciated that the parties have found advisers worthy of their own mettle. I do not, however, at all complain of the length of the trial, for there are in this case sufficient distinct causes of action, involving consideration of distinct issues of fact, to furnish at least half a dozen separate and respectable proceedings". *White v Taylor (No 2)* [1968] 1 All ER 1019, Buckley J.

THE LAW OF THE DEAD

Showing that death is no escape from life's problems

By D J ROUND, *lecturer in law, University of Canterbury.*

"Inviolability of sepulture is one of the dearest and most ancient rights of mankind; it is most deeply impressed on all our minds, and embodied in our common forms of speech. In the grave a man expects to be undisturbed; it is his last home" *(a).* Who would disagree? But although the common law of the dead was reasonably clear, statutory interference, in New Zealand, has changed, and often obscured, many things. The nature of the right of inviolability of sepulture may have changed a little. The grave may be not merely the domus ultima, the "last home", but also the domus aeterna, the eternal home of the temple of the soul. The Burial and Cremation Act 1964, the most recent of a line of statutes on the topic, creates several problems. Since it is trite law that there is no property in a dead body *(b),* and that a corpse has no rights, in what sense is it true that one *can* have a right, not merely to Christian burial, but to an undisturbed sleep until the trump of doom? And, since "Christianity is part of the laws of England" at least to the limited extent that Christian burial, as opposed to the burning of the dead, seems to be the only method of disposal of the dead known to the common law, there is room (depending on one's interpretation of the 1964 Act) for one of two complaints: either that Parliament has, by one absent-minded deletion, made it possible for anyone to be cremated, even despite his expressed desire not to be; or that Parliament has nowhere said in so many words that cremation is lawful, merely implying that some cremations are, and accordingly it is possible that some of the cremations carried out in this country are unlawful. This is a long story; statute has made many changes to the common law of the dead, and it will be found, that, just as the Lord giveth and the Lord taketh away *(c)* so statute has done the same thing.

Consider first of all the nature of the right of the dead man to lie undisturbed. ("Although to speak of the deceased as having a right of burial involves some laxity of language", *Halsbury* says, "the expression is convenient, and sanctified by usage") *(d).* At common law, every parishioner and inhabitant of a parish had a right to be buried in the parish churchyard or burial ground; that is to say, his executors had the right to bury him there (section 6 of the Burial and Cremation Act also provides that, as a general rule, cemeteries are "to be open to [the] public" (referring to the dead members thereof)). There was no right, however, to remain there forever undisturbed, *until the last day (e).* "The fact is, that 'man' and 'forever' are terms quite incompatible in any state of his existence, dead or alive, in this world. The time must come when his posthumous remains must mingle with and compose a part of the soil in which they have been deposited. Precious embalmments and splendid monuments may preserve for centuries the remains of those who have filled the more commanding stations of human life: but the

(a) Arnold, for Gilbert, *Gilbert v Buzzard,* 3 Phill Ecc 335 at 341. This is the most well-known of a number of "Iron Coffin cases" concerning the lawfulness of iron coffins used in attempts to frustrate "resurrection men". There is now little danger from these persons, and the line "Why do cemeteries have fences around them? Because people are just dying to get in" probably does not refer to them.

(b) See eg 3 Inst 110, 203; 4 Bl Com 236. The executors, of course, are still under a duty to dispose of the body in a lawful manner.

(c) Cf Cardinal Spelman's remark on signing a contract: "The big print giveth and the small print taketh away".

(d) Vol 4, p 7.

(e) Unless a faculty were obtained from the ecclesiastical authority – *Gilbert v Buzzard* (supra); also *Bryan v Whistler* 8 B & C 288, *De Romana v Roberts* [1906] P 332. A faculty is also necessary for the right to erect a monument. Note also that the right to be buried in the parish churchyard was not correlative with a duty on the executors to bury there. "The law does not require that an interment should be in any particular place, nor, if the burial takes place elsewhere than in consecrated ground, does it prescribe any particular ceremony . . . Burial in private ground is permissible unless the user of the ground, for that purpose amounts to a nuisance". *Cowley (Lord) v Byas* (1877) 5 Ch D 944 at 951. It is now only in extreme cases that burials are allowed in private ground; see ss 46 and 48 of the 1964 Act. Since, for some burials, no particular ceremony is required, "Christian burial", as required by law, now means, presumably, "burial in the earth, at the canonical depth".

common lot of mankind furnishes them with no such means of conservation. With reference to men, the domus aeterna is a mere flourish of rhetoric . . . . Founded on these facts and considerations, the legal doctrine certainly is, and remains unaffected, that the common cemetery is not res unius aetatis, the exclusive property of one generation now departed; but is likewise the common property of the living, and of generations yet unborn, and subject only to temporary appropriation" *(f)*. It follows, then, that no-one had a right at common law to convert his domus ultima into a domus aeterna by, for example, building a grave in brick, or being buried in an iron coffin, or even erecting a monument, without the grant of a faculty by the ecclesiastical Magistrate.

The situation is different here. There has been much discussion recently of the very real dangers that can be created by the burial of nuclear waste in the earth, nuclear waste that must remain untouched and unmoved for a quarter of a million years before it loses its potential for harm. It may be extremely difficult to find places to bury it where the earth is stable enough; and even if the earth be solid, it is too much to hope for a quarter of a million years of political stability, and freedom from armed attack. Yet s 10 (1) of the Burial and Cremation Act clearly promises to all the dead of New Zealand who so desire "the exclusive right of burial . . . in perpetuity" in any part of a cemetery, which is a very comforting sort of promise. The wonderful promise of this subsection is drastically altered, however, by the remarkable subs (4) which provides that "any exclusive right of burial referred to in subs (1) of this section . . . shall lapse if, at any time after the sale, sixty years pass without a burial taking place in that part of the cemetery or in that vault, brick grave or place of burial which is the subject of such exclusive right" *(g)*. And since Part VI of the Act confers wide powers to close burial grounds and forbid further burials, except in certain very limited cases *(h)*, the "exclusive right of burial . . . in perpetuity" is unlikely to last for more than two or three hundred years. But although the exclusive right of burial may have gone, yet, by s 43 of the Act, even a closed cemetery must be maintained in good order, and "not be sold or leased or otherwise disposed of or diverted to any other purpose", and so its inhabitants may still sleep there undisturbed until the last day, in no danger of being disturbed by later arrivals *(hh)*.

At this point it might be handy to consider exactly who the owner is of the statutory "exclusive right in perpetuity". This is not something

(f) Sir Wm Scot, *Gilbert v Buzzard*, p 357. Everyone, of course knows that Hamlet's soliloquy over Yorick's skull occurred while Hamlet and Horatio were standing by gravediggers preparing a new temporary dwelling for someone before the previous occupant had returned completely to the earth. Reginald Hine in his *Confessions of an Uncommon Attorney* tells of a John Trigg (ob 1729) whose coffin, still containing his remains, is to this day resting upon the cross-beams in the roof of his barn: "He and Richard Tristram were standing one day in the churchyard of St Mary's, Hitchin, watching the sexton dig a grave, and were both so horrified at the way in which the bones of earlier interments were tossed about that they resolved, there and then, not to be buried in consecrated ground. Accordingly Trigg, when he died, had his body hoisted between heaven and earth as aforesaid, and Tristram directed his son to bury him in a field . . . To the intent that his father's remains might never be disturbed or the land ever alienated, Tristram's son, . . . a solicitor . . . executed and enrolled a Bargain and Sale, dated 14 December 1768, whereby the field in question was vested in trustees 'upon trust to dispose of the yearly rents and profits on every Christmas Day amongst the sixteen poor persons in [certain] almshouses'."

(g) This subsection appears for the first time in 1964. Should it be taken to refer to exclusive rights of burial granted before then?

(h) See ss 41 and 42. Section 41 gives the Minister (despite the marginal note, which still refers to the Governor-General) the power to close the cemetery by notice in the *Gazette*. Section 42 provides that certain near relatives of the deceased (husbands, wives, parents, children, brothers and sisters) may still be buried in the plot. Section 43 provides that the closed cemetery must still be maintained, and is to be open to the public. Interestingly enough, the statute nowhere gives the public (the living members thereof) the right to enter cemeteries still in use. Perhaps such a right is implied by s 59 (b), which gives the Governor-General power to make regulations "regulating the conduct of persons using or frequenting any burial ground"; but the reference to "persons . . ." does not sound exactly the same as a reference to "the public".

(hh) Subject to extraordinary statutory provisions of course, of which those of the Public Works Act would be the most common. Section 18 of that Act provides that, *except* for the purposes of a railway or motorway or for defence purposes, land occupied by, inter alia, any cemetery or burial ground may not be taken without the previous consent of the Governor-General in Council or the consent in writing of the *owner*, (whoever she is). The Act does not seem to mention what is to happen to the graves, but hopefully enough respect will be shown to them to enable the remains to be disinterred and decently re-interred elsewhere.

They're moving Grandad's grave to build a sewer,
They're shifting it regardless of expense
They're moving his remains
To make way for nine inch drains
To service some posh chap's residence.

But (if the writer may inject a personal note) I would not trust the Ministry of Works and Development any further than I could throw one of their hundred ton earthmovers.

that concerned Parliament when the Act was passed. At common law, any right that a man had would pass on his death (if it passed at all) to his executors. In the situation of the purchase of a plot for burial, the deceased may purchase the plot before his death, or his executors may purchase it later. Since the right involved is a right to lie there for ever, the chances are that some person must exist, even if only in the eyes of the law, even if only the dead man himself, who possesses it. Who is that person to be? It can be important to know, for s 10 (2), for example, provides that "before any body is permitted to be buried in any . . . place . . . the exclusive right of burial wherein has been sold, the local authority may require satisfactory evidence that the person for the time being appearing to it to be entitled as owner to such exclusive right, has consented or would not object to the burial taking place herein". Is there a hint in that section, by its use of the phrase "the person for the time being appearing to it to be entitled as owner", that the person in whom the right is vested is up and about? Any hint that there is there, must be countered by the hint contained in other words of s 10 (2) that the person "has consented or *would not object* to the burial taking place" which words suggest that one might have to look at the intention of the deceased; the words of the Act are not much help at all. It is difficult to know which is the stranger situation; that of a dead man, otherwise without any rights at all, who has been granted this one right by statute, and is therefore, for this purpose, made into something like a person in the law's eyes; or of this right being held by his executors or administrators, and after their death passing to others, and then to others, for centuries. (But exactly to whom, it is difficult to know. Does the right pass from the executors to the beneficiaries of the estate? The Administration Act is silent as to whom a right of this nature would pass, such a right possibly not being "real estate" within the meaning of that Act; and few wills have a special clause designating to whom the right is to pass. If it does not pass to the beneficiaries, does it remain with the executors and on their death pass to their executors, under s 13 of the Administration Act? If so, what happens to the right when the "chain of representation" is broken?). The fact that only a certain number of people may be buried in any plot, the executors being unable to put as many people as they like in it, is no indication that the right is vested in the dead man rather than his representatives; it is simply that the right originally granted was not one that would allow the burial of an infinite number of people, and so the executors may not bury anybody they want to; it does not necessarily mean that the dead man himself has the right. Section 59 of the Act is likewise of little use; it provides that the Governor-General may make regulations providing for, inter alia, the removal of dilapidated or neglected monuments or tablets "after due notice to any known persons entitled to maintain them". But a right to maintain a gravestone (such a right is mentioned in s 9 (d)) is not the same as a "right of exclusive burial"). Moreover s 9 (d) is a little unclear. It says "Any person who has dug or made a grave or vault or erected a monument or placed a tablet in accordance with any permission granted by the local authority, and has paid the prescribed fees, shall be entitled to maintain such grave, vault, monument or tablet according to the terms of such permission to and for the sole and separate use of such person and his representatives and successors in perpetuity, or for the time limited in such permission". The reference to "representatives and successors" might be taken to mean, those of the dead man; but it refers to the representatives and successors of the maker of the grave, the erector of the monument and the placer of the tablet. The dead man is unlikely to have erected his own monument (although it was once the custom of the great to prepare their tombs before their deaths and the habit, even among the lowly, has not entirely died out yet). Or does Parliament really *mean,* the representatives and successors of the dead man? In any case, the situation as to who exactly has the "exclusive right of burial" is far from clear.

It has already been pointed out that this "exclusive right of burial in perpetuity" is seldom going to last for more than a few centuries, because of s 10 (4). What difficulties this causes! When, under s 10 (4), the exclusive right of burial has disappeared, exactly what is it that is left to the owner (whoever he is)? Presumably, it is not the situation that merely the exclusiveness is lost, so that, while burials can still be carried out there by the owner's authority, *other* people, strangers, can have granted to *them* rights of burial in that ground also; for the cemetery may well be closed. The consequence of s 10 (4) must be that the "owner" loses *all* interest he had in the land; he loses the exclusive right to burial, and that is the only right that he had. It would follow from this that, whether the "owner" be the interred person or his living representative, once the exclusive right has gone the interred person no longer has any right to be buried there at all; and could presumably even be exhumed and otherwise disposed of, were it not for s 51 of the Act (which prohibits exhumation save with a licence under the hand of the Minister

of Health, but does not say what is to be done with the bodies) *(i)* and were it not, also, for s 43 (mentioned above) and also for the common law, which, as I shall suggest, recognises only burial in the earth as a lawful means of disposing of the dead. (So that if the persons were exhumed, they could, at common law, only be buried again). In a way, the situation is not all that different from the situation at common law; for, at law, the graveyard was simply the domus ultima, and once the cadaver had decomposed and mingled with its parent earth all its rights had been observed and granted to it, and others could be buried in the same place; and after sixty years at least have elapsed since the last burial in "that part of the cemetery or . . . that vault, brick grave or place of burial which is the subject of such exclusive right", whoever is buried there will also have passed beyond all signs of human recognition. The only difference here is that although a corpse may lose its "right of exclusive burial", other sections of the statute still give it a right to remain there undisturbed.

The Burial and Cremation Act has very little to say about cremation. There are only four sections, in Part V of the Act, which provide that the Governor-General may make regulations as to cremations and crematoria; concerning the erection of crematoria; the application of the rest of the Act to this part of it; and concerning bylaws that can be made about cremation and crematoria. Nowhere in the Act does it say in so many words, as the Cemeteries Act 1908 thought it necessary to say in so many words, that it is lawful for a person to be cremated; that "Any person, by writing under his hand, may direct that his body shall after death be disposed of by cremation instead of by burial in the earth, and the executors of such person, or other persons having authority to dispose of his remains, may carry such direction into effect in the manner provided by this Act" *(j)*. Assuming, for the moment, that cremation was unknown to the common law, and unlawful (an assumption the 1908 Act seems to share), nevertheless the mere fact that the 1964 Act mentions cremation at all means that it is no longer illegal per se; but the exact scope of lawful cremation remains obscure, although my own speculations follow. Cremation does not count as the "subjection of goods or materials to any process" within the meaning of the Income Tax Act (UK) 1952 (15 & 16 Geo 6 & 1 Eliz 2, c 10); *Bourne v Norwich Crematorium Ltd* [1967] 1 WLR 691.

The better view is, I think, that at common law cremation was unlawful. That is not what *Halsbury* tells us: "the ordinary method of disposing of the body is by burial (ie a Christian burial in the case of a person who when living was of that faith . . .) but other methods are not forbidden. Thus, even before the statutes by which the practice is now recognised and regulated, cremation was not unlawful" *(k)*. Two cases are given as authority – no more could be found – those of *R v Price* (1884) 12 QBD 247 and *R v Stephenson* (1884) 13 QBD 33. *Stephenson* is not great authority, merely holding that it is a misdemeanour to burn a dead body in order to prevent the holding of a coroner's inquest. It could be taken, though, as an implication that the burning of dead bodies is not *otherwise* unlawful. But the reasoning of those cases, and in particular that of Stephen J in *Price* (which is the more definite statement) bears some resemblance to the reasoning (commonly considered to be faulty) generally attributed to Caligula when he proposed that his horse Incitatus be elected a consul. Suetonius and Dio Cassius both mention this story, Dio Cassius saying that "[Caligula] . . . even promised to appoint him consul, a promise that he would certainly have carried out, if he had lived longer" *(l)*. The reason why he thought he could do this was simply that there was at Rome no law which said in so many words that a horse could not become consul; and what was not prohibited was therefore possible. By the same reasoning, it would still be possible (were it not for the wording of the Electoral Act) for a horse, or some other beast, to be elected to Parliament, to enter the Cabinet, and more; nor, one could say, is there any reason why beasts (provided their intention could be discovered, and any other conditions be fulfilled) could not commit torts, make contracts, and so on *(m)*. The answer, of

(i) The Act is silent as to what effect the exhumation of a body would have on an agreement, under s 9 (f), to maintain a grave in perpetuity.

(j) Section 44, as amended by s 5 (1) of the Cemeteries Amendment Act 1926. Section 5 (2), of the 1926 Amendment, though, does say that "Nothing in the said section forty-four as amended by this section shall be deemed to abrogate any rule of law by which it is lawful to dispose by burning of any human remains, but every such rule shall be construed subject to any regulations made under section forty-six of the principal Act". But this is simply a safety-valve, in case any cremations should be lawful otherwise than under the statute; the Parliament may even have thought that some were, but we are not obliged to agree, and s 5 (2) can stand without our agreement.

(k) Vol 4, p 3; provided that it was not done in such a manner as to amount to a public nuisance.

(l) Book LIX, 14, 7.

(m) "On the continent", say Pollock and Maitland in their *History of English Law before the time of Edward I* (Vol II, p 472) "the trial and formal punishment of

course, lies in the fact that there are certain rules – of law – that are so obvious, or should be, that they do not *need* to be written down *(n)*. The example of horses in Parliament may seem a little farfetched, but there has never been any written law saying that women – or for that matter, children or idiots – could not enter Parliament; it was simply assumed, and was undoubtedly the law. As Lord Denman said in *O'Connell v R (o)*. "A large portion of that legal opinion which has passed current for law, falls within the description of 'law taken for granted'. If a statistical table of legal propositions should be drawn out, and the first column headed 'Law by Statute' and the second 'Law by Decision'; a third column, under the heading of 'Law taken for granted' would comprise as much matter as both the others combined". And it is here that Stephen J falls into error when he says that ". . . upon the fullest examination of the authorities, I have, as the preceding review of them shows, been unable to discover any authority for the proposition that it is a misdemeanour to burn a dead body, and in the absence of such authority I feel that I have no right to declare it to be one" *(p)*. But although he may not be able to find any authority for the proposition that it *is* a misdemeanour to burn a dead body, neither can he find any authority for the proposition that it is not; it is simply that there is no authority directly on the point at all. But there are a good number of cases which definitely *assume* that it is a misdemeanour to burn a dead body *(q)*; and in the light of these cases, and in the light of the universal practice of Englishmen far back into the depths of that time whereof the memory of man runneth not to the contrary, it cannot be doubted that the right of the dead to Christian burial and the duty of the living so to bury them, is the custom of the English; a legal custom common to the whole Kingdom of England, and therefore part of the common law. In *Gilbert v Buzzard (r)* Sir William Scott remarks that burial is probably more ancient than burning and that "the example of the Divine Founder of our religion in the immediate disposal of His own person, and those of his followers, has confirmed the indulgence which appears to prevail against the instant and entire dispersion of the body by fire; and has generally established sepulture in the customary practice of Christian nations" *(s)*. The saying that "Christianity is part of the laws of England", although it may never have led to a man being indicted for not loving his neighour as himself, has nevertheless this much truth in it at least, that Christian burial is part of the law of England, and so obviously a part that it has never been felt necessary to say so in so many words; although everything said in many cases quite clearly implies and assumes it *(t)*. Stephen J himself admitted the force of this argument, and might even be seen to have admitted that the law was other than he held

beasts have been known in recent times". But the authors suggest that this idea, that an animal is alone responsible for its act, is not as ancient as the principle that a man was responsible for the harm done by the acts of his slaves and beasts, and even his inanimate possessions.

(n) "It is a constant source of wonder to foreigners that our law is built up to so great an extent on assumptions": Sir Carleton Kemp Allen, *Law in the Making*, p 75.

(o) (1844) 11 Cl & F 155 at 372.

(p) P 255.

(q) As well as *Gilbert v Buzzard* (supra), the leading authority, the most obvious cases are *R v Sharpe* 1 D & B 160, *R v Vann* 2 Den 325, and *R v Stewart* 12 A & E 773. *Sharpe* is also authority for the proposition that exhumation is prima facie unlawful. In *Stewart*, Lord Denman CJ said that "Every person dying within this country and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial". This "right" of the deceased may well be correlative with a positive *duty* of the executors to bury in that way. This does not negate the remarks made in Note (e) above; that note observes that there is no duty on the executors to bury in consecrated ground or with any particular ceremony; but there is still a duty to provide Christian burial, ie burial in the earth, at the canonically required depth. Only two years before *Price* was decided, Kay J in *Williams v Williams* (1882) 20 Ch D 659 observed that "the purpose [expressed in a certain will] confessedly was to have the body burnt, and thereupon arises a very considerable question whether that is or is not a lawful purpose according to the law of this country. That is a question I am not going to decide" (p 666).

(r) 3 Phill Ecc 335.

(s) Pp 346–347. Sir Thomas Browne, in his treatise on Urn-burial, says that "Men have been fantastical in the singular contrivances of their corporal dissolution; but the soberest nations have rested in two ways, of simple inhumation and burning . . . But Christians abhorred the way of obsequies by burning, and though they stuck not to give their bodies to be burnt in their lives, detested that mode after death; affecting rather a depositure than absumption, and properly submitting unto the sentence of God to return not unto ashes, but unto dust again".

(t) Christianity is not of course the only reason for the abhorrence of cremation. "For however men may feel, or affect to feel, an indifference about the fate of their own mortal remains, few have firmness, or rather hardness of mind, sufficient to contemplate without pain the total and immediate extinction of the remains of those who were justly dear to them in life. A feeling of this kind has been supposed to have caused the preference of burial to the process of burning; and has likewise given rise to extravagant means for preserving human remains for a period of time long after the term at which any memory of the individuals themselves, or any affection of their survivors, can be supposed to extend": Sir

it to be, when he said that "The law presumes that everyone will wish that the bodies should have Christian burial. The possibility of a man's entertaining and acting upon a different view is not considered". But, despite this observation and the authority supporting it, he came to the conclusion, with Sir Thomas Browne, that Tabesne cadavera solvat an regus haud refert *(u)*. Not only is this decision against the weight of authority, but its reasoning does not withstand close inspection. He begins with an historical review, and observes that "the change [to burial] took place so long ago, and was so complete, that the burning of the dead has never been formally forbidden, or even mentioned or referred to, as far as I know, in any part of our law . . ." But, as pointed out above, if it be the common custom of the realm that dead bodies may only be buried, it is completely irrelevant that no statute or judicial decision forbids cremation, or even mentions it. The fact that there have been no instances of cremation shows that the custom of burial was universal. Stephen J goes on to say that the supply of bodies for anatomy is legal, and that the 1832 statute (2 & 3 Wil 4c 75) presumes it to be. That seems to be a misinterpretation of that statute; and the statute moreover, provides that all bodies so dissected and inspected are later to be interred, cremation not being considered. The dissection of bodies may not be burying, but it is not burning either, and the statute still requires that the bodies be buried later.

Stephen J goes on to say that the cases of *Vann & Stewart (v)* which he says are the nearest approach that there is to authority on this point, do not mean to lay down any rule that there is an absolute duty to give every corpse Christian burial, which duty is violated by burning them. In *Stewart*, he said, the real question was, *whose* duty is it to bury the corpse? *(w)*. In *Vann*, the question was, was one obliged to incur a debt in order to be able to bury a body? *(x)*. But nevertheless, these cases do assume that the body must be buried; in fact, in *Vann* Lord Campbell CJ did consider other possibilities besides burial: "He cannot sell the body, put it into a hole or throw it into the river" *(y)*; but the possibility of burning was even less to be considered than those bizarre methods of disposal. Stephen J's argument is not advanced by his weary complaint that Courts in the past were not being severely and literally accurate to speak of the "rights" of a dead body; and there seems little force in his argument that Christian burial is "obviously inapplicable to Jews, Mohammedans, or Hindoos". Jews, Mohammedans and Hindoos must, even in death, observe the law of the land; and English law has for many centuries preserved a marvellous insularity and intolerance of the religious beliefs of others *(z)*. It was, for example, only in 1836 *(aa)* that for the first time marriages could be celebrated elsewhere than in a parish church, and otherwise than by the rites of the Church of England. If a Hindoo, Jew or Mohammedan (or, for that matter, a Roman Catholic or Dissenter) had to be married according to the rites of the Church of England, why should he not also be subjected to Christian burial? (The Catholics and Dissenters would not object to that type of burial, of course). And, begging the question by his remark *(ab)* that "Nothing is a crime unless plainly forbidden by law", he acquitted the accused; being mistaken, as I hope I have successfully suggested, as to the common law *(ac)*.

William Scott, *Gilbert v Buzzard*, at p 353.

For who to dumb Forgetfulness a Prey
This pleasing anxious Being e're resign'd
Left the warm Precincts of the cheerful Day
Nor cast one longing lingering Look behind?

(u) "Whether decay or fire consumes matters not". Sir Thomas, of course, was taking a philosophical, rather than a strictly legal, point of view. Compare Lord Chesterfield's remark, "I do not care how I am buried, so long as I am not buried alive".

(v) 2 Den 325, 12 A & E 773.

(w) It was held that, if no-one else were responsible "the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial. He cannot keep him unburied, nor do anything which prevents Christian burial. He cannot, therefore, cast him out so as to expose the body to violation, or to offend the feelings or endanger the health of the living. For the same reason, he cannot carry him uncovered to the grave" (p 778).

(x) The answer is no: nor, if one does not have the means of giving the body Christian burial, is one liable to be indicted for the resulting nuisance. See now s 49 of the Burial and Cremation Act 1964: "Burial and Cremation of poor persons".

(y) P 330.

(z) Eg "All infidels are in law perpetui inimici, perpetual enemies, (for the law presumes not that they will be converted, that being remota potentia, a remote possibility) for between them, as with the devils, whose subjects they be, and the christian, there is perpetual hostility, and can be no peace". Coke CJ, *Calvin's Case* (1608) 7 Rep 1a at 17a.

(aa) 6 & 7 Will IV c lxxxv.

(ab) P 256.

(ac) See the interesting case of *Doodeward v Spence* (1907) 6 CLR 406, which concerned a stillborn two-headed child, preserved in a bottle of spirits. Only one Judge held that it was not a "body" at all, but rather akin to such things as mummies and skeletons, which do

If cremation were generally unlawful at common law, it would follow that special statutory authority would have to exist for lawful cremations to be carried out. Such authority was given by s 44 of the Cemeteries Act 1908 (quoted above) and also by s 82 of the Cemeteries Act 1882 (the latter statute requiring that the direction be in the will of the deceased). In both cases, "the executors . . . *may* carry such direction into effect . . ." (my emphasis); there was no obligation on them to do so, and they could still bury the deceased if they so desired. That perfectly clear situation is now thrown into confusion by the refusal of the Burial and Cremation Act 1964 to repeat such an authorising section. The new Act does have four sections dealing with cremation, and we must therefore assume that Parliament does intend that some cremations are lawful; but exactly *what* cremations are lawful is unclear. The only section of any relevance to this is s 37; subs (1) provides that "the Governor-General may . . . make regulations controlling or restricting the establishment and closing of crematoria, prescribing the conditions subject to which and the manner in which cremations are to be carried out, and providing for all matters incidental thereto", and subs (2) provides that "No person shall carry out or procure or take part in any cremation except in accordance with regulations made under this section" *(ad)*. It may be as well to note, before we go any further, that there is no scope for the operation of s 20 (f) of the Acts Interpretation Act 1924; for that provides that "the repeal of an Act shall not revive anything not in force or existing at the time when the repeal takes effect", but the common law, opposed to cremation, was in force before the 1964 Act was passed; it was merely subject to one exception, contained in s 44 of the 1908 Act.

Now, s 37 (1), when it says that the Governor-General can make regulations about crematoria, and "prescribing *the conditions subject to which* and the manner in which cremations are to be carried out", can mean one of two things. One interpretation is that there is really not much difference between the phrases "the conditions subject to which" and "the manner in which"; that they are both there merely because of the legal love of using two phrases where one will do, and that both refer merely to the mechanical and technical aspects of cremation; how hot the fires have to be, what fuel is to be used, how the smoke is to be released and so on. Support for this interpretation is derived from the words of s 37 (3), which provides that "the provisions of ss 38 to 40 of this Act shall be subject to any regulations made under this section"; ss 38 to 40 definitely do deal with merely the mechanical and technical aspects of cremation. Support for this view is also derived from the fact that the phrase "the conditions subject to which", in s 37 (1), comes between two other phrases which clearly refer only to the mechanics of cremation; and also from the fact that the whole attitude of the statute to cremation (which is also the attitude of the statute to burial) is that the statute merely provides the facilities for these things, and leaves it to the executors to decide what is to be done. If this interpretation be correct, then it follows that nowhere in the Act is it said exactly who may be cremated, and for the Governor-General to try to say who may and may not be cremated would clearly be beyond the powers granted him by s 37 (2). We are therefore in this situation, that the common law principle that cremation is unlawful still stands, but some cremations must (by implication) be lawful. I think it goes too far to say that Parliament's omission to re-enact an enabling clause in the 1964 Act has had the effect of legalising all cremations. Which cremations are lawful? Presumably those ones are where the deceased has left instructions that he is to be cremated; but what if there is silence on the matter of disposal of the body? What if there is a definite instruction that the body be not cremated? This latter situation must surely be one where cremation is unlawful; and the 1973 Cremation Regulations could quite possibly be founded on a mistake of law, when the explanatory note (not part of the regulations but intended to indicate their general effect) says that "the present prohibition on the cremation of a person who has left a written direction to the contrary . . [is] omitted". If the common law is still allowed to stand to some extent by the statute, no regulation could make such cremations lawful, and there may well be unlawful cremations carried out all the time. The question of remedies is another question entirely. The common law misdemeanour of burning a dead body can have no place in this country, and unfortunately, s 56 of the Act (Part VIII, Offences and Penalties) deals

not count as bodies, he suggested, for the purposes of the law of burial. The majority held that there was "no law forbidding the mere possession of a human body, whether born dead or alive, for purposes other than immediate burial . . . . If the requirements of public health or public decency are infringed, quite different considerations arise" (Griffith CJ, pp 413–414). But this case merely allows possession of the body, it does not allow cremation. The body can still be disposed of only in a lawful manner.

(ad) The meanings of "carry out" and "procure" are clear enough. What can the difference be between "carrying out" and "taking part in"? Is it to the deceased that "taking part in" refers? Perhaps it is rather to his kinsmen and friends.

only with offences against the regulations made under s 37, whereas we are concerned with a matter not covered by the regulations at all. Presumably it would be possible, if one were quick, to obtain an injunction to restrain a proposed cremation, but unlawfully to burn dead body does not seem to be explicitly made a criminal offence.

That is one interpretation of s 37 (1). The other view of the section is that the Governor-General's power to make regulations "controlling or restricting the establishment and closing of crematoria, prescribing the conditions subject to which and the manner in which cremations are to be carried out . . ." includes the power to say which cremations are lawful. In other words, while Parliament itself did not abolish the common law, it has given the Governor-General power to do so, and he can provide that all cremations are lawful, even if a deceased has ordered that he be not cremated; or he could provide that no cremation is lawful unless the deceased has specifically requested it, thus reinstating the enabling s 44 of the 1908 Act. This interpretation seems less likely, both on an analysis of the words of the section, and also for the reason that it would come as a surprise to many people, not least to those many Christians who have a religious objection to cremation, to learn that one could be cremated even if one left instructions that one was not to be. It is a lot to read into the section, and is but one step away from compulsory cremation for everyone.

Whichever interpretation one takes, it is quite likely that the Governor-General has acted beyond his powers in another part of the regulations, where he prescribes the forms to be used by those people applying for the cremation of another. According to the forms, either an executor of the deceased or "near relative" (defined as a wife, husband, parent, child of sixteen or more years, or any other relative who usually resided with the deceased) may apply for a cremation. This is a clear contravention of the common law rule that the executors, and they alone, have the right of disposal of the body. It is true that the form (Form A) does ask, "If the application is not made by an executor, is there an executor . . .? [If so], has he been informed of the proposed cremation? . . . To the best of your knowledge and belief has any near relative or executor of the deceased expressed any objection to the proposed cremation? . . . If so, on what ground?" This application must be made to the "crematorium authority", that is, the "person or body of persons . . . having the control or management of a crematorium". And cl 5 (3) does say that if an executor or near relative does not sign, but someone else does instead, the reason why must be shown. But the fact remains that the regulations treat "near relatives" and executors as being in exactly the same situation, and having the same powers of disposal over the dead body. This is not the common law, and the Act gives no authority at all to the Governor-General to change this part of the common law, whatever authority it may give to change other parts *(ae)*.

The law of the dead is not an area of the law that often attracts wide public attention, but that is no excuse for slipshod laws on the subject. It is not suggested that the present laws encourage a disrespect for the dead, but it may be wondered if some of the changes in the common law, and in particular, the changes (whatever they are) in the law of cremation brought about by the 1964 Act were necessary. They have thrown into doubt an area of law that was once reasonably clear, and to little profit.

(ae) Speaking of changing the powers of executors, this is perhaps as good a point as any to note the effect of the Human Tissues Act 1964. Section 2 (2) (a) provides that the Medical Superintendent or other medical officer in charge of a hospital is a person "lawfully in possession of any body lying in the . . . hospital"; and one possible interpretation of the extremely confusing ss 3 (2) and 5 (2) is that such a person has the power to take parts of the body "for therapeutic purposes or for purposes of education or research" or for anatomical research even if the deceased has not requested it and even if surviving relatives object, as long as the "person in possession" has no reason to believe that the deceased had expressed an objection. It is perhaps more likely however that, before the body may be dealt with there must be both no reason to believe that there was an objection by the deceased *and* no reason to believe that the surviving spouse "or any surviving relative" has objected. But the section is confusing. "Surviving relative" is not defined anywhere in the Act. Note also that according to s 6 (5) "all human remains resulting from anatomical examination shall be buried or cremated in accordance with the written instructions of an inspector who shall take into consideration any wishes that the deceased or his relatives may have expressed". It is difficult to know from this whether or not the wishes of the relatives ("relatives", again, is not defined) bind the Inspector. Certainly, if there are no expressed wishes on the matter, cremation is lawful in this situation.

TAXATION

LAZARUS REVISITED

The decision in *Baldwin & Anor v Commissioner of Inland Revenue* (1978) 2 TRNZ 587 (NZ Estate & Gift Duty Cases 15–014), may well affect the principles of the valuation of unquoted company shares. In England the approach has been to consider the value of the shares the testator held as at a time immediately prior to death of testator (*Barclays Bank Ltd v IRC* [1960] 3 WLR 280). If he had, say a 20 percent shareholding, but was also the first trustee on the register in respect of another 35 percent of the shareholding, his 20 percent shareholding would be valued on a controlling interest (assets value) basis, instead of market value, which of course postulated that he is still alive and able to vote in both capacities. In *Baldwin's* case however, Jeffries J has held that what has to be valued is not what the deceased owned, but the rights to which the executors succeeded. Section 36 of the Partnership Act states that, subject to any agreement between the partners, every partnership is dissolved by the death of any partner and the Court held it to follow from this that the value of the property in the deceased's share in the partnership is what would be received by the executors on a postulated winding up. Evidence had been given that inter vivos transactions (sales by partners) had taken place at a discount, but the Court held that a sale inter vivos is different from a winding up. The executors could insist on a winding up, and thus receive more than the deceased (so long as there was breath in his body) could have obtained in an arm's length transaction for the same property.

This could mean that the statutory direction in s 18 to value "as at the date of death" is to be interpreted as meaning "as at a date immediately after death" or perhaps "as at a date soon after death taking into account that several weeks after death when a grant of probate has been obtained the executors could choose to insist on a winding up". Or put another way, the fact of death if it affects value, should be taken into account.

While a 75 percent majority is needed to wind up a company, only one vote is needed to wind up a partnership after a partner dies (subject to deed of course). The decision means that what is being valued is not the interest of the testator, but the rights of the executors. It is true the testator could have forced a partnership dissolution by comitting suicide; this is a rather inconvenient, and perhaps ineffective way of increasing the value of his interest in the partnership.

The statute just says valuation is to be "as at date of death". In the case of land or buildings the value would not change with death. (Does any one still remember the District Commissioner in a rural area who used to enquire from the Trustee the time of death so as to include in the estate eggs if laid, and both the morning and evening milking?). There seem to be no other reported decisions in New Zealand on whether "as at date of death" should mean (a) the instant before death, while the deceased was breathing his last, or (b) the instant after enough functions have ceased for a medical practitioner to certify death had taken place.

The *Baldwin* decision could mean that the value for estate duty of many company shares must in future be reduced. If the shares in an unlisted Company were held by the managing director, his personal skills and abilities may have been the biggest asset in the Company. So that if the shares had been valued the day before his death, he then being in good health, the probability that past prosperity would continue would keep up the price which a willing purchaser would pay for those shares. The day, or the instant, after death the picture is quite different and the market, and therefore the valuer (and the stock market in the case of quoted shares) takes into account the likelihood that the absence of the business acumen, management skills, and enterprise of its founder will mean for his company a falling of turnover, profit, dividend and goodwill, so that the value of the shares will drop considerably when the death of their owner is taken into account.

Of course the decision could have the opposite effect on the valuation of shares in a private company.

If, for example, the shareholder prior to his death was not only lazy but was also siphoning off all the income of the company by way of directors fees and salary, there would have been no dividend and previously it could have been argued that a minority parcel of shares which had never paid a dividend were virtually worthless. It will now be possible to postulate, if an outsider is appointed to run the business, that there will in future be dividends, and so a valuation immediately after death may increase the value of the shares. Or, if the Trustees or the beneficiary are going to run the business, in future, that there will

be directors fees, salary or dividends as the case may be coming to the new shareholder. It looks as if the business man with some knowledge of accountancy might be a better valuer – prognosticator than an accountant who confines his attention to the figures in the balance sheet, and the last three sets of accounts.

What happens now about the rule that block values are to be disregarded and that what has to be valued is what land or shares etc were worth to the deceased while still alive?

A sale of partnership assets at the behest of the executors is a forced sale, a liquidation sale. This means auction, so that ther other partners can bid to buy the partnership property. If therefore (as had been held by the Full Court of Queensland in *Robertson v C of S D* [1958] Qd R 342) the correct approach as held by Jeffries J is to ascertain what the actual sale of assets in a winding up would produce, then it should be permissible to apply the same rule to shares, land etc. If a large block of shares go on the market at once, the price is forced down. If several parcels of similar land are offered at once they will sell at less than if offered over a period of time. Australian decisions such as *Myers* case [1937] VLR 106 (1,000,000 shares) have refused to take block value into account. But the same Judge in *Perpetual Trustee Co v F C of T* (re Sir James Murdoch) held that a parcel of shares sufficient to carry a special resolution may have a higher value than parcels which are insufficient for that purpose.

Court of Appeal decisions have emphasised value to the existing owner, especially where the owner is taxed, or rated, on the value of property. The Courts held that the absence of any other buyers for the Colonial Sugar property did not prevent the land and buildings being assessed on their value to the Owner, rather than what the market would produce if the land was offered for forced sale. Similarly the Wellington City Council objected to paying rates to Makara County on the value the city's septic tanks added to the land. The Court held that to exclude the city from potential buyers was to eliminate the most likely purchaser at the best price, (*Valuer General v Wellington City Corporation* [1927] NZLR 855).

Now we have a decision that the (higher) value on a sale forced by the executors is to prevail over the value to the deceased, who could not force a sale.

The taxpayer may be forgiven for thinking that the rules are:

(a) If valuing the shares as a block would increase the duties the Commissioner succeeds.
(b) If valuing the shares as a block would reduce death duty the taxpayer loses.
(c) If valuing the property on its worth to the owner, while still alive, would increase the duties, the Commissioner succeeds.
(d) If valuing the property after death would increase the duties the taxpayer loses.

Dick Daniell

Guilty of treating – "A person shall be guilty of treating if he corruptly, by himself or by any other person, gives or provides the expense of giving or providing any meat, drink, entertainment or provision for the purpose of corruptly influencing a person to vote . . . every elector or proxy who corruptly accepts or takes any such meat, drink, entertainment or provision shall be guilty of treating". From Representation of the People Act 1949 (cf Electoral Act 1956 (NZ), s 142).

A person commits an election offence if he gives
(or provides) any liquid (or meat)
Paying wholly (or partly) the cost (or expense)
Of standing a treat.
A person who seeks to solicit a vote
By free entertainment corruply competing,
Be it liquor (or snacks or a table d'hote), Is guilty
of treating.
Electors such drink (or such meat) must refuse,
At all such provision must shudder (or shrink)
He likewise is guilty who swallows (or chews)
Such meat or such drink.
Elector (or proxy) by terms of the Act,
All such entertainment by drinking (or eating)
Directly (or else indirectly) in fact
Is guilty of treating.
All persons are guilty who give (or provide)
Such meat (or such drink) to be eaten (or
quaffed)
Consumed within doors (or else taken outside),
Be they hard drinks (or soft).
A practice corrupt shall have plainly occurred
Both treater and treated corruption completing,
When one person a glass to the next has transferred,
All are guilty of treating.
All persons risk guilt who have drunk (or have
supped)
Where free entertainment may bubble (or
foam)
But persons avoid all transactions corrupt
By staying at home.

Sagittarius. in *The Statesman*

PERSONNEL FUNCTIONS IN THE LAW OFFICE

DENIS ORME *continues his series on office management.*

The level of service and the degree of commitment provided by all personnel within a law firm provides the key to the future success of that enterprise. Staffing costs in the law firm environment comprises over 30 percent of the total expenses and it is therefore desirable to obtain and maintain the good will of all personnel to ensure the overall effectiveness of your firm.

If you have set broad objectives for your firm it will now be possible to set working level objectives for each facet of your organisation, and working level objectives in relation to your human resources are the subject of this paper. Historically the attitude has been one of persons working "for your firm" and by changing the emphasis to "working with your firm" the effectiveness of your firm will ensue.

This overview of the personnel function in a law firm environment is to provide a focus for your attention.

At the basic stages a job analysis should be undertaken for each of the tasks performed within your firm. This analysis will highlight:

(a) the basic functions of duties and title for the job;
(b) the scope of the job, the responsibilities of that position and the authority required to undertake the tasks;
(c) the relationship of that position to other positions in the firm; and
(d) the criteria used for performance of valuation.

It is only following this job analysis that selection interviewing should be undertaken.

Selection interviewing should be structured with three objectives in mind:

(1) to provide the applicant with complete details of the duties, responsibilities and functions of the position;
(2) to gain from candidates complete information in relation to their personal and work-related background that they could bring to the position being offered; and
(3) to allow the interviewer the opportunity of explaining about the firm and its personnel policies so that even if the applicant is unsuccessful a positive image of the firm is left with him/her.

A structured interview will ensure that the interviewer focuses on essential factors and that applicants are subsequently considered in like terms. The pattern for the interview will cover:

(a) *Appearance and mannerisms* – (i) dress; (ii) speech; (iii) facial expressions; (iv) appearance and cleanliness.

(b) *Education* – discuss and record complete information about education including honours or distinctions gained, aptitudes to particular courses, etc.

(c) *Work history* – (i) record of the last two jobs; (ii) reasons for the choice of jobs; (iii) reasons for change of jobs; (iv) career goals; (v) work liked the best; (vi) progress in old job; (vii) how jobs obtained;

(d) *Social adjustment* – this will include such things as; (i) marriage; (ii) interests and activities; (iii) financial commitments/pressures; (iv) emotional maturity/stability; (v) personal aspirations (outside work); (vi) attitudes towards supervision; (vii) initiative; (viii) perseverance.

(e) *Health* – past and present as well as any physical limitations.

Following the selection of an applicant for the job all other applicants must as soon as possible be advised as to the result of their application so that the reputation of the firm is not damaged.

New employees should have an induction programme on the day they commence with your firm. This induction will be broken into three sessions.

(1) A general discussion with the supervisor for that person. During that discussion the staff record forms and other personal forms will be completed and matter covered will include the general working conditions, general office procedures, responsibilities, chain of command, and grievance handling.

(2) The new employee should be taken on a tour of your office with explanations being given at each of the points of interest in relation to the xeroxing facility, deeds filing and retrieval, the accounts section, the telephonist's functions and the procedures adopted in relation to telephones, stationery location and issuing, mail distribution, the library, the use and purposes of automatic typewriters and the functions of the receptionist.

(3) Introduction into the immediate work area. In order to ensure that the proper procedures are followed in a specific work situation it is desirable that a surrogate supervisor be appointed so that the new employee has a reference point within a work area, will be made to feel at home with the persons in that area and can refer to that person in relation to matters as they occur.

The responsibility to that new employee does not cease at that point but there should be a review session at the end of the second week and first month, as to how their performance is seen from the firm's point of view and in giving that person an opportunity to raise any matters which may be necessary to achieve a true "settling in".

In a larger firm situation, in order to assess the effectiveness of staff and to remunerate them correctly based on individual performance, it is necessary to have an evaluation system which looks at all persons within a specific workgrade in like terms, even though subjective assessments are made.

A forced choice assessment allows persons to be evaluated in one of the five grades on both personal and job related characteristics. The rating scale is:

(1) if sole factor dispense with services
(2) below average
(3) satisfactory
(4) above average
(5) excellent

It is convenient to have three types of rating assessments in a law firm for legal staff, typists/secretaries, and clerical assistants. These factors to be rated for legal staff are:

Personal
- appearance
- personality
- co-operation
- communication skills – oral
- dependability
- intelligence

Job related
- judgment
- work interest
- initiative
- telephone manner
- response to pressure
- staff utilisation and control
- knowledge of departmental functions
- knowledge of accounting functions
- knowledge of office procedures
- letter writing ability
- knowledge of own job
- work organisation (priority determination)
- opinion formation
- effective legal research
- Court preparation – drafts
- fee billing – regularity
- self development – continuing education
- client attraction – retention

The rating for typists/secretaries should assess the following characteristics:

Personal
- appearance
- personality
- co-operation
- dependability
- intelligence
- judgment
- interest
- English

Job related
- shorthand speed
- shorthand accuracy
- dictaphone typing speed
- dictaphone typing accuracy
- copy typing
- typing speed (50 plus for copy typists, 60 plus for secretaries)
- typing accuracy
- response to pressure

Additional characteristics for a secretary are:
- ability to learn
- initiative
- telephone manner
- dealing with clients
- knowledge of secretarial functions
- knowledge of departmental procedures

The rating for clerical staff should assess the following characteristics:

Personal
- appearance
- personality
- dependability
- co-operation
- communication skills – (a) written, (b) oral

Job related
- knowledge of job
- work organisation
- knowledge of departmental functions
- work interest
- initiative
- judgment
- response to pressure
- telephone manner
- dealing with staff

Each of the rating forms should allow for additional comments beyond the rating scale on both personal and job related factors.

The purpose of completing a rating in relation to each individual is to form the basis of a face to face discussion by way of a counselling session.

These should occur at least twice per year. The purpose of counselling sessions is:

(a) to assist employees in developing abilities;
(b) increasing his/her job satisfaction;
(c) preparation for future work assignment in the same work position or long term development to a position of charge due to your responsibility within the firm.

Guidance for counselling

Preparation

(1) Ensure that you have sufficient time available for the interview.

(2) Have a thorough knowledge of the employee including interests, family background, etc.

(3) Have you looked at the total work performance of the individual, as well as all past ratings.

During the interview

(1) It is important that this session is used for a two-way interchange both on the strengths and weaknesses of the individual so that it is not just viewed as a grouch session.

(2) Ratings may be discussed at the interview.

(3) Encourage the person to talk out fully any subject he/she wishes to discuss.

(4) Do not talk out your own problems or take notes during the interview.

(5) Any employee grievances should result in immediate attention.

(6) After the counselling session ensure that you record brief notes in order to note the long term response to the session.

By now it will be appreciated that the purpose of the assessment and counselling is to provide a continuous involvement with staff. To ensure that barriers are not created by having counselling at set times of the year you should continually build on strengths and develop any weakness areas of the people you are associated with.

If in your assessment of personnel, either at the formal review sessions or at any other time, specific defects are highlighted which may result in the termination of employment it is important that the correct procedure be adopted so that if termination is inevitable then it is justified. On these occasions the procedure to be followed is:

(a) Staff members must be fully informed as to what is expected of them.
(b) Receive proper equipment and instruction for the correct method of undertaking the job.
(c) Have good working conditions and pay with reasonable consideration to personal needs.
(d) Following this initial communication, a regular review would then be undertaken and related to what is in fact expected.
(e) If as a result of this review deficiencies are highlighted, they should be the subject of a discussion with the employee so that an opportunity is given to respond.
(f) If, as a result of the interview, there is still no improvement in the *specific deficiencies* a further counselling should be undertaken with the staff member and notes of the counselling recorded. (If the specific deficiencies are serious enough the employee should be informed of the consequences of not improving performance in those areas).
(g) If there is no response in the specific areas, any subsequent dismissal should be based on fact and related to matters serious enough to warrant dismissal.

The final area requiring your attention for the training in respect of legal personnel is to ensure that a high level of support is provided during the initial employment stages. Not only will this include counselling sessions at at least three-monthly intervals, but should also provide for a written assessment of tasks which have been set for that person and which are of significance as part of the training effort for that person. Specifically, at the time a matter is handed to a staff member (if the matter being delegaged is of significance as part of the overall training effort) an assignment sheet should be handed out. This will give the staff member guidance as to what is expected of him in relation to that matter and will ensure that on the completion of the matter a formal evaluation is undertaken. Factors on the assignment sheet will be:

Assigned to
Date
Matter
Client
Attention (urgent, routine or indefinite)
Completion date
Oral progress report required
Job detail, either exhaustive, broad understanding only or limited understanding, a brief description of the matter, estimated hours required for completion

On completion of that particular matter the assignment should be evaluated and include a summary of:

(a) the estimated hours;
(b) the hours taken; and
(c) the hours charged;
(d) whether or not a discussion with the assignee is required; and
(e) any general comments.

These assignments and assignment of evalua-

tion sheets will form a record of the overall training effort in relation to that staff person to ensure that he receives a co-ordinated training programme on several aspects of the law which are undertaken with the right degree of supervision.

In summary, by following these working level objectives in relation to your personnel, the overall efficiency and effectiveness of your firm will result. At that point objectives may be set to ensure that all persons involved with your firm receive fair rewards (by reviewing your remuneration policy) and are given reasonable opportunities to promote greater job satisfaction as well as have reasonable opportunities for leisure and self-development.

CORRESPONDENCE

Dear Sir,

Solicitors nominee companies holding shares

About two years ago the Wellington District Law Society held a series of lectures on commercial law subjects. One matter which arose in the discussions was whether a solicitors nominee company should be able to hold shares in companies in trust for clients.

It was agreed by nearly all present at the particular seminar that if the shares in a company were fully paid then there should be no objection to a nominee company holding such shares. Indeed, the consensus appeared to be that it was preferable that shares should be held in this way rather than held by a practitioner personally in trust for a client.

From memory, at the suggestion of Mr Colin Patterson, it was agreed that the views of the meeting should be passed on to the Law Society for their consideration. So far as I am aware nothing further has been heard.

Meantime, have any practitioners ideas on how shares should be held where a client desires that they should not be held in the client's own name?

Yours faithfully,

J A Young
Wellington

Dear Sir.

Punishing the words of section 5 (1)

Having once persuaded a Magistrate that punitive damages can, notwithstanding s 5 (1) of the Accident Compensation Act 1972, be awarded for what is commonly called assault, I read Mr R D McInnes's article under the above heading with some interest and rather more skepticism.

Personal injury can arise as a consequence of either of the two torts, trespass to the person or negligence. The latter can easily oe disposed of; the injury to the plaintiff is one of the elements of the tort which is only actionable upon proof of special damage. It is, therefore, a tort recovery for which, in the case of personal injury, is barred by s 5 (1) since the proceedings necessarily arise directly out of the injury. The former, however, is one in which, it seems to me, a claim for punitive damages is still available notwithstanding s 5 (1).

I looked in vain in Mr McInnes's article – and, also, in Mr D B Collins's article at [1978] NZLJ 138 – for a discussion of the nature of the tort of battery and the types of damages which it attracts as, it seems to me, these are the matters that are relevant to a determination which s 5 (1) applies to prevent a claim being made whether for punitive or other possible types of damages. When one does consider the nature of that tort and the types of damages flowing from it then, in my submission, the following points become plain.

(a) The tort of battery is committed when some act of the defendant directly and either intentionally or negligently causes some physical contact with the person of the plaintiff without the plaintiff's consent.

This definition is adopted from Professor Street's book *The Law of Torts* and is supported by any number of cases; see for instance *Rawlings v Till* (1837) 3 M & W 28.

The point which is of importance in the present context is that this tort is committed as soon as physical contact occurs, whether or not personal injury results. That is to say, subject to point (d) below, a claim for damages for battery does not arise, whether directly or indirectly, out of personal injury or death.

(b) Battery is a tort that is actionable per se; that is to say, once the physical contact is proved the law presumes that damage has been caused and therefore gives general damages in respect of it, without requiring the defendant either to plead or prove actual damage.

(c) It follows from (a) and (b) that the damages awarded for battery need have no relationship to the consequences of the tort nor to the actual losses suffered by the plaintiff. Indeed, in an appropriate case, the damages may only be nominal. The plaintiff may, however, seek to increase the damages he obtains.

(d) One avenue the plaintiff may follow is to seek damages for the consequential losses he has suffered. In so far as such consequential losses arise from the personal injury he has suffered his claim is now barred by s 5 (1), but consequential losses otherwise arising – say through injury to property – remain available as a foundation for damages.

(e) Another avenue open to the plaintiff is, in my submission, to seek punitive damages. Certainly, as Mr McInnes points out, these are available to him only because he is the victim of the tort; but he is the victim of the tort because he was the person on whom the physical contact took place, not because he suffered personal injury as a result of that physical contact. Accordingly, his right to claim punitive damages does not arise "directly or indirectly out of personal injury or death" but solely out of physical contact; s 5 (1) cannot, therefore apply.

(f) It would be opening another can of worms to discuss whether or to what extent *Rookes v Barnard* [1964] AC 1129 forms part of the law of New Zealand. For the present purposes it probably suffices to note that, even applying Lord Devlin's views, the right of punitive damages depends upon the nature of the defendant's acts, not upon their affect upon the plaintiff. Once the tort of battery has been established – and again, the existence of personal injury is irrelevant to that issue, except in so far as it may afford evidence to physical contact – the sole inquiry is into the nature and motives for the defendant's actions.

Once these points are taken then, I believe, it becomes clear that there is in respect of battery no connection at all between personal injury and the right to claim or recover punitive damages. Whether, in the social climate that gave rise to the Accident Compensation Act 1972, this is a good thing may very well depend upon personal philosophies but as lawyers we must surely exclude such considerations when we seek to determine what the law actually is.

Yours faithfully,

K I Bullock

TAXATION

EXAMPLE OF ESTATE PLAN

A previous article at [1979] NZLJ 47 outlined and described the various matters that, in the author's opinion, should be included in a letter reporting to a client on recommendations for estate planning. There follows an example of such a letter. It is in the form of a report by counsel to his instructing solicitors, rather than directly from solicitor to client. However, it is written with a view to the letter being read and understood by the client.

This letter was originally prepared for discussion at continuing legal education seminars. Consequently, it has been drafted in such a way that it is open to some comment and criticism. At the end of the letter will be found a short appendix listing some comments.

By JOHN PREBBLE, *an Auckland Practitioner. This is the last in a series of articles on practical aspects of estate planning adapted by the author from lectures he gave in Auckland, Whangarei, and Tauranga as part of the continuing legal education of the Auckland District Law Society.*

Messrs Sue Grabbit & Runne
Barrister and Solicitors
PO Box 58
AUCKLAND

Attention Mr Runne

Dear Sirs

Re Mr and Mrs KJ Harris: Estate Planning

Background and objective

1. Your client Mr KJ Harris is the governing director of Quality Furnishing Ltd, Henderson, a retail furnishing business. Mr Harris is aged 63, and his wife, Mrs AC Harris, is 58. They are both in good health. They have two children:

Donald S Harris, 35, married to Mary Harris, schoolteacher. Two children 6 and 8. Mr Donald Harris is his father's deputy at Quality Furnishing Ltd.

Susan L Rogers, 30, married to Charles Rogers, solicitor. Three children 3, 5, and 6.

2. Mr Harris wishes to retire from active management of Quality Furnishing Ltd and to hand over the control of the business to his son Donald. However, Mr Harris is to remain as a non-executive director of the company. Also, Mr Harris desires to rearrange his estate with a view of minimizing duties. He wants ownership of Quality Furnishing Ltd to pass to his son and, as far as possible, he wants to treat his son and daughter more or less equally when the total disposition of his estate, both in his lifetime and by will, is taken into consideration.

3. I set out below Mr Harris's current assets and the estate duty that would be charged on them were he to die today, and do the same in respect of Mrs Harris. For this purpose I have assumed that Mr Harris will predecease his wife. Thus I have included the couple's joint family home in Mrs Harris's estate only. There would be no duty in Mr Harris's estate in respect of the home, assuming his wife does survive him. The figures ignore quick succession relief.

Mr KJ Harris: assets

Shares in Quality Furnishing Ltd	200,000.00
Shares in public listed companies	150,000.00
Life insurance (value on death)	90,000.00
Furniture	30,000.00
Car (used by Mrs Harris)	10,000.00
Boat and marina	65,000.00
Total	545,000.00
Estate duty net of widow's relief	167,481.00

Mrs Harris: assets

House	60,000.00
Net estate Mr KJ Harris, say	375,000.00
Total	435,000.00
Estate duty	144,200.00

4. Mrs Harris has no income. Mr Harris's current income is as follows:

Salary from Quality Furnishing Ltd	25,000.00
Director's fees Quality Furnishing Ltd	2,500.00
Dividends	12,000.00
National Superannuation	4,500.00
	44,000.00

5. Mr Harris's income tax on $44,000.00 is nearly $22,000.00, leaving him approximately $22,000.00 net.

6. I propose a ten-year estate plan for Mr Harris. The full benefits will accrue after thirteen years, allowing for the lapse of the three-year period during which gifts may be brought back into his estate.

House property

7. The house property at 73 Glen Road should be left as it is, registered as a joint family home. Thus, its value will not come into the estate of the first of the two spouses to die.

Boat and marina

8. Mr Harris should retain the boat and marina as his own property. This asset will afford him the opportunity of considerable enjoyment and relaxation during his semi-retirement and, later, retirement. Also, it provides a useful "nest egg" of capital for contingencies, and it is reasonably easily convertible to cash in the future should Mr Harris decide to realise the asset. I understand that the value of the boat and marina is appreciating. I expect that the insurance position is kept under regular review, but in case this is not so I should mention that Mr Harris should check regularly that his interest in the boat is fully insured.

9 I understand that Mr Donald Harris often uses the boat. The will of Mr KJ Harris should therefore provide that Mr Donald Harris may purchase the boat and marina, or any replacement, at probate value should he so wish.

Life Insurance

10. I recommend that all Mr Harris's life insurance be sold to his wife at surrender value or, in the case of recently purchased insurance, for the amount of the premiums paid to date. The price should be left owing, without interest and payable on demand. It should be forgiven by Mr Harris as part of his over-all giving programme. I shall deal with that in more detail below. Since the great bulk of the life assurance has only just been arranged the total price to be forgiven is only $15,000.

11. Mr Harris should continue to pay all but $1,000.00 of the annual premiums out of his own income. He will be able to claim his own $1,000 tax exemption since the policies are to be owned by his wife. The final $1,000 in premiums should be paid by Mr Harris. I propose below that she should start receiving an income, and it is as well for her to be able to take full advantage of her own tax exemption.

Shares in listed public companies

12. Over the years, Mr Harris has built up a portfolio of shares listed on the stock exchange now worth $150,000. Currently, he is receiving an annual return by way of dividends of $12,000. This $12,000 is all taxed at the maximum marginal rate of 60%. Since Mr and Mrs Harris are very happily married and in practice regard Mr Harris's total income as their joint property, there is every reason to divert this $12,000 from Mr Harris to his wife. Moreover, the public company shares form a fairly substantial part of Mr Harris's estate. Accordingly, to minimize duties at his death it is advisable that the shares should be transferred elsewhere. I do not recommend a direct transfer to Mrs Harris. This step would simply increase her eventual estate duty. Accordingly, I recommend that a trust be constituted to hold the shares.

13. The trust should be a standard, flexible, discretionary family trust. However, the intention is that Mrs Harris should have the income of the trust fund for life, and that the corpus should pass to Mrs Rogers at the death of Mr Harris. Flexibility in drafting of the trust will ensure that, if necessary, the following changes in the operation of the trust will be able to be made:

(a) The corpus could partly be diverted from Mrs Rogers to Mr Donald Harris should this be necessary in order to equalise the treatment of the two children of Mr KJ Harris. However, that is unlikely to be necessary. Under the present plan, Mr Donald Harris will probably be slightly preferred to his sister.

(b) Should Mrs Harris's income be more than she needs or wants, trust income could be diverted to her daughter, son, or grandchildren.

(c) Should Mrs Rogers herself appear to face estate duty problems, the corpus could instead go to her children.

14. Once the trust is constituted, the shares should be sold to it by Mr Harris, and the price left owing. This debt should be on demand and without interest. In this way, there will be no gift duty payable on the sale transaction. Subsequently, I have recommended that Mr Harris should forgive $75,000 of the debt owed by the trust. Should it later prove desirable, he can forgive more or less of the total debt of $150,000.

Shares in Quality Furnishing Ltd

15. It is proposed that Mr Harris should sell all his shares in Quality Furnishing Ltd to Donald, the price being the current total value of the shares, $200,000. The price should be left owing, without interest, and payable on demand, again in order to avoid gift duty. Mr Donald

Harris should execute a mortgage of the shares in favour of his father securing the debt.

16. It is proposed that Mr Donald Harris should pay $50,000 of the debt to his father by quarterly instalments of $1,000. The remaining $150,000 owed by Mr Donald Harris to Mr KJ Harris is to be dealt with in Mr Harris senior's programme of debt forgiveness. It should be emphasised that these proposals for liquidation of the debt are not contractual. Theoretically and legally, Mr Harris will at all times be in a position to demand repayment from his son in full of all moneys that he has not already repaid or which have not been forgiven. While it is expected that this right will never be exercised by Mr Harris, its existence gives him an additional security in transferring the business of Quality Furnishing Ltd to his son. Further, it should be noted that if Mr Harris in the future wants to charge interest on the loan, this could be done. It would simply be a matter of arranging an appropriate rate with his son. Nevertheless, it is not expected that there will ever be any reason for interest to be charged.

17. The quarterly instalments of $1,000 to be paid by Mr Donald Harris are a result of calculations of Mr KJ Harris's income needs, though they will of course be tax free in his hands. These payments may be increased or decreased by Mr KJ Harris should he so wish, though he will naturally want to consider.

Furniture and motor car

20. While Mr Harris owns a number of valuable pieces of furniture that may be expected to appreciate, in the context of his total estate the furniture is not a very large item. I recommend that Mr Harris should continue to own the furniture and that he should leave it to his wife absolutely in his will.

21. The motor car driven by Mrs Harris is the property of Mr Harris. I understand that this particular model of motor car is depreciating in value. Consequently, there is no particular advantage in transferring it to Mrs Harris. However, it would be advisable if any replacement motor car were owned by Mrs Harris. Should Mr Harris need to give money to Mrs Harris in order to purchase a replacement motor car, gift duty would be payable. I have allowed for such a transaction in calculating the gift duty that will be payable as this estate plan is put into operation.

Wills

22. It is proposed that Mr Harris's will should contain the following dispositions:

(a) Any remaining debt owed by Mr Donald Harris in respect of the purchase of the shares in Quality Furnishing Ltd is to be forgiven. This disposition would carry its proportionate share of death duties.
(b) All furniture and any motor car owned by Mr Harris at his death should go to his widow.
(c) Mrs Harris would have a life interest in the balance of her husband's estate.
(d) The residue of the estate should go to Mrs Rogers.

23. Mrs Harris's will should be as follows:

(a) All furniture and any motor car that she may own at her death should to to Mr Harris.
(b) Mr Harris should have a life interest in the balance of the estate.
(c) The residue of the estate should go to Mrs Rogers.

24. While these provisions appear to give Mrs Rogers a slightly larger proportion of Mr Harris's current estate than is to be received by Mr Donald Harris, it should be noted that Mrs Rogers' interest is postponed behind that of her mother (assuming her father dies first). Mr Donald Harris is compensated by receiving his interest earlier, and by the favourable terms on which he is able to purchase the shares of Quality Furnishing Ltd. Nevertheless, the wills should be kept under review, and the situation should be checked every two or three years to determine whether any changes should be made.

25. The provision for Mr Harris to leave his wife a life interest in the bulk of his estate is of particular importance. Mr Harris's current will leaves everything to Mrs Harris. The result is that estate duty will be payable twice on the same assets, on the respective deaths of both Mr and Mrs Harris. This situation can be avoided by leaving Mrs Harris merely a life interest in Mr Harris's estate. In this way, she will be able to enjoy the income from the estate, but will not own the capital. Consequently, on her death there will be no further duty.

Liquidity

26. As I pointed out earlier, estate duty of $167,481 would be payable on Mr Harris's estate of $545,000 were he to die today. Also Mr Harris has no significant debts; he has recently completed payment of the mortgage on the joint family home. Consequently, were he to die in the near future the immediate demand for cash in his estate would be most unlikely to be any more than $170,000, including death duties, general, testamentary, and administration expenses, and the immediate needs of his widow.

27. The only liquid asset in the estate available to meet this demand is Mr Harris's life assurance, which he has recently increased to $90,000. That leaves a possible shortfall of $80,000. However, I do not recommend that more life assurance be purchased to cover this sum. If necessary, shares can be sold on the stock exchange. Mr Harris's executors might not be able to obtain the very best prices, but they will have several months within which to act. In my opinion, the risk of some loss on the sale of these shares is acceptable in the circumstances of this estate.

Giving programme and estate duty savings

28. I attach two schedules setting out the current estates of Mr and Mrs KJ Harris, on the assumption that Mr Harris predeceases his wife. Apart from the 1978 valuations of Mr Harris's estate and the estimated gift duty, most of the figures are fairly speculative. The tables make some attempt to project into the future the savings in estate duty that will be made by Mr and Mrs Harris by the end of the thirteen year programme of his estate. I have assumed for the purposes of the schedules that the values of most of the items in Mr Harris's estate will double in dollar terms by 1991. I have increased the value in the life insurance and the furniture by somewhat less than the other assets.

29. If inflation continues at anything like its present rate, my assumption of a mere doubling in nominal dollar value will tend to minimise the likely savings by the

end of the estate plan. Nevertheless, assuming inflation does continue at 12% a year or so, I expect that there would be a reduction in the rates of estate duty over the next ten years. One cannot know whether these countervailing tendencies will balance each other out. Government tardiness in revising estate duty and tax rates suggests that if recent history is repeated over the next decade the effective rates of estate duty will increase. On the whole, I think it probably fair to say that the estimated savings in the tables give a reasonable indication of the efficacy of the plan outlined in this letter, with the estimates being on the conservative side.

30. Each table contains four columns, with the estates of Mr and Mrs Harris set out in 1978 and 1991 without any planning, and in the same years after following the plan that I propose. Mr Harris's table contains a further column with his total giving programme added up and then divided by ten to discover the annual figure to be forgiven and the resulting annual gift duty.

31. I set out a summary of the schedules below. It will be seen that if inflation ceases and estate duty rates remain static, the total savings for Mr and Mrs Harris come to $216,913. Allowing for inflation and non-inflationary increases in the value of Mr Harris's assets; the figure projected for 1991 is $468,855. The difference between these sums, $251,942, represents the savings made by pegging the value of the various assets in Mr Harris's estate at their current worth. As a result of the disposal of the life insurance, the shares in Quality Furnishing Ltd, the shares in the listed companies, and the car driven by Mrs Harris, the capital appreciation of these assets is taken out of Mr Harris's estate. The other $216,913 represents the savings made by following the giving programme that I suggest, at a total cost over ten years of $21,700 in gift duty.

32. It will be seen from the schedule relating to Mr Harris that it is proposed that Mr Harris should forgive debts as follows in respect of the transactions mentioned earlier, and set out immediately below:

	Sale Price	*Amount for forgiveness*
Shares in Quality Furnishing Ltd	200,000.00	150,000.00
Shares in listed companies	150,000.00	75,000.00
Life assurance	15,000.00	15,000.00
Motor car	10,000.00	10,000.00
Total		$250,000.00

33. Thus, over the ten year period suggested for Mr Harris's giving programme, there is total of $250,000 to be disposed of. At $25,000 a year this programme will attract annual gift duty of $2,170, making a total of $21,700 in gift duty over all. In fact, Mr Harris's current financial position is fairly good. I understand that he and his wife prefer to live fairly modestly and do not by any means spend all their annual income of $22,000. Thus, if and when convenient, the rate of the programme of debt forgiveness may be accelerated. In accordance with Mr Harris's objectives, the debts should be forgiven in the following order: life insurance; motor car; shares in Quality Furnishing Ltd; shares in listed companies.

34. It will be recalled that the balance of $50,000 owing in respect of the shares in Quality Furnishing Ltd is to be paid by Mr Donald Harris to his father in quarterly instalments of $1,000. Also, I have suggested that only $75,000 of the $150,000 sale price of shares in the public companies should be forgiven. This is a somewhat arbitrary figure. However, if the balance of $75,000 is left owing to Mr Harris, the result is that his total estate, including his $30,000 half share in the joint family home, amounts to $200,000 in value. This may be seen from the schedule. While $200,000 is a somewhat arbitrary figure, it is suggested that this sum is a reasonable amount to be retained by Mr Harris in his personal estate.

35. I have not recommended any giving programme for Mrs Harris. Her potential estate duty in 1991, $96,200, may seem unacceptably high. Indeed, the position should

Estate Duty Savings According to Proposed Plan
1978 values

Mr Harris		
Estate Duty at 1978 values	167,481.00	
Estate Duty at 1978 values with plan completed	25,818.00	
Difference	141,663.00	
Less gift duty pursuant to plan	21,700.00	
Savings at 1978 values		119,963.00
Mrs Harris		
Estate Duty at 1978 values	144,200.00	
Estate Duty at 1978 values with plan completed	47,250.00	
Savings at 1978 values		96,950.00
Total savings Mr and Mrs Harris, 1978 values		$216,913.00

1991 Values (assuming doubling since 1978)

Mr Harris		
Estate duty at 1991 values	357,945.00	
Estate duty at 1991 values with plan completed	53,390.00	
Difference	304,555.00	
Less gift duty pursuant to plan	21,700.00	
Savings at 1991 values		282,855.00
Mrs Harris		
Estate duty at 1991 values	282,200.00	
Estate duty at 1991 values with plan completed	96,200.00	
Savings at 1991 values		186,000.00
Total savings, 1991 values Mr and Mrs Harris		$468,855.00

be reviewed in three or four years to determine whether Mrs Harris herself should adopt an estate plan. In the meantime, there are several reasons for keeping Mrs Harris's potential estate, and thus her potential estate duties, on the generous side. Mr Harris informs me that he wants to be absolutely certain that his wife will be comfortably off after his death. Moreover, Mrs Harris has indicated that she wishes to have access to some capital, as well as the income that she will receive from the trust fund; Mr Harris agrees. In response to this desire, I have suggested that Mrs Harris should own the insurance on her husband's life. Finally, while arranging for Mrs Harris to own all the life insurance does increase her estate quite considerably, at least this step ensures that the family will be able to benefit from the income tax exemptions in respect of life insurance premiums paid by Mr and Mrs Harris. Were the trust to own the life insurance, this would not be so. The annual benefit to Mr and Mrs Harris will total about $1,000.

Protection of the position of Mr KJ Harris

36. The plan proposed in this letter contains a number of features which have been referred to in different contexts that are designed to protect Mr Harris by ensuring that, although disposing of the bulk of his estate, he retains fully adequate capital and income for his possible needs. These various measures are:

(a) Maintenance of Mr Harris's capital at at least $200,000.
(b) Service contract with Quality Furnishing Ltd.
(c) Reserving $75,000 from the debt to be forgiven to the trust. Mr Harris can require interest on this sum should he so wish.
(d) Providing Mrs Harris with a good income in her own right. Since Mr and Mrs Harris treat their income as jointly owned, the effect is to increase Mr Harris's own income.

There is, however, one contingency that might detrimentally affect Mr KJ Harris's income position: that is the death of Mr Donald Harris. While Mr KJ Harris's employment contract would still be binding on Quality Furnishing Ltd, the situation would no doubt at least be somewhat changed. One possibility is that Mr Donald Harris's estate would need to sell his shares in Quality Furnishing Ltd at an undervalue. Consequently, I recommend that Mr Donald Harris should insure his life for, say, $75,000 and that the policy be assigned to Mr KJ Harris by way of security for the debt owed to Mr KJ Harris in respect of the shares in Quality Furnishing Ltd.

Incidental matters

37. I understand that Messrs Runne & Tout of your firm have consented to act as trustees of Mr Harris's family trust, and also as the executors and trustees of the wills of Mr and Mrs Harris.

38. There are several subsidiaries of Quality Furnishing Ltd. In practice, these companies operate more or less as part of the parent company, and accordingly they need play no particular role in this estate plan. However, Mr KJ Harris holds one share in each of these companies, all of the others being held by Quality Furnishing Ltd. It would be appropriate for Mr KJ Harris to transfer these holdings of single shares to Mr Donald Harris. Apart from more correctly reflecting the new ownership of Quality Furnishing Ltd, it is simpler to make these transfers now than to have to do them as part of the administration of Mr Harris's estate.

39. Mr Harris informs me that he has a modest portfolio of shares in London, worth approximately £500. He has kept these shares not so much as an investment, but in order to cushion the effects of New Zealand exchange control regulations should he go on a trip abroad. Nowadays, exchange control regulations are not as onerous as they once were. Moreover, the £500 that Mr Harris could realise from his London shares would be unlikely to make a significant difference to himself or Mrs Harris were they to take a trip abroad, considering the amount that they are now permitted to take with them. On the other hand, were Mr Harris to die still owning this portfolio of shares in London, the trouble and expense of administration would be out of all proportion to the value of having kept the shares. Accordingly, I recommend that the London shares be sold and their value repatriated to New Zealand.

Documentation

40. The following documents will be needed to put this estate plan into effect:

(a) Wills of Mr and Mrs KJ Harris
(b) Deed of Trust: settlor Mr KJ Harris
(c) Service contract: Quality Furnishing Ltd and Mr KJ Harris
(d) Transfer of shares in Quality Furnishing Ltd: Mr KJ Harris to Mr Donald Harris.
(e) Mortgage of shares in Quality Furnishing Ltd: Mr Donald Harris to Mr KJ Harris.
(f) Transfers of shares in public companies: Mr KJ Harris to his family trust.
(g) Agreement for sale and purchase of life insurance policies: Mr KJ Harris to Mrs KJ Harris.
(h) Deed of Gift of money to purchase new motor car: Mr KJ Harris to Mrs Harris.
(i) Annual Deeds of Gift forgiving debts owed to Mr KJ Harris.

Yours faithfully,

APPENDIX: COMMENTS ON ESTATE PLANNING EXAMPLE

(1) The plan does not specifically mention the position of Donald and his family. It may be that the shares in Quality Furnishing Ltd should skip Donald's generation. Perhaps, also, it would be better to reorganise the whole company at the present stage. For example, it might be appropriate to turn the company into a partnership of Donald and Donald's Family Trust. Alternatively, if the company owns its own premises, perhaps these should be transferred to Donald's Family Trust. Note that if Donald intends to attempt to split the income he obtains from Quality Furnishing Ltd it would be desirable to arrange the necessary contracts before a new pattern of business becomes apparent. See s 99 of the Income Tax Act 1976 as applied in *Halliwell v CIR* (1977) 2 TRNZ 186.

(2) A possible criticism of the plan is that it goes too far in stripping Mr Harris of his assets. The only appreciating assets he has left once the

plan is in operation are his house and his boat and marina. While this is a desirable result from an estate duty point of view, it must be appreciated that, at 63, Mr Harris may well live another 20 years or more. If inflation continues at anything like its present rate, Mr Harris's personal income and asset position could well be insufficiently protected.

(3) The opinion makes no reference to the matrimonial home allowance. It may well be that for the peace of mind of Mrs Harris it is desirable to leave the house as a joint family home. However, the advantages of changing to a matrimonial home in the name of Mr Harris alone should be pointed out.

(4) The figures in paragraph 3 of the opinion ignore the possibility of quick succession relief. That factor is mentioned, but it is not explained in any detail. It must be recalled that the letter is meant to be understood by the client, Mr Harris, an intelligent layman.

(5) Mr Harris's National Superannuation of $4,500 was correctly stated in paragraph 4 at the date of writing. The figure is now over $5,000 per annum for a man over 60 with a dependent wife. It does not matter that the wife is under 60. However, after the plan is put into effect Mrs Harris will have her own income, and will not therefore qualify as a dependent wife. Since she is only 58, a means test will apply until she reaches 60. Consequently, Mr Harris's National Superannuation will be rather less than the $4,500 mentioned in paragraph 18.

(6) Paragraph 20 does not reflect the changes made in respect of furniture in the 1978 budget. If the furniture is left absolutely to Mrs Harris there will be no duty payable on it in Mr Harris's estate.

(7) Paragraph 21 suggests that Mr Harris should give his wife money to buy a new car when a replacement is needed. It would probably be better from a death duty point of view for Mrs Harris to use the income she will receive from the trust to be set up to purchase the car, and for Mr Harris's income to be used for household and general living expenses. If this pattern is followed, Mr Harris will not become liable for gift duty in respect of money that he spends for the benefit of his wife, whereas he would be so liable if he were to purchase items of a capital nature for her.

(8) Paragraph 18 shows that the annual saving of income tax under the plan is $12,200. A reader might infer that this saving accrues to Mr and Mrs Harris senior. However, this is not so. Their net disposable income increases by only $690 a year over the net $22,000 that Mr Harris was receiving before the plan was put into effect. In fact, the benefit of the tax saving goes mainly to Donald Harris since, as the proprietor of Quality Furnishing Ltd, he now needs to pay his father a good deal less by way of salary and director's fees than was the case beforehand. Indeed, overall

MR KJ HARRIS ESTATE

	1978	1978 values with plan	1991 without plan assuming doubling * of values	1991 with plan assuming doubling* of values	Gift duty payable on:
Shares in Quality Furnishing Ltd	200,000	*	400,000	*	150,000
Shares in listed companies	150,000	75,000	300,000	75,000	75,000
Life assurance (value on death)	90,000	*	130,000	*	15,000
Furniture	30,000	30,000	45,000	45,000	*
Car (used by Mrs Harris)	10,000	*	20,000	*	10,000
Boat and marina	65,000	65,000	130,000	130,000	*
Total	545,000	170,000	1,025,000	250,000 ÷10	250,000
					25,000
				Gift Duty	2,170 x 10 years
Estate duty net of widow's relief	167,481	25,818	357,945	53,390	21,700

* Life assurance and furniture have been increased by less than 100 per cent.

income tax saving could probably be improved somewhat even on the plan set out in paragraph 18. Mr Harris senior could be paid an entertainment allowance by Quality Furnishing Ltd. Moreover, his salary could probably be increased. In that case, the annual repayments from Donald (out of net income) could be reduced. The additional salary and the entertainment allowance would, of course, be deductible as far as Quality Furnishing Ltd is concerned. It should be remembered that, as Donald is probably on the maximum marginal tax rate, he must earn $1 for every 40 cents that he pays in annual repayments to his father.

Life insurance

(9) The life insurance dealt with under the estate plan raises a number of legal and practical problems that may not be immediately apparent. The first is that since Mr Harris is no longer the beneficial owner of the policies, gift duty will be payable in respect of the annual premiums. No allowance for that liability has been made in the income statement in paragraph 18, nor in the estate duty savings schedule appended to the letter.

(10) Mr Harris's liability for insurance premiums should be set out explicitly. Although that liability remains the same after the plan is put into effect as it was before, since the policies have already been purchased, it is to be noted that the bulk of the insurance has only just been bought, presumably in order to make some inroads into possible liquidity problems of the estate. Thus Mr Harris's income requirements may be more than they were previously. No allowance is made for that possibility in the income statement in paragraph 18.

(11) Paragraph 10 suggests that life insurance policies recently purchased by Mr Harris, which do not yet have a surrender value, should be sold to Mrs Harris for a price equal to the premiums paid so far. While this figure will be acceptable to the Inland Revenue Department, it is arguably excessive, since at this stage the policies have no value at all unless Mr Harris dies. It is thought that the better practice is for the purchase price to be at the nominal consideration of $1. That practice has certainly been acceptable in the past at some stamp offices.

(12) Paragraph 35 states that if the trust were

MRS AC HARRIS ESTATE

The same dates of valuation are used in this table as in respect of Mr Harris's estate, ie 1978 and 1991. In fact, Mrs Harris's life expectancy is some years more than that of her husband, so, perhaps, some later dates might be more appropriate. However, the table is essentially for the purpose of illustration, rather than to act as an accurate predictor of what will happen; accordingly, for ease of comparison, the same dates are chosen here. They are, of course, the suggested commencing and completion dates for Mr Harris's estate plan. Were Mrs Harris's death to follow her husband's by less than five years, there would be some reduction in duty, pursuant to the relief granted by the Estate and Gift Duties Act 1968 in respect of quick successions. However, this relief applies in respect of assets that have been left by Mr Harris to Mrs Harris, and are then in her estate. Pursuant to the plan, these are only the motor car and furniture.

	1978	1978 values with plan	1991 without plan assuming doubling* of values	1991 with plan assuming doubling* of values
House	60,000	60,000	120,000	120,000
Net estate of KJ Harris, including life assurance, furniture and car, say	375,000	*	660,000	*
Proceeds of life assurance on KJ Harris	*	90,000	*	130,000
Furniture	*	30,000	*	45,000
Car	*	10,000	*	20,000
Total	435,000	190,000	780,000	315,000
Estate duty (no widower's relief)	144,200	47,250	282,200	96,200

* Less than double in respect of furniture and life assurance.

to own the life insurance policy Mr Harris would not be able to claim the special exemption on the premiums. That is why the policy is in the name of Mrs Harris. This interpretation certainly represents the better view of the effect of s 59 Income Tax Act 1976. See, eg, AP Molloy, *Income Tax*, 445 (1976). However, CA Staples, *A Guide to New Zealand Income Tax Practice* (1976-77 37th ed) states at p 249 that where a policy has been transferred to a trust for the benefit of the wife and children of the taxpayer, "It would seem that the taxpayer could claim for the premiums as long as his wife is living, but that, after his wife's death, the qualification would last only so long as one or more of the taxpayer's children are dependent upon him." It is thought that Staples' opinion is in line with departmental practice.

(13) It may be a mistake, in any event, to transfer all the life insurance to Mrs Harris. The reason for purshasing the life insurance is to provide money for death duties should Mr Harris die prematurely. Can it be certainly assumed that Mrs Harris will lend the proceeds to the estate to pay duty? Widows in this position have been known to be less than cooperative. In Mrs Harris's case, the problems may not be too serious. If she does not lend the money to the estate, it will be necessary to sell public company shares belonging to the family trust. That would cut into her income. If there is concern about ensuring that the proceeds will be available if required to pay estate duties, but the legal adviser does not want to rely on Staples' interpretation of s 59 of the Income Tax Act 1976, a compromise would be to split the policies and to transfer to Mrs Harris policies representing premiums of $2,000 a year, and to transfer the balance of the policies to a family trust. To allow for possible increases of the special exemption, the figure could be somewhat higher than $2,000. The figure of $2,000, rather than $1,000, is chosen in order to obtain the advantages of special exemptions of both Mr Harris and Mrs Harris.

(14) The insurance policies in this case were initially purchased by the client. Consequently, there is no point in suggesting in the opinion that some other method of purchase would have been desirable. However, where a solicitor is advising a client who proposes to take out life insurance policies for estate planning purposes, it is generally better for the person or entity which it is proposed will hold the policies to purchase them in the first place. This procedure saves the trouble of transferring the policies later, and, more importantly, makes sure that they are never owned by the client, and consequently are invulnerable to s 14 of the Estate and Gift Duties Act 1968. Generally speaking, where it is proposed that a family trust will hold the life insurance, the trust will have an insurable interest in the life of the client, since the trust will be the client's debtor. If there is no insurable interest, then it is often preferable for a policy to be purchased by the wife and then transferred to the trust. However, that procedure would not be appropriate here, since the wife is a beneficiary of the trust. The policies or their proceeds would thus be vulnerable to inclusion in Mrs Harris's estate, pursuant to s 11 and/or s 12 of the Estate and Gift Duties Act.

In the present case, where it is proposed that Mrs Harris should own the policies beneficially, there is no reason why she should not have purchased them in the first place, though, as mentioned above, there are reasons suggesting that it is often undesirable for the wife to hold a policy benefecially in this type of case.

(15) Paragraph 35 suggests that there is no need for Mrs Harris to start a giving programme at this stage. The reasons are set out. In fact, Mrs Harris is not now in any position to make gifts, since her only assets are the car and a half interest in the matrimonial home. Notwithstanding the relative modesty of her present estate, she may be expected to die fairly well off as a result of receiving the proceeds of the insurance on her husband's life. Even if she does lend this money to her husband's estate for death duties, it will still appear as an asset in her own estate. That seems an unfortunate result, and is a further reason for not transferring the insurance to Mrs Harris, or at least not all of it.

(16) Paragraph 22 suggest that Mrs Harris's will should leave a life interest in her estate to Mr Harris. This would give Mr Harris a life interest in the insurance policy that he has transferred to Mrs Harris, and in respect of which he continues to pay the premiums. That is, it would seem that from the death of Mrs Harris the premiums would be paid into a fund in which Mr Harris had a life interest. Thus the premiums would come back within Mr Harris's notional estate under the provisions of s 12 of the Estate and Gift Duties Act 1968. See *Overton's Trustees v CIR* 1968 [NZLR] 872 (CA). Moreover, it will be the proceeds of the policy that come back into Mr Harris's estate, and not just the premiums. Section 12 of the Act brings back into the notional estate of the deceased property disposed of in which he has retained an interest. Section 12(2) provides for tracing of the proceeds of the sale or conversion of that property, and brings into the estate "all property which has in any manner been substituted for the property originally" disposed of by the deceased. Clearly, the policy should be disposed of separately in the will of Mrs Harris. There is, of course, no particular point in having any sort of interest at all in the policy come back to Mr Harris should his wife predecease him.