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THE INARTICULATE MAJOR PREMISE

In his book *The Politics of the Judiciary* Professor J A G Griffith refers to the "inarticulate major premise" in judicial law making. When it comes to statutory interpretation it is his opinion that, for all the discussion of declaratory versus creative function, wide construction versus narrow, and whether the approach to a statute "should be literal or semantic, or seeking 'the intention' of Parliament", in the final analysis the decision is likely to be swayed by the emotional prejudices of the Judge concerned and it is those attitudes, usually unexpressed, sometimes unknown to the holder, that he describes as the "inarticulate major premise".

Differences in interpretation usually arise from a deeper difference as to the philosophy behind legislation. Yet concentration on interpretation alone, on supposedly ascertaining the intention of Parliament, often masks that difference and results in major policy decisions being made with little or no discussion of the underlying philosophy. They have been made almost by default – or as Professor Griffith would put it, by virtue of an inarticulate major premise. It is suggested that just that has happened in a recent series of Supreme Court decisions dealing with the question of whether proceedings for punitive damages for assault are barred by s 5 of the Accident Compensation Act 1972.

Section 5 bars "proceedings for damages arising directly or indirectly out of . . . injury or death". In the various cases it was generally accepted that actions for general and special damages for actual injury from assault were barred. Two decisions fell to be made. One was whether proceedings for punitive damages (which are awarded to punish the defendant) arose "directly or indirectly out of . . . injury or death". Here there is a sharp division of both judicial and academic opinion. Some say it does. Others say it does not but rather arises from the commission of an act that is contrary to law. The distinction has been of no particular importance in the past and it is suggested that it was open to the Court to make a decision either way.

The other decision is whether hurt feelings caused by an assault that resulted in no other injury amount to "personal injury by accident". If they do not, then an action for punitive and possibly aggravated damages (which compensate injured dignity) could lie for technical assaults such as the wrongful taking of fingerprints.

So far, in coarse terms, the lineup of decisions is four to one against proceedings for punitive damages for assault. Three of those decisions illustrate the conflicting opinions. In *Howse v Attorney-General* [1978] Butterworths Current Law 214 (allegation of assault causing injury by police) O'Regan J held that proceedings for punitive damages were not barred for they did not arise directly or indirectly from the injuries suffered but from acts done contrary to law. In the most recent decision, *Stowers v Auckland City Council* (Auckland, February 1979) (allegation of assault by traffic officer causing injury) McMullin J held that where an assault caused injury, proceedings for exemplary damages were barred, but expressed the opinion (obiter) that where no injury resulted then proceedings would lie. However that observation is difficult to reconcile with *Betteridge and others v Wellington Racing Club Inc* [1979] Butterworths Current Law 46. There the plaintiffs alleged assault and trespass to chattels against police officers who had seized them by their clothing, taken them to a room and searched them. They were not injured (except in their dignity). Nonetheless Jeffries J, held proceedings for punitive damages to be statute barred.

In these decisions, precedent was examined to ascertain the nature of exemplary damages,

and the Accident Compensation Act 1972 was analysed to ascertain the intention of the legislature. It was suggested above, and O'Regan J's "dissenting" judgment seems to confirm, that it was open for a decision to be made either way – yet there was nought but the most passing comment on the merits of retaining the action for punitive damages for assault. Jeffries J considered that "a dichotomy in damages [between compensation and punishment] is inherently improbable in the scheme of the Act" and he was "tolerably certain the legislature did not wish to leave to injured persons the right to impose private fines on wrongdoers when there are ample avenues available elsewhere". Punitive damages are a civil law anomaly. They would be no more anomalous existing side by side with the Accident Compensation Act 1972. Their survival or discontinuance should depend not on whether they are anomalous but on whether they are necessary or desirable.

McMullin J was "of the opinion that there is much to be said for the retention in our legal system of the power to make awards of exemplary damages in certain cases. While the matter is primarily one of legal policy, a case can be readily made out in times of increasing bureaucratic intervention, for the retention of exemplary damages and indeed they may well be the most effective avenue of redress available to a citizen for whose rights some branch of government, central or local, has shown contumacious disregard. Such a remedy may be the best method of curbing 'the oppressor's wrong . . . the insolence of office'. I am far from persuaded that the power to institute a private prosecution against an individual for an excess of force will be a sufficient remedy and, indeed, it may well be difficult, where a number of persons are concerned in some high-handed and oppressive action, to identify with sufficient particularity, for the purpose of a criminal prosecution, the individual persons responsible. Nor do I think that the power of the courts to award part of any fine imposed to the person wronged will operate as an effective bar against the exercise of powers in a high-handed way."

However he then went on to construe the Act and decided, against that expressed inclination, that the claim of the plaintiff for exemplary damages arose from the personal injury suffered and was therefore statute barred.

Looking then at those cases, O'Regan J held proceedings for exemplary damages for assault are not barred, Jeffries J held they are barred altogether irrespective of whether there was injury (or alternatively because hurt dignity from assault is a personal injury by accident), and McMullin J held that proceedings are statute barred where there is physical injury but otherwise has preserved the remedy as far as possible. On the merits the lineup could be described as one for, one against and one sitting.

It is difficult to defend the retention of punitive damages for assault, for, unlike other causes of action giving rise to punitive damages, such as trespass to chattels, malicious prosecution, false imprisonment and defamation, the compensatory remedies are well-paralleled by criminal law sanctions, so it could well be said to be unnecessary. But McMullin J has suggested that there are areas where punitive damages may have a place and has mentioned in particular oppressive acts by government agencies including no doubt assaults of the type being litigated. The question of compensating wrongful acts by public authorities is at present under consideration by the Public and Administrative Law Reform Committee. In earlier reports of that Committee the need for the establishment in law of the tort of misfeasance in public office has been mentioned. The ambit of such a tort has been but generally defined and there is no reason why it should not embrace assaults by public officials and other tort actions based on trespass to the person as well as actions based on negligence, unreasonableness, malice and fraud. The emphasis in this tort will be on misconduct. Punitive damages also emphasise misconduct. Actions for punitive damages are likely to provide the seed-bed for this tort. For that reason it is a pity that punitive damages were not held to be grounded in wrongful conduct. And perhaps it would not be amiss to raise the possibility of actions for the protection of privacy arising out of, among other areas of tort law, actions for punitive damages based on forcible entry.

Although anomalous, punitive damages still have a place in our legal system. Rather than engaging in what amounts to partial abolition, it would be better, at this stage to re-examine their boundaries – to reconsider the decision in *Fogg v McKnight* [1968] NZLR 330 and perhaps to adopt instead the categories delimited by the House of Lords in *Rookes v Barnard* [1964] AC 1192.

The decision on where matters should go from here will not be an easy one. In fact it has taken a series of decisions by the Supreme Court just to throw up the different issues that may arise. Despite the preponderance of opinion that punitive damages for assault are statute barred the law can hardly be regarded as satisfactorily settled and it is to be hoped that future decisions will turn more on the merits or otherwise of retaining the remedy of punitive damages than has so far been the case.

Tony Black

ADMINISTRATIVE LAW

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

An address delivered last year to a Continuing Legal Education Seminar convened by the Auckland District Law Society by the HON MR JUSTICE P T MAHON.

My remarks this evening on the 1972 and 1977 Amendments to the Judicature Act must necessarily be confined to some general observations as to its apparent scope. I am certainly not to take the risk of offering any provisional view touching on questions of interpretation. It is not wholly impossible that some enterprising counsel might in a subsequent case use my statement as evidence against me.

The general purport of what I have to say is therefore devoted in substance to considering the significant impact which has been made on the law by the Judicature Amendment Act 1972 and to the further strength added to the original enactment by the 1977 Amendment. Let me say something at the very beginning upon this general question of reviewing the judicial and administrative acts of subordinate tribunals. It is worth remembering that the common law Courts long ago insisted upon these principles of natural justice which have come into such prominence today. Here is an observation made by Baron Parke in *Bonaker v Evans* (1850) 16 QB 162, 171:

> "No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary."

There, expressed in one sentence, is the whole rationale of the opinion of the Judicial Committee in *Furnell v Whangarei High Schools Board* [1973] AC 660. Then you have the statement of Willes J in *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, a case involving the power of a local body to demolish a house where the builder had not obtained the necessary permit. As a matter of interest, the relevant statute also gave a right of appeal to another tribunal from the decision of the local authority, a consideration which was thought by the Court of Common Pleas to be not material. Willes J said:

> "I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice."

In the same case it was the opinion of Byles J that the plaintiff was entitled to be heard and that the Board in that case was wrong whether they acted judicially or ministerially.

Thus the great common lawyers of the past thought the natural justice principle to be too deeply embedded in the common law as to require any elaborate commentary. But, as we all know, procedural limitations imposed by the prerogative writs were eventually found in the present century to be so restrictive as to bar in many cases any effectual remedy, and thus we have seen the phenomenon, both in England and in Australia, of considerable expansion of the jurisdiction conferred by those common law remedies and, of course, the common law itself in the *Anisminic* case fundamentally liberalised the scope of the common law remedy.

But these procedural fetters still retained a great deal of force, and they certainly provided, up until 1972, a notable safeguard in favour of administrative tribunals. Those tribunals, or rather perhaps the departments of State charged with their administration, adamantly opposed the idea of any appeal to the Supreme Court, and they were finally confronted as an unwelcome reward for their exertions with the enactment of the Judicature Amendment Act 1972. As is well known, this was drafted in terms almost identical with the Statutory Powers Procedure Act 1971 enacted by the Province of Ontario, and to the present day, so far as I am aware, the only two English-speaking jurisdictions with this statutory power of review are the Province of Ontario and New Zealand.

The purpose of this statute is essentially remedial and its scope is almost entirely procedural. It was decided, however, in *Thames Jockey Club Inc v New Zealand Racing Authority* [1975] 2 NZLR 768 (CA) that the phrase "statutory power of decision" did not cover a case where a statutory authority made a purely advisory decision, for that was not a decision which "decided or prescribed" the rights and liabilities of various persons. By s 10 of the Judicature Amendment

Act 1977 various additions to the previous definitions are therein made and the effect of the *Thames Jockey Club* case is overcome by including in the definition "statutory power of decision" power "to make a decision deciding or prescribing or *affecting*" the relevant rights and privileges of any person. That jurisdiction accords with the view of the High Court of Australia in relation to common law remedies as shown in *Brettingham-Moore v St Leonard's Corporation* (1969) 121 CLR 509 where Barwick CJ said at p 522:

> ". . . in so far as my own view is concerned, I would not regard the fact that the report is not self-executing or that the discretion of the Executive is interposed between it and any actual consequence to the person "affected" as necessarily preventing the making of the appropriate order."

That new statutory reference to a decision, and in particular a purely advisory decision which merely "affects" rights and liabilities, is certainly very wide. As already indicated, I cannot take the risk of expressing any view as to what limitation may hereafter be placed by the Courts upon that phrase, bearing in mind that the question whether a person has been "affected" may have to be controlled in the end by applying the principle of remoteness. Then we have s 11 of the 1977 Amendment which gives statutory recognition to the opinion expressed by Mr Justice Byles in the *Cooper* case, namely that this type of relief is not to be confined to cases where there is only a duty to act judicially. Further substantive powers are provided by s 12 of the 1977 Amendment authorising the Supreme Court, for the purpose of preserving the position of the applicant, to make interim orders preserving the status quo and vesting in the Court a very wide discretion as to terms and conditions under which such interim orders may be made. Sections 13 and 14 are devoted to some very wide-ranging procedural improvements, and Mr Baragwanath is to say something about those sections.

So coming back to the scope and intent of the 1972 Act and the very much wider power to intervene now contained in the 1977 Amendment, it is essential to bear in mind the very considerable impact which this legislation has made upon the determinations of the tribunals which affect the rights and liabilities of citizens and corporations in New Zealand. I am not sure whether the full impact of this legislation is fully realised by the legal profession as a whole, but I think it necessary to emphasise that this jurisdiction to review must, of necessity, depend upon the way in which it comes to be operated by the Courts. Perhaps I can best illustrate what I mean by comparing the position today in relation to the extraordinary remedies with what it was before the 1972 Act.

When I was at the Bar it was a matter of considerable difficulty to persuade a Court that an administrative tribunal, or a subordinate judicial tribunal with specialised jurisdiction, had gone wrong. The main difficulty was that there was hardly a Judge on the Bench in those days who had ever appeared before administrative tribunals, or judicial tribunals like the Town and Country Planning Appeal Board. The Judges tended to take the view that the plaintiff, on an application for a writ of certiorari or mandamus, was unjustifiably attempting to persuade the Supreme Court to override the purported "special expertise" of the tribunal complained of. I once estimated that while at the Bar I appeared on various occasions before at least 20 different types of special tribunals and, like many other counsel with the same experience, I was well aware of the simple truth that it was the very expertise of the tribunal which so often led to determinations based upon predetermined views of expediency or policy. When I appeared for the successful plaintiff in *Straven Services Ltd v Waimairi County Council* [1966] NZLR 996 I was subjected by the trial Judge to a searching enquiry as to why a decision of the Town and Country Planning Appeal Board, with its specialised knowledge, should be enquired into by the Supreme Court, and we only succeeded because of the accidental circumstance that there was an error on the face of the record, namely, a supposed mistake by the Board as to the onus of proof, whereas the real cause of complaint was that the Board had decided against the plaintiff without even reading the expensively compiled expert reports placed before the Board for its consideration.

The same judicial reaction may be discerned in *Turner v Allison* [1971] NZLR 833 (CA). That was a certiorari case, in which (inter alia) there had been an allegation of bias against the Board, the Chairman having, during the proceedings, openly stated that the object of the Board in granting consent to the construction of a large retail building was to replace the existing retail shops on the other side of the road. That object, as it happened, was not permissible. The appeal by one of the objectors to the Court of Appeal failed, and Wild C J and Turner J took the opportunity to say that an overall policy on the part of the Board was a permissible factor in the disposal of objections, and that this was a type of predetermination which could not be construed as bias. Once again, those views were expressed by two Judges who had not had the educational advantage of repetitive appearances before that particular Board over the years, and who were presumably unaware of the practice which then prevailed whereby many decisions were given in the interests not of planning policy but of local body expediency, and local body

finance, as indeed had been the fact, though it is not found in the judgment, in the case of *Turner v Allison* (supra). I need hardly say that I am not criticising in any way the functions of the Town and Country Planning Appeal Boards as at present constituted. But these were the considerations which used to influence at least one of the Boards in those days.

At this time, however, there are various members of the Supreme Court Bench who have had considerable experience in practising before administrative and subordinate judicial tribunals. They are all very familiar, I am inclined to say, with the determinative imperfections which occasionally are found in that type of proceeding. Generally speaking, they will be unimpressed with any arguments going to support the expediency of the statutory decision complained of, and they will not be concerned with what practices and procedures have been traditionally followed by the statutory body whose decision is under review.

The case which probably marked the start of this new era was *Denton v Auckland City Council* [1969] NZLR 256, a decision well known to all lawyers interested in administrative law. In that case, Speight J set aside the decision of the Town Planning Committee of the respondent Council because it did not disclose to objectors that it had in its possession a lengthy report from its Town Planning Officer covering matters of fact and opinion relating to the application. As will be remembered, the solicitors for the objectors had appealed to the Special Town and Country Planning Appeal Board. The Board was of opinion that there had been no breach of natural justice. Speight J decided that the exercise of the right of appeal had no effect upon the status of the original decision which he had held to be a nullity, and his views in that respect have later been adopted by the Court of Appeal.

Speaking today, 10 years after the *Denton* decision, it would be easy to assert that the conduct of the Committee in that case was clearly repugnant to the principles of natural justice. But I can assure those of my listeners tonight who were not in practice in the town planning jurisdiction in 1968, that the *Denton* decision was received almost with incredulity by local authorities. The practice of considering in private conclave an undisclosed expert opinion as to the validity of objections had been widespread among Town Planning Committees. From that time onwards, I think it has been true to say that applications for review before Judges who were accustomed at the Bar to practising before administrative tribunals have tended to be received far more sympathetically than in days gone by. The objectors are no longer treated as intractable marplots intent on destroying the planned symmetry of the administrative decision. But I must at this point sound a note of warning.

A Judge may have had wide experience at the bar before administrative tribunals, but he is obliged to remember that the jurisdiction to determine very many matters of social and business policy has been vested in highly skilled and conscientious executive officers of the central Government, or in the Minister receiving their advice, or in local body elected representatives. It is not for a Judge to say what shall or shall not be done in these special areas of delegated jurisdiction. His duty is only to see that the matter in contention has been determined by the relevant statutory officer or tribunal within the confines of the appropriate legal jurisdiction, in accordance with natural justice in cases where that concept has not been excluded by legislation, and without illegality or actionable pre-determination.

This point was recently given some attention in an address by Professor Cramton, who is Dean of the Law School at Cornell University. On 27 May 1976 he delivered a speech which was printed under the title "Judicial Lawmaking in the Leviathan State". He referred in particular to the process of judicial review of administrative action. He pointed to the importance of a judicial "second look" at the process by which the administrators have determined individual rights. But he went on to express the warning that the object of the judiciary should only be confined to directing elected officials in the manner of performing their statutory responsibility. The following paragraph expresses the fundamental point which he made:

> "While the precise boundaries of the adjudicative technique are flexible rather than fixed, if they are abandoned entirely the judge loses credibility as a judge. He becomes merely another policymaker who, in managing prisons or schools or whatnot, is expressing his personal views and throwing his weight around. When that point is reached, the judge's credibility and authority is no greater than that of Mayor White in Boston or Mayor Rizzo in Philadelphia."

So I therefore end these remarks by saying that judicial review of administrative action is of fundamental importance in a modern democracy, a fact which has been recognised by the New Zealand Legislature in the Judicature Acts of 1972 and 1977. And I think there has been a shift in emphasis on the part of the Courts since 1972 which fully accords with the spirit of the new legislation. All the Courts have to guard against is any tendency to equate the distinct process of mere review with an unarticulated opinion that having investigated the facts they are in a better position to adjudicate upon the merits. That is

not the function of the Courts. It remains the function of the legislative delegates who administer the relevant branches of central and local Government policy.

No matter how ample the opportunities now offered by the two Acts of 1972 and 1977, a Judge must constantly keep in mind that his jurisdiction is limited to a review of the process by which the relevant determination is reached. His opinion as to the moral quality of the substantive determination must always be placed on one side, for if he does not, then he himself has fallen prey to that same subjective predisposition of which subordinate tribunals are so frequently accused.

Let me conclude, as I began, by delving back into the past. In the celebrated cause of *Shylock v Antonio* the Duke of Venice, as President of the tribunal, made the following incautious observa-

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ACCIDENT COMPENSATION

INFORMED CONSENT TO MEDICAL TREATMENT AND THE ACCIDENT COMPENSATION ACT 1972

By PHILIP H OSBORNE, *Professor of Law, University of Manitoba.*

Introduction

One of the most interesting questions arising from the Accident Compensation Act 1972 is the extent to which the common law medical malpractice action has survived the passage of the Act. There can be no doubt that if in the course of medical treatment a patient suffers personal injury by accident (which will include medical, surgical, dental and first aid misadventure) *(a)* the patient is restricted to the benefits available under the Act *(b)*. However it is equally clear that the Accident Compensation Commission is not treating the expressions personal injury by *accident* and personal injury by *negligence* as being synonymous and interchangeable *(c)*. It is still open to a patient to bring an action in negligence against doctor, surgeon or hospital so long as the patient cannot be said to have suffered personal injury by *accident*.

Review Decision Number 75/R1017 illustrates this point. The claimant had undergone cosmetic surgery to remove excess tissue from her thighs. She was dissatisfied with the result. Her thighs were left scarred and hollowed. The Hearing Officer refused her claim for compensation on the ground that she had not suffered personal injury by *accident*. He did not, however, view his findings as foreclosing all possibility of recovering compensation. He stated *(d)*.

> "The applicant expressed some interest at the hearing in taking Court action against the surgeon concerned. This of course is a matter for her and by holding that she has not suffered personal injury by accident the way is left open for her to commence such an action should she so desire".

The purpose of this article is to consider one aspect of the medical malpractice action and to estimate the extent to which it has survived the passage of the Accident Compensation Act 1972. The aspect considered is the common law liability of a doctor where he has failed to inform a patient of known risks inherent in medical treatment and those risks have materialised in the form of personal injury or death to the patient. The liability is founded, not on any negligence in technique, but on the failure of the doctor to ensure that the patient has given an informed consent to the treatment. The landmark case setting out the duties of a doctor is *Smith v Auckland Hospital Board (e)*.

Smith v Auckland Hospital Board: the common law principle of informed consent

The plaintiff suffered from a suspected aortic aneurysm and he underwent a diagnostic procedure known as an aortogram. The procedure involved the injection of a radio-opaque dye into his aortic artery so that the artery could be examined by

(a) Accident Compensation Act 1972, s 2 (1).
(b) Accident Compensation Act 1972, s 5 (1).
(c) *Application for Review by C*, Review Decision Number 74/R00432, A C C Report of March 1976, p 24 at p 25.
(d) Review Decision Number 75/R1017 at p 2.
(e) [1964] NZLR 241; rev'd [1965] NZLR 191 (CA).

means of x-ray. Although the procedure was executed efficiently and competently, unexpected complications arose which interrupted the flow of blood to the patient's right leg. The leg finally required amputation just above the knee. Before undergoing the procedure the plaintiff had asked the doctor if there were any risks involved in an aortogram. The doctor in reply had glossed over the matter and reassured the patient that he would be fine in a few days. That reply was not completely true and correct. There were risks to the procedure; risks which could correctly be described as "slight" or "minimal". The issue for the Court was whether the doctor should have volunteered information about the risks involved in the procedure, and if not, whether the duty to inform was enlarged by the plaintiff's question.

On the first point Woodhouse J stated that in some circumstances detailed warnings must be given to the patient. Such a circumstance would be where serious collateral damage is the inevitable price to be paid for the proposed treatment. However, as the risks recede and the benefits increase his Honour found the need for such warnings to be less obvious *(f).* Woodhouse J stated that in deciding what information a patient should be given in respect of the risks of treatment it was necessary to consider how the reasonably prudent doctor would weigh up and balance the following factors *(g):*

(i) the degree of risk in the treatment
(ii) the seriousness of the malady to be treated
(iii) the importance of the benefits to be expected from the treatment
(iv) the need to encourage the patient to accept the treatment
(v) the intellectual and emotional capacity of the patient to evaluate the information and make a rational decision
(vi) the extent to which the patient has placed himself in his doctor's hands
(vii) the knowledge, that all patients are deemed to have, that medical science is not infallible.

On the facts before him Woodhouse J stated that as the risk of the aortogram was minimal and the threat of an aortic aneurysm was serious the doctor was under no duty to volunteer information of the risks inherent in the procedure. His Honour went on to hold that the specific question posed by the plaintiff about the risks in the aortogram did not enlarge the doctor's duty. It is on this latter point that the Court of Appeal reversed Woodhouse J. The Court of Appeal held that where there is a specific inquiry the answer of the doctor must be true and complete *(h).*

Illustrations of the application of this common law doctrine of informed consent can be found in three recent Canadian decisions. In *Koehler v Cook (i)* the plaintiff underwent surgery to prevent migraine headaches. The plaintiff was told by the defendant doctor that there were no unusual risks or complications in the particular kind of surgery. In fact, many patients had complained of a permanent or temporary loss of smell after the operation. The plaintiff suffered permanent loss of smell and recovered damages from the defendant. In *Kelly v Hazlett (j)* the plaintiff underwent surgery to straighten her deformed right elbow. The defendant doctor failed to tell her that the operation involved a risk of stiffness in the elbow additional to that which the plaintiff already suffered. The plaintiff did in fact suffer increased stiffness in her elbow and the defendant was found liable in negligence. In *Reibl v Hughes (k)* the defendant doctor suggested to the plaintiff that he should undergo an operation to remedy a narrowing in his left carotid artery. The defendant recommended the operation as one which would diminish the risk of having a stroke in future years. During or immediately after the operation the plaintiff had a massive stroke which left the right side of his body paralysed. The defendant was found liable for failing to inform the plaintiff that the particular operation involved a four percent fatality risk and a 10 percent risk of neurological damage or non-fatal stroke *(l).*

(f) [1964] NZLR 241, 247.

(g) Id, at p 250.

(h) [1965] NZLR 191, 198 per Barrowclough CJ, at p 206 per Turner J, at p 210 per Hutchison J, at p 219 per T A Gresson J.

(i) (1976) 65 DLR (3d) 766 (BCSC).

(j) (1976) 75 DLR (3d) 536 (Ont HC).

(k) (1977) 8 DLR (3d) 35 (Ont HC). It should be noted that since this article was submitted the Ontario Court of Appeal has ordered a new trial on the grounds that the trial judge's finding of liability was not supported by the evidence. See *Reibl v Hughes* (1978) 89 DLR 112. Leave to appeal to the Supreme Court has been granted.

(l) One question which remains unsettled in Canada is the respective spheres of the actions of battery and negligence. It has been suggested that battery will lie if the basic character and nature of the treatment has not been explained to the patient whereas negligence will be the proper action if collateral risks associated with the treatment are not explained. See *Kelly v Hazlett,* supra n (j) at pp 558–559 and *Reibl v Hughes,* supra n (k) at pp 41–42. The distinction has not been an easy one to maintain and the cases reflect no consistency in approach. See *Koehler v Cook,* supra n (i) (battery); *Kelly v Hazlett* supra n (j) (negligence) and *Reibl v Hughes,* supra, n (k) (negligence and battery).

Accident Compensation Commission

The attitude of the Commission to claims by persons injured as a result of materialised risks of efficient and competent treatment has been made clear through a number of Review Decisions. The key question for the Commission is whether injury to the patient in these circumstances is the result of an accident, which will include medical misadventure. It will be seen that concentration on the question of accident has resulted in an analysis of these situations in a manner which contrasts markedly with the common law response outlined in *Smith v Auckland Hospital Board (m).*

The leading Review Decision in the area is *Application for Review by W (n).* The claimant underwent a surgical operation to treat a varicose vein condition. One week after his discharge from hospital he suffered a pulmonary embolism which partially incapacitated him for some weeks. The claim for compensation was rejected on the basis that he had not suffered personal injury by accident. The Hearing Officer formulated the issue in these words *(o):*

> "If adverse developments or results are known to reasonably informed medical opinion to constitute a known risk of treatment and that risk then materialises can it be said that those adverse effects are personal injury by accident?"

The Hearing Officer answered that question in the negative and on the facts before him the Hearing Officer rejected the claim. Although the embolism was serious and unexpected by the claimant, medical opinion would regard it as a known and contemplated risk of such surgery. The Hearing Officer went on to lay down guidelines as to when consequences of proper medical treatment might be regarded as personal injury by accident. Four requirements would have to be met *(p):*

> "(i) the risk that eventuated was a rare and remote one;
>
> "(ii) such risk would not reasonably be taken account of when considering the wisdom of the treatment proposed;
>
> "(iii) the consequences were grave and totally disproportionate to the significance normally attached to the treatment;
>
> "(iv) such consequences were clearly beyond the extent of adverse consequences that would normally and reasonably be contemplated as included within the risk".

Thus the key to whether side effects and materialised risks of medical treatment are accidents is whether the consequence was rare, completely unexpected and grave *(q).* In deciding this, the state of medical knowledge and opinion is crucial. The patient's knowledge of the materialised risk is immaterial. This was made clear in Review Decision Number 75/R0236. The Hearing Officer considered the relevance of the patient's knowledge of the risks and concluded that it was irrelevant in deciding if there had been an accident. The side effects and risks which have materialised must be unexpected and unforeseen by the doctor or surgeon *(r).* This contrasts markedly with the common law approach where the focus is on the knowledge of the patient and whether the patient has been given sufficient information about serious, known and contemplated risks to give an informed and rational consent to treatment. The contrast is illustrated well by the facts of *Smith v Auckland Hospital Board (s).* In that case there was no duty at common law to *volunteer* information about the risk inherent in an aortogram because that risk was so minimal and remote. If one was to apply the four criteria laid down in *Application for Review by W (t)* it would seem likely that the plaintiff was injured by an accident and would receive compensation. The risk was a rare one, in all probability it would not have been taken into account in considering the wisdom of the treatment, the consequence was grave and would probably not have been regarded as within the risk *(u).* The patient's specific inquiry about the risk enlarged the common law duty but would have no effect on whether there was personal injury by accident.

The principles laid down in *Application for Review by W (v)* have been applied a number of times in other Review Decisions. Many of the decisions involve post-operative infection and bleeding. The Commission has held that post-operative bleeding and infection are a medically known and common risk of surgery and has therefore ruled that the claimants have not suffered personal injury by accident *(w).* Two in-

(m) Supra, n (e).

(n) Review Decision Number 74/R00408, ACC Report of January 1976, p 19 at p 20.

(o) Id at p 20.

(p) Ibid.

(q) The four requirements set out in *Application for Review by W,* supra n (n) were fulfilled in Review Decisions Numbers 75/R0159 and 76/R0957.

(r) The Hearing Officer stated: "to constitute misadventure the complication or consequence must . . . have been unexpected by the doctor or surgeon giving the treatment".

(s) Supra n (e).

(t) Supra n (n).

(u) There might be some difficulty in satisfying this last requirement.

(v) Supra n (n).

(w) In Review Decisions Numbers 75/R1193; 76/R0300; 76/R0924 and 76/R1332 it was held that there was no personal injury by accident. Contra Review Decision Number 74/R00186.

teresting decisions are Review Decisions Numbers 75/R1017 and 75/R0289. The former decision was discussed briefly in the introduction to this article. The applicant's claim was rejected because the scarring and hollowing was a medically known risk of that kind of cosmetic surgery. In the latter decision a claimant sought to recover compensation after she was forced to undergo surgery to remove an intra-uterine device which had worked its way through the wall of her uterus into her peritoneum. The Hearing Officer held that the misplacement of an IUD was a known and recognised risk. She had not suffered personal injury by accident *(x)*. The principles set out in *Application for Review by W (y)* have recently been confirmed in *Application for Review by E (z)*, a decision which contains a wide ranging consideration of the interpretation of personal injury by accident in the field of medical treatment.

As yet the Accident Compensation Appeal Authority has not considered the correctness of the Commission's view that the materialised risks of medical treatment are generally not accidents *(aa)* but the Supreme Court has recently lent some support to the Commission's position. In *Tietjens v Rutherford (ab)* the plaintiff underwent a tubal diathermy to ensure that she would have no further children. The defendant gynaecologist performed the operation. After the operation the plaintiff became pregnant and in due course gave birth to a son. The plaintiff brought an action in negligence. One issue for O'Regan J was whether the action was for personal injury by accident and should therefore be dismissed. His Honour reviewed the various allegations of negligence and held that only one allegation amounted to personal injury by accident. Among those allegations excluded from that classification were the following:

(i) failing to warn the plaintiff that the operation might not achieve its desired purpose;

(ii) failing to explain the risk of pregnancy notwithstanding the operation.

Thus two allegations which gave rise to the issue of informed consent in respect of medically known risks of that kind of surgery were not regarded as involving an accident and his Honour held that a common law claim could be pursued in respect of such allegations *(ac)*.

Conclusion

It is submitted that the principle in *Smith v Auckland Hospital Board (ad)* has not been eclipsed by the Accident Compensation Act 1972. There will still be cases where the risk inherent in medical treatment will materialise and cause collateral injury. In many of those cases the patient may not be able to satisfy the Commission that he has suffered injury as a result of an accident. However if the patient has not been informed of the risks and has not had an opportunity to give an informed consent an action at common law may still be available *(ae)*.

(x) The principles set out in *Application for Review by W*, supra n (n) have also been applied in cases involving dental treatment. See Review Decisions Numbers 75/R0661; 75/R1317; 76/R1456 and 76/R2024.

(y) Supra n (n).

(z) Review Decision Number 77/R1352, ACC Report of July 1978, p 44 at p 47.

(aa) The issue might have arisen in *Appeal by S*, Accident Compensation Appeal Authority Decision 66 (1977) 1 NZAR 297; ACC Report of May 1978, p 28. In that case the appellant became pregnant after undergoing an operation of laparoscopic sterilisation. The pregnancy was ectopic and the appellant suffered personal injury when there was a rupture and subsequent bleeding. The appellant's claim was originally rejected by the Commission because pregnancy following a sterilisation operation was a known risk and could not be described as rare, completely unexpected and severely injurious. In view of this Counsel did not contend that it was a case of medical misadventure at the Review Hearing (Review Decision Number 76/R1788) or before the Appeal Authority. He preferred to argue that the accident was the conception itself since it was an unexpected and untoward event. The argument failed at the Review Hearing and before Blair J on appeal.

(ab) Supreme Court, Wellington, 30 September 1977 (A415/76). O'Regan J (unreported).

(ac) A similar fact situation arose recently in *Cryderman v Ringrose* [1977] 3 WWR 109 (Alta DC). The plaintiff underwent a new and experimental sterilisation procedure. The procedure was not successful and the resulting pregnancy was terminated. The defendant doctor, who failed to inform the plaintiff of the unreliability of the procedure, was found liable in negligence. The decision has been affirmed by the Appellate Division of the Alberta Supreme Court in *Cryderman v Ringrose* [1978] 3 WWR 481.

(ad) Supra n (e).

(ae) It should be noted that if there is a complete lack of consent to treatment a battery has been committed against the patient. It seems likely that a battery will amount to personal injury by accident. See *G v Auckland Hospital Board* [1976] 1 NZLR 638; *Howse v Attorney-General*, Supreme Court, Palmerston North. 22 December 1977 (A132/75). O'Regan J (unreported). It should be noted however that these cases did not involve unauthorised medical treatment.

CASE AND COMMENT

The Crown and Matai Industries

The action by *Meates v Attorney-General* (judgment 13 December 1978) failed. The plaintiffs, shareholders in Matai Industries Ltd, did not establish Crown liability. Although no new principle involved, the case is interesting because the plaintiff invoked the *Hedly Byrne* principle as a basis for liability while the defendant questioned the authority of the Prime Minister and other Ministers to bind the Crown and any intention on their part to create legal relations.

The Chief Justice, relying on the majority view in *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793 and the decision of Chilwell J in *Plummer-Allinson v Spencer L Ayrey Ltd* [1976] 2 NZLR 254, held that the requirements of *Hedley Byrne* had not been satisfied.

The Prime Minister, a Minister of the Crown or any other official must be shown to have authority to contract on behalf of the Crown. The Crown will be bound only if the agent is acting within the scope of his actual, ostensible or usual authority. None was shown to exist.

The Crown had not been shown to have intended to create legal relations. The Chief Justice found that the discussions with the Prime Minister and Minister of Trade and Industry were of a political nature, not intended to result in legally binding contractual obligations.

JFN.

Maintenance on divorce – wife on DPB

In *Crawford v Crawford and Russell* (Supreme Court, Auckland, 27 February 1979 (No D 590/75). Mahon J) the respondent wife sought maintenance for herself on divorce, and also for the two girls of the marriage who were aged 7 and 5. The parties were married in 1971.

It was established in custody proceedings before Barker J in 1976 that the wife had carried on an affair with a friend of the appellant husband in 1972 and that the association had ended when the friend went overseas. It was further established that, late in 1974 or early in 1975, the wife entered into an adulterous relationship with the co-respondent, another friend of her husband's. The husband obtained his final decree in respect of that adultery in March 1976. The custody proceedings had been contested by the husband, but Barker J had granted custody to the wife. After the parties parted in 1975, the wife took a clerk-typist's job which paid $62 per week net, but she testified before Barker J that she intended, if her custody application succeeded, to give up work and rely on the DPB. Barker J suggested an appropriate level of maintenance for the two children would be between $8 and $10 weekly. In the events which happened, the husband either paid in respect of the children, or credited to them in a bank account, about $10.75 per week each.

The wife's needs were estimated at about $81 per week. She was receiving the appropriate social welfare benefit and had not resumed work even though the younger child had been for some time of school age. She had bought a home unit with a Housing Corporation loan, the balance being found by capitalising the family benefit and by a second mortgage of $2,500, which was the responsibility of the husband pursuant to the parties' matrimonial property settlement.

The husband had a successful building contracting company which had also acquired a small farm at a cost of $69,000. He said, according to his Honour, his total worth would be "approximately $100,000 representing gross assets of something over $200,000 less mortgages of $100,000 upon which the company pays interest at the annual rate of about $13,000." The husband said that, after allowing for corporate and personnal expenses, he could not find the additional revenue from his company with which to pay the $81 per week the wife's counsel was contending for. Counsel submitted this sum could be found if the husband "rearranged" his affairs.

Counsel for the husband relied on the relevance of conduct pursuant to s 43 of the Matrimonial Proceedings Act 1963, pointing to the wife's adultery. He also put forward, partly as an element of conduct and partly as a factor for consideration on its own, the wife's continuing association with the co-respondent. The wife did not deny this, or that she had received small gifts from him, but she did deny that she received financial assistance from him.

His Honour made the following valuable observations:

(1) *As to the statutory omission in s 43.* "Under paragraph (a) of the section the Court must take into account the ability of the wife, if she has no dependent children, to support herself or, if she has dependant children, then

to support herself without working. Paragraph (a) does not advert to the case of a wife with dependent children who has the ability to support herself by working, an omission which on a literal interpretation would lead to extraordinary results, as pointed out in *Hallwright v Hallwright* [1967] NZLR 936. I propose to treat the apparent statutory omission as included in paragraph (f) which refers to 'any other circumstances'."

(2) *As to the wife's conduct.* "Under section 43(d) the conduct of the parties is relevant. In this case, as I have said, the wife formed a liaison with a friend of her husband in 1972, one year after her marriage, and then later formed the association with the co-respondent which subsequently gave rise to divorce proceedings. This is clearly one aspect of the history of the marriage which falls within the 'conduct' principle enacted by the section. It must not be overlooked that the influence of adultery as a factor disqualifying a claim for maintenance has been impaired, though not eclipsed, by the theory that the commission of adultery is not in itself culpable as it may only be the culmination of marital disharmony for which the other party is primarily to blame. I certainly do not overlook that prevailing sociological opinion, but in the present case I see nothing in the evidence in the prior proceedings to justify the separate liaisons into which the respondent entered. I therefore consider that the commission of adultery by the respondent in the present case is a factor which requires to be placed in the balance when the question of conduct is to be considered. Wild CJ was brought to the same conclusion in *Higgie v Higgie* [1970] NZLR 1066."

(3) *As to the wife's supposed continuing association with the co-respondent.* Having reiterated that this had not been specifically denied, the Court proceeded to say that this was: "Clearly not a case in which it can be alleged that the co-respondent is living with the respondent and openly supporting her. Nevertheless in this regard I place reliance upon the observation of White J in *Mitchell v Mitchell* [1975] 2 NZLR 127 pp 129-130:

> " 'It is proper to add, however, that, in my opinion, conduct may well be an important consideration where, for example, a wife has become involved in a semi-permanent association falling short of a stable de facto relationship or where a husband's maintenance is being used in part to enable a wife to associate intimately and continually with other men. It seems to me that associations of that nature were not intended by the legislature to be subsidised by a husband or former husband and that they are contrary to the public interest.' "

(4) *As to the wife's ability to earn money herself.* Concerning this, Mahon J had this to say: "In my view the terms of paragraph (a) of Section 43, to which I have previously referred, do not comprise an exclusive code governing this question. For the reasons already indicated one cannot reasonably disregard the ability of the respondent to obtain employment now that both children are of school age, and I consider this this factor falls within the phraseology of paragraph (f). The respondent was earning a very good salary up until the time when she resumed custody of the children and now that they are both of school age I cannot see why she cannot obtain part-time employment."

(5) *As to the relevance of receipt by the wife of a social welfare benefit*, Mahon J remarked: "It has been held in several cases under the Domestic Proceedings Act that where liability to maintenance is made out, the party liable must pay whatever sum the court considers proper to the exoneration of the general taxpayer who is footing the Social Welfare bill. But this principle can only apply where the person who can afford to perform this obligation is in fact liable to pay maintenance under either the Matrimonial Proceedings Act or Domestic Proceedings Act. In this regard I cite the observations of Moller J in *Parrish v Bromich* (unreported, Hamilton, 24 May 1976, D 3/74) which was referred to by Barker J in *O v O* [1976] 2 NZLR 435. At p 438, Moller J [is reported as having] said:

> 'The only matter that I further have to take into consideration is that the maintenance which she is now receiving without working comes from a social security benefit, and that these proceedings are admittedly inspired by the Department of Social Welfare. That is, of course, quite understandable, but the department is there, as a matter of social and political policy, to provide maintenance and support for those who are quite unable to get it from other sources. It is true that the taxpayer must then pay in the end. But I think it would be a completely unjustifiable adoption of any so-called principle of public policy in this regard to say that a husband, who otherwise should not be called upon to pay maintenance to his wife because of her own behaviour during the course of a very short marriage and, indeed, after it, should be forced by this court to pay maintenance purely for the sake of relieving the taxpayer. In my view that was not in any, way the intention of Parliament when this legislation was passed.' "

(6) *Conclusion as to maintenance for the wife.* In the view of Mahon J no case had been made out on the wife's behalf. First, he said, there was "the question of conduct and of a continuing association with the co-respondent, and second,

there is the apparent ability of the [wife] to engage in well-paid employment. Taking those two circumstances together, and looking at the whole of the facts, it is my opinion that the claim for periodic maintenance on behalf of the [wife] has not been established. That being my view of the matter no question arises as to the ability of the [husband] to meet any maintenance order which might be made."

(7) *Conclusion as to maintenance for the children.* Mahon J thought that the figure of $960 per annum for the two children was an appropriate level of maintenance and that there was no present ground for ordering a different sum.

Before parting with the case, however, it is interesting to note that Mahon J did not doubt the husband's ability to make periodic payments "of a reasonably substantial kind" even if some adjustment of his financial affairs might be required. His Honour was inclined to accept the argument for the wife that the husband could not expect to use surplus income from his company to set up a new business enterprise without first meeting his liability to maintain the wife if he were found liable. But, said his Honour also, even if he had thought it a case for ordering maintenance, there might well be difficulty in assessing the correct amount in the absence of any details of husband's business affairs. In fact the husband's position was not verified in exact terms, as he had not produced, nor had he been required to produce, any company accounts.

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Negligent delay in estate planning

In *Stirling v Miller & Poulgrain* (Supreme Court, Auckland. 4 August 1978 (A1774/75). Mahon J) the first plaintiff was a Mrs Stirling, owner of two farms on the Hauraki Plains. The second plaintiffs were the trustees of the Alwinger Trust, a trust constituted by Mrs Stirling for estate planning purposes. The defendants were a firm of solicitors engaged by the first and second plaintiffs to undertake the legal work in connection with the sale of Mrs Stirling's farms to the Alwinger Trust.

Some time before 1973 Mrs Stirling discussed estate planning with her Wellington solicitors. They advised her to set up a family trust and transfer her two farms to it. In order to minimise gift duty, the standard procedure of selling the land to the trust and leaving the price owing on demand for progressive forgiveness of the debt over a number of years was to be adopted. Pursuant to this plan, Mrs Stirling's Wellington solicitors drew up the deed of the Alwinger Trust, and the trust was duly constituted. Through her Wellington solicitors, Mrs Stirling then instructed the defendant solicitors in Thames to see to the conveyancing formalities in respect of the sale of the farm to the trust. The letter of instruction was sent in July 1973.

In family transactions of this nature, the sale price is generally speaking in the hands of the Inland Revenue Department. The objective of the client is to sell the property at the lowest possible price. Consequently, the sale takes place at the lowest price acceptable to the Inland Revenue Department as not involving an element of gift. Accordingly, on receipt of the instructions, Messrs Miller & Poulgrain wrote immediately to the Inland Revenue Department at Hamilton inquiring whether the Department would permit the transfers to proceed at prices equivalent to the then current government valuation. The department replied in the negative, stating that it had ordered special valuations of the farms as at July 1973. These valuations were to hand by October, and the department then wrote advising that the acceptable values of the two farms were $28,000 and $110,000 respectively. This letter also stated that if the transfers were not executed and received within two months from 18 October 1973, then the Commissioner reserved the right to reconsider the question and to obtain a further valuation. For a variety of reasons, the transfers were not in fact completed and lodged for assessment until April 1974. As threatened in its letter of October 1973, the Inland Revenue Department did in fact require a fresh valuation at that date. This disclosed a total value of $228,000 for the two farms, $90,000 more than the Department had been willing to accept in the previous October. The learned Judge found that the defendant solicitors were responsible for the delay in completing the transaction. He further held on the evidence that there was a rapid increase in rural land values in the latter part of 1973, and that the defendant solicitors should have known that this was the position. The defendant solicitors were thus liable for such losses as resulted from their delay. The chief legal interest in the case arises from the assessment by the learned Judge of just what that loss amounted to.

The Alwinger Trust simply claimed for $90,000, the difference between the price paid for the land and the cost that the trust would have incurred had the transactions been completed within two months of 18 October 1973. Mrs Stirling claimed that she was required to forgive $90,000 more than would have otherwise been the case, and accordingly claimed for gift duty thereon. Her total claim came to $24,400, made up as follows: $900 additional stamp duty, incur-

red as a result of the higher purchase price; $23,500, being the duty on a gift of $94,000 under the Estate and Gift Duties Act 1968. Duty on the extra $4,000 was claimed because a further result of the delay in completing the transactions was that Mrs Stirling had lost the opportunity of making the first of a programme of $4,000 duty-free gifts to the trust in 1973. She had to wait until the transactions were completed in 1974 before starting her programme of debt forgiveness.

It might be thought that Mrs Stirling in fact had no claim. As a result of the delay by the defendant solicitors, she was $90,000 better off than she would otherwise have been. However, Mahon J held that since the whole object of the conveyancing exercise was to put into effect an estate plan, damages should be assessed on the basis of the sum needed to repair the damage to that plan. His Honour therefore allowed Mrs Stirling's claim of $24,400.

Counsel for the Alwinger Trust contended that the claim of the trustees should be considered as if the trustees had brought the proceedings alone, and that the award of damages to Mrs Stirling and the consequential results of any such award were not relevant. Counsel argued that any ex gratia payment which might reduce the prima facie loss of $90,000 by the trust should be ignored. This argument was rejected by the Court, following the principle that an award of damages may be reduced as a result of a benefit consequentially accruing to the plaintiff by the actions of a third party. Whether the consequential benefit should be taken into account is a question of remoteness of damage: *British Transport Corporation v Gourley* [1956] AC 185. Since the whole basis of the claim of the trustees was founded on a contract for conveyancing work preparatory to the establishment of a planned giving programme, the prospect that Mrs Stirling would use her award to repair the damage to the estate plan was not too remote to take into consideration. Accordingly, the principles of *British Transport Corporation v Gourley* applied.

Nevertheless, his Honour pointed out that there was always some chance that Mrs Stirling might not in fact carry out her plan to forgive the debt. There were various contingencies. For example, she might not survive her ordinary expectation of life, or there could conceivably be a complication resulting from an application in her lifetime under the Matrimonial Property Act 1976. His Honour therefore held that there was always some slight chance that the $90,000 debt might not be reduced. This possibility of loss was sufficient to warrant an assessment of damages. Citing *Chaplin v Hicks* [1911] 2 KB 786, his Honour determined that some award in favour of the trustees was appropriate. In view of the facts the award had necessarily to be modest. His Honour fixed on the sum of $2,000.

It may be seen that this case produced some rather difficult problems for the Court. The assessment of damages in contract cases generally proceeds on the basis that the parties involved are engaged in a commercial transaction. The concept of loss is thus reasonably comprehensible, though in individual cases measurement may sometimes be difficult. However, in *Stirling v Miller & Poulgrain* the Court was not concerned with a commercial transaction at all. Unlike the normal vendor, anxious to maximise his profit, Mrs Stirling was endeavouring to sell her farms at the lowest price possible. Her objective in lay terms was simply to give the farms to the Alwinger Trust. The device of sale and progressive forgiveness of debt was adopted as an expedient to reduce or eliminate gift duty by spreading the debt forgiveness programme over a number of years, and to reduce estate duty by pegging the value of the asset in her estate that represented the farms, to wit a debt owed by the Alwinger Trust. In short, the parties were not at arm's length. It might be said that at least as between Mrs Stirling, the Alwinger Trust, and Messrs Miller & Poulgrain, the trust was simply an instrument of Mrs Stirling's plan to reduce her estate duties. It is submitted that this is the attitude that solicitors generally take to trusts constituted for estate planning purposes, at least until their clients have conveyed property to those trusts. On paper, there were two separate parties, Mrs Stirling and the Alwinger Trust. In substance, however, the essence of the contract of retainer of Messrs Miller & Poulgrain was that they were to put into effect an estate plan for Mrs Stirling, for the benefit of her family. If through their negligent delay the cost of effecting the estate plan increased, the damages payable by the solicitors should be measured by that increase. To award damages to the trust as if the contract between Mrs Stirling and the trust had been an arm's length transaction is to disregard the nature of the work that Messrs Miller & Poulgrain were instructed to do.

The writer's arguments in the previous paragraph may appear at first sight to be contrary to the long-accepted rule that in tax cases the Court must ascertain the true nature of a transaction by reference to the legal arrangements actually entered into and carried out (*CIR v Duke of Westminister* [1936] AC 1). As explained by Richardson J in *Buckley & Young Ltd v CIR* (1978) 2 TRNZ 485 (CA) the starting point is to consider the documentation embodying the transaction. "The decision in any particular case can only be arrived at by considering what is the substance of the transaction in question, and what is the substance of the transaction can only be ascertained by

careful consideration of the contract which embodies the transaction. That being so, in our judgment what has to be done here is to examine the particular clauses of . . . the agreement in question, and to see what is the appropriate conclusion . . . to be arrived at on the consideration of that agreement." (Lord Wright MR in *CIR v Ramsay* (1935) 20 TC 79, 94). This doctrine clearly governs the legal rights and duties of the parties inter se, and also their rights and duties vis-a-vis the Commissioner. But it does not necessarily follow that the same consequence should obtain as between the parties and their solicitors. The documents are binding on the parties and they cannot go behind them because the documents embody the agreement that they have finally reached. Earlier negotiations are legally irrelevant and, even from a lay point of view, are very likely to be irrelevant. A party may well change his mind about the significance of a particular factor before a final agreement is drawn up. But the same does not apply in respect of a legal adviser. He is not a party to the agreement signed by his client. His task is to carry out the instructions of his client as efficiently as is reasonably possible. If he makes a mistake, it does not necessarily follow that the compensation he should pay to his client should be calculated solely by reference to documents entered into by the client. In the present case, it is submitted that the true nature of the transaction was a gift from Mrs Stirling to the trust. The form adopted, a sale, was simply in order to make the donation more efficient inasmuch as gift duty would be minimised or eliminated.

It is submitted that the conclusion reached by Mahon J is more or less in accord with the above arguments, though his Honour's reasoning is to the contrary. Taking into account the circumstances of the case, in particular that an estate planning transaction was involved, his Honour awarded the trust only $2,000. Nevertheless, his Honour's starting point was the loss on paper suffered by the trust of $90,000. As already noticed, his Honour justified the substantial deduction by reliance on *Chaplin v Hicks*. It is submitted that that case does not support his Honour's argument.

It will be recalled that the facts of *Chaplin v Hicks* were as follows: the defendant was a theatrical manager, and he arranged with the plaintiff and 49 other actresses for them to be auditioned. He proposed to select and employ 12. The defendant broke his contract by failing to give the plaintiff a reasonable opportunity to attend the auditon. It was held that even though the plaintiff had only one chance in four of being successful, the damages of £100 awarded by the jury must stand. A chance has some value, difficult though it may be to assess. Analysis shows that the fact of *Chaplin v Hicks* have no real parallel with the present case. What the plaintiff there lost was chance. The Alwinger Trust, on the other hand, lost a certainty: it could have purchased the two farms from Mrs Stirling at a cost of $90,000 less than the sum that in the event it had to incur. *Chaplin v Hicks* provides no basis for the reduction made in the damages awarded to the trust. Nevertheless, it is submitted that the result was correct, and should even have gone further; the trust should not have received damages at all. The reason is simply that when the whole case is looked at globally, the compensation, for which the defendants were liable, should simply have been the cost of repairing the estate plan.

The award to Mrs Stirling of the full $24,000 is also open to some criticism. Counsel for the defendants submitted that Mrs Stirling was obliged to mitigate her loss. The loss she suffered was liability for extra gift duty. This liability could be reduced by spreading the necessary extra gifts over a number of years. Admittedly, that course of action would leave Mrs Stirling's estate vulnerable were she to die prematurely, before completing her programme of gifts. However, that risk can be catered for by life insurance. If Mrs Stirling was not insurable, the onus should have been on her to demonstrate that this was so. Citing *Treloar v Henderson* [1968] NZLR 1085, Mahon J held that this submission was sufficiently met by the rule that a plaintiff sustaining a loss by reason of breach of contract is not obliged to go to extraordinary lengths to achieve mitigation. Nevertheless, the plaintiff is obliged to take such steps in the ordinary course of business as may result in a substantial diminution of the loss which he has sustained. See eg, *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, and *Billingham v Dhillon* [1973] 1 QB 304. It is submitted that what is in the ordinary course of business must depend upon the context and circumstances of the case. In the circumstances of an estate plan, it is not only ordinary but almost invariable for a client to spread his programme of gifts so as to minimise the estate duty. Moreover, it is frequently advisable, and certainly common, for an extended programme of giving to be protected by the purchase of life insurance. Accordingly, it is difficult to agree with Mahon J's conclusion that the method of mitigation suggested by counsel for the defendants would place an undue burden on the plaintiff, Mrs Stirling. In fact, it would appear that this course is still open to her. Assuming she is insurable, her professional adviser would probably suggest to her that, rather than spend her whole award of damages by making an immediate gift of $90,000,

she should spread that sum over her already-planned programme, and purchase life insurance to cover the risk. The result appears to be that at the end of the day the plaintiff is better off than she would have been had the defendants never been in breach of their contract of retainer, a result condemned as long ago as 1911 by Lord Atkinson in *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 (JC).

It is understood that both the plaintiff trustees and the defendant solicitors have lodged appeals.

LOCAL GOVERNMENT

FARM-LAND ROLL – FOR WHOSE BENEFIT?

By Dr KA PALMER *Senior Lecturer University of Auckland*

Is is one thing to be told by s 5 (j) of the Acts Interpretation Act 1924 that every Act is remedial for the public good and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit. It is another thing, however, to be asked to interpret legislation passed in a particular social or economic climate and then to apply it 45 years later in totally different social and economic climate. Such was the situation facing Quilliam J and Mr RJ MacLachlan, sitting as the Administrative Division of the Supreme Court on four appeals from the Wellington No 1 Land Valuation Committee. The problem was simply whether certain properties qualified to remain on the farm-land roll of the Wellington City Council and the four decisions given on 7 February 1979 (*Wellington City Corporation v Beveridge, Fenton and Deal, Kenna and Kenna, and Callendar, Hunter and Goodwin* (M 68, 69, 70, 71/77), disclose fundamental interpretation problems under the Rating Act 1967 in granting the farm-land roll concession.

As a matter of background information, s 118 of the Rating Act 1967 enables the occupier of farm-land situated in a borough or city area to apply for inclusion in a farm-land roll (which lasts for five years normally), and under s 120 the council is to determine with respect to every property on the farm-land roll whether or not the rateable value should be reduced for rating purposes after considering:

(a) whether the rates payable by the occupier are excessive or unduly burdensome;

(b) the municipal services available to the property;

(c) the incidence of general, special and separate rates in the urban district, and the rates levied by or on behalf of rating authorities other than the Council;

(d) whether any reduction would be likely to impose an undue burden of rates on the urban ratepayers of the urban district or any of them;

(e) any alteration of the rateable value since the valuation roll came into force.

The expression "urban farm land" is defined in s 117 to mean farm land which is subject to a rate levied by the council and is not fit for subdivision or likely to be required for building purposes within five years. Where the land ceases to be urban farm land, the council may remove the property from the roll under s 142. This decision may result from either the likelihood of urban development for building or from cessation of farming as an activity on the property itself. The term "farm land" is defined in s 2 of the Act to mean "rateable property, being property that is separately rated, that is used exclusively or principally for agricultural or horticultural or pastoral purposes or the keeping of bees or poultry or other livestock by an occupier *whose income or a substantial part thereof is derived from the use of land for any such purpose or purposes*". The recent decision of the Court of Appeal in *Johnston v Manukau City Council* [1978] 1 NZLR 68 states that the test as to whether land is being used for farm land purposes is purely objective and the motive or intent of the user (eg long-term capital gain) is irrelevant. Thus, any appreciable agricultural activity on the land is sufficient to maintain the farm land character. That case arose under the rates postponement provision rather than the farm-land roll part, although the principle of interpretation applies equally to both provisions. Not arising for argument in the *Johnston* case was the issue as to whether the occupier derived his income or a substantial part thereof from the use of the land. It appeared to be assumed that the actual occupier, Tamaki Farms Ltd, did derive a substantial part of its income from either the land in question or from adjoining land, and that settled the issue. But it could be noted that here was a corporate body obtaining in effect a significant rating concession to avoid personal hardship. An immediate query is whether Parliament ever

intended to consider the feelings of hardship which a corporate body might be recognised to have by the year 1978.

The problem of interpretation as to whether the occupier did derive his whole income or a substantial part thereof from the land being used for farm purposes was, however, for decision in the four cases before Quilliam J and Mr RJ MacLachlan. The Court treated the matter in the following way.

In *Kenna and Kenna*, the farm comprised 25 acres owned by the respondents as joint tenants. Mr Kenna was a full-time engineer but, as a secondary occupation, he and his wife farmed the property. It appeared for tax purposes that, although Mr Kenna had previously farmed the property in partnership, it was now farmed solely as Mr Kenna's business. His gross income as an engineer at 31 March 1974 was $9,917 and his gross farm income $2,750, with the net farm income being $1,500. The Court first ruled that the "occupier" contemplated should be construed as the owners rather than one of the owners, being a joint tenancy which was "not capable of being separately disposed of". (Quaere: surely a joint tenant may dispose of his interest and thereby break the tenancy?)

The next question was whether the total income of the joint owners meant net or gross income fore the purpose of construing whether it was substantial. Here the Court faced immediate difficulties as to the legislative intent. It stated:

> "Relief is not, however, available to persons using land for such a purpose [farming purpose] if the extent of the use is only small. In order to draw a distinction the legislature has imposed a test based on income. It cannot have intended that word to be interpreted in any artificial way so as to have defeated the main intention of the Act. To equate 'income' with net profits or returns as upon a taxation basis would be wrong, as also would be to interpret it as meaning gross receipts. We think the word was intended to mean the gross receipts reduced by at least some of the expenses necessarily incurred on the property. We feel unable to be more precise than that and think the answer can only be given by an examination of the figures in an individual case."

The Court then stated:

> "Before attempting to apply these considerations to the present case, we turn to the equally difficult question of the meaning of the expression 'a substantial part'. This again is a word which has been variously defined in differing contexts. It is unhelpful to review the decisions in which it has been discussed. It is an expression which defies precise definition and which must depend upon the facts of the particular case. It is one of those words whose meaning becomes more clouded in obscurity the more one tries to define it. It may be said that the word 'substantial' does not necessarily mean more than half, and certainly it does not involve any particular percentage or proportion of the whole. In an individual case the percentage of the whole may well be a helpful guide, but only in relation to the circumstances of that case. The expression 'a substantial part' can only be comprehended by a process of comparison in the particular case."

With respect to the foregoing description of what "income" might mean and what "a substantial part" could comprehend, this can only cause despair to councils and land valuation tribunals, but the Court may not be to blame for the failure to define the legislative intention and the only solution may be for Parliament to provide more precise definitions as to what it now might have in mind.

The end result in the *Kenna* case was that on a comparison of gross incomes the farm income was 22 percent, and on gross engineering income to net farm income the percentage was 13 percent, but in either case the Court regarded it as a substantial part of the total income. The land had been continuously used as a farm-land and there was no suggestion that it was being used "merely as a device to achieve some other end". Accordingly, the case came within the intention of the statute and the farm was to remain on the farm-land roll.

In *Fenton and Deal*, the farm property comprised 520 acres and was farmed under partnership. The Court considered that at law the partnership should not be regarded as a legal person itself and that the individual partners as owners should be considered the occupiers under the Rating Act. The gross receipts appeared to be $3,000 for the year ending 30 June 1975, but with an accounts net loss for the year of $7,300. There was no evidence of the other income of the owners and, accordingly, the Court stated that no finding could be made as to whether the income from the farm (albeit a loss) was a substantial part of each owner's income. On that basis the listing on the roll was disallowed.

In *Callendar, Hunter and Goodwin*, it was found that another person, Prosser, owned a 2.5 percent share as tenant in common in the relevant year. Both Callender and Hunter were surveyers by profession, with a substantial income from that source. A comparison of gross receipts, for example, showed the farm producing $6,500 approximately, as against $35,000 for professional income for both these respondents, in fact, the accounts for the 1975 year showed a net loss and a

loss on a related farm, also owned by the partnership. Another factor was that the owners had leased the farms later to themselves at an annual rental equal to the depreciation of the buildings erected on the property allowed under normal income tax rates. The Court went back to the Urban Farm Land Rating Act 1932, the original statute providing for a farm-land roll, in an endeavour to determine who should be treated as the occupier. It considered that there was no real difference between that Act and the provisions of s 2 in the Rating Act 1967. The Court considered that the later leases should be disregarded and the four persons owning the fee simple in shares stated should be regarded as the occupiers for their respective interests. The question to determine was whether one of four alternative interpretations should be adopted for the purpose of the substantial income test, namely, whether each partner should cumulatively meet the test; whether at least one partner only should meet the test; whether only the partnership income from farming activities should be considered and the substantial part assessed; or whether the partnership income should be totalled from all sources and then compared to that from farming. The Court rejected the last three interpretations and considered that the first was the proper approach. Then, seizing upon Mr Prosser, who had formerly had a 2.5 percent share of the fee simple, it was clear that his income from that ownership was not a substantial part of his income (he had dropped out of the ownership in the meantime) and, therefore, the position of the other owners did not arise for consideration and the property could not qualify.

This unusual outcome could produce some anomalous results, which the Court acknowledged, and it did suggest that individual shareholding in a company would not affect the result as only company income could be considered and that would be a possible way around the difficulties.

One may comment that, to suggest corporate ownership as a means of qualifying for the rate relief provision under the farm-land roll indicates the widespread acceptance today of corporate ownership, yet this must have been far from the minds of the parliamentarians in 1932. As stated in the *Johnston* case (supra) the Court of Appeal in 1977 did not query at any stage the hardship provision in relation to the corporate occupier and the daily needs of that legal body.

Finally, in *Beveridge*, the Court considered a 13-acre farmlet on which the respondent and his family resided, but the respondent worked elsewhere full-time as a fire surveyor. The property was farmed within its capacity and produced a net income of $1,546 as against the employment income of $8,523; as a proportion of the total, the farm income was 15.5 percent. The Court seemed to consider the proper approach was to compare incomes from both sources before taxation. Following the *Kenna* decision, the Court considered the property was being fully farmed and was not an adjunct or device, and was yielding more than a token production. The income, although a fairly small sum was capable of being described as a substantial part of the whole.

To Summarise, the four decisions establish:

(1) that the word "income" in the definition of "farm land" in s 2 of the Rating Act cannot be given any clear meaning;

(2) that in assessing whether a person derives a substantial part of his income from the property no specific proportion can be relied upon and it would appear that a farm income of 13 percent of a person's total net income before taxation would be sufficient;

(3) that in a joint tenancy the comparison is between the total income of joint tenants together as against farm income;

(4) that in a partnership each partner is to be considered individually and must satisfy the income test cumulatively for the property to qualify, but a nil income for one partner from both farm and outside sources would not be a reason for disqualification.

Returning now to the problem of finding the legislative intent, as pointed out in the *Callender* case, Part VI of the Rating Act 1967 is in the critical provisions virtually identical to the Urban Farm Land Rating Act 1932. Thus, it can be assumed that the intent of Parliament in 1932 is the relevant basis for interpretation, bearing in mind, however, that legislation is deemed to be always speaking. An examination of the *New Zealand Parliamentary Debates* for that year discloses the well-known serious state of the economy and notable matters being debated were the Unemployment Amendment Bill and the Public Safety Conservation Bill. Also questions were asked daily about the rioting in Auckland, disorders in Dunedin, and the general plight of the unemployed and relief-workers. Concerning the introduction of the Urban Farm Land Rating Act, the Hon Mr Hamilton, Minister of Internal Affairs, disclosed that the Bill arose out of a magisterial commission of inquiry in 1928 which sat in the Otaki and Fielding areas and examined the problems of small farmers on land taken into the borough districts. The general complaint was one of hardship and the principle of using rates from rural land to provide services in the urban areas for urban dwellers. For example, Mr Hamilton stated (NZPD Vol 234, 1932, p 458):

> "Now I think all honourable members will admit that there is a problem to be solved in connection with urban-farm rating, and that the present law does not make the

necessary provision to do justice to *small farmers* living within boroughs or in localities where rates are collected mainly for farm purposes and not for rural purposes. I think it is admitted that that problem exists, and the the present law bears very unjustly upon some *small farmers* resident in the districts affected."

A more precise picture of the type of farmer envisaged as qualifying for relief comes from the contribution of Mr Sullivan (Member for Avon):

"The holders of these areas are mostly market gardeners, and so on. Such areas are called 'urban farm lands', but they are not really farm-lands. Their holders are not in the category of farmers. In the main they are men who are supplying vegetables, fruit, and other such produce to the city. They are not ranked as ordinary farmers, and when it is proposed to give them a concession at the expense of relief workers and struggling small tradsmen, one doubts the equity of it – doubts whether it is the right thing to do at this particular time."

The Hon Walter Nash, the Member for Hutt, who had been a member of the magisterial inquiry, considered the Act long overdue, but raised the problem of betterment which could occur where there small-lot owners sat on the properties and then eventually realised the land at an appreciable capital gain. The Municipal Association supported the measure in 1932 (but not so in 1929) and the Bill had no difficulty passing through the Legislative Council.

At p 689 of the Debates, Sir James Parr (Leader) stated:

"It is in respect of the lands within boroughs used entirely or mainly for the purpose of farming or agriculture that this Bill is promoted, and it seeks to give relief to *small farmers* so that they shall not be required to pay rates on the same basis as owners of land used for business purposes."

Considering the overwhelming nature of personal ownership of small lots in 1932 by persons making the whole of their income or a substantial majority part of it from the land, and the hard economic times, it is clear that Parliament intended the legislation to benefit *resident* farmers who really *depended* upon the land for their survival. Could that Parliament really have envisaged the situation arising in the four Wellington cases where *all* the occupiers obtained the major share of their income from employment or activities unrelated to the farm land and none could be said to be dependent on the farm income as a matter of basic survival? Furthermore, it is clear that, in some of the Wellington cases, the ownership was providing a tax shelter or a basis for future capital gain, and these factors were no disqualification at all for listing. The *Johnston* case affirms this interpretation beyond doubt.

Over the years there have been various decisions in the Magistrates' (Assessment) Courts, commencing with *In Re Northcote Borough Assessments* (1944) 3 MCD 477, which asserted the concept of equity of sharing the rating burden to avoid personal hardship, but acknowledged that an owner who leased out the land to a casual occupier should not be denied, in a consequential way, the relief which the legal occupier might obtain under the farm-land roll. In *Re Aitken* (1947) 5 MCD 434, the Magistrate appeared to consider that the token use of the land for farming could not be sufficient, and the farm should meet the ordinary household requirements of the occupier and thus satisfy the whole or substantial part of one's income test. In the case *In Re Horowhenua Agricultural and Pastoral Association's Assessment* (1953) 8 MCD 220, the eligibility of the Association (presumably incorporated) was considered. The Magistrate refused listing on an income basis (showing that £200 rental from the land as against an annual income of £3,400) and that the real intent was to hold the land for the two-day annual show. This decision, as far as it bases the outcome on intent, is probably contrary to the *Johnston* case (but relief is now granted for showgrounds under s 146. In *Re Smith's Objection* (1956) 9 MCD 109, the Magistrate considered that it was wrong for the council to remove a listing from the farm-land roll prematurely when there was no likelihood of building. The purpose of the borough was apparently to force the sale of the properties through high rates for cheap residential sections. In the particular case, the objector's property was removed after part of the land was required for a school and the objector was left with a 44 acre dairy farm from which he obtained his total income. In *White v Howick Borough* [1959] NZLR 1388, TA Gresson J ruled that the listing of farm land did not remain for the benefit of the purchaser of an urban lot subdivided therefrom. None of these decisions concerned an analysis of the income test in relation to an occupier earning his primary income from another source or as to corporate, partnership, trust, joint tenancy, or tenant-in-common ownership.

It must be apparent that today the nature of farm-ownership, especially small-lot ownership, which is likely to occur in urban farm land areas, is very different from the nature of ownership and the problems of hardship faced in 1932.

It is clear that great variations occur in circumstances, but one could simply say that no corporate or trust owner should be entitled to income-relief, as personal hardship cannot directly result from the incidence of rating. If relief were available

only to human persons occupying farm property, and obtaining all their income or at least, say three-quarters of their individual or combined income in a partnership situation, from the property, then there might be some incentive for corporate owners and trust owners to dispose of the land back to these human occupiers, and this could be a worthy public purpose. Alternatively, if it is considered that no distinction should be drawn between the nature of ownership, whether corporate or otherwise, nor as to the intent to perhaps use the property as an income tax shelter or to achieve a long-term capital gain, then Parliament should seriously consider whether continuation of the farm-land roll can be justified at all, in that there is now a discretionary power vested in all councils to introduce differential rating. The prime unspoken premise with differential rating is to achieve equity of sharing the rating burden and to give relief to types of use which bear an unfair burden under the traditional land valuation assessments. The same general comment could be made about rates-postponement values on rural properties in counties. One could say that this part of the Rating Act is now obsolete, following the introduction of differential rating, and the continuation of the dual systems can only lead to further complications and much greater likelihood of unfairness or discrimination on the wrong bases. It is understood that Government at present is considering a consolidation of the Rating Act, and is open to submissions on the problems. One can, with respect, suggest that if the four decisions of Quilliam J and Mr RJ MacLachlan are read with care by government advisers and the law draftsmen, it will be apparent that there are very substantial problems under the Act, whatever the word "substantial" may be taken by them or anyone else to mean.

OFFICE MANAGEMENT

WORD PROCESSING FOR LAW FIRMS

By DENIS ORME *(this has also been published in Law Talk)*

Word processing, power typing, or pooled typing resources – the meaning is the same and that is "the transition of a written, verbal or recorded word to verbal, typewritten or printed form and distribution for its ultimate use". A word processing system is a combination of the specific procedures, methods, equipment and people designed to accomplish this objective.

In looking at the production of documents one must turn to each particular aspect in order to arrive at a total system for one's law practice. The component parts are:

(a) Staffing – both the skills required in support staff, and the ratio to productive legal personnel.
(b) The various forms of recording the message by the use of draft, dictation or shorthand.
(c) The manner in which the document is produced both in draft and final form.
(d) Reproduction of the final document and, if necessary, presentation of a bound document.

This paper is concerned with document production.

Potential benefits

One must consider first whether or not tangible benefits can be obtained from the use of a word processing system. If there is no potential monetary benefit in introducing a system, the capital expenditure on the equipment cannot be justified.

To the probability of reducing secretarial staff, one can add many intangible benefits.

Time saved in proof reading documents. After initially reading a whole document, you need subsequently read only any amendments made.

Greater productivity through assembly and retention of standardised documents. There are probably many situations within your firm where similar transactions are undertaken on behalf of clients and, with a little forethought, standard documents or correspondence could be used.

Relative ease in producing urgent documents. You know the feeling of waiting on your secretary as your time deadline approaches and she is still correcting mistakes or retyping pages. The word processing system allows her to correct as she goes and then play out a final perfect document.

Morale benefits. By storing standard form documents on your word processor, your secretary is not involved in boring repetitive typing.

An aid in training new staff. Standard documents for reference allow staff to have an informed discussion with you about matters which are new to them.

High document quality.

Suitable documents

Before looking at specific document types, we must consider why it is necessary to retype documents.

Error correction is one of the three main reasons why some form of word processing system should be used. Typist errors reduce output because production must be stopped to make a correction or to repeat the entire document. To avoid committing an error, a typist may type at a much slower rate.

A second major cause of retyping relates to *document* changes from the original author. Most people who create documents find when they see it in print that they could have worded it better. The author must then consider whether the document is important enough to be retyped and conventional typing services are able to meet his time deadline. A document is rarely totally revised; usually only a small number of changes are made.

The last major reason for retyping is the need for *additional original typewritten copies* of a document. There are many needs for originals throughout the profession. For example, practitioners may undertake the same range of transactions for different clients and, with a little forethought, use a standard document to improve the productivity of both the author and the person keyboarding documents.

The three general applications for word processing are therefore:

Single entry typing – Using a word processing system, an operator can input at a fast draft speed and then correct typographical errors as they are detected, before printing the document. Examples of this are:

(a) Any one-time letter
(b) Forms completion
(c) Any difficult typing job where revision of the document would be light
(d) Any transcription typing from draft, shorthand or dictaphone tape
(e) Final document production.

Partial retrieval – This includes any document where author changes are made. If an author makes amendments to only part of a document, it is necessary to retrieve only part of it and make changes to it, before the entire document is played out in final form. Examples of this are:

(a) Documents standardised for use within any part of your practice
(b) Employee handbooks
(c) Minutes of meetings, etc.

Multiple use – This includes all documents or any part of them which, when recorded and revised, are stored for subsequent re-use. Examples of this are:

(a) Directories or listings
(b) Repetitive letters
(c) Company articles and memorandum of association
(d) Wills
(e) Trust deeds
(f) Debentures
(g) Leases (in various forms)
(h) Precedents
(i) Mortgages and mortgage release forms
(j) Resolution of directors
(k) Conveyancing agreements, etc.

In summary, word processing offers potential benefits in:

(1) Rough drafting, or error correction
(2) Revisionary work or editing
(3) Repetitive typing or in the use of pre-recorded documents.

A systems approach

Principals have a management responsibility to use a "systems" approach to word processing so that any decision taken is based on complete factual information. This highlights the alternatives available (including the status quo). The specific responsibilities are:

(a) *Documentation standardisation* – whether or not you decide to introduce word processing to your practice, you should standardise documents throughout.
Potential productivity gains for your legal personnel and support staff should not be overlooked. Secretaries should be involved in discussions which may lead to greater standardisation of general correspondence.
(b) *Establishment of normal work flow patterns* throughout the entire firm. A review of support given to productive staff should also be undertaken, and if necessary a rationalisation of support levels should be undertaken. This includes balancing out workloads, within work groups.

(c) Fixing where the word processing equipment you are to evaluate should best be placed.
(d) Establishing the means by which dictation, revision and final form documents will pass between the word processing centre and productive staff.
(e) *Establishing work priorities* and methods to govern the use of the equipment. Priorities should be clearly established and procedures adopted in the use of the word processor before evaluation begins.

Equipment

If you have used a systems approach, your specific needs from a word processor or your conventional typing services will be apparent. There is no single right decision now to be made, but the decision you take should offer the maximum advantages to your practice.

There are various types of word processing systems available in New Zealand at this time. The advantages and disadvantages of each are explained in brief detail so that you may make a preliminary evaluation of products of the type most suited to your needs.

(1) *Magnetic card equipment*

(a) *System description.* A magnetic card system uses a card coated or impregnated with magnetic material on which information may be stored in the form of coded polarised spots. Each magnetic card holds approximately 1½ A4 pages of typewritten material. A memory in the keybroad unit holds 3 pages. Material is recorded through the keyboard on to the magnetic cards, which can form a library for later use. As with a typewriter, the keyboard and print mechanisms are enclosed in the same unit.

Print speed 16 characters per second (using an element type face) or 50 characters per second (with a daisy wheel).

(b) *Advantages.* A "mag card" system permits easy insertion of information into legal forms. It is most suitable for the storage and retrieval of multiple-use documents requiring little if any alteration. However, by machine manipulation, it is possible to minimise difficulties encountered through restricted storage (see below) by, for example, in a standard form document selecting clauses for storage on individual mag cards, to allow later insertion of variable information. This type of system generally starts at the lower end of the price range for word processing systems.

(c) *Disadvantages.* Approximately 1½ pages are stored on each magnetic card and there are physical handling problems of numerous magnetic cards. For the system to be effective, a rigid filing system must be maintained.

Single-entry typing and partial retrieval of documents are not particularly suited to this type of system because machine manipulation time offsets the productivity obtained.

When information is being recorded it goes into the memory, not directly on to a card. If there is a power failure or machine is switched off, the document is lost in the system and has to be retyped.

In this and other systems where the print mechanism and keyboard are enclosed in the same unit, while a document is being played-out through the system, an operator may waste time because she cannot undertake other functions.

This system does not have an internal index of documents and this must be kept manually.

(2) *Cassette storage systems*

(a) *System description.* Cassette systems use magnetic tape enclosed in cartridges or cassettes. The recording is entered on the tape as an invisible magnetic marking. The nature of the magnetic recording allows the text to be erased and re-recorded and also allows for changes and corrections to the original tape. Some machines using this medium automatically leave an area of tape unrecorded at the end of each typed line, so that any changes which may extend the line can be accommodated.

An alternative configuration is to use two cassettes simultaneously. This allows for modification by transferring material from one tape to another. The systems available are either stand-alone units (ie a word processor with a cassette reader attached) or appendages to IBM Selectric typewriters.

Print speed approximately 16-40 characters per second.

(b) *Advantages.* Cassette systems allow for a greater storage of information and the page range for various systems is from two A4 pages to 98 A4 pages. To a large extent this reduces the physical storage problem and makes this type of equipment suitable for partial retrieval of documents or retrieval for multiple use.

(c) *Disadvantages.* Again the keyboard and print mechanisms are in the same unit so that in all but one system demonstrated the operator ceases to function when documents are being played out through the system. This type of system requires considerable machine manipulation in order to insert or change information.

(3) *Diskette systems*

(a) *System description.* Diskette-based systems allow for the storage of documents of between 80 and 200 pages on any one diskette. These

diskettes form a permanent archive of standard form documents or documents requiring revision. Alternative configurations are available, so they may operate as stand-alone units or in tandem with a central processing unit. These systems have separate printers. High quality printers operate at 40 characters per second and draft printers at 600 lines per minute.

(b) *Advantages.* Diskettes allow the number of storage devices required for archive purposes to be reduced, because of their capacity. The separate printer enables the operator to continue to input documents at the same time as the printer is working.

A diskette-based system allows greater flexibility in the insertion, deletion or amendment of any part of a document because of document rearrangement capabilities on diskettes.

Diskette systems use a cathode ray tube or visual display unit (see below) which allows the operator to see what is happening to a document.

(c) *Disadvantages.* Diskettes are flexible and prone to damage unless handled and stored carefully. A diskette system still involves physical handling of the storage medium, which may slow the operator.

(4) *Computer-based systems*

(a) *System description.* Computer-based systems are avaible as a software enhancement to most computers, or as stand-alone word processing units. They use a visual display unit and are much more flexible because of increased storage capacity. If you are considering a computer system for your office, word processing may provide an additional benefit at a relatively low cost.

High quality printers operate at 40 characters per second and draft printers at 600 lines per minute.

(b) *Advantages.* If you adopt a computer system for your office, you can make better use of your printer(s) if you use a word processing package. However, the major advantage is in the increased storage capacity available.

(c) *Disadvantages.* In stand-alone word processing systems or word processing systems using a central processing unit, word processing is not available in the event of a system failure. The word processing sub-system may be the last to be made usable because other parts of your computer system may be more important.

Adjuncts

Cathode ray tube (CRT) A cathode ray tube or visual display unit (VDU) is a television tube that shows an operator the changes actually made in the memory of a word processing system. It enables an operator to type a document and to insert, delete or correct words or phrases – all without using paper – before the document is entered into the storage medium. The CRT is used in both diskette and computer based systems.

Optical page reader. This device scans documents produced by an ordinary golfball typewriter and allows highspeed input into a mini computer-based word processing system either of the stand-alone type or as a sub-system of a mini computer. It allows all secretaries to perform an input function and reduces the need for expensive CRT terminals. This equipment is in the early stages of development and preliminary data only is available.

Preliminary evaluation

Using a systems approach to word processing, you will now have determined the *type of work* which is suitable for word processing in your environment, and you will have decided which *type of system* is best suited to your needs. Preliminary evaluation should be undertaken by seeking from potential suppliers information which will enable you to narrow down the products which are best suited to your needs. This information should include:

(1) Input routines
(2) Revision routines
(3) Indexing functions
(4) Page length
(5) Procedures required to format documents on the system
(6) Training required (and supported by potential suppliers)
(7) Media used for storage
(8) Print speed and printer reliability (based either on hours of usage or documents produced)
(9) Access to stored documents (random and scrolling functions)
(10) Paragraph selection procedures
(11) Data conversion – both cost and timing
(12) Service commitment, including contract amounts and obligation of potential suppliers in terms of providing "maintenance"
(13) Component cost, including whether system updates are included in the purchase price
(14) As well as meeting your current needs how is future expansion accommodated?
(15) Consumables – will there be a continuing supply of ribbons, paper, diskettes/cassettes/mag cards at a reasonable cost.

An important consideration in your preliminary evaluation is the credibility of the potential suppliers. They should be well established companies who will ensure that you are not left with expensive equipment which is not supported. If supplier support is not satisfactory, others with your firm who are not as enthusiastic about the

introduction of word processing will seize on this factor to add further delays to the implementation of a system.

Who to operate?

A recent survey conducted by the international Word Processing Association found the following attributes to be desirable in machine operators.

They should be:

(a) machine orientated and

(b) adaptable to new equipment and receptive to change in the method of document construction on existing equipment (because of continual updates to systems) and

(c) analytical in their approach to document construction and

(d) able to work well in a group environment as they will be involved as part of a work group within a practice and

(e) able to show initiative and

(f) accurate typists.

Because of the expense of word processing equipment, it is necessary to have back-up staff, so that the system is continuously in operation. This back-up should be from existing secretaries within your practice, as they will be able to sell the word processing concept to reluctant users, by demonstrating the advantages and discussing document suitability. To ensure that this back-up is continually available, exposure to the system should be given on a weekly basis by rotation of lunch hours or extending the use of the word processing system beyond normal office hours.

On-site evaluation

Having (1) obtained a preliminary indication as to which type of system is best suited to your needs *AND* (2) having narrowed down potential suppliers who offer the greatest potential in the factors listed (in the preliminary evaluation), an on-site evaluation has two main purposes.

First, it enables you to test the credibility of potential suppliers in relation to the claims made for their equipment. This applies to the potential capabilities and reliability of a particular system in your operational environment.

Second, it allows you to determine productivity achievements (following the initial training period) related to the work mix peculiar to your practice. Productivity achieved during any evaluation period, albeit brief, provides the basis for a later cost-benefit study.

Cost-benefits

Potential tangible benefits to be obtained from word processing must be related to the output productivity of conventional typing services. In a survey conducted by the International Word Processing Association, out of 278 responses 50 percent of the respondents had had a decrease in their typing labour resources; a further 30 percent reported no change in their typing resources, though many had been able to increase output without additional staff.

Output measurement must be in constant measurement terms, ie, output from all sources must be converted to the same number of characters per line and lines per page, with similar spacing, and the same number of keystrokes per word.

The actual productivity measurement, particularly from the word processing system, must be scrutinised carefully to ensure that the output produced does not result from wasteful production. Because a word processing system makes document changes easy, true productivity may be inflated because of unnecessary repetition of the same document.

A return-on-investment calculation should be made using a time period of no more than three to five years because of rapidly changing technology. This return on investment calculation should include:

(a) Annual savings, identified from the additional output of a word processing system, and from a reduction in typist salaries, and

(b) Savings from not having to provide additional typewriters.

Salary and typewriter savings must be offset against the additional costs of word processing. The additional costs include:

(a) paper loading,

(b) a difference in ribbon prices,

(c) establishment of a word processing archive, and

(d) the difference in maintenance costs between conventional typewriters and a word processing system.

The net saving is the basis of a return-on-investment calculation.

Finally

If your decision is to lease or buy some form of word processing equipment, periodic follow-up workload surveys must be undertaken to ensure that savings are continuing.

Glossary

As with data processing, word processing uses its own jargon. A potential user should ensure that the use of jaron by any potential supplier is kept to a minimum and where necessary full explanations are given. Terms vary slightly between suppliers. Common word processing expressions include:

Availability. The ratio or percentage of time during which the word processing system is functioning correctly and is related to the total time in that period.

Buffer storage. A device in which information is assembled and stored ready for transfer. For example, a buffer in a printer would allow a document queued for output to be stored at the printer, thus allowing system availability for another transaction.

Cassette. This normally refers to the two reels of magnetic tape encased in a small plastic or metal cartridge and used in tandem for the transfer of information.

Continuous stationery. Normally high quality paper attached to a cheap backing paper by glue dots. Following printing, the paper is removed from the backing and has no noticeable imperfections.

CRT – Cathode ray tube. Similar to a small TV screen and used to display text at various intensities (also called VDU – Visual Display Unit).

Cursor. A "light dot" used for indexing in any position on the cathode ray tube (CRT).

Daisy wheel. Print keys of a printer mounted in a circle and used to strike the paper.

Dead keys. Keys on a keyboard which, when struck, do not automatically advance the cursor to the next character position.

Down time. Time when the word processing system is not available, due to a malfunction.

Draft paper. Cheap low quality paper normally perforated on sides to allow both splitting and paper feed sprocket holes to be removed.

Element. Usually refers to the spherical IBM golfball typing fount.

Fanfold. Paper supplied in a flat folded form.

Fast forward. Tape recording feature which allows fast access to cassettes.

Hard copy. Typewritten copy of any description.

Hardware. The electrical, electronic, magnetic and mechanical devices comprising a system.

Ink jet. Method by which characters are electronically "squirt printed" on to paper. Although a fast method of transfer, the print quality is not high.

Interface. Where two systems interact.

Merge. Combine data in a set arrangement.

Off line. Independent of a central processor. In word processing, this would refer to a text editing station.

On line. Having direct access to the main processor through or by a cable.

Pin feed platen. Typewriter platen having a sprocket feed for continuous form feeding.

Search. Electronic text editing process which scans to identify a word, phrase, paragraph, clause or numeric character.

Software. Programmes and routines used internally by word processing systems.

Stop code. A system signalling device which stops the playback of a document (on hard-copy) to enable insertion of variable information.

Turnaround time. Time which elapses between the despatch and receipt of material back at the starting point.

Words. The expression of typing speeds by counting keystrokes, a word normally comprising 5 strokes. Although this may be considered an undesirable measurement, provided productivity from all types of equipment is converted to the same basis, it will provide a valid comparison.

VDU. Visual Display Unit, or cathode ray tube (CRT).

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tion to the defendant prior to the arrival of the plaintiff in the Courtroom:

"I am sorry for thee; thou art come to answer
A stony adversary, an inhuman wretch
Uncapable of pity, void and empty
From any dram of mercy."

As will be recalled, the proceedings terminated in favour of the defendant. But it is possible that the trial was vitiated ab initio by an element of declared bias which even the most recondite counsel, retained for the defendant on a motion to review, might be hard put to deny. But at least he would be able to argue that the reviewing Court, in exercising its discretion, was powerless to express any view as to the legality of the condition attached to the bond. Its only lawful function would be to assess the legality of the process of trial. Any considerations as to the moral obloquy of the bond, and its possible invalidation as being against public policy, must be left to an appellate tribunal whose functions, as I have indicated, are so fundamentally different from those of a Court of review.