# The New Zealand LAW JOURNAL

3 April 1979 No 6

## INTER ALIA

**Justifying administrative divisions**

In an earlier editorial ([1978] NZLJ 465) Professor Northey outlined why administrative tribunals should give reasons for their decisions. Put very basically the reason is that it is only fair to a person against whom a decision is made that he should know why. The New Zealand Public and Administrative Law Reform Committee has asserted for some years now that reasons for administrative decisions should be given, while in Australia legislation passed in 1977 enables a person who is entitled to challenge a decision to request "a statement in writing setting out the findings of material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision".

To that we may now add the Court of Appeal which in *Fiordland Venison Ltd v MacIntyre (Minister of Agriculture and Fisheries)* (20th December 1978 (CA 59/77). Woodhouse, Cooke and Richardson JJ) agreed with the Public and Administrative Law Reform Committee "that in the normal course those affected by administrative decisions are entitled to an explanation". As well as the appellant, the Court was not given reasons and this prompted the observation "that administrative law is not a formal or technical field, but one in which it is vital for the Court to be as fully informed as reasonably possible of the facts and issues as they presented themselves at the time to the authority whose decision is under review". The particular interest in the case lies in the approach the Court adopted in the absence of information.

Briefly the appellant had operated a successful game packing house since 1964. In 1975 the Federal Republic of Germany altered its rules relating to venison imports. Official inspection of individual carcases was required. A transitional year for upgrading facilities was allowed and after consultation three packing houses were nominated. The appellant was obliged to send carcases intended for export to Germany to a competitor for processing. In late 1975 the appellant applied for a licence in terms of the Meat Amendment Act 1975 and the Game Regulations 1975. The application was declined, as mentioned earlier, without reasons.

The criteria for the grant of a game packing house licence are set out in reg 10. That regulation placed a duty on the Minister to grant a licence if he was satisfied as to five specific and limited matters. He had no residual discretion to refuse a licence although he had a limited discretion to override the provisions. There was no room for a policy decision. His function was "analogous to a judicial one".

From the affidavits it became apparent that only one of these criteria was in issue, namely whether the issue of a licence would have a significant detrimental effect on the economic operation of any other game processing establishment. This point was not covered in the affidavits. The Court was not prepared to assume any other knowledge on the part of the Minister, other than that properly deposed to in the affidavits (ie, "it was not for the Director of the Meat Division to say why the Minister declined the application"). The clear inference from them was that the Minister rejected the application "because he was of the opinion that a rationalised industry could function satisfactorily without a licence at Te Anau. However understandable administratively, that was not a ground authorised by the regulations".

Where though does this leave the Court when it comes to providing a remedy? In this case, in

view of the time that had passed, it was not felt that substantial justice would be done by directing reconsideration of the application. In view of the paucity of evidence concerning competitors could the Court do more? This depended very much on who should be responsible for providing the information required to enable the Minister to determine what impact the grant of a licence would have on competitors. The Minister obviously felt that economic information should come from the applicant for the Ministry had written to the applicant saying "that the Minister will need to be convinced of the economic need and justification for the continuance of the premises as a game packing house (processing)".

The Court of Appeal approached the matter more realistically. "Fiordland provided much information in support of its application in a series of letters. The company was not asked for any more and could not reasonably have been expected to provide information about the affairs of its competitors. In this rather rudimentary licensing system it could only be the responsibility of the Ministry to obtain that sort of information, if it was thought to be relevant. Apparently the Ministry saw no need for further inquiries".

(This pinning of responsibility for obtaining information on the Minister brings to mind a decision of Mr Justice Vautier in *James Aviation Ltd v McCarthy (Air Services Licensing Appeal Authority)* Supreme Court, Hamilton, 27 June 1978 (A 22/77). There it had been contended that a report should not be disclosed to the parties as it contained information that other operators were required to supply to the Ministry of Transport, disclosure of which could affect their competitive position. His Honour felt that owners and operators of aircraft must accept that the nature and extent of their operations may be revealed to those concerned in an Air Licensing inquiry. Disclosure could be regarded as one of the prices paid for participation in a controlled industry).

What evidence there was, was "against any suggestion that the economic operation of any other packing house would have been detrimentally affected to a significant extent". But the interesting conclusion was drawn "that there was no evidence on which the respondent could reasonably or properly determine that he was not satisfied with the matters prescribed by the regulations; and that the evidence established these matters satisfactorily . . . . We do not think that the respondent, as a reasonable Minister applying himself to the right tests under the regulations, could have found that he was not satisfied in terms of [the regulations]". The conclusion is described as interesting because the regulation is expressed in positive terms (the Minister must be "satisfied") while the Court, operating in a semi-vacuum, has looked at it the other way round and has placed emphasis on the absence of information justifying a conclusion that he was not dissatisfied. Thus it is not solely for the applicant to establish that the minister was, or should have been, satisfied – a difficult feat indeed! The minister must also participate and establish grounds for dissatisfaction. In the event a declaration was granted that, subject to the upgrading of the premises, the appellant was entitled to a game packing house licence.

This decision is another step forward for administrative law. It underlines the nature of the administrative decision as one made in accordance with legal criteria and based partly on information supplied by an applicant and partly on information which the administering authority may reasonably be expected to obtain (and make available to the applicant in proceedings challenging the decision) and follows on to the logical conclusion that in any subsequent proceedings both parties must justify their respective positions. The focus is not on the applicant alone. Furthermore the Court will act only on the information before it and will not assume knowledge. If that from the applicant is sufficient to satisfy, and that from the Minister insufficient to dissatisfy then the result is likely to favour the applicant. Is there also an indication that from a failure on the part of the Minister to obtain information it may be inferred that he is satisfied with what he has? All in all there is a subtle change in emphasis and a willingness to provide effective remedies that cannot but make applicants happy and also make it increasingly in the interests of administrative bodies to be much more open about their decisions if they wish them to survive challenge.

**Electoral Law**

In a recent press release the Minister of Justice the Hon J K McLay said "Social Credit's stated intention to boycott the Committee of Inquiry into the Electoral Act reflects no credit on that party's leader". He continued "I am quite sure that Mr Beetham knows full well that the Committee of Inquiry was given terms of reference that were agreed to between the Prime Minister and the Leader of the Opposition".

If Mr Beetham's refusal to participate reflects no credit (and that is a dubious proposition), by the same token it can hardly be held to his discredit that he declines to waste his hard-pressed time participating in the patching up of a system that the major political parties have succeeded in botching beyond belief – particularly as the limited and specific terms of reference for the inquiry were

settled by the leaders of two parties that the present electoral system serves very well.

The statement went on to say "if Social Credit is not interested in these matters then it is at liberty to boycott the Committee's inquiry – but Mr Beetham can hardly complain afterwards about its findings. Mr Beetham cannot fail to be aware . . . that the purpose of the inquiry is to carry out a practical examination of the existing electoral law to ascertain whether it has been – and can be – effectively administered. It is not asked to look at the philosophy of the Act". So Social Credit won't help me mend my swing. Why should it? It didn't think much of it in the first place. Members would rather devote their energies to improving the playground. One can understand (and see) the need to inquire into the machinery deficiencies of the present system. That inquiry is needed urgently so that remedial measures may be taken before the next Election. These measures will be required whatever system of voting we have. However it is also perfectly understandable, and should not be the subject of criticism, that the sole Parliamentary representative of a minority party should decline to participate.

The concluding comments are the most interesting though. "Mr Beetham knows that in its 1978 Election Manifesto the National Party promised to set up a Select Committee to consider changes to the electoral laws and to receive submissions from interested organisations and individuals. The matters that concern Mr Beetham – such as proportional representation – can be looked at by that Select Committee". What seems to have been forgotten right now is that the philosophy underlying our electoral system is no less important than the machinery by which it is implemented. A large segment of the voting population – and particularly those who support the Social Credit and Values Parties – have expressed dissatisfaction at the first-past-the-post system. The lack of governmental enthusiasm demonstrated over the past years for a wider inquiry contrasts with the speedy convening of this inquiry into a topic that is really no more than an administrative responsibility of the Minister of Justice that just happens to be a little fouled up.

If there is to be criticism, then now that Mr Beetham has been told where he may direct his submissions, we would say that it will reflect no credit on the present Government if the promised Select Committee to consider changes in the electoral law is not established with equal promptitude.

Tony Black

Note: Since writing, Mr Beetham has announced that in view of the assurance as to a more general review he will participate in the inquiry. This particularly underlines the observations in the final paragraph. And of course recent public opinion polls point to the desirability of a wider inquiry.

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**Rat technology**

This marsh was a muskrat slum, unkempt, crowded, and untidy. The river banks were crisscrossed with a maze of muddy trails that must have confused the animals themselves. A muffled splash, then telltale ripples alongside the canoe, marked the spot where a rat dived out of our way. Overcrowding is the forerunner of a serious drop-off in numbers. Disease takes over, as the close contact between individuals causes it to spread and to claim more and more victims. But the effects of overpopulation can be more subtle: living at such close quarters the competition for food and places to live becomes intense, and the animals become intolerant of each other. This stress of crowded living in a complex social environment affects reproduction, and numbers decrease. Nobody knows if muskrats experience other, less evident effects of overcrowding: soaring crime rate, pollution, reduced life span, economic imbalance. If they do, they are unaware of the real cause of their miseries – a rising birthrate that will eventually annihilate their society. Doubtless they would be incensed at the idea of some governing muskrat interfering with their right to have as many babies as they want. They probably care little if the constant comings and goings of their offspring beat out trails that infringe on the grounds of others, or if their carefree gorging on waterarum causes their neighbours to go hungry. The scientific muskrat will pull them through, will discover a process that converts muskrat dung into high-quality protein, and invent highrise burrows and twelve-lane supertrails. Muskrat technology is so advanced that only a heretic among them would call muskrats 'animals' or suggest that the same set of biological rules govern muskrats as govern lower forms of life, like frogs and snakes.

Nature Canada

CONSTITUTIONAL

# SOME THOUGHTS ON STEPPING DOWN

*By the Hon* PETER WILKINSON, *MP and formerly Attorney-General.*

The following article does not pretend to be an objective scholarly offering, much less a definitive statement on the role of Attorney-General. It is merely a short personal impression of some aspects of my three years as the holder of that exalted office.

I neither sought nor initially expected to become Attorney-General in the first Muldoon Administration. My qualifications for the job were limited to a law degree together with some experience on the Parliamentary Statutes Revision Committee, and my main interest in the Parliamentary Context lay elsewhere. I had never practised law, and at the time of my appointment as titular head of the legal profession I was only six years out of law school.

I could not – and did not – claim expertise in this field, but in the course of my term of office some situations arose which were without precedent in this country's legal history. Very difficult controversial decisions had to be made. Plans had to be made, and thinking done for a complex and uncertain future. My term of office will be associated inevitably (but not I sincerely hope, exclusively) with the Ford Motor Company and the Bastion Point prosecution stay decisions.

With the benefit of hindsight, and being in a better position now to comment more freely, there are some more things I would like to say on this subject "for the record". I remain convinced that those decisions, (and the complex issues they raised) are even now not widely understood, despite all that has been written and said about them. Lay critics, in particular, seemed to have great difficulty in grasping the inter-relationship of the Attorney-General's law officer and politician roles, and the bearing of this inter-relationship on the decision-making process.

Many criticisms of the prosecution stay decisions concentrated much of their thrust on the chain of circumstances leading up to the stays, which were actually quite irrelevant to the propriety of the decisions themselves. My decision as a law officer to stay in the Ford Motor Company case could not be governed by a consideration of the pros and cons of suspending the operation of the scheme under the Superannuation Act 1974 any more than the Bastion Point prosecution stay decision could turn on the merits of the decision to prosecute the protesters under the Trespass Act 1968.

The decisions I took sole personal responsibility for, but the circumstances leading up to them were not, of course, within my control. Nor could I – in making the decisions in my law officer role – be expected at the same time to take account of, or deal with the political ramifications that might flow from the decisions.

In both cases I stayed the prosecutions to protect the court system from abuse, acting in what I believed to be the public interest and the interests of justice.

This power of Attorney-General to stay proceedings should not, in my view, be qualified, nor should it be rendered subject to judicial review.

The court system needs to be protected from individuals and groups in our society who seek to use or abuse the courts to their own ends and the system's detriment. I believe that this is a more compelling consideration today than, say, in 1967, when s 77A (Enacted by the Summary Proceedings Amendment Act 1967 s 2) of the Summary Proceedings Act 1957 was enacted. Dr F M Brookfield in discussing the Ford Motor Company prosecution stay in his article ([1978] NZLJ 469) suggests that the Attorney-General cannot lawfully use s 77A as a means of anticipating changes in the criminal law that Parliament still has to enact.

I must respectfully point out that it is inappropriate for Dr Brookfield to make such a submission in relation to my Ford Motor Co decision. The stays – as I shall elaborate on later – were entered because the prosecutions if allowed to continue, would have inflicted needless harm to the administration of justice; they were not entered because the legislation was shortly to be changed.

Furthermore, in my view, nothing in the wording of s 77A suggests that it should be construed in the way Dr Brookfield suggests. But if his learned submission can be shown to have raised a sustainable doubt then Parliament should move quickly to clarify the matter.

The Crown's chief law officer, with ultimate responsibility for criminal prosecutions must, in my view, have this residual protective power faced as he is with a growing trend towards con-

trived pressures on our court system by people prepared to disrupt our institutions where it serves their own ends *(a)*.

In all that was written on the Bastion Point prosecutions, for example, it surprised me how so few commentators appeared to really appreciate one of the main considerations involved namely the need to consider the future protection of the court system from organised attempts to undermine it by provoking mass arrest situations leading to mass prosecutions, which in turn could seriously clog and overtax its resources.

All the information I received, prior to making my decision led me to believe that the Bastion Point prosecutions had degenerated into a farce, without meaning other than to clog up the courts for another eight months. If no, move had been made to halt them a dangerous pattern for the future would have been seen to be condoned.

Another surprising and unsettling aspect of the controversies was the tendency of many critics to overlook the fact that I was dealing in each case with immediate, practical, real life situations, and in their intense concern for matters of "principle" such critics seemed to forget the all-important, (if mundane) consider action of basic common sense.

Many critics of the Ford Motor Co decision, for example, obviously did not stop to consider what could have actually happened if these prosecutions had been allowed to proceed. For a start, a magistrate could have been faced with the task of having to apply a criminal sanction to enforce a social policy (the Labour government's Superannuation Scheme) which he knew for certain would soon be repealed by the new National Administration. Next, all the hundreds of employers and thousands of employees who had relied on the decision of the Superannuation Corporation not to take action to recover Superannuation deductions from wages, and on the Prime Minister's subsequent announcement about the discontinuance of deductions could have found themselves at risk of being criminally prosecuted. It could have opened the floodgates to a major spate of needless litigation throughout the country at a time when the courts were already under serious strain. I was not prepared to allow such a situation to occur. I could not see how either the public interest or the interests of justice could be served if the Superannuation Act deductions had continued in force until Parliament met, involving as it would have the making of payments for a further six months, which would then have had to be repaid. I felt then – and still feel that it would take a bad case of tunnel vision to fail to see such an outcome as a gross affront to common sense, and one which would most certainly have held the law up to ridicule.

Nor would it have served the public interest the interests of justice or the dictates of common sense if the Bastion Point prosecutions had continued to the bitter end. To me it is simply quaint for anyone to suggest that 170 more people should have been solemnly paraded through the court merely to tell them – (and take about eight more months to tell all of them) – that they were equal offenders with those who had already been convicted for doing something the Court apparently thought was so minor that no penalty needed to be imposed.

When I made the decision to stay the rest of the Bastion Point prosecutions there was an immediate howl from a wide section of the news media, as well as the predictable reaction from our political opponents that people's rights had been violated and injustice had been done. At first the opposition was not too well orchestrated, and it was not immediately clear whose voice was going to emerge as the loudest – that of those already convicted, or that of those who had not been convicted and wanted to be.

In time opposition focused on the "plight" of those already convicted. Tongue-in-cheek election-year comments about "justice becoming a lottery" were circulated.

The people who had been convicted must, of course, have contemplated the distinct possibility of being convicted at the time they chose to be arrested at Bastion Point. If they genuinely felt stigmatised and disadvantaged by their convictions, rather than regarding them as status symbols in a political cause, their legal advisers have no doubt advised them about the courses open to them long before now.

The fact that some of their number were not convicted did not suddenly turn the convictions of those already dealt with into some unfair punishment.

I accept that there may still be objective and bona fide critics who will say that the inconsistency of treatment meted out to the Bastion Point protestors is a matter of regret. But so also is the needless stress the whole incident placed on the courts. I said at the time that the Bastion Point situation was one for which no "perfect" solution was available. I had to weigh the position of those convicted against the consequences of continuing the prosecutions, and arrive at the

(a) I am somewhat puzzled at Dr Brookfield's suggestion that the Attorney-General's power to stay proceedings is subject to judicial review. It is my understanding that the judgment of McMullin J in the *Daemar* case. [Supreme Court Auckland 14 November 1977] makes it clear that the power is not reviewable.

"least imperfect" solution. There was no doubt in my mind then – nor is there now – as to which course of action best served the public interest and the interests of justice.

Then there were those like Mr David Lange M P who admitted that the stays should have been entered, but said that they should have been entered sooner. The difference between us is one of degree only, because even if the stays had been entered at an earlier stage there would still have been some who would have been convicted. In fact I moved within 24 hours of an approach from the Commissioner of Police seeking my intervention. The police were, in my view, fully justified in waiting to the absolutely sure that a clear pattern of conviction without penalty was being adhered to by the court in each case.

The Government was accused of "political expediency" in the wake of the prosecution stays. In fact the Government had no part in the decisions, which were made by me alone.

While there were those who have argued that my Ford Motor Company decision was – albeit incidentally – of advantage to the Government, no one could sustain such an argument in the case of my Bastion Point decision. That decision brought no advantage for the Government. On the other hand it did bring political trouble for me personally. Apart from the (mainly predictable) avalanche of hostile reaction from political and news media critics I have clear evidence that I lost a lot of votes in my own electorate in November because of the Bastion Point decision – mainly, ironically, from strong law and order proponents who did not grasp the full meaning of the decision.

With the perspective of hindsight I would say of those decisions that they cost me dear in personal political terms, but – faced with exactly the same circumstances again in each case – I would make the same decisions again.

In a letter written to me in November shortly after my announcement that I would not accept appointment in the new Cabinet my respected opponent (and one time lecturer) Dr Brookfield suggested to me that I might think of offering my services to the Prime Minister as Attorney-General outside Cabinet, holding no other portfolio. I appreciated the very considerable implied compliment but – quite apart from the consideration of my current state of health – I remain unpersuaded that the Attorney-General in New Zealand should function outside Cabinet.

I agree that the position of Attorney-General as a member of Cabinet can indeed be "invidious" at times, as Dr Brookfield suggests [1978] NZLJ 470 though not, I feel, insurmountably so. It is not hard to envisage a situation in which the Attorney-General's sitting in Cabinet might place him in a difficult position in the exercise of his law officer powers where his decision will have political flow-on effects. Difficult, but not impossible.

Such a difficult situation could well arise where, for example, an Attorney-General's independent decision to stay a criminal prosecution happens to coincide with the political advantage of the Government of which he is a member.

As I see it if the Attorney-General has sustainable arguments on grounds of public interest and the interests of justice which can stand on their own independent of any political consideration (as was the case, I believe, with the Ford Motor Co decision) he should be able to live with any "difficulty" arising from that situation.

There will undoubtedly be times when a situation would be easier for an Attorney-General if he was not a member of Cabinet. This is in my view, however, substantially outweighed by the fact that as a member of Cabinet, he is much better equipped to make assessments on matters of public interest. Only in Cabinet can he obtain the "over view" needed to make fully informed and properly balanced decisions.

By the same token the Attorney-General in Cabinet is in my view better equipped than any court to assume the burden of deciding what the public interest is in a situation such as the one that confronted me in the Ford Motor Company case.

During my term of office the Government faced formidable problems in the field of court administration, which was labouring under the strain of a workload which had greatly increased in volume and complexity in recent years.

When we took office late in 1975 we noticed a feeling of drift and uncertainty and we felt that morale was not particularly high in the legal profession and indeed throughout the institution of justice generally. This was arrested and a lot of (not always productive) controversy within the profession was defused when we took early action to set up a Royal Commission on the Courts to look at our court system and produce a comprehensive blueprint for the future. I feel some degree of personal identification with the Royal Commission because it was initially my idea that it be included in the 1975 National Party Manifesto, and I can fairly claim to have spearheaded the pressure to have it set up with a minimum of delay when we came to power.

In the course of its hearings the distinguished Royal Commission attracted unprecedented sustained public attention to our Court system and its problems, and its Report is no less a monumental achievement for being less radical and sweeping in its recommendations for reform than some had expected. After an exhaustive and comprehensive inquiry the Royal Commission's findings basically

vindicated the existing system.

It was a matter of considerable personal satisfaction to me to see approval secured for the implementation of the first major Royal Commission recommendation before I left Cabinet. This was the raising of the permanent judicial establishment to 25 Judges.

During my three years there was almost constant (and about evenly-balanced) pressure from the judiciary and lawyers on the one hand and the "abominable no-men" in Treasury on the other with respect to the making of extra-judicial appointments to deal with the mounting workload. During that period the appointment of more new Judges was authorised than in any other three-year period in this country's history. Eleven judicial appointments of all kinds were made, including a new Chief Justice. The Court of Appeal (under a President appointed in my time) was expanded and reorganised to double its workload capacity, and an internal reorganisation of the Supreme Court was affected soon after the present Chief Justice assumed office.

I believe I can therefore reasonably claim that fairly profound changes to the nature and face of the Judiciary took place during the 1975–78 period.

I am well aware that my assumption of the office of Attorney-General was as much a step into the unknown for the judiciary and the legal profession (and the cause for some understandable apprehension) as it was for me, a virtual stranger to the profession.

From the outset I received total and unstinting loyalty and support from the Judges and lawyers with whom I came into regular contact. Initially I accept that that loyalty and support went to the office of which, for the time being, I was the bearer. In time I like to feel that some of that loyalty and support also went to me personably.

The legal profession has many critics, some of the most active being from among its own members. As an, in effect non-lawyer, brought suddenly and unexpectedly by a combination of circumstances to the titular leadership of the profession, I can claim to be able to view it from a somewhat unique perspective.

In the course of administering seven Ministerial portfolios of my own over that period, as well as acting Minister from time to time for two other portfolios, I came across no group more willing and able than lawyers to take a broad view of the needs and interests of the community; I encountered no group with so many members prepared to undertake onerous and disinterested work in the public good. I also found that most lawyers are genuinely concerned to see that justice is in fact done.

When I assumed office Sir John Marshall suggested to me that my time as Attorney-General might well prove one of the most personally satisfying experiences of my political career, and so it turned out to be. I am very proud indeed to have held the office.

For the future half-brother James knows that I believe – like Stanley Baldwin – that when a Captain steps down from his job he should not hang around the bridge or spit on the deck. I shall not, however, be too far away.

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# THE LOGIC OF EXPLORATION

*By* MD MALLOY, *an Auckland practitioner*

What do these activities have in common: research by a scientist; diagnostic work by a doctor; and a murder investigation by a policeman? At first blush, very little. If, however, we think about them in information terms, we can see them as different fields of application of a few simple processes. The goal is always to determine what goes with what. The doctor wants to find out which germ has produced the presenting symptoms in his patient. The policeman tries to find out whodunnit. The scientist seeks a cause and effect relationship – the "aetiology" of some presumably resultant state of affairs. All three must set out to acquire relevant information, to exclude irrelevant information, to apply the information to their problem of interest and, hopefully, and sometimes after a great deal of trouble, to find out which of a number of possibly relevant preceding events is the one uniquely linked to the consequent of interest.

Involved in this are:

(a) The method used in gathering information. (Careful thought on how information is to be used may cut down on superfluous effort through adoption of the most effective and economical design).

(b) The presentation of the information to a judge. (The Court, the prosecutor, the patient, other doctors, the scientist's colleagues etc).

(c) The weighing of the information by the judge. (Some pieces of information are

more important than others).

(d) The exclusion of bias. (The most obvious forms are set or expectancy, and attitude, both of which can affect the individual's reception of incoming information).

The first task of an investigator is to gather as much easily obtained information as he can get so that he can build up a rough picture of his problem. This may take the form of gathering clinical data, examining the scene of a crime and reading the technical literature. Out of this will emerge a critical task for the investigator – to formulate a range of possible cause-and-effect relationships to "explain" his consequent of interest (Task 2). Individual skills will, of course, play a role in how well the hunch list is prepared, but the important aspect is to play down favourites so that the list is reasonably adequate. As time goes on, the list may well expand as incoming information modifies the initial picture and eliminates some of the hunches on the list. However, the greatest danger for the investigator at this stage is to guard against his own biases, because the mere formulation of a particular hunch may result in a tendency to favour it at the cost of other possible starters.

Having formed his list of possible "causes", an investigator then sets about gathering testing information designed to test them (Task 3). This kind of information is aimed at finding out which of his starting hunches is the most plausible. The elimination of unlikely hunches by exclusion is the most obvious goal at this state. For this purpose, the investigator seeks critical information by the quickest route. If he is a scientist, he is aided by a great deal of expertise in selecting the most economical research design. In other cases, practical issues such as the availability of job aids will play an important role in setting about the elimination of inappropriate hunches. Individual flair (or lack of it) will have an important bearing on how quickly individual investigators will get through this vitally important, but sometimes tedious, aspect of their work.

The fourth task involves a judgment or judgments on the investigative work. In some situations, this may be done by the investigator himself (eg the doctor), but if this happens the investigator lacks a check on investigative bias. This can present very real dangers for a patient who, for example, approaches a specialist without referral by a G P and therefore without the possibility of an independent weighing of the evidence.

When judgment is carried out by an independent person, the total scene should be set before him. This must include the initial informational picture, the hunches tested, the information gathered to test these hunches, and the conclusion reached. At this point, there may well be room for argument on adequacy of the information, the significance of a given piece of information, the adequacy of any experimental design used, the logic of the investigator and the conclusion reached. What is unacceptable, however, is the use of any device to cloud issues, the suppression of information, and the failure to use every available device to eliminate or at least reduce investigative error, set, and attitudinal bias.

Following the making of a judgment, action follows. For the pure scientist, this may involve nothing more than the publication of results, which thus become another drop in the bucket of scientifically acquired information. For the applied scientist, action may take the form of a new paint design to improve the recognition of aircraft, a new car design to eliminate some visual defects, or whatever. For the doctor, a diagnostic judgment will lead on to his recommending a preferred treatment. For the policeman, the terminal point of his work is the Court judgment, with the Court deciding on treatment of an offender.

All this seems so straightforward that the question must arise: why bother to state the obvious? The answer for those not familiar with police and medical investigative method is that scientific method cuts across entrenched habits. In the case of the police, no course in scientific method exists. For the doctor, his education emphasises the art and the unique virtue of clinical judgment – elevated at times into something of a mystical cult. Legal education which, via the courts, might exercise some kind of influence on police method, also fails to include any course on scientific method.

To argue for a change of investigative method to one based on logic is likely to require a cost-benefit analysis before decision-makers will consider it. The major pro is error reduction. This is what science is all about and the extension of its methods, built up painstakingly over the last three centuries, to other areas of exploration, seems overdue. The payoff for the suggested change comes to the individual and, in the case of police work, to society as well. Better methods are likely to lead to fewer diagnostic errors, more appropriate treatment, and fewer avoidable deaths and injuries to doctors' patients. Improved detection methods are likely to lead to more convictions of the guilty and fewer convictions of the innocent. In addition, adoption of the scientific model would, in the case of medical practitioners, lead to the establishment of procedures in diagnosis such that definition of the criterion for expected minimal behaviour in any given situation is clear cut, and breach of the criterion can, if necessary, enable negligence to be readily determined.

The cons for medical practice comprise time

and expense. The profession will probably allege that to make widespread use of testing devices available to it in every case will involve excessive work in relation to the odd correct diagnosis and erroneous diagnosis which would otherwise not have been made. This is an issue of values which may require different answers in different situations, depending upon the nature of risk associated with error. However, the point seems relevant only to the *adequacy* of information obtained touching on individual hypotheses, rather than to the adoption of the model. It may be that among medical specialties, different expectations will prevail. The informational detail expected to be gathered by a specialist is likely to be wider in scope that the detail expected of a GP.

For the police, adoption of a scientific model would in part cut across the gamesmanship of the trial system. The adversary pattern of trial lawyers, and the winner-take-all nature of most trial games, provide a design for behaviour with strong inducements for the players to conceal information tending to make a "win" less likely. When a system makes the winning or losing of a case potentially as important as, say, the imprisonment of an innocent person, justice must in some cases tend to take a back seat. Any argument in favour of a scientific model is thus squarely opposed to those in the police force and legal profession whose skills comprise manipulation of information within the rules of the trial game. Such entrenchment is extremely difficult to change.

Why bother with change even if, formally, existing methods are less than perfect? Does anyone care? Have we reached the stage when administrative convenience and the numbers game are more important than the individual? It may be that this is so, but we should at least have some practical knowledge of where existing methods have led us. Two anecdotes will be cited to provide some real-life background to the theoretical issues raised. The first is fictional but based on a real incident.

Some few years ago John Doe, a young professional man consulted a medical specialist after experiencing three years' slow deterioration in the functioning of a sense organ. His syndrome neatly fitted the text-book description of a rare but well-known brain tumour. The specialist carried out limited testing. He obtained an ambiguous reading from his test but took no steps to check it by repeated testing at the same and different magnitudes of sensory input. He did not diagnose a tumour and did *not* suggest a further visit, either on a routine basis or if the condition deteriorated. Inevitable deterioration was diagnosed, with the necessary inference for the patient that any further worsening was just something he must tolerate. It did worsen, and he did tolerate it – for four years! At that time, his tumour was about the size of a pigeon's egg. Because of the acute danger involved in a removal operation, and because of his extensive experience in this kind of operation, an overseas surgeon was recommended. With the assistance of personal loans, John Doe found his way to the surgeon on the other side of the world. Miraculously, he survived the operation. Permanent damage resulted from the removal of the tumour. The initial consulting specialist in that case failed to use the sources of information freely available to him and to test possible hypotheses in a systematic manner. He even failed to use a back-up recall system to check on the possibility of diagnostic error. As a direct result, his patient suffered. Yet, according to the opinions expressed by his New Zealand peers (but not according to those expressed in the overseas texts), the specialist acted in conformity with normal medical practice.

This case highlighted the difficulty faced by the legal profession in obtaining guidance from the medical profession on expected standards of professional behaviour. The scientific literature recorded a consensus on what steps should be taken given the initial symptoms. The specialist did not do this. His colleagues appeared to be unanimous in saying that what he did was in accord with normal medical practice. Had their views been exclusively relied on, the gap between practice recommended in the technical literature and that apparently in existence in this country would not have become manifest. It seems overly simple to suggest that the medical advisers were simply covering up for their colleague. Just as plausible is the hypothesis that, in a world where subjective, individual, clinical judgments are given a God-like status, the advisers were merely reflecting a significant component of their culture.

For the police, spectacular departure from the scientific model of exploration is found in their conduct and that of Crown counsel in the murder trial of Arthur Thomas. That case stemmed from the double shooting of Jeanette and Harvey Crewe on a Pukekawa farm. Possible explanations for the killings involved *either* a double slaying with the murderer or murderers being the most likely person or people involved in the removal and concealment of the bodies *or* a murder and suicide with someone else tidying away the corpses. In the event, a neighbouring farmer who, as a youth, was supposed to have a crush on Jeanette Crewe, was charged with double murder and convicted in two trials – in spite of a clear alibi provided by his wife and nephew, and a case built up entirely on circumstantial evidence.

Most New Zealanders, through extensive

media coverage, are aware of the broad pattern of the Court cases involving Thomas. Hardly anyone has bothered to study the tedious detail of the facts. In books published on the case, journalists Pat Booth, Terry Bell and David Yallop have recorded details of relevant information, bearing on a variety of hypotheses other than that imputing guilt to Thomas, which was deliberately suppressed by the prosecution at the trials. This included:

(1) Suppression of the fact that the one letter (from the dead woman) – handed to police investigators by Thomas during their inquiries – and later used as evidence of an obsession lasting some eight years – was one of a number of letters from other girls known in his youth which he had also retained. The other letters were handed over to junior counsel, Mr Webb, the day after the Court of Appeal rejected the first Thomas appeal. Mr Temm did not know of their existence until Mr Pat Booth of the *Auckland Star* told him two years later. They are still in Mr Booth's possession, and include a further card from the dead woman.

(2) Suppression of the report of Professor Elliott, who in September 1970, told police that, on the basis of his study, he believed the child, Rochelle, had been fed in the days after her parents' deaths. He was asked to attend the Otahuhu deposition hearing but was not called, and the fact that he was available as a witness was not disclosed to the defence at any stage. The fact that his report existed became known to Mr Booth in 1977.

(3) Suppression of the fact that a further potential witness existed who believed that it was his watch that had been cited in the first Thomas trial. This man, John Fisher, came forward in 1972 after reading reports of the first trial. Despite the fact that some time was spent at the referral to the Court of Appeal later that year arguing the watch evidence, the defence was never notified that he was available, and the Judges who weighed up the facts on the watch were not given the opportunity of assessing the relevance of his evidence. I found him after an anonymous phone call nearly five years later.

(4) Suppression of the fact that a neighbour believed she had heard three shots the night of the murder and apparently between 8 and 9 pm. This would have materially aided Thomas because of his alibi at that time.

(5) Suppression of the fact that a neighbour's young son reported seeing sparks, apparently from the Crewe house chimney, at about 7.30 pm on the Friday at a time when Thomas and his wife were clearly not in Pukekawa (this was two days after the murder and three days before the tragedy was discovered). Police were told. They took a statement. They now say that it seemed the boy had mistaken the lights of Te Kauwata for sparks, but the boy's mother, when I interviewed her earlier this year, was adamant that her son had seen sparks. In any case, exactly what he believed he had seen should have been plain from testimony.

These items only pertain to the non-disclosure of available information to the Court. Other departures from the scientific model include failure to carry out a *population* based test firing of .22 rifles within a 5 mile radius of the Crewe homestead, a failure to test adequately the murder-suicide hypothesis, and a failure to cross-check critical verbal reports such as those on the inferred, youthful interest in Jeanette Crewe.

The consistent failure of police and Crown counsel to adhere to anything like a scientific model for carrying out the Crewe murder investigation must leave us all with grave reservations as to the adequacy of a trial and adversary system which can permit this kind of behaviour and which has proved incapable of rectifying what comprise obviously grave errors from a scientific standpoint. In the world of today, it is not acceptable for a legal system to become an anachronism by the common standards of science.

Because the legal system has failed to draw the necessary conclusions as to its own reform, it seems that society must set about other ways of doing this. One possibility lies with the Law Societies. By establishing clear ethical principles governing the acquisition and disclosure of information in conformity with scientific method, it can at least move towards an improved standard of performance on the part of prosecuting counsel generally. Firm action along these lines could lead to a time when popular concepts of the dumb cop and the legal trickster become the exception rather than the norm.

The stories of John Doe and Arthur Thomas provide a disturbing picture of system weakness from the viewpoint of the individual. Adoption of a scientific mode for investigative practice in the medical and police areas would not eliminate such errors, but it should lead to diminished frequency. Logically, the virtue of the scientific model is its greater likelihood of avoiding error. It must be thought of in probabilistic rather that categorical terms.

EVIDENCE

# EXPERT EVIDENCE

*Address to the 49th Congress of the Australian and New Zealand Association for the Advancement of Science delivered by* MR JUSTICE MAHON *at Auckland on 25 January 1979*

The purpose of expert testimony is to establish the existence of certain facts which are relevant to an enquiry being conducted by a tribunal. The facts in question will involve matters calling for specialised skill or knowledge, but apart from that special aspect the facts thus sought to be established do not differ in principle from the facts sought to be proved by ordinary testimony. Expert evidence is only part of the overall juridical process by which facts are sought to be proved. But expert evidence has a special quality, recognised and defined by the legal process, in that it is not confined to proof of the existence of specific facts but may also include an expression of opinion based upon proved facts. Under our legal system it is only an expert who can proffer an opinion in the course of testimony, and one need hardly say that this aspect of expert evidence achieves great significance in a large number of cases. The special power of expert opinion in a Court-room lies in the circumstance that if the tribunal accepts the validity of that opinion, then the expert has in fact taken the place of the tribunal, for it is the expert and not the tribunal who has, in reality, determined the particular matter in issue.

It is this latter point, so I believe, which historically has formed the basis of many criticisms of the opinions of expert testimony, for unless the opinion is completely detached and wholly reliable then the basis of the judicial decision, whether made by Judge or jury, is open to question. Upon this question of impartiality of expert testimony a great deal depends. Sometimes an expert witness is seen as a partisan, not merely as a witness expressing an objective scientific opinion. Then again there is the practice often adopted by legal advisers, of going to one expert after another in order to find someone who will propound a doubtful thesis favourable to one side of the case. It used to be quite common when I was at the Bar for the advisers for the plaintiff in a personal injury case to go to one doctor after another in search of an opinion which would relate the present condition of the plaintiff to his accident. The doctors who would not connect the two sets of circumstances were duly paid their fees for examination and their services were thereafter dispensed with, and the case went to trial upon the opinion of perhaps the fifth or sixth doctor consulted and, not unnaturally, the jury would remain unaware that the preponderance of opinion among the doctors consulted by the plaintiff was totally against the proposition now advanced with some confidence before them.

Such criticisms have always been entertained. Sir George Jessel, one of the greatest of English Judges, made some trenchant observations in 1876 about this practice in a patent case. Whilst holding the opinions of experts in the highest regard, his Lordship was of the opinion that the mode in which expert evidence is obtained was not such as to give the fair result of scientific opinion to the Court. He said:

> "A man may go, and does sometimes, to half-a-dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, Will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one" *(a)*.

On any disputed scientific or medical question there will be honest differences of opinion and such differences, I venture to suggest, are capable of resolution by most duly constituted legal tribunals, but only if the expert witnesses are impartial and have given on each side of the case a complete survey of the factors relevant to the opinion conveyed. But the proposition just stated has for a long time been questioned in various quarters. It has often been said that expert evidence, when tendered in the context of the adversary system of proof, loses its proper efficacy, and the reason most commonly advanced is that the expert witnesses are selected by the parties themselves. The proposal has therefore often been made

(a) *Thorn v Worthing Skating Rink Co* (1876) LR 6 Ch D 415n.

that the Court should sit with expert assessors who would take part in the decision, or that the Court should appoint an expert or a panel of experts charged with the duty of evaluating the expert testimony, and advising the Court thereon. The assessors or the expert panel would have access to the whole of the scientific knowledge and informed technical opinion surrounding the point at issue, and would not be misled by testimony flavoured by partiality or pruned and tailored to the requirements of the particular case which the expert is retained to advance. The purpose of this paper is to examine these proposals and see if they are workable, and I also propose to say something about expert evidence in relation to jury trials.

**Assessors**

Looking back down the history of the judicial process as applied in Anglo-Saxon jurisdictions, it is apparent that the Courts in centuries past frequently called in aid their own experts to consider and advise upon conflicting expert testimony. The earliest example, although a curious one, was the mode of selection of common juries in mediaeval times. In the 14th and 15th centuries, juries were summoned from the locality of the incident under review because of their special knowledge of the parties concerned and of the facts. The jurors determined the contested issues, not as independent arbiters but as witnesses with special knowledge. They were virtually expert assessors. It was not until about the 16th century that the law began to require that jurors be completely impartial, and that they must be guided not by their own knowledge but by the evidence of witnesses.

There also developed, at a very early date, the practice of a Judge sitting with assessors in a special class of case, and the leading example was in the admiralty jurisdiction in England. In 1514 there was formed and duly chartered a corporation known as the Corporation of Trinity House, a maritime institution whose members were mainly sea captains, and selected members of the Corporation, known as "Trinity Masters", were called upon to sit with the Judge of the Admiralty Court in order to give assistance upon various problems of maritime law and practice. One of the members of Trinity House was the diarist, Samuel Pepys, and we are told that he often sat with the Courts in an advisory capacity. The practice of using assessors in admiralty cases continued through to modern times. In New Zealand today the terms of the Valuation of Land Act authorise a Judge to sit with assessors who are people with acknowledged expertise in the field of land valuation.

Generally speaking, however, the use of assessors has never been favoured by English or Amercian Courts for the obvious reason that as opposed to an expert witness whose evidence may be tested by cross-examination, the expert opinion of an assessor is not revealed to the parties. It is revealed only to the Judge. Our legal system has always distrusted any process by which a judicial determination may be affected by outside advice which is unseen and unheard. I appeared at the Bar in many land valuation cases, and I must admit that I was always uneasy at the presence and at the unknown influence of the expert assessor, especially in those occasional cases where his qualifications and ability were thought to be inferior to the experts who testified before him. This defect in the use of assessors was once adverted to by an English Judge, Sir Roger Ormrod, in these terms:

> ". . . indifferent scientific evidence given into the Court's ear is much worse than the worst expert evidence given from the witness box" *(b)*.

Another device adopted by the English Courts in days gone by, similar to the use of assessors, was to summon special juries, particularly in cases involving questions of commercial law, and the expansion of English mercantile law in the 18th century was largely achieved by leaving disputed questions of that kind to the determination of jurors who had special knowledge of that branch of business activity. It was Lord Mansfield, the great Lord Chief Justice of England in the 18th century, who converted the special jury into a regular institution, and it was with the assistance of special juries that he built the basic English structure of mercantile law. In Lord Campbell's biography of Lord Mansfield, he adverts to these special juries and says that they were designated and honoured as "Lord Mansfield's jury-men". One of them, whom Lord Campbell particularly remembered, was a Mr Edward Vaux who always wore a cocked hat, and was said to have had almost as much authority as the Lord Chief Justice himself. *(c)*

Apart from these special cases the Courts have consistently discouraged the intervention of experts in the decision-making process and have confined the operation of expert witnesses to the role of submitting evidential opinions which may be accepted or rejected by the tribunal. In 1901 an American lawyer, who was destined to become one of the great jurists of the United States, suggested a process by which a scientific or technical dispute could be resolved by a scientific or technical tribunal, with the Court being placed under a consequential obligation to adopt the tribunal's advice as being con-

(b) (1968) Crim LR 245

(c) *2 "Lives of the Chief Justices"* 407n.

clusive. I am referring to an article by Judge Learned Hand, in 1901 *(d)*. This reforming proposal has a theoretical attraction, but its fulfilment is necessarily obstructed by the constitutional principle that litigants are entitled to have their disputes settled by a Judge with or without a jury, and the maintenance of that principle, enshrined for American purposes in their Constitution but equally omnipotent in our own unwritten constitution, stands in the path of any such reform.

In the result, therefore, the use of expert assessors, sitting as part of the tribunal itself, has never been favoured by the law, or by the litigants who resort to the law, except in a very limited class of litigation.

**Court-appointed expert witnesses**

In practice, it has been possible in England for many years for the Court to appoint its own expert, a procedure authorised by the Rules of the Supreme Court, and there are similar rules in Australia and New Zealand. In New Zealand, the power of the Court to refer a technical or scientific question to an expert for inquiry and report is contained in s 14 of the Arbitration Act 1908. But the power is seldom resorted to, except in building disputes, and is confined to civil litigation. Lord Denning once referred to the English provision in the following terms:

> "Neither side has applied for the court to appoint a court expert. It is said to be a rare thing for it to be done. I suppose that litigants realise that the court would attach great weight to the report of a court expert, and are reluctant thus to leave the decision of the case so much in his hands. If his report is against one side, that side will wish to call its own expert to contradict him, and then the other side will wish to call one too. So it would only mean that the parties would call their own experts as well. In the circumstances, the parties usually prefer to have the judge decide on the evidence of experts on either side, without resort to a court expert." *(e)*

That quotation perhaps emphasises the inherent difficulty in the Court itself appointing an expert for, as Lord Denning says, the opinion of a Court-appointed expert must be open to challenge by the parties and once that is allowed to occur then the dispute reverts to a judicial consideration of conflicting expert opinion. On the other hand, if a Court expert is not permitted to be cross-examined then his opinion, likely as not, becomes the opinion of the tribunal and, once again, there is a breach of the constitutional principle that a litigant is entitled to have his case determined by a legal tribunal.

**Expert evidence in jury trials**

Up until this point I have disclosed my disagreement with past proposals that the assessment of scientific evidence might be assisted by the use of scientific assessors, or by the Court appointing its own advisory expert. I have been referring in that context to trials by Judges alone. In addition to the reasons already advanced, there is the simple point that the Judge is quite capable of comprehending the disputed scientific issue and in formulating an opinion as to its validity. Like other Judges, I was engaged when at the Bar in a multitude of cases involving scientific testimony and I cannot recall one instance where the Judge, suitably educated during the case by expert testimony, was not able to include in his judgment a fully informed opinion upon the disputed point. But I am now about to deal, in this concluding part of my address, with quite a different matter, and that is the consideration of disputed scientific questions by a jury. It is in this area that there is, in my opinion, a pressing problem.

The average juror is not selected by reason of any assumed scientific knowledge or power of dialectic analysis. His place in the judicial system lies in his ability to determine everyday questions of fact in the light of the evidence which he hears. His duty for the main part is to resolve simple factual issues by the process of observing witnesses of fact and making his own judgment of their reliability or credibility, and he calls in aid for that purpose his ordinary experience of men and affairs and his ability to appraise the demeanour and other characteristics of the witnesses whose evidence is adduced before him. This is a task which the average juror performs conscientiously and faithfully, and in the long run it is found that most jury verdicts based on that type of evidence are not only reasonable but in accordance with the totality of the evidence. But I fear that one cannot express the same view when a jury case involves a disputed scientific question.

I am prepared to go so far as to say that the average jury is not competent to reach an informed conclusion upon a scientific dispute of any complexity. Many classes of citizens with special scientific or professional qualifications are automatically excluded by the Juries Act from being called as jurors. In addition it is within the province of counsel, and is frequently seen by counsel as their duty, especially counsel for the defence in criminal cases, to challenge any juror who by his appearance or by his known occupation might be suspected of earning his living by his intellect. My views as to the difficulty of a jury deciding scienti-

(d) (1901) Harv LR 40.

(e) *Re Saxton (Deceased)* [1962] 1 WLR 968, 972.

fic disputes would have, I believe, the support of most members of the legal profession and most judicial officers, and certainly has the support of one of the great lawyers of modern times. I refer to Sir Owen Dixon, a Justice of the High Court of Australia for a period of 35 years from 1929 to 1964 and Chief Justice of that Court for 12 of those years. Here is what he once said during the course of an address to the Medico-Legal Society of Melbourne:

> "When a judge is confronted with some question which depends upon a scientific inquiry however ill equipped he may be for the task, he is expected to acquire from the evidence of experts a sufficient knowledge of the subject to enable him to appreciate and even form a critical judgment upon the scientific facts, inferences and deductions which contribute to a correct solution of the question. No one expects a jury to do this. It is probably true that in mechanical matters, if no mathematical or other abstract reasoning is invoked, juries are as likely to understand them as judges. But, for the most part, it is useless to expect a jury to form any reasoned judgment on scientific or technical questions."

That last sentence is quite uncompromising and in addition it was uttered many years ago, before science and technology had made the tremendous strides of the post-War years, bringing into operation an ever-widening diversity of expert knowledge and scientific research. The latter phenomenon has brought in its train a multiplication of the scientific questions, and in particular medical questions, which find their way before the Courts as part of ordinary litigation, and very many of these disputed scientific issues arising within the context of particular cases are required to be determined as part of a verdict by 12 jurors. In these circumstances the task of the ordinary juror is distinctly unenviable. He comprehends as best he can the involved and sometimes prolonged expert testimony at the time when it is given. He later has the advantage of having that evidence discussed by counsel on each side, and finally, he has the relevant portions of that evidence collated and explained to him by the trial judge in the course of a summing-up. In addition to that the juror must also reach a decision upon other non-scientific evidence in the case, and by the time he retires with his companions to the jury room the esoteric content of the expert evidence, sometimes given 2 or 3 days before, has very often faded from his recollection. So what is the result? The result is, I fear, that the scientific or technical issue calling for determination tends to be treated by the jury on the basis of a vague impression.

As I see it, therefore, this question of adducing expert evidence before a jury represents a real problem in the administration of justice, and a problem which is becoming more accentuated as the frontiers of science so rapidly expand. Its difficulty, moreover, cannot be evaded by transferring such questions to trial by Judge alone. A citizen charged with an indictable offence has a right to trial by jury. When it is suggested that there might be a Court-appointed expert to assist that tribunal on scientific questions, it can immediately be seen that such a suggestion is futile so far as criminal jury trials are concerned. An accused person is entitled to demand a verdict from the jury and from the jury alone, and there is no other feasible course except to place the scientific evidence before the jury, to be considered by the jury along with the other evidence which, in the end, will control its verdict. But I have said already that in my opinion, and in the opinion of many others, a jury is simply not capable of resolving by its own deliberations a complex scientific dispute, not necessarily because of any lack of comprehension of the issues, but purely because by the time the verdict comes to be considered the details of the scientific evidence have not unnaturally receded from memory.

In view of the foregoing, I would therefore propose the following procedural reform. My suggestion is that where a disputed scientific question arises in a case for determination by a jury and where the issue is of some complexity, it should be the duty of the presiding Judge to prepare for the use of the jury a typescript memorandum stating the salient facts relied upon by each of the experts, and the conclusions and reasons for those conclusions which the expert witness has advanced. This would not be a document of any inordinate length. In the case of each expert witness the essential facts which he relies upon would be stated together with his conclusion. By way of example, let me take a purely hypothetical case. Suppose that a question arose as to how long an empty cartridge case had been lying in the ground. The memorandum for the assistance of the jury would name the expert witnesses who gave evidence on the point, and under the name of each witness would be listed the factors relied upon by that witness. There would be the physical characteristics of the cartridge case – for example, its colour, deterioration, the condition of its interior, its location, and so on – and then the conclusion reached. The jury could then remind themselves at one glance of the exact nature of the controversy, and could weigh up for themselves the relevance of the detailed

facts relied upon by each witness, and the validity of the stated conclusions. The document thus constructed would merely attain the status of an aide-memoire to the jury when they came to consider the disputed scientific question, and would be free from any comment by the trial Judge. It would be submitted in draft to counsel before being handed to the jury, and the Judge would adopt such of counsel's suggestions as he thought right. During his summing-up the Judge would be entitled to comment, if he so desired, upon the typed summary of the expert evidence and as in the case of all other evidence the jury would in no way be bound by that comment.

It would be for the Judge to say in any given case whether or not the expert evidence was of sufficient complexity to warrant the delivery of such a summary to the jury. I do not suggest that such an evidential reform, which could easily be authorised by an amendment to the Evidence Act, would solve all the difficulties, but at least each juror would be in possession of a simplified and brief summary of the rival scientific views and of the salient facts upon which those views had been constructed.

I am not sure whether such a proposal would attract the unreserved approbation of my judicial colleagues, oppressed as we already are with the lamentable and artificial complexity of the legal rules surrounding every summing-up in a criminal case. But I venture to suggest that the preparation of this evidential summary would impose no real hardship. Every Judge is familiar with the same process in preparing decisions in Judge Alone cases involving scientific testimony, a duty which Judges discharge on dozens of occasions every year.

So, for what it is worth, that is my proposal aimed at alleviating this difficult problem of asking juries to reach fair and just verdicts in cases which involve a substantial scientific controversy. In my opinion it would not only advance the cause of justice but would also comprise a due recognition by the law of the care and the patience and skill devoted almost daily in our Courts by doctors and scientists in the preparation and in the delivery of their expert evidence.

# EFFECTIVE TIME UTILISATION

*By* DENIS ORME.

At a cost of over 25 cents per minute for the time of the principals of your firm (based on a 1,300 hour year, at a notional salary of $20,000) can it be said that you are really "working" the hours that you put in each day. If this is not the case then your entire working day should be reviewed in an effort to manage your time more effectively.

First, consider whether the job needs to be done at all, and, if it must be done ensure that it is handled at an appropriate level within your firm.

**Self organisation**

(1) Are you aware of the total objectives for your job?

(2) Do you effectively plan your working day in advance so that you have objectives on a daily, weekly or monthly basis.

(3) Have you carried out a realistic and accurate check on how your actual "working time" is spent? A time recording system will assist with this.

(4) Consider how your time is allocated between various tasks. How much time is available each day for *your own work* as opposed to the time working with other members of your firm? Not only is it an interruption to your own day but additionally it effects the productivity of other persons. If it is found that these interruptions are necessary it may be desirable to group the interruptions and lessen the frequency of them.

(5) Have you clearly established priorities in relation to your total work load? This will prevent matters from being picked up and then being cast aside as not being urgent enough.

(6) Can any of your work be eliminated, simplified or standardised without adversely effecting either your firm or the standard of service to the client?

(7) Are you spending time on work that can be quite satisfactorily delegated to a subordinate? Does the matter need partner participation, or with correct training and supervision can the matter just as effectively be handled by competent staff? The first criteria in determining whether work can be delegated is the level of service required by a client to effectively handle the matter, and secondly to ensure that the work is handled at a profitable level within your firm.

(8) Have you control over your telephone or does it control you? Effective use of your secretary who is conversant with your files and who then has the ability to recognise when clients should be allowed to reach you, will assist in this control. If your secretary is effective in dealing with some enquiries herself and screening other calls she will ensure a continuing high standard of client service

by her approach, and your credibility will be maintained provided that you always return calls.

(9) With secretarial assistance again it should be possible to standardise the documents you use. This may be done throughout your entire firm for greater productivity, and may lead you directly into the area of considering the cost benefits of word processing facilities. If you think about it, there are a whole host of matters handled within a practice that are mere repetition and do not require personalised replies. By standardising such correspondence both your time and that of your secretary will be more effectively used.

(10) By numbering paragraphs on correspondence which goes out to clients, your attention subsequently will focus issues raised in response to your letter. This will prevent the necessity of re-reading the entire document.

(11) Where you are taking on a new instruction, client information cards should be completed in an outer office. This will enable you to obtain background information at a glance improving your productivity, as well as demonstrating efficiency to clients.

(12) Following the taking on of a new instruction the work should be completed as expeditiously as possible, and the file completed at an early date so that it can be costed. Too often practitioners complete the main part of the transaction and then progress to some other matter leaving the file uncompleted and uncosted. On these occasions the client has had the benefit of your service and because the matter is still uncompleted has the benefit of credit.

**Subordinates**

Your practice should be effectively organised into a work group concept so that every member of your staff, irrespective of their function or responsibility has a sense of participation and belonging. Although hard, because of the traditional methods of a law practice, your self discipline in allowing staff to participate in such matters as

(a) client attraction and retention,
(b) methods of undertaking work,
(c) productivity goals and
(d) self development objectives,

can only result in benefits to your firm

Delegation of work within your firm should be consciously undertaken at all times and the subordinate you select must be sufficiently trained to allow him to exercise the authority and responsibility to undertake the matter. By delegation to a subordinate, and then not allowing him to complete the task with only a minimum of supervision, will sap initiative and may result in creativity towards a problem being stifled. Remember that you can never delegate the ultimate responsibility for the task (this must always rest with the principals of the law firm) but the employee should have the appropriate authority to undertake the task. In order to assess your training policies and the level of competence of staff, review sessions should be undertaken at regular intervals with each subordinate on all matters that he/she is handling, so that you are aware of work loads and developments in relation to each matter.

**General**

Your partnership must establish a clearcut decision-making process. This process must ensure that there is no duplication of function by committees or individual partners. To remind you of the stages involved in decision making

(a) the problem must be clearly identified;
(b) a statement of all relevant facts should be made;
(c) all the alternatives available must be listed and this would include the status quo;
(d) each alternative must be evaluated and the alternative giving the most advantages should be decided upon. (Remember it is not the number of advantages available for each alternative but rather the quality of those advantages that is relevant);
(e) There should be a review of the decision following its implementation. If your decision relates to policy matters it is wise to remember that policies should change as situations alter. An automatic bring-forward system will ensure that this occurs.

Are your firm's objectives and goals clearly stated? If this is not the case a lot of time can be wasted in this type of discussion.

Could improved mechanisation improve your firm's productivity? A cost benefit study may be desirable in relation to word processing, centralised dictation systems, mechanical bookkeeping, machine equipment and computers.

Have you the correct staffing levels? Comparative analysis with other law firms may be a guide to more effective use of secretarial and support staff being desirable.

Does work duplication occur within various sectors of your firm? Ensure that your communication system is effective.

Geographical layout – is the layout of your premises designed to reduce the kilometres walked by all; for example, Xerox and Accounts Records in a central location.

Apart from standardisation of correspondence previously mentioned, consideration of work flow also should occur. This would even include the service functions such as search and registration or

even deeds filing, in order to streamline procedures.

How effective is your document filing system? Does it allow for automatic purging without the review of the entire file. A file numbering system using either work category or year as a filing key will enable automatic purging to occur. The overhead cost of file storage can then be minimised without the necessity of microfilm.

Attention to these areas will increase the profitability of your firm.

# CASE AND COMMENT

**The law officers and s 77A: a postscript**

The writer's articles "The Attorney-General" [1978] NZLJ 334 (a 1978 Law Conference paper) and "The Attorney-General and the Staying of Proceedings", ibid, 467, were written in oversight of *Daemar v Savage* (1977), a decision on one of a number of appeals and applications for review brought by Mr Daemar, dealt with by McMullin J in a lengthy unreported judgment given on 4 November 1977 (see *Daemar v Gilliand and Others* [1978] NZ Recent Law 37). *Daemar v Savage* was an application for review of the decision of the respondent as Solicitor-General in entering stays under s 77A of the Summary Proceedings Act 1957 of a number of informations laid by the applicant. The Solicitor-General (for whose general authority to exercise the senior Law Officer's powers, see s 4 of the Acts Interpretation Act 1924 and s 27 of the Finance Act (No 2) 1952) moved to strike out the application on the ground that the stays were not subject to review and that the application was frivolous or vexatious or otherwise an abuse of the procedure of the Court.

McMullin J held, contrary to the view later submitted in the articles mentioned ("the 1978 articles"), that exercise of the power of the Law Officers under s 77A was unreviewable. First, he held, it was not a statutory power to which s 4 of the Judicature Amendment Act 1972 applies; and, secondly, even if he were wrong on that point, no relief could be given under that section because the applicant would not, as the section requires, have been entitled to relief in proceedings for mandamus, prohibition, certiorari, declaration or injunction, the power to stay having originally been, in the learned Judge's words, "part of the prerogative".

The present note will do no more than discuss briefly the grounds and reasoning of the decision, the substance of much of which is aleady covered in the 1978 articles.

1 *Is the power to stay under s 77A a "statutory power of decision"?*

McMullin J's negative answer to that question is based partly on the fact that a stay of proceedings "neither decides a case nor prescribes the rights of any person". That however would make inapplicable only the unamended definition of "statutory power of decision" in s 3 of the Judicature Amendment Act 1972. Clearly now the amended definition substituted by s 10 (3) of the Judicature Amendment Act 1977 applies, so that a "power or right conferred by . . . any Act . . . to make a decision deciding or prescribing *or affecting* . . . the rights . . . of any person" is a statutory power of decision. The power under s 77A "affects" the rights of prosecutor and defendant and is therefore, it is submitted, a statutory power of decision under the 1972 Act.

There is, however, one difficulty in the way of this. McMullin J accepted the argument of counsel for the Solicitor-General that the general right of prosecution under s 13 of the Summary Proceedings Act 1957 ("except where it is expressly otherwise provided by any Act, any person may lay an information for an offence") must be read subject to the Attorney-General's power of stay under s 77A. "The same statute both confers and limits rights". McMullin J concluded:

> "Accordingly, an informant's right to bring proceedings under . . . the Act is not an unqualified right which enables him to seek a final judicial determination of the information, but rather a right which is correlative with the unqualified right of the Attorney-General to end proceedings, short of a judicial determination, by directing that a stay be entered".

The point is not covered in the 1978 articles where the right of prosecution is treated as a common law right and its expression in s 13 of the Summary Proceedings Act is not mentioned. *Culpa auctoris.* However, the fault may not be a serious one. Section 13 and its predecessors have in effect been treated as declaratory of the common law: see eg *Middleton v Incledon* (1914) 34 NZLR 182, 184, 189 and *Campbell v Kirton* [1961] NZLR 886, 888, where the common law principle that anyone may lay an information and prosecute in a matter of public concern is recognised and applied.

Certainly, the basic principle of the common law that, except where it is specifically provided otherwise, anyone may prosecute, lies behind s 13.

Section 77A, on the other hand, inserted by s 2 of the Summary Proceedings Amendment Act 1967, is a statutory innovation in that it confers on the Attorney-General a power to stay summary proceedings which that Officer did not have at common law. Due effect must be given to it, but that surely should not entail reading s 13 as so subordinated to s 77A that the rights "permitted" by the former (see s 146 (a)) are inchoate only and, in effect, subject to a condition precedent that the Attorney-General does not exercise his power of stay under s 77A. Especially in the absence of any formula expressly subordinating s 13 in this way, presumptions in favour of the existing law (see *Maxwell on the Interpretation of Statutes* (1969, 12th ed, 116 et seq)) should rule out the construction accepted by McMullin J.

One is not, after all, asking much for s 13: merely that it be seen to permit the basic right of an individual to prosecute and the correlative right of a defendant that the charges against him will be disposed of according to law. The Attorney-General has the undoubted power to "affect" those rights by entering a stay under s 77A. This power is surely then a statutory power of decision for the purpose of the Judicature Amendment Act 1972.

2 *The prerogative power to stay proceedings and s 77A.*

McMullin J in effect treats the power to stay summary proceedings under s 77A as part of the Attorney-General's prerogative power to enter a nolle prosequi in proceedings on indictment (now contained in s 378 of the Crimes Act 1961) and therefore not subject in its exercise to judicial review. But, with respect, none of the authorities that he cites, with the exception perhaps of an unguarded statement by Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1978] AC 435 (discussed below), supports this.

The Attorney-General had no power under the prerogative to stay summary proceedings by entering a nolle prosequi, as Professor J Ll J Edwards (upon whom McMullin J relies on the point of unreviewability of the prerogative power) shows clearly in *The Law Officers of the Crown* (1964) in his discussion of the Ponomarera case (at pp 218 and 236–237). And indeed it was expressly held in *R v Wylie, Howe and McGuire* (1919) 83 JP 295, referred to by McMullin J and quoted below, that there could be no stay before indictment. Any reference (as in Short and Mellor, *The Practice of the Crown Office* (2d ed 1908) 141) to the Attorney-General's staying proceedings "on information" (as an alternative to indictment) is clearly to the criminal information at common law (ibid, 151) which was an ex officio means of the Attorney-General's putting a person on trial without committal (see now s 345 (3) of the Crimes Act 1961) and had no relation to summary proceedings.

Clearly his Honour must have been aware of the point now being made but to which he may not have given due weight. It surely does not follow that, because the prerogative power to stay proceedings on indictment and (probably) its statutory expression in s 378 of the Crimes Act 1961 are virtually unreviewable, the same should apply to the statutory innovation of s 77A of the Summary Proceedings Act. But, in the proceedings before McMullin J, Daemar was not represented by counsel and his Honour lacked the benefit of argument based on *R v Kent ex parte McIntosh* (1970) 17 FLR 65 and on the considerations put forward by B M Dickens in 35 MLR 347 and by the writer in the 1978 articles.

McMullin J did, however, refer to B M Dickens' article and quoted from it (loc cit, 355) – "There is a distinction, however, in that nolle prosequi is a prerogative matter which the Courts cannot control . . . ." – but went on to say that the article must be read in the light of the House of Lords judgments in *Gouriet* (supra). Reverting to the point, McMullin J said:

> "If, with the greater readiness which the Courts may seem to display in examining the exercise of statutory powers it was to be thought that some inroads had been made upon the Attorney-General's prerogative powers, *Gouriet's* case demonstrated that that ancient office is still, in certain matters, beyond the reach of the Courts.
>
> "In *Gouriet's* case, Lord Wilberforce said:
>
> > "'The individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. The historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, *and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi)* remains a valuable constitutional safeguard against inertia or partiality on the part of authority'." ([1978] AC at 477).

But, with all respect, the words of Lord Wilberforce emphasised by McMullin J cannot have been intended to contradict the established position that the nolle prosequi can be entered in proceedings on indictment only. There is no English equivalent to s 77A, either at common law or by statute. It is true that the Director of Public

Prosecutions may take over a prosecution under s 2 (3) of the Prosecution of Offences Act 1908 and then, like any other prosecutor, withdraw it with the leave of the court or offer no evidence. The Director, a statutory officer, exercises his functions under the "superintendence" of the Attorney-General (s 2 of the Prosecution of Offences Act 1879). It may be that the directions given in the course of that superintendence are to be treated as part of the Attorney-General's prerogative control of the administration of justice which the statute assumes; and are beyond judicial review as Lord Dilhorne states obiter in *Gouriet* (at p 487) and Lord Wilberforce no doubt meant in the passage quoted. But s 77A is very far from an equivalent of s 2 (3) of the English Act of 1908 in that exercise of the power conferred by the latter does not enable the jurisdiction of the court to be arbitrarily ousted and leaves a defendant's rights (notably to costs) unaffected (cf [1978] NZLJ at 471). At all events *Gouriet* was concerned directly only with an undoubted prerogative power of the Attorney-General – the granting of a fiat in relator proceedings – and any distinction between the prerogative and the statutory (particularly novel) powers of that officer was not in question.

Finally, as a matter of policy, can the grounds which justify the virtual unreviewability of the entry of a nolle prosequi in proceedings on indictment apply to stays of summary proceedings under s 77A? It is suggested not, for the good general reason that an unreviewable power under s 77A would upset the compromise between the role of the private prosecutor and the role of the Crown's officers which is fundamental to the enforcement of the criminal law. (See [1978] NZLJ 334, 337. Under the Summary Proceedings Act, even as amended by the insertion of s 77A, the Attorney-General has no general ex officio role in the matter of prosecutions. His powers to present indictments under s 345 of the Crimes Act 1961 are unmatched by any similar ex officio power or duty to lay informations under the former Act. This in itself suggests that his role under s 77A is not to be assimilated with his roles in relation to indictments largely carried forward from the common law to the Crimes Act).

There is also one particular reason indicated in a passage which McMullin J himself quotes from the judgment of Darling J in *R v Wylie, Howe and McGuire* (supra):

> "It is properly pointed out by the clerk of assize that a nolle prosequi can only be presented when an indictment has been already found; you cannot enter a nolle prosequi and have a kind of pardon for crimes which somebody may allege against him that he has committed."

The language may be clumsy, but the point is clear. It is, in part, precisely because under s 77A the Attorney-General may grant a "kind of pardon" for alleged offences that have in no way passed before a court that the exercise of his power under that section should be reviewable, if only within the narrow limits suggested on the authority of *R v Kent ex parte McIntosh* (see [1978] NZLJ 467–469).

F M Brookfield

**Protest, possession and trespass**

I

After the title of the Crown to the land at Bastion Point, Auckland, was upheld by Speight J in *Attorney-General v Hawke and Rameka* (20 April 1978); see F M Brookfield "Protest and Possession at Bastion Point" [1978] NZLJ 383 (referred to as "the Bastion Point Article"), some 200 protesters still occupying or present on the land were on 25 May arrested and charged with wilful trespass under s 3 of the Trespass Act 1968. Thirty of the defendants having been convicted and discharged without penalty, the Attorney-General stayed the remaining prosecutions ([1978] NZLJ 321 and 467). Twenty-one of those convicted appealed. The appeals were heard at Auckland by Perry J who dismissed them in the cases *Chisholm v Police* and *Carrigan & Others v Police* (judgments 3 November 1978) and *Ilolahia v Police* (judgment 13 November 1978).

The facts and legal background of the three cases were the same, for the purposes of this present note. Each appellant was in occupation of the land held to be Crown land in *Hawke and Rameka* or else present on it by invitation of a person in occupation. All were taking part with the other defendants, whose prosecutions had been stayed, in the Bastion Point protest, the origins of which were examined by Speight J in *Hawke and Rameka* and in the Bastion Point article.

On the occasion of their arrests on 25 May, general warnings to leave the land had been given by the Commissioner of Crown Lands and an Assistant Commissioner of Police (who had entered on the land with a large constabular force), and warnings to each protester by individual constables.

Of the several grounds of appeal rejected by Perry J, the present note is concerned only with the following, of which the second was put forward in all three cases though argued fully only in *Chisholm* (an important ground of appeal based on Magna Carta argued in *Ilolahia* being the subject of the following note):

(1) That the charge disclosed no offence known to the law in that the warning to leave was alleged to have been given on behalf of the Crown as "the owner" without any averment that the owner was "in lawful occupation".

(2) That s 3 of the Trespass Act 1968 is directed only against "the ephemeral trespasser as distinct from the adverse occupier or persons claiming under [him] and that the appellant [was] in this latter class".

The two grounds are in fact closely related. It will be suggested that Perry J was right in rejecting the first (though doing so for the wrong reason) but in substance wrong in rejecting the second.

## II

### 1 *The requisite wording of the charge: warning by "the owner" or "the owner in lawful occupation"?*

Section 3 of the Trespass Act 1968 requires the warning to leave to be given to the trespasser "by the owner or any person in lawful occupation of the place" or person authorised by him. Perry J declined to accept counsel's argument that "in lawful occupation" is to be read as qualifying "the owner" as well as "any person". His Honour's primary reason was that such a construction, though perfectly grammatical, made the reference to the owner superfluous. But he supported himself also by the judgment of Cooper J in *James v Butler* (1906) 25 NZLR 653 given at a time when the legislation creating the offence of wilful trespass (s 6 (3) of the Police Offences Act 1884) mentioned only warning "by the owner" ("or any person in lawful occupation" having been included only since 1952). Cooper J had to decide whether a warning to leave given by the tenant in occupation of the land in question was a warning by "the owner". Having referred (p 661) to the "undisputed . . . title" of the lessor, Cooper J held that "the word 'owner' . . . includes the person for the time being in exclusive beneficial occupation of the 'place' on which the trespass is committed" – so that in the case before him the tenant was "owner". Perry J took the reference to "inclusion" of the person in occupation to mean that an owner *not* in occupation – it would be the lessor in *James v Butler* – can give the necessary warning for the purpose of s 3. Cooper J's words are obiter dicta so far as they inferentially support the interpretation favoured by Perry J. The latter's reasoning must then stand on its own. It is at first sight plausible because in such a case as *James v Butler* one would expect the lessor as owner but not in possession (or occupation) and the tenant (as owner in possession or occupation) to be at one in wishing to repel the trespasser, so that in fact either might conceivably warn him to leave. However, Perry J's reasoning must also cover the case where there is no such co-operation and (let us suppose) the tenant submits to the presence of the trespasser or at any rate declines to use the Trespass Act against him. On Perry J's reasoning the lessor can himself give the warning. But – (1) the lessor's possession is not infringed for *he* is not in possession; (2) the lessor, unless he has an adequate right of entry reserved, cannot lawfully come on the land to give the warning – he must shout from the street or use the telephone; (3) if he enters unlawfully to give the warning he is himself a trespasser so that presumably the tenant may use s 3 against *him.*

The consequences in (2) and (3) are so extraordinary in the context that, with all respect, one cannot easily accept a construction of s 3 that would lead to them. Quite apart from the near-absurdities in the hypothetical situation considered, it is surely unlikely that the owner out of possession – who may have leased the land for 999 years or by perpetually renewable lease – should be able to use s 3 when he himself has no civil remedy for the intrusion on his tenant's possession.

The construction of s 3 argued for the appellant avoids the extraordinary conceptual and practical difficulties discussed above. However, there is a third construction, as grammatical as the others, which avoids those difficulties and supports Perry J's actual decision that a charge under s 3 need not aver that the owner was in lawful occupation. This is that in s 3 "any person in lawful occupation" is no more than synonymous with or explanatory of the word "owner", except in so far as it indicates that, where there is more than one such person, it suffices if the warning is given by one. Thus, for the purpose of the section, an owner *is* "any person in lawful occupation".

On this construction the charge may, as Perry J held, aver either that the warning was given by the owner or that it was given by "a person in lawful occupation". But of course the substantial effect of this construction is very different from that of the construction adopted by Perry J. So it is the substance of the matter that we must now consider.

### 2 *Are adverse possessors amenable to s 3?*

This question was argued by the writer in the Bastion Point article and the conclusion suggested that once a trespasser has become an occupier and possessor of the land in question, whatever other remedies and steps can be taken against him, he and his invitees cannot be trespassers for the purpose of s 3 of the Trespass Act. Perry J's account of counsel's argument shows that similar arguments to those in the

article were submitted in *Chisholm* and *Carrigan*. They were also adopted by counsel in *Ilolahia* (who, it is understood, referred his Honour to the Bastion Point article).

Those arguments apparently did not find favour with Perry J. One must then re-consider the matter in the light of his Honour's judgment.

In considering the first ground of appeal, Perry J had said that on the evidence the Crown "had never legally parted with the right to occupy [the land] and [the] actions [of the Commissioner of Crown Lands] as the Crown's agent in returning from time to time to the land after the appellants or their invitees had entered upon it while I think unnecessary was (sic) *an assertion of the Crown's right to lawful occupation* as well as that of ownership". [Emphasis added]

This passage is relevant also to the second ground, in dealing with which the learned judge accepted for the purpose of the case that "certain persons had moved on to this land some sixteen months before – that the appellant was one of them or alternatively an invitee of one of them, and that the type of occupation was that described by [counsel]" – ie buildings had been erected, the land cultivated and entry controlled (cf [1978] NZLJ at 387). Perry J added "On the other hand I find that the Crown did not acquiesce in their occupation".

He quoted *Clerk and Lindsell on Torts* (1975 14th ed), para 1320: "A person claiming possession as against the true owner cannot be said to have possession unless the true owner has been dispossessed", and Megarry and Wade, *Law of Real Property* (4th ed 1975), 1006 – "Ownership, as between two rival claimants, is the better right to possession", and then continued:

> "So even at common law this appellant would have no rights to resist eviction at the suit of the Crown as owner . . . . nor could he maintain an eviction against the Crown if he endeavoured to do so.
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> I accordingly do not understand [counsel's] proposition that the Trespass Act is directed only against the ephemeral trespasser and *that the law will not evict him* [sic: the adverse possessor is obviously intended] *at the suit of the owner."* [Emphasis added]

With all respect, the following comments are offered:

(1) The passages last quoted appear to suggest some misunderstanding of the point in issue. In particular, the emphasised words (applied as must be intended to the adverse possessor) do not appear in Perry J's earlier statement of counsel's argument and in no way follow from it or from the material in the Bastion Point article. Indeed in the latter the principal undoubted remedies of the Crown against adverse possessors (except for possible summary eviction at common law) are all mentioned ([1978] NZLJ at 387, 389).

Whether the Trespass Act can be used against them is a question which cannot be answered simply by asserting the right of the Crown to evict the protesters and to recover possession from them.

(2) Certainly the Crown "never legally parted with the right to occupy". But the question is not whether it did so but whether it was in fact dispossessed by the protesters. Unless a court were to adhere to the ancient fiction (argued against in [1978] NZLJ at 388–389 and nowhere referred to by Perry J) that the Crown can never be dispossessed, the issue is of the facts of occupation and possession.

(3) The next question is whether the Commissioner's visits to the land, mentioned by Perry J, negated any acquiescence in the protesters' actual occupation so that the Crown's own occupation and possession were preserved during the 16-month period in question. The visits appear to have been formal entries only so that, for the purpose of the Limitation Act 1950, they did not interrupt the period of adverse possession that apparently began to run against the Crown in early 1977: s 17 of that Act. On the other hand, they would normally have restored to the Crown constructive possession to enable it, if it chose, to sue in trespass rather than for recovery of the land: *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, 25; and see below under (6), where the significance of constructive possession for the purpose of the Trespass Act is discussed in relation to the Commissioner's entry on the land on 25 May 1978. So far as his visits before that date (ie those relied on by Perry J) are concerned, it must be very doubtful whether the effect was even to preserve constructive possession. The reason is that in *Hawke and Rameka* occupation of the land, in no way distinguishable from possession, appears to have been (at the very least) admitted by the Crown in the protesters' favour. Speight J found at the suit of the Attorney-General that the land was "occupied without right, title or licence by the Defendants" in that case and he records in accordance with the evidence and the Crown's allegations that "other persons associated with [those] defendants" had "remained in occupation" with them since early January 1977.

The formula of "occupation of any Crown land" by persons "without right, title, or licence" is used in s 25 of the Land Act 1948 by which the Commissioner is authorised to recover "possession" from such persons.

There can therefore be no doubt (if there

were otherwise any) that in this context occupation is to be equated with possession.

The Crown, then, having successfully alleged (let alone admitted) that the protesters were in occupation and therefore possession from January 1977, can scarcely rely on the occasional visits of the Commissioner as showing anything different.

(4) Apart from the matters discussed in (3) above, the Crown's 16-month delay in acting to expel the intruders must be taken as clear evidence of acquiescence in their actual occupation of the land. In the words of Clerk and Lindsell, op cit, para 1322, the Crown "submitted to the expulsion by delaying to re-expel the intruder[s] within a reasonable time". As the learned authors show, what is a reasonable time depends on the circumstances, 10 days being held reasonable in *Browne v Dawson* (1840) 12 A & E 624, 113 ER 950, cited by them. It is scarcely conceivable that 16 months could be reasonable in any circumstances.

(5) With due respect to the contrary view of Perry J, it follows from the above that from early January 1977 to 25 May 1978 and for the purposes of s 3 of the Trespass Act, the Crown was not in "lawful occupation" of the land at Bastion Point simply because it had been dispossessed and was not in occupation at all.

(6) The possibility remains that Perry J's judgment may be supported on a ground not relied on by him, namely that when on 25 May 1978 the Commissioner, in Perry J's words, "went to the Crown land at Bastion Point in company with officers of the Police", the entry on that land that then took place converted the Crown's undoubted right to the immediate possession of the land into possession, so that, immediately, the unevicted adverse possessors and their invitees became trespassers. There is no doubt that, for the purpose of the civil law of trespass, this is so: Clerk and Lindsell, op cit, paras 1330 and 1331, citing eg *Jones v Chapman* (1847) 2 Exch 803, 821; 154 ER 717, 724; and cf *Ocean Estates Ltd v Pinder*, supra.

In the view of some this may conclude the matter in favour of the dispossessed owner who makes formal entry and then invokes s 3 of the Trespass Act. However, such a conclusion would be precipitate and is not supported by a consideration of the purpose of the law of criminal trespass.

As to the common law, there is no doubt that the possession of the true owner, restored by mere or formal entry (ie without departure of those hitherto in possession adverse to him) though described as "actual" in contrast with the *right* to possession (see *Jones v Chapman*, supra, at 821, 724) is *constructive* (only): *Ocean Estates Ltd v Pinder*, supra, at 25. It can be established in the ensuing trespass proceedings only by his proving superior title, as he would have to do if he had not entered and had sued for possession. One must then consider whether the policy of the Trespass Act extends to assist such a person – one who has acquiesced in the other's occupation of the land so that he has been dispossessed by that other and then – perhaps years later – re-acquires possession by formal entry.

It seems clear that the policy of the legislation does not so extend. We may infer this from two judicial statements of the legislative purpose. The first, admittedly tentative, is that of Perry J in the instant cases:

> "It may well be that in those comparatively early days in New Zealand's history Parliament saw fit to provide a summary method of penalising trespassers rather than to confine owners or persons in lawful occupation to the dubious right of an action for damages brought in a Court exercising civil jurisdiction, with all the delays and expense which invariably accompany such litigation."

That statement certainly indicates that, whatever its scope in relation to eg lessors entitled to re-enter, s 3 is not intended to protect the class of owner under consideration, who can quite justifiably be left to his remedies under the civil law. It would be strange if an adverse possessor, suffered to remain on the land perhaps for years, could be turned into a criminal offender simply because a person able to prove a better title takes constructive possession by formal entry on the land and orders him off ([1978] NZLJ at 390). (The point is independent of any question, unsuccessfully raised in *Chisholm* and not dealt with in this note, of magisterial jurisdiction in such a matter).

Then there is the statement of the intent of corresponding Victorian legislation by Mann CJ in *Marsden v O'Callaghan* [1938] VLR 87, 88:

> "The Legislature has provided that trespass per se shall not be a punishable offence, unless and until the trespasser has been ordered to leave and has refused to do so. The wisdom of that provision no doubt lies in the fact that it is designed to prevent breaches of the peace, by affording a remedy to owners *upon facts which are very easily ascertained*, and so giving them no excuse for taking the law into their own hands and removing trespassers by force or violence". [Emphasis added]

Mann CJ's statement shows the public order purpose of the law of criminal trespass, which must be related to that of the law against forcible entry

now contained in New Zealand in s 91 of the Crimes Act 1961. Under that section even a person entitled to possession commits an offence by making forcible entry on land. Clearly then the public order is preserved by preventing the person out of possession and lawfully entitled to land from (whatever his title and his rights under the civil law) forcibly repossessing the land. The person in actual possession, on the other hand, whatever *his* title and his rights under the civil law, is encouraged to use s 3 of the Trespass Act rather than to expel intruders forcibly. It would be an extraordinary anomaly if the owner who, having been out of possession, forcibly enters and is liable to indictment under s 91 of the Crimes Act, could employ s 3 of the Trespass Act against those hitherto wrongfully in possession who refused to leave on his ordering them to do so.

In all essential respects the foregoing applies to the entry by the Crown on the Bastion Point land on 25 May 1978. The Crown's common law powers to take possession were presumably displaced by the statutory power of the Commissioner under s 24 (1) (d) of the Land Act 1948 "to enter on any Crown land in order to take possession thereof in the name of Her Majesty" and, by s 24 (1) (b) "to remove or expel, or cause to be removed or expelled, all . . . persons unlawfully occupying Crown land". Presumably breach of s 91 of the Crimes Act had to be avoided (as it no doubt was in this case) by the Commissioner and those through whom he acted. But whether that is so or whether the powers under s 24 may be exercised forcibly without the restraint of s 91, it is submitted that only when the Crown had actually resumed possession and control of the land and those hitherto in possession had departed, could the commissioner use s 3 of the Trespass Act – and that as a remedy against *future* intruders, in this case any protesters attempting to return to the land.

III

For the reason set out in the Bastion Point article and in the present note, it is suggested that the decision of Perry J in dismissing the appeals in the instant cases may well have been incorrect, at least on the assumptions as to evidence which he was prepared to make. Persons established as adverse possessors of land and their invitees are in certain respects in a better legal position than those who are mere or ephemeral trespassers, and it appears to be the latter only who, at the instance of an owner "in lawful occupation", can be dealt with under s 3 of the Trespass Act 1968. Nor, it is thought, can the constructive possession conferred by mere entry suffice to enable a hitherto dispossessed owner to claim to be in occupation for the purpose of the section. To sum up the result that should have followed, the Crown, in failing to move promptly to evict the protesters when they first occupied the Bastion Point land, lost the advantage which the section accords to the owner in occupation who is disturbed by ephemeral trespassers.

No doubt there were the best of reasons for the delay. Perhaps, too, there was some political advantage in not being seen to move precipitately. The Crown chose to vindicate its title, and hoped to obtain possession, by the proceedings for injunction in *Hawke and Rameka.* But the injunction could issue only against the four named defendants (see [1978] NZLJ at 383) and the problem of removing the remaining protesters remained. The Crown and its officers then thought, apparently, that vindication of its title was sufficient to enable the Trespass Act to be used to solve the problem. With respect, that was not so; the actual removal or departure of those in occupation should have been accomplished by other means. But, fortunately for the Crown and perhaps deservedly on the ultimate merits, its view has found favour with the Courts.

However, the merits of the dispute between the Crown and the protesters are substantially non-justiciable ([1978] NZLJ at 386–387). The limited legal problems that arise as part of it have, to quote Lawton LJ holding against the squatters in *McPhail v Persons Unknown* [1973] 3 All ER 393, 400, "to be solved by the application of principle". In such application even "the devil" – that most persistent of protesters against the Established Order – "his cause being good, should have right". Sir Thomas More's dictum applies a fortiori to the protesting squatters in the present cases, whose cause, whatever its moral and political merits, may in law have been rather better than has been recognised.

F M Brookfield

**Magna Carta broken? Justice denied?**

In *Ilolahia v Police* (judgment 13 November 1978; noted elsewhere on other matters) Perry J rejected submissions made on behalf of a Bastion Point protester convicted of wilful trespass that the Attorney-General's direction to stay proceedings against 170 of the defendant protesters entailed a breach of Magna Carta in relation to those 30 who like the appellant were convicted before the direction to stay. Counsel cited Article 40 of the Charter – "we will sell to no man, we will not deny or defer to any man, either justice or right" and argued that the Attorney-General's action resulted in a denial of justice in that because of it the prosecutions were in effect at random.

Perry J pointed out that the prosecutions were not *brought* at random in that the police charged all those who they thought had committed an offence. As far as the Attorney-General's action was concerned, Perry J held that he had no power to comment in any way on it, relying on A L Smith LJ's statement of the unreviewability of the entry of a nolle prosequi, in *R v Comptroller-General of Patents Designs and Trade Marks* [1899] 1 QB 909.

Perry J was of course not being asked directly to review and to grant relief in respect of the stays of proceedings; but he could accede to counsel's request to refer the matter back to the convicting magistrate (who in the circumstances, Perry J remarked, would then be likely to acquit) only if he considered that the stays of proceedings were improper in that they resulted in unfairness to those who had been convicted. The learned judge was therefore in effect being asked in some sense to review the directions to stay.

However, with respect, the problem was not solved by citing an authority on the unreviewability of the prerogative power to enter a nolle prosequi, the stays in the Bastion Point matter being under a statutory power (s 77A of the Summary Proceedings Act 1957) to which other considerations are likely to apply, so that exercise of the power is reviewable within narrow limits (see Brookfield [1978] NZLJ 334, 339 and 467, and case note on *Daemar v Savage,* in a following issue). But it was suggested by the writer at [1978] NZLJ 469 that the decisions to stay in the Bastion Point cases, though open to serious criticism, were not for an unlawful purpose or capricious or grossly unreasonable, and were not fit cases for judicial review.

Does the invocation of Magna Carta suggest that this conclusion should be modified? Perhaps. But it must be said immediately that a wide measure of judicially unreviewable discretion in the Crown's administration of the criminal law has not been thought inconsistent with the provision of the Charter that justice shall not be denied. Thus, although the discretion to prosecute must not be improperly exercised (*Kumar v Immigration Department* (1978) unreported; Court of Appeal; [1978] NZ Recent Law 258) cf *R v Commissioner of Police ex parte Blackburn* [1968] 2 QB 118)), exercise of the powers to enter a nolle prosequi (see above) and to pardon *(Hanratty v Butler* (1971) 115 Sol Jo 386) is unreviewable; those being prerogative powers, or the statutory substitution for a prerogative power in the case of the New Zealand nolle prosequi. And of course a great deal of unfairness could occur in the administration of justice through the improper exercise of either of those powers. If, however, the reviewability within narrow limits of the statutory power under s 77A is accepted, that possibility is avoided in regard to the stay of summary proceedings. One is brought back to the question in the instant case whether in all the circumstances of the Bastion Point prosecutions the Attorney-General exercised his power grossly unreasonably – in a way that no reasonable Attorney-General would. The question remains undecided since Perry J, wrongly it is suggested, held exercise of the power not to be reviewable at all.

A negative answer to this undecided question would of course not necessarily mean that the Crown should leave unremedied whatever measure of possible unfairness may have resulted from its handling of the Bastion Point matter. Surely any of the convicted protesters who petitions the Governor-General for a pardon ought on the merits to be successful.

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## PRACTICE NOTE – TOWN PLANNING

The Chairmen of the Divisions of the Planning Tribunal have issued the following *Practice Direction*, concerning appeals out of time (to supersede that issued by the Chairmen of the former Appeal Boards, recorded at 3 NZTCPA 232):

**Appeals out of time**

(1) Where on receipt of a Notice of Appeal by the Registrar it appears to him that the appeal is out of time he is to:

(a) record it as having been received subject to the Tribunal having jurisdiction to hear and determine it; and

(b) notify the appellant, respondent and applicant (if any) of the date of the receipt of it by him, that it appears to have been lodged out of time and that it has been received subject to the Tribunal having jurisdiction to hear and determine it.

If a waiver is required under s 154 of the Town and Country Planning Act 1977, the appellant should then move promptly pursuant to reg 67. If that application is consented to, all necessary written consents should be annexed and the application may then be made ex parte.

Attention is drawn to the limitation on the Tribunal's powers, imposed by s 154.

It is of course open to other parties to move at any time prior to the grant of a waiver that an appeal be dismissed on the ground that it has been lodged and/or served out of time.

(2) This Practice Direction shall apply regardless of the statute under which the appeal is brought.

February 1979