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DESIGNATION OR ZONING?

A recent decision of the Court of Appeal, *Laing v Waimairi County Council* [1979] Butterworths Current Law serves as yet another reminder of how muddled are the Town Planning provisions bearing on public works. The decision concerned the use of zoning procedures to protect public works. Land in the vicinity of Christchurch Airport had been so zoned that dwellinghouses accessory to farming were to become conditional rather than predominant uses. This threw into issue, among other things whether zoning was an appropriate method of protecting public works or whether the designation procedures should be used. However, what was really at stake was not so much the form of protection as the compensation rights attaching to the various methods available.

In the case of designation of land there are procedures whereby a landowner may require the designation to be removed or the land taken and appropriate compensation paid. On the other hand where land use is restricted by zoning then the owner is left to the meagre and some would say, illusory, compensation provisions of s 126 of the Town and Country Planning Act 1977. This section and its predecessors have never been satisfactory. They have been the subject of constant criticism from the Planning Tribunals and in submissions on the Town and Country Planning Bill the Law Society described what is now s 126 as "inadequate", "difficult to apply" and "essentially the same as existing provisions and . . . no easier to comprehend".

Suggestions for change have been consistently stonewalled. Even a Law Society suggestion that one limitation on time for applying for compensation be extended from one month to three months to enable expert advice to be sought was ignored.

A particularly obnoxious provision is contained in s 126 (10). If a prohibition or restriction for which compensation has been paid is removed then the compensation plus interest *shall* be repaid by the person benefiting. In the Christchurch Airport case then it could well be that a person is declined consent to construct a dwellinghouse, is awarded compensation and applies it in making alternative accommodation arrangements, only to find on the next review of the Town Plan that the zoning restriction is removed and he has to pay it all back. The Law Society described the provision as it stands as unjust and suggested a time limit of five years on the obligation to repay with a right of appeal against assessment to the Land Valuation Tribunal and power to the Planning Tribunal to disallow repayment where it was found to be inequitable or in cases of hardship. A particularly reasonable and fair suggestion was met with the usual intransigence.

In the event the Court of Appeal held that the use of the zoning powers in the circumstances was reasonable and that there were no special circumstances that would justify the Court in saying that the power given by Parliament had been exercised for a purpose that Parliament did not intend. It is worth emphasising that the decision was based on the reasonableness of zoning powers to achieve the particular result sought. It has not given a blank cheque to local authorities to use zoning or designation procedures as they think fit (or financially advantageous to them). That is important because the Planning Tribunals have also been grappling with this same topic.

In a decision shortly to be published (*MOW v Taranaki County* (1979) 6 NZTPA 485) the (then) No 2 Town and Country Planning Appeal Board was faced with an attempt by a local authority to create a reserve by zoning land in such a way that it could not be used for anything else.

The Chairman, Mr Treadwell SM, was of the view that the zone "would be a complete restriction on the owner's freedom to control their own land and no compensation would be payable for the removal of that freedom" and went on to hold "as a matter of law that where there are two alternative modes of procedure open to a local authority it is required to conform with the procedure involving less hardship to the owners and occupiers of the land. I accordingly hold it as a matter of law that the proposed zone suggested by the appellant is not acceptable." In essence, fairness to persons affected is recognised as a proper factor to take into account when selecting the appropriate form of land use control.

However, matters do not end there because of other shortcomings in the legislation. In the case just mentioned and also in others, the Planning Tribunal has expressed the view that power for a local authority to designate land within its own boundaries has been inadvertently omitted from the Act. It may designate land when so required by local authorities outside its area but cannot designate for its own purposes. It may then be left with no choice but to use land control procedures that are rather lacking in fairness.

All in all it is a bit of a muddle.

Tony Black

PROBATE AND ADMINISTRATION

PRACTICE NOTE

Tracing order procedure

Sections 46 et seq of the Administration Act 1969 enable the Court to make orders for the following of the assets of an estate after distribution to the beneficiaries. A tracing order may be made where relief is granted under the Family Protection Act 1955. By s 49 (3) a tracing order may not be made unless applied for within 12 months of the grant of administration, unless special leave is granted; by s 47 (4) the administrator may distribute the estate after 6 months of grant unless notice has been served of a proposed claim under (inter alia) the Family Protection Act.

In *McKenna v Langford*, (Supreme Court, Gisborne. March 1979 (A13/78)) Barker J had before him a writ of summons purporting to be issued under s 49. The executor had distributed the estate after the six months; the writ was issued within the 12 months and named as defendant the beneficiary to whom it was sought to trace the assets to the extent necessary, should a favourable order be made for the plaintiff under the Family Protection Act, in the same proceeding. Evidence relevant to the Family Protection claim had been given at the hearing. No directions for service had been obtained.

Under R 538 (j) of the Code, family protection applications are to be made by originating summons and directions for service obtained.

Counsel for plaintiff had been uncertain whether to commence his proceeding by writ or by originating summons, and although the Court considered the latter would have been correct, it was willing to deal with the matter on the form of proceeding before it and upon the family protection type evidence given. His Honour however observed that an originating application was to be preferred to a writ of summons where a tracing order was sought under s 49 in respect of a family protection claim because:

(a) all evidence in chief can be given by affidavit, saving substantial hearing time;
(b) it is often distressing for a defendant to give all the relevant information viva voce; and
(c) R 554A contemplates a motion for directions for service as permissible for any originating application.

But defendant had a deeper jurisdictional objection: the Court had no jurisdiction to entertain an application such as plaintiff's unless there was filed within 12 months of grant both:

(a) an originating summons under the Family Protection Act with motion for directions as to service and supported by usual affidavits, bringing all interested parties before the Court if they wished, and
(b) a separate substantive application, whether by writ or originating motion under s 49 enabling a tracing order to be made in respect of any Family Protection award that might be made.

It was said for the plaintiff that the application had been made within time; the executor could not be a party, as he was functus officio; and the course adopted was appropriate.

The defence stressed the difficulty the Court would have in making an order akin to a family protection order without knowing the extent of the demands on the bounty of the deceased and the strength of the competing claims.

However in this case all relevant information was before the Court; this may not be the case in other claims of this nature. After discussing s 49 and considering *Re Selby* [1966] NZLR 650 and *Re Due* [1977] 1 NZLR 696 His Honour ruled that plaintiff had acted properly in bringing a substantive application under s 49 and that she did not in addition have to file an originating summons under the Family Protection Act. An application under s 49 in so far as it related to a family protection type claim should however in general be by way of originating motion, and directions for service sought.

His Honour then dealt with the merits of the family protection application and awarded the plaintiff a lump sum against the defendant who was the recipient of the principal asset from the executor.

Gordon Cain

OFFICE MANAGEMENT

WORD PROCESSING – COPING WITH CHANGES IN TECHNOLOGY IN YOUR FIRM

By DENNIS ORME

Technological change is bombarding all parts of our society and the law firm is no exception.

Word processing (the transition of a written, verbal or recorded word to verbal, type-written or printed form and its distribution for ultimate use) is one of the more recent technological changes being considered by practitioners in an attempt to control the "costs – price squeeze" in relation to the profitability of their firm. Secondly, there is recognition of the need to maintain or improve document quality at a time when clients are demanding faster more efficient service on longer and more complicated documentation.

Word processing has a significant effect on three classes of persons:

(1) The person who will operate this new technology;
(2) Secretaries and typists whose job descriptions will change as some of their typing functions are removed to the word processing centre; and
(3) The end-users of word processing, that is:
    (i) persons who may be told or instructed to use word processing now that the facility is within the firm; or
    (ii) persons within the firm who cannot be directed to use the technology, but who it is hoped will see the advantages of word processing and therefore would wish to use it.

Fear of change is one of the first factors to be recognised. If it is proposed to introduce word processing because of the cost benefits demonstrated to you, the transition will occur if you recognise:

That the law office is not just a collection of people, but embodies an integrated system embracing, (1) the functions and responsibility for each position established within the office, (2) the technological system including the equipment and procedures used by all. This includes xeroxing, accounting machines, computers or word processing and, (3) the persons filling each function within the office. Individuals bring to their work situation a considerable background of attitudes and opinions, likes and dislikes, trusts and mistrusts, motivations and inhibitions. The effectiveness of the firm is determined by how well each part of the system operates individually and collectively.

This implied integration highlights the fact that all members of the firm must be familiar with, and subscribe to their job definitions, functions and responsibilities as well as having a basic understanding of how the use of any technology can make them more effective in their particular tasks. Principals of law firms should understand and subscribe to Maslow's hierarchy of needs in relation to each person in his firm ie the physiological needs of food warmth and shelter, security, acceptance, esteem, and self-actualisation *and* MacGregor's theory "Y". In particular all personnel will exercise self-direction and self-control towards the achievement objectives to which they feel committed. They are also capable of a relatively high degree of imagination, ingenuity and creativity. If you accept these theories then the motivation and degree of involvement of each person within your firm is largely within your control.

Specifically, word processing should not be imposed. Rather *all* persons within your firm

should understand and appreciate both the effects and benefits of having word processing. In this regard a group discussion should be embarked on covering the aspects of:

(a) what is word processing? and,
(b) the benefits of having word processing in a law firm.

This group discussion will allow all personnel to think through their particular work situation, and will advance suggestions as to where the use of this technology may be beneficial to them.

Part of this discussion should focus on the disruptive nature of introducing word processing to established procedures and communication flows. Suggestions should be invited as to how existing procedures can be streamlined to make more persons more effective.

One major concern with the introduction of any technology is the fear of redundancy and the general discussion should highlight the fact that no persons would be made redundant as a result of the technology, but that as people left through natural attrition, consideration would then be given to whether or not a replacement was necessary. The changing nature of individual job descriptions through the introduction of technology should be traversed at that early stage.

Following the general discussion there should be discussions with those individuals sharing like tasks and having similar responsibilities.

Word processing operators

This discussion should embrace both your permanent word processing operators and those providing a back-up service. Discussion points will include:

(a) The importance of their role in using word processing equipment. The operators should be aware of the wider scope of their tasks in that they will be undertaking work of a very much wider range of matters than when they were secretaries for individuals within the firm. Greater job satisfaction will result.

(b) The increase in the skills required to be a word processing operator. Not only must they adapt to this new technology but because the technology is being continually updated the firm will be reliant on their initiative in order to make the best use of that technology and to take advantage of any enhancements made to it.

(c) The responsibility of their position. Because word processing equipment makes it easier to play out better quality documents at a faster speed, they will be subjected to individual pressures in relation to work priority, from all persons using the word processing system.

(d) Review sessions. Periodic review sessions should be undertaken with your word processing operators to ensure that self-esteem is maintained and enhanced, because your operators tend to function for all, and yet have no affiliation with any group. This discussion will include user-education so that people do not have endless retyping because of the ease of doing it on a word processing system; *or* send all their jobs through as urgent when a lesser priority may have still met their requirements. The operators should be given an opportunity to communicate how they consider word processing can be developed further within your firm. Who better to make these suggestions than the people operating the system.

Typists – Secretaries

The discussion with this group should traverse

(a) The changing nature of their function. Historically secretaries in law firm spend 80 percent-90 percent of their time in typing situations and with the advent of word processing this typing commitment will be reduced, so that their role changes to that of more a personal assistant. Their observations and suggestions in relation to how they may further assist the person they work with, for example, they may be able to undertake some of the basic stages in conveyancing transactions; be able to understand client matters further to be able to assist with client enquiries; or may be effective in the drafting of bills of costs.

(b) Suggestions in relation to the range of documents which they currently produce, as to whether they consider those documents to be suitable for processing by the word processing centre.

(c) Relationships with the word processing operators. The importance of the word processing operators' job should be stressed to secretaries. The production of documents either by an operator or by a secretary is then seen as a team effort to provide a client with the best standard of service possible in the most efficient manner. The role of the word processing operator and the secretary is therefore complimentary in that each use individual skills in the performance of their tasks.

End users of word processing

(a) Those who may have word processing technology imposed on them.

Law firm principals may if they desire impose word processing upon productive personnel within their firm, if they feel that the use of this technology is economically justifiable. However, in order to make the best use of this technology and make productivity gains by its use, it is beneficial to engender a motivation or desire to use this technology by an indepth discussion on its benefits. This will cover such areas as high document quality, relative ease in producing urgent

documents (in that the operator can correct as she goes and then play out a final-form perfect document), greater productivity through the assembly and retention of standardised documents, and reduction in the time to proof-read documents. After initially proof-reading the whole document it is then only necessary to read any amendments made.

Following this discussion suggestions should be invited by your productive personnel as to the range of documents they see as being suitable for word processing, so that they may conduct a self-evaluation of the benefits.

(b) Peers who cannot have word processing imposed on them.

A partnership discussion should occur and this should be initially based on the objectives of your partnership to provide fast and efficient service to meet client needs. The progression of this discussion will lead you into the area of word processing and the benefits to be obtained. If there is a consensus of the broad firm objectives, the ultimate implementation of a word processing system (provided that the benefits can be demonstrated) is something that all partners should subscribe to.

Being realistic about this situation, even though there is a consensus on the broad objectives when it comes to the implementation of a word processing system, those partners who are keen to use the new technology should be introduced to the system first. It will be by the medium-term demonstration of benefits to those individuals that other reluctant partners can be introduced to the system. In conformity to the partnership objectives it would not be unreasonable to expect reluctant partners to at least try the system to see if benefits can be obtained in their particular work environment.

By trying the word processing system, I do not mean a passive conformity, but rather if they believe in the broad firm objective to provide high quality client service *partners must actively attempt to understand the word processing system and use it over a wide variety of situations.* If this approach is taken it will be useful to have a review session with the unwilling users to see (1) exactly how they found the system and (2) whether they consider any improvements are possible, so that they may use it as an on-going part of their particular operations.

Attention must therefore be paid to the overall system. This comprises the functions and responsibilities of each position within the firm; the technological system employed; and the human aspects of the persons in positions either as word processing operators, typists and secretaries or the word processing end-user. Only then can you be assured of a reasonably smooth transition of word processing equipment into your firm with a minimum of resistance to change and without a fear of the unknown.

TOWN PLANNING

PRACTICE NOTE

Issued by Direction of the Chairmen of the Divisions of the Planning Tribunal

Further Evidence

The Tribunal requires that on all appeals and inquiries, each principal party will, not less than 7 days before the hearing, deliver to all other principal parties (so far as they are known to that party) a copy of the briefs of the evidence of all witnesses whom he proposes to call.

The term "principal party" means: the appellant (or the applicant for the inquiry), the respondent, the applicant whose application gave rise to the appeal (if such is the case), the Minister, and all public bodies and local authorities who intend to be represented at the hearing.

In the case of appeals, the briefs of witnesses who gave evidence or made a statement when the matter was heard at first instance, need not be delivered pursuant to this direction if the evidence to be given on appeal goes no further than the evidence or statement given at first instance.

CASE AND COMMENT

Natural justice and prison discipline: a postscript

In a recent note ([1978] NZLJ at pp 323-324), the decision of the Divisional Court in *R v Hull Prison Board of Visitors, ex parte St Germain* [1978] 2 All ER 198 was discussed. It was there suggested that the decision that the visitors were not amenable to certiorari was wrong. That view has prevailed in the Court of Appeal where Megaw, Shaw and Waller LJJ allowed the appeal (The Times, 3 October 1978). Decisions of the visitors in disciplinary proceedings under the Prisons Act 1952 and the Prison Rules are reviewable and an order was made remitting the case to the Divisional Court for hearing of an application for judicial review under the new procedure (similar to Part I of the New Zealand Judicature Amendment Act 1972) provided in Order 53 of the Rules of the Supreme Court.

MAORI LAND

THE MAORI AFFAIRS BILL – ITS HISTORICAL BACKGROUND

By E J HAUGHEY

The Maori Affairs Bill at present before Parliament consolidates and amends:

(a) The Maori Affairs Act 1953 and its amendments.
(b) The Maori Housing Act 1935 and its amendments; and
(c) Various other statutory provisions relating to Maoris and Maori land set out in the main in various annual Maori Purposes Acts.

It is of necessity a long and complicated measure as it deals with all the various aspects of Maori land law and Maori land administration. As it represents the culmination of many years of legislation on these matters it is appropriate that some consideration should be given to its historical background.

The Treaty of Waitangi

On the establishment of British government in New Zealand in 1840 the Crown entered into the compact with the Maori people known as the Treaty of Waitangi. By Article 2 of this compact the Crown confirmed and guaranteed to the chiefs and tribes of New Zealand and to the respective families and individuals thereof the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties, which they might collectively or individually possess, so long as it was their wish and desire to retain the same in their possession. This article, however, then went on to provide that the chiefs yielded to the Crown the exclusive right to pre-emption over such lands as the proprietors thereof might be disposed to alienate at such prices as might be agreed upon between the respective proprietors and the persons appointed by the Crown to treat with them in that behalf.

Although the Treaty of Waitangi has never formed part of the municipal law of New Zealand *(a)* the legislation which has been enacted from time to time with regard to Maori land has been designed to implement its provisions. In an article which appeared in this Journal in 1934 on "The Effect of the Treaty of Waitangi on Subsequent Legislation" *(b)* considerable emphasis was placed on this point. In one passage it was said:

> "The terms of the Treaty of Waitangi were never specifically enacted as part of the municipal law of New Zealand but, nevertheless, the effect of the Treaty appears through a long series of Ordinances and Statutes, and colours the legislation of this country in no uncertain manner *(c)*."

In 1975 by the Treaty of Waitangi Act a tribunal known as the Waitangi Tribunal was set up under the Chairmanship of the Chief Judge of the Maori Land Court. This tribunal has the following functions:

(a) To enquire into and make recommendations upon claims by Maoris alleging they are prejudicially affected by any legislation or Crown policy, practice or act which is inconsistent with the principles of the Treaty;
(b) To examine any proposed legislation (whether of a Parliamentary or subordinate nature) referred to it by Parliament (or by a Minister of the Crown) and to report whether in its opinion that legislation is contrary to those principles.

Acquisition of Maori land

In the years from 1840 onwards the impact of European civilisation on the primitive Maori society brought with it many serious strains and stresses. Considerable friction soon arose between the newcomers from Europe and the indigenous

(a) See *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308; and cf "The Treaty of Waitangi; Its Consideration by the Courts" (1934) 10 NZLJ 20; and AP Molloy, "The Non-Treaty of Waitangi" [1971] NZLJ 193.

(b) (1934) 10 NZLJ 13.

(c) This matter has also been adverted to by the Courts on a number of occasions; See *Nireaha Tamaki v Baker* [1901] AC 561, 566-567; NZPCC (1840-1932), 371, 372-373; *Tamihana Korakai v Solicitor-General* (1912) 32 NZLR 321, 342-344; 351; *Re the Bed of the Wanganui River* [1955] NZLR 419, 432, 462-463; and *Re the Ninety Mile Beach* [1963] NZLR 461, 468.

population; and this ultimately led to the breaking out on a number of occasions, especially in the decade from 1860 to 1870, of open and extensive warfare between the Government and various sections of the Maori people. At the root of most of this trouble were problems connected with the acquisition of land. The new nation depended for its very survival, as well as for its future advancement and progress, on ample areas of land being forthcoming for European settlement. Many of the Maori people, however, became increasingly reluctant to allow land to be provided for this purpose *(d)*.

The whole situation relating to the acquisition of land was also bedevilled by the inherent complexites of Maori customary title. These complexities were aggravated by the changes in land ownership resulting from the intertribal warfare which had been a characteristic feature of Maori society in pre-European times. A notable example of this is provided by the conquests made by Te Rauparaha, an extremely warlike chief from Kawhia in the South Auckland region, who in the 1820's invaded the southern districts of the North Island (as well as parts of the South Island) and seized extensive areas of land in these districts. Problems arising from situations of this nature were later to exercise the attention of the Maori Land Court on many occasions.

The dangers involved in attempting to acquire Maori land without any systematic procedure being available for investigating the title to it were very well illustrated by the Waitara dispute which arose in 1859. In that case a chief named Teira offered to sell to the Government a block of land at Waitara in the Taranaki district but the offer was countermanded by the head chief of the tribe, Wiremi Kingi, although at the time it was reported to the Government (but this was later proved to be incorrect) that Teira had a right to sell and the head chief none to intervene. The Government persisted with the sale; and when possession of the land was taken on behalf of the Crown the Maoris opposed to the sale took up arms against the Government *(e)*.

Maori customary title

At one stage it was suggested by many public men in England (including in particular the promoters and supporters of the New Zealand Company) that the Maoris' rights to land extended only to the lands which they actually cultivated and could cultivate and no further, and that the lands of New Zealand beyond this were the waste lands of the Crown. This viewpoint was however completely ill-founded and was quite unacceptable to the Government in New Zealand *(f)*. It was abundantly clear from the opinions of various authorities on Maori land tenure, including in particular that of Sir William Martin, the first Chief Justice of New Zealand, that the whole surface of New Zealand (or as much of it as was of any value to man) had been appropriated by the Maoris, and with the exception of the parts which they had sold, was held by them as property *(g)*.

Under this system of tenure lands were held in common by all members of the tribe. Private or personal ownership did not exist though in many instances the right to use a particular portion of land might be accorded to a particular individual or family. The situation was further complicated by the fact that frequently different tribes or subtribes (hapus) claimed the same land. Such would be the situation where the rights of the original owners were alleged to have been displaced by conquest *(h)*.

Establishment of the Maori Land Court

As early as 1846 the Royal Instructions issued to the Governor in that year referred to the setting up of a special Land Court to deal with Maori land but effect was never given to this provision. The Waitara dispute, however, brought home to the Government the pressing need for the establishment of a Court of this nature.

The existing system under which the Crown exercised its pre-emptive rights to acquire Maori land (by direct negotiation with the Maori owners without any systematic investigation of their title to it) also placed the Crown in an invidious position. It was strongly objected to by many people on the ground that the Government was buying land for the least possible amount and making an excessive profit out of the resale of it *(i)*.

In 1862 the Legislature after a lengthy debate *(j)* passed a Native Lands Act in which for the first time provision was made for the establishment of a

(d) See Keith Sinclair, *The Origins of the Maori Wars* (2nd ed 1961), passim.

(e) See Sinclair, op cit 136 et seq.

(f) See EW Wilson, *Land Problems of the New Zealand Settlers of the 'Forties* (Wellington, 1936), 201-224.

(g) These opinions were collected together and published as Parliamentary paper, first in 1861 as E, No 1, Appendix A; and later (with additions) in 1890, as G1.

(h) As to the nature of customary (or papatipu) land, see CE MacCormick, "Native Custom (as relating only to the Ownership of land)" (1941) 17 NZLJ 173; and Norman Smith, *Native Custom and Law Affecting Native Land* (1942), passim, and *Maori Land Law* (1960) 83-114.

(i) See for instance, the statement by Mr WBD Mantell, MHR, (who had himself been a Government Land Purchase Officer) in NZPD 1861-1863 at 620.

Maori Land Court. In the preamble to this Act references was made to the Treaty of Waitangi; and the Act then went on to recite that:

> "It would greatly promote the peaceful settlement of the Colony and the advancement and civilisation of the natives if their rights to land were ascertained, defined and declared and if the ownership of such lands when so ascertained, defined and declared were assimilated as nearly as possible to the ownership of land according to British law."

This Act of 1862 never became fully effective and was replaced by the Native Lands Act 1865 (which contained a preamble in somewhat similar terms to those appearing in the 1862 Act).

By this Act the Maori Land Court was established in its present form as a Court of Record consisting of a Chief Judge and such other Judges as might be appointed from time to time but in the course of its history there have been extensive changes in the scope and nature of its functions and jurisdiction. The Act of 1865 (and the other Native Land Acts which were subsequently passed in the early years of the Court's history) was, however, devoted chiefly to the process of ascertaining the Maori customary title and transforming it into freehold title. Although subsequent legislation made many detailed changes in the nature and incidents of the orders made by the Court the general jurisdiction of the Court to investigate the customary title to Maori land has throughout remained substantially the same.

In *Re the Bed of the Wanganui River (k)*, Cleary J pointed out that while in other societies the transformation of communal rights of this nature into individual ownership as we know it had been a process of evolution over a very long period (a development which is discussed in chapter VIII of Maine's *Ancient Law*) the transformation of Maori customary title into freehold titles was required to be carried out by the Maori Land Court uno ictu. To do this the Court had to ascertain as best it could the rights of individuals in what had been formerly communal property. The Court was, therefore, very much concerned especially in the early stages of its history with the ascertainment or determination of Maori customs and usages in respect of land and the application of those customs and usages to the particular blocks under consideration by it.

The Act of 1909

Over the years there has been an immense output of legislation in respect of Maori land. It was recorded by the Rees Commission, set up in 1891 to inquire into and report upon the operation of the Maori land laws, that in one year, 1888, eight Acts were passed and in 1889 nine, specially dealing with Maori land and the Court, besides others partially touching them. Furthermore a number of other proposed enactments were introduced but then thrown out or abandoned *(l)*.

An important landmark in the history of Maori land legislation was the enactment of the Native Land Act of 1909, which consolidated (with amendments) 69 statutes or portions of statutes relating to Maori land. The draftsman of this measure was Mr JW (later Sir John) Salmond who brought to this task his characteristic legal acumen and his great capacity for juridical analysis. In an informative memorandum on the Act Salmond included a valuable set of "Notes on the History of Native Land Legislation" *(m)*.

The definition of "Maori land"

The Act of 1909 has provided the basic framework for the later consolidations of 1931 and 1953 as well as that now underlying the present Bill.

For the purposes of this legislation all land has been classified as being of three kinds, namely, Maori land, Crown land and general land *(n)* Maori land is itself of two kinds, namely, customary land and Maori freehold land. Customary land was land which had never been the subject of a Crown grant, and was held by Maoris under the customs and usages of the Maori people. It was land in respect of which the ancient customary Maori title, as recognised and guaranteed by the Treaty of Waitangi, had not been extinguished. Such land, since it had not been Crown-granted, remained vested in the Crown, subject, however, to the customary title of the Maoris and to their right to have the customary title transformed into a freehold title by the Maori Land Court. For all practical purposes there is now no land of this kind left *(o)*, all Maori land having now become freehold.

"Maori freehold land" means land (other than land which has become general land) that

(j) Ibid, 608-625, 627-638, 642-654 and 682-695.

(k) [1962] NZLR 600, 618.

(l) Parl papers 1891, G1, p xi.

(m) These Notes were reproduced for their legal and historical value in the Reprint of the Public Acts of New Zealand (1908–1931), vol 6, 86 et seq.

(n) See Salmond's Memorandum on the 1909 Act. The full text of this memorandum appears in an official publication of the Act issued by the Native Minister in 1910.

(o) By s 136 of the Maori Affairs Amendment Act 1967 the Court's jurisdiction to investigate the titie to customary land was to come to an end by 31 December 1974; but its jurisdiction for this purpose was later fully restored and is now provided for under part X of the present Bill.

(or any undivided interest therein) is owned beneficially for an estate in fee simple by one or more Maoris. Merely because a European may acquire an undivided interest in Maori land it does not cease to be Maori land. Land held in such circumstances by Maoris and Europeans as tenants in common remains Maori freehold land.

"Crown Land" means land other than Maori land that has not been alienated from the Crown for an estate in fee simple.

"General land" (formerly known as "European land") is land other than Maori land or Crown land *(p)*. Land of this nature can (and always could be) owned by a Maori. However, once land has become general land it can never become Maori land again. If a Maori buys a piece of such land from a non-Maori that land remains general land as before.

In the Maori land legislation the term "Maori" now means a Maori or the descendant of a Maori *(q)*. Previously a Maori had been defined as meaning a Maori, a half-caste, or a person intermediate in blood between a Maori and a half-caste. Persons who were intermediate in blood between a half-caste and a European were classed as Europeans.

The legislation of 1967 and 1974

In a Report on the Department of Maori Affairs made in 1960 by Mr JK (now Sir Jack) Hunn, who was then the acting Head of that Department, he stated that the Maori Land Court had been retained to throw a protective mantle over the Maori in his land transactions and a few matters of family status. He then went on to question whether the Maori of today really needed this degree of protection; and suggested that a review of the Court's functions would be "progressive and timely" *(r)*.

In 1964 the Prichard-Waetford Committee under the Chairmanship of Judge Prichard (who had then recently retired from the position of Chief Judge) was appointed to inquire into the laws affecting Maori land (including those in respect of the jurisdiction and powers of the Maori Land Court). They recommended a large number of importance changes in the general legislation relating to Maori land as well as in the constitution, jurisdiction and powers of the Court. They pointed out that the primary purpose for which the Court had originally been established (ie the investigation of the title to Maori customary land) had "long since been accomplished". Many of their recommendations, modified as thought fit, were adopted by the Government and embodied in the Maori Affairs Amendment Act 1967.

A revolutionary feature of the 1967 Act was the provision contained in Part I thereof for the abolition of the status of Maori land (and for its transformation into general land) in respect of Maori freehold land which was beneficially owned by not more than four persons in fee simple. This provision was however repealed by s 13(3) of the Maori Purposes Act (No 2) 1973; and later a procedure was provided for by s 68 of the Maori Affairs Amendment Act 1974 for the restoration in certain circumstances of the status of Maori land where land had lost that status under the 1967 Act.

The Act of 1967 also made extensive alterations in the provisions relating to the alienation of Maori freehold land. The "Confirmation" procedure became confined to alienations by way of transfer only (and no longer applied to such transactions as leases and mortgages); and a number of the specified matters on which the Court had been required to be satisfied as a condition of confirmation were abolished. The provisions relating to Confirmation were again amended by the Act of 1974. Confirmation was still confined to alienations by way of transfer but the Court was again required to take into account as a condition of confirmation some of the matters which had been abolished by the 1967 Act.

The present Bill

As the Bill is primarily a consolidation of enactments already in existence almost all of its provisions are already on the statute book. In the extremely useful explanatory note attached to the Bill there is a comparative table showing the present source of each clause thereof.

The Bill is divided into 24 parts as follows:

I	Administration
II	The Maori Land Court
III	The Maori Appellate Court
IV	Miscellaneous Provisions Relating to the Courts
V	The Maori Language and Licensed Interpreters.
VI	Representation of Owners of Maori Land
VII	Persons under Disability
VIII	Wills and Succession
IX	Conversion Fund for Acquisition of Maori Land by Maori Trustee
X	Customary Land
XI	Partition
XII	Exchange
XIII	Alienation of Land by Maoris

(p) The term "General land" was substituted for "European land" by s 16 of the Maori purposes Act 1975.

(q) This definition first appeared in s 2 of the Maori Affairs Amendment Act 1974.

(r) Parl paper 1960, G 10, 76-77.

XIV Powers of Assembled Owners
XV Leases of Maori Land
XVI Acquisition by Crown of Land owned by Maoris
XVII Maori Incorporations
XVIII Promotion of Better Use and Administration of Maori Land
XIX Maori Land Development
XX Maori Housing
XXI Surveys of Maori Land
XXII Roads and Streets
XXIII Special powers of Court
XXIV Miscellaneous provisions

In an article such as this it would be impossible to embark on any detailed commentary on the contents of this very lengthy Bill. In any event such a commentary would be largely superfluous as the explanatory note already provides a comprehensive analysis of its provisions.

The Bill contains a small number of "new provisions", a summary of which is given in the explanatory note. These changes in the legislation seem to be merely of a machinery or incidental character.

ADMINISTRATIVE LAW

GOVERNMENT BY REGULATION

By the Public Issues Committee of the Auckland District Law Society

It has been said that in conducting the business of democratic government the easiest way is seldom the best way. But it is a regrettable truth that while politicians in Opposition (and, sometimes, on back-benches) loudly clamour for the best way, politicians in power (and, especially, politicians in Cabinet) seem irresistibly drawn to the easiest way. And the easiest way to govern, it seems, is to dispense with the services of Parliament to the greatest degree possible.

A major problem of democratic communities today is that of government by regulation, government by the making of rules which have the force of law, yet have not been enacted by Parliament in a statute. Such rules are usually made by the Executive. Recent events provide useful illustrations. The Economic Stabilisation (Conservation of Petroleum) Regulations (No 2) 1979, under which the weekend petrol sales ban has been imposed and the carless days scheme established, were made, not by Parliament, but by the Governor-General in Council, acting on the advice of his Cabinet Ministers. These actions have already drawn fire. It has been suggested that the regulations establishing carless days might be ultra vires – beyond the Governor-General's power to make. But, more importantly, it may now be asked whether the implementation by regulation of policies of such importance does not represent a clipping of the coinage of democratic process and debate – of the right of the people of New Zealand to hear their representatives debate important measures concerning their lives.

The power of the New Zealand Government to enact subordinate or delegated legislation (usually regulations) is found in statutes. Parliament often chooses to leave the detailed workings of some scheme or agency to be sorted out later. The statute setting up the scheme in question may paint with a broad brush; the detail is filled in by regulations, and the statute usually gives the power to make such regulations (which must be for the purpose of the scheme envisaged by the statute) to the Governor-General in Council. The Governor-General will enact such regulations on

the advice of the relevant Minister, the regulations being drawn up at the direction of the Minister or the department concerned. No objection can be taken to this course in proper cases. Government has to do its housekeeping; there are many complex technical matters which would waste Parliament's time, had they to be the subject of legislation. However, the objection which can and should be raised against many regulations is that they should have been the subject of statute; that they cover matters of importance which Parliament should have had the opportunity to debate.

Initial evidence for the assertion that much of the business of Government which should be done by Parliament is being done by regulation can be found in the numbers game. The petrol sales restriction and carless days regulation was made under the very open-ended powers given to the Governor-General by the Economic Stabilisation Act 1948, a favourite Act for Governments wishing to find a home for some new set of regulations. Between 1949 and 1965, some 43 different sets of regulations and amendments thereto were made under that Act. Between 1966 and 1975, about 108 were made. And in the last three years, some 62 have been made. The yearly figure was slightly higher under the third Labour Government than under the current National administration. A similar story can be told in respect of other Acts giving wide regulation-making powers.

There is also the tendency, noted previously, to use regulations to deal with matters of policy, rather than matters of mere machinery. Perhaps the weekend sales ban falls into this category. Carless days certainly do so. Could we not reasonably expect that, where such important departures are made, it would be under the aegis of a properly debated energy policy, perhaps an Energy or Fuel-Conservation Act? Or even under the aegis of an emergency short-term policy? And, if the detailed scheme (the ban) is not to be debated, surely the power to impose it and its criteria, should be debated. The restrictions on petrol sales may be necessary, but what is suggested here is that the way in which they have been introduced has not allowed proper debate – Parliamentary debate – of the topic, and that such debate is what is needed in such an important policy area. It must be agreed that there *are* opportunities for debate of regulations after they are made; the regulations are laid before Parliament and questions can be asked of the responsible Minister. But this is ineffective debate, for the regulations have been made; the voices that should have been heard have had no part in their making – the opportunity to speak comes at the wrong time. Government by regulation tends, for this reason, to be undemocratic.

What then are the major defects in the New Zealand regulation-making process? Before passing to this question, it is worth stating briefly why delegated or subordinate legislation is (and probably always will be) necessary in an increasingly complex society. Regulations are necessary because of pressure on Parliamentary time, and because of the occasional technicality of the subject matter. It would be squandering resources to require Parliament to enact legislation to deal with trivial "housekeeping" matters when regulations can fill the bill. And in arcane technical areas little purpose will be served by a Parliamentary debate. Regulations are also an appropriate means of dealing with unforeseen contingencies that may arise in the introduction of large and complex legislative schemes, especially schemes of reform. There is, in addition, a more general need for flexibility which delegated legislation can meet. Flexibility and speed may occasionally be necessary to prevent racketeering – as in the area of price control (although all that should be done by regulation here is the fixing of margins and so forth). Delegated legislation may also provide means of experimenting with different modes of administration and, finally – and perhaps most significantly – delegated legislation provides a means of reaction to emergencies. All this is well-understood, but the needs which are conveniently met by the use of the power to make regulations should not blind us to the dangers of the exercise of that power.

That there are dangers and problems with delegated legislation is clear enough. In the last 40 years there have been numerous reports of Parliamentary Committees and independent researchers on the question. Concern has been present for many years. In 1929, Lord Hewart, then Lord Chief Justice of England, wrote (with reference to delegated legislation) that there was in existence "a well-contrived system producing a despotic power which at one and the same time places Government departments above the sovereignty of Parliament and beyond the jurisdiction of the Courts". That is perhaps an exaggerated picture of what has so far occurred, but the dangers and problems are still present.

The major problem – a problem already mentioned – is the practice of using regulations to enact new policy. For new departures in policy it seems reasonable to require governments to allow debate in Parliament. The objection immediately arises that, in many instances, swift action will be called for and that the business of calling Parliament (if it is not in session – the situation for the majority of the year) and passing legislation in due form is too slow, cumbersome and

costly (an example of a case where swift action was required might be the current oil shortage and the weekend sales ban).

These objections do not stand up to scrutiny. With modern communications, calling a special session of Parliament would be quick and simple. And legislation can be passed very quickly if the House so wishes. The response to an emergency can be almost immediate – and there are few "emergencies" that are entirely unheralded. The oil-shortage we are now experiencing could have been foreseen at least in December of last year. It is to be noted that the United Kingdom Parliament seems capable of a flexible response to such events. In July 1976, in response to the worst drought in Britain for 250 years, Parliament rushed through the Drought Act, a statute giving authorities appropriate powers to cope with the crisis. Legislation *can* be a quick, flexible response.

It should be noted also that the New Zealand Government is not averse to calling special sittings of Parliament for ceremonial purposes. In 1977, on the occasion of a Royal visit, a special (but quite needless) one-day session of Parliament was called to receive the Speech from the Throne and to pass, for the royal assent (as opposed to the vice-regal assent) the Seal of New Zealand Act. If a special sitting can be called for ceremonial purposes, why not for the purpose of dealing with sudden economic or social crisis? It *is* possible for new policy departures to be debated in this way; the practice should be adopted.

Another problem is that of control and scrutiny of regulations by Parliament. In New Zealand, all regulations must be laid before Parliament. But there is no guarantee that a single Member will examine them. It is clearly desirable that elected representatives should keep an eye on what the Executive is doing in the delegated legislation field. Yet the New Zealand Parliament, unlike several other Commonwealth Parliaments, has no permanently established body charged with this task. There is a procedure for referring regulations to the Statutes Revision Committee; it has been used three times since its inception in 1962, and it is entirely an ad hoc affair. In the United Kingdom, Parliament has a permanent Joint Committee on delegated legislation. The Committee has a staff. Between 1966 and 1972, it examined 5,496 statutory instruments – a majority of those made. This is a much more effective system of scrutiny than that operating in New Zealand.

A further defect in the New Zealand system of Parliamentary control is the almost complete absence of provisions either providing a procedure for Parliament to annul regulations it dislikes, or requiring that regulations be confirmed by Parliament before taking effect. In the United Kingdom and other Commonwealth nations, this is a common practice, especially where the regulation involved in some way moves beyond mechanical matters (such as the prescribing of forms) into areas which may affect citizens' rights or property. In the United Kingdom Counter-Inflation Act 1973, a measure providing for the control of prices, pay, rents and dividends, most possible pieces of subordinate legislation are subject to annulment by the British Parliament. New Zealand Regulations and Statutes dealing with similar matters have no equivalent procedure.

An additional, and perhaps related, defect in our system of delegated legislation is the inconsistency with which the device of the expiring regulation is used. It is frequently the case in other Commonwealth jurisdictions that an expiry date is set, often in the enabling Act, for any regulations made under that Act. The Counter-Inflation Act 1973 (UK) provides an example; indeed in that Act a portion of the Act itself was to expire in three years. The New Zealand practice is much more erratic. No rhyme or reason appears in the use of the expiry date. The Economic Stabilisation Regulations 1973 had an expiry date one year from their making. They were replaced with the Wage Adjustment Regulations 1974; no expiry date was provided in those regulations. Curiously enough, the emergency regulations made during World War II had expiry dates, and had to be continued by Act of Parliament year by year (Emergency Regulations Amendment Act 1940). If time could be found amid the clash of arms to provide such a safeguard, why not in peace time, especially with regulations dealing with important topics such as the weekend petrol sales ban, where the strictures are likely to be temporary in any case. Expiry dates *are* used to a limited extent in New Zealand (the Primary Products Marketing Act 1953, for example); their use should be more widespread and uniform.

A further defect in the New Zealand system of delegated legislation is that we have not entirely rid ourselves of the "Henry VIII" clause. This term, presumably used because of Henry's despotic tendencies, describes an enabling clause in a statute whereby the Executive is given power to suspend, repeal, or otherwise alter an Act of Parliament by regulations. In other words, a statute duly enacted by Parliament is set aside or otherwise interfered with by a body other than Parliament. No explanation is needed as to why this is a deplorable device; it strikes at the very roots of democratic government, and all committees and individuals investigating delegated legislation have entirely condemned its use. Yet we have a recent and embarrassing instance in the Accident Compensation Self Employed Levy

Payment Regulations 1978, which purported to repeal certain subsections of the Accident Compensation Act 1972 and substituted new subsections in their place. Specific power to make regulations for this purpose was given in the Act, but this does not render the practice any more respectable. The Government seems to be aware of this; the section "amended" by the regulations was later amended in proper form by a duly enacted statute, in exactly the same terms. This was *not* a serious instance of the "Henry VIII" defect, but Government should set its face firmly against *any* use of the device; great oaks from little acorns grow.

A final defect in our system of delegated legislation, and most certainly the most important, inasmuch as it facilitates the use of regulations to make policy, is the existence of wide, subjectively worded Acts giving power to make "such regulations as appear to (usually) the Governor-General to be necessary for the general purpose of this Act". Such wide enabling provisions are, of course, objectionable because they effectively exclude review of regulations by the Courts, and Government thus obtains an almost unlimited power to make what regulations it pleases.

The Courts' power to review regulations turns on their being able to declare a regulation ultra vires – beyond the power given to the regulation-maker by the Act. This will usually take the form of a statement that the regulation is not for the purposes authorised by the Act. But if the Governor-General is the final judge of whether a regulation is needed for the purposes of the enabling Act (as he is where the enabling clause is subjectively worded) this power to review evaporates almost entirely.

These problems were recognised by a New Zealand Select Committee on Delegated Legislation in 1962 (the Algie Committee) and by the Government of the time. A standard form of enabling clause in statutes was established, to be in objective terms and to recite with precision the purposes for which regulations could be made. It has been used in most recent legislation. But the wide and unrestrained subjective clause still exists in older statutes, most importantly in the Economic Stabilisation Act 1948. In that Act, the Governor-General is given power to make such regulations as he thinks necessary for the purpose of economic stabilisation; wide, vague, imprecise words, which may cover an incredible range of purposes and subject matter. We thus find the Act used to impose price, wage and rent controls, ban petrol sales, adjust flour stocks, or control hire-purchase procedures. It is difficult to see what could *not* be said to be within the ambit of such an Act.

Yet things were not always thus. This incredibly wide power to make regulations stems from the continuance of wartime regulation-making powers. Wide subjective regulation-making power was given in the Emergency Regulations Act 1939. Government and opposition outdid each other in their patriotic acknowledgments of the need for such sweeping powers. This power was repealed in 1947, but the Labour Government soon decided that it needed the wide powers still. The Economic Stabilisation Act was passed. The opposition was not so pliant on this occasion. The Act was said to "establish all the elements of a dictatorship", and the wide power to make regulations was compared with the "divine right of Kings". Mr Holland, leader of the Opposition, said of such powers "we have become so casehardened and blase about these things that we are now being asked to put a further stranglehold around the necks of the people . . .". But despite the opposition's protestations that such powers should not be given in peace time, the Act has never been repealed. It has been found convenient. It is the easy way. But it should now go. The wide subjective power to make delegated legislation in this and other Acts should be repealed and purposes (and thus policies) spelt out with precision in objective terms. The potential for abuse will thus be minimised.

Other defects exist in the New Zealand regulation-making process. Publicity and publication of regulations is not all it could be. Consultation with interested parties before regulations are made could be required by enabling Acts. But the important points are noted above. It is fair to say that Governments consistently seem insensitive and generally lacking in care in their use of the regulation-making power. The best way is seldom the easiest way, but Governments constantly move down the easy way by enacting regulations (rather than statutes) to implement new policy, doing so under extremely wide and unreviewable subjective powers, failing to provide for adequate Parliamentary scrutiny and control, and sometimes offending against such desirable principles as the provision of expiry dates and the avoidance of the "Henry VIII" clause. It is axiomatic that rule by decree is entirely anti-democratic; a Government which rules largely by regulations while retaining a system of delegated legislation with the flaws noted above may be justly suspected of having a less than wholehearted commitment to the principles of democratic process and debate. Extensive use of the power to make regulations results in Parliament being denied the opportunity to debate matters of substance that it is competent to consider and on which the public is entitled to the publicity of public debate.

WHAT ELECTION

BE D'SILVA, *a former Magistrate in Uganda, continues his reminiscences.*

Not so fast – kindly bear with me as I reach into the recesses of my memory, thread my tortuous way into the thickets of the past and weave my thoughts into a fabric of recognisable pattern by using this title as a guide in my journey through the dark paths. You will meet lawyers, politicians and the common man. Of some, only footprints could be seen along the way.

To portray the events leading up to Independence means putting on paper the legal formula designed by the British for problems arising in the Transitional period, for the new tasks of the autonomous Government and for producing the elaborate document called "the Constitution of Uganda". Looking back what a farce it was. Politics is invigorating. It can be debilitating and even fatal.

Transition to Autonomy – Uganda was bracing up for her very first local Government and Parliamentary elections in the true British Democratic tradition. Everyone was happy. African philosophy seemed to be "Don't look back, look ahead". Laws and Rules were enacted to cope with the new developments. Three main parties were Uganda Peoples' Congress (UPC), Democratic Party (DP) and Kabaka Yekka – literal meaning KABAKA ONLY (KY) within Buganda, a province of Uganda.

Electoral Roll was drawn up and printed. Names of Resident Europeans and Asians who satisfied legal requirements were included with Africans as voters. My employer was a DP candidate of which party the late Chief Justice BMK Kiwanuka was the President. Whenever possible I took the chair, when my boss held his election meetings in Kampala. In point of time local Government elections came first. Outside Buganda, the contest was between UPC and DP. In one such local council election DP lost and the unsuccessful candidate published a defamatory leaflet vilifying Chairman of the local council, Gulu, who was a civil servant. The contemptible publication, alleged that he threw his weight slyly on the side of UPC and manipulated UPC victory. A private criminal prosecution was commenced against 3 DP members.

Autonomous Government

Uganda had her taste of Parliamentary elections; DP easily won, for Self-Rule for 4 months. The late Chief Justice was appointed first Chief Minister. My superior was installed as Minister of Justice. Man of principle, he did not appoint me a magistrate, which he could with a stroke of his pen, but instead he let me sweat it out and earn myself sufficient merit in courts to fight my lone way to the bench which I did. Working in that office was like being in the eye of the wind of changes sweeping East Africa. Most courts would not agree to long adjournments to suit our convenience. Trial of the above prosecution started before Resident Magistrate, Gulu. Since the QC could not have appeared for the 3 defendants while he was Minister of Justice the choice was between our office, and outside lawyers. A case fixed for 3 days went on for 3 weeks, with long adjournments. In a civil proceeding the onus of proof of the main defence is on the defendant under a plea of justification, though plaintiff produces evidence of bare facts to prove his case, or at least makes known to the trial court the course he proposes to follow (*24 Halbury's Laws of England* (2nd ed) para 192) and though truth alone may be a complete defence to a civil action, it is not in criminal law. Public good was easy to be established. The burden of proof was placed on defendants as though it was a civil matter. The three accused were convicted and fined. Appeal was advised mainly on the ground that there was no compliance with Criminal Procedure Code which imposed burden of proof on Prosecution. This was not done. "In cases of libel the writing and publication of the alleged libel must be proved" (*10 Halsbury's Laws of England* para 813 p 439). Appeal was in fact filed but whether it was prosecuted to hearing in High Court I do not know;

Autonomy to Independence – Time was running out for Interim Government headed by the late Chief Justice. Three parties had put up their candidates. General elections representing "one man one vote" were stringently supervised. Anything hanky-panky would not easily go unnoticed. DP did not do as well as anticipated. The President himself lost his seat as aura of credit of DP had faded. The barometer of public mood gave UPC preference. To DP it was a catastrophe. Election of

one DP candidate was challenged in Kabale, Kigezi, better known to tourists as Switzerland of Uganda, by Election Petition filed in the High Court Registry. The chief ground to set aside the election of Respondent No 1 was no secrecy was observed in Polling booths while the voters were putting voting papers into the voting box. Further reliefs sought were (a) Scrutiny (b) Inspection of Ballot papers (c) Recount.

In the meantime interlocutory application was heard in Kampala for Scrutiny and Recount before a Judge in Chambers. My senior (QC) assisted by me appeared for Resp 1, Attorney-General (QC) assisted by his junior represented Returning Officer, Resp 2 and an Indian lawyer who was almost specialising in Election Petitions acted for Petitioner. Counsel for both Respondents opposed the application. It was dismissed. No apparent mistakes of RO were alleged in the pleadings (see *14 Halsbury's Laws of England* paras 559-560). Two QCs on the same side of the fence was not a common occurrence. Trial was adjourned to Kabale, the capital of Kigezi, so that, if need arose polling stations, approximately 80 winding miles away, could be viewed. At the eleventh hour, my boss could not go to Kabale because he had a contested case in Mwanza, Tanzania. Strictly speaking it was a question of 1 day or 1½ in Mwanza at the most. He could be in Court on the afternoon of 2nd day or at worse definitely for the start of 3rd day in court. An architect had already prepared a plan of the polling booths showing the height of the rooms and the height and size of the temporary windows in the forms of holes in the walls through which trespassers and interlopers could allegedly see who was voting for whom. That was a distinct possibility, if the electors were not screened from observation while depositing ballot papers.

As a stop-gap, our desperation coupled with our client's exasperation steeled our will to positive action. A visit before the trial was crucial for surveillance of the area around polling stations. The countryside being mountainous, it was not unusual for darkness to descend on the village by 4.00 pm with overspreading of rain-clouds. In a thunder-and-lightning storm we drove about 80 miles, on the muddy wet roads and inspected the rooms and the walls. One of the allegations was that extra openings in the (mud-and-wattle) walls had let daylight in. The trip seemed to fortify our contention.

Trial commenced in a packed small room. Respondent No 1 gave his evidence and his witnesses testified. From their account they appeared ill at ease in voting because of Peeping Toms. They wanted to vote for UPC but in fact they put their voting papers through the slot in the box with DP symbol. (Each had a different symbol). Five fingers of right hand were marked with indelible ink to stop a voter voting twice. Their statements to the RO (2nd Resp) contained no complaints at all concerning the holes in the walls or that any holes had prevented them from exercising their vote as they wished. Fair appraisal was that their story was a hotchpotch of omissions, contradictions and downright lies. On 2nd day at about 2.00 pm I was told in court that Mwanza wanted me on phone. Who but my mentor enquired what the progress was, adding that he was flying straightaway. I surprised him "Case has collapsed. Our client wishes me to carry on. The only question is who is going to pay our costs."

On 3rd day hearing was completed. Petition was overloaded with charges which were not proved. RO is not immune from costs if he was negligent and authorities on pp 321 and 322, para 586 (*14 Halsbury's Laws of England*) were cited but unfortunately for us there were no irregularities on the part of RO or his deputy. No order was made against 2nd Resp. The Petitioner who lost his petition had no ostensible means to pay the costs ordered.

Back to the hotel for dinner we sat in a corner. While not gloating over my opponent's discomfiture I felt pleased with myself in a once-in-a-lifetime experience. The Judge, the Attorney-General and his junior (this silk has appeared before me without a junior and I doubt if this was mandatory) were seated at one table. The judge invited me to join their table. The Attorney-General enquired "Where did you get all those authorities to make RO liable for costs." I replied "I had to prove to our client that he had lost nothing by my senior's absence". The judge remarked "If I may say so you did well". I thanked him for the compliment.

As a sovereign State – As Acting Chief Magistrate (equivalent to Senior Resident Magistrate under the British) I was posted to Jinja, temporarily; out of my 6 months there one case is mentioned for 2 reasons.

(1) It was the only case where an Indian and a European were arraigned together as Receivers of stolen tyres. My ex-employer defended the Indian and an Indian Advocate defended the European. Senior State Attorney now in NZ prosecuted. Trial lasted 2 weeks with several witnesses for the State. In a reserved judgment both were convicted and sentenced. In appeal to High Court the same Counsel for the European raised a point of law of evidence for the first time in appeal successfully. He deserves to be congratulated. The acquittal created new crisis affecting judgments by 4 Magistrates Gr I (including myself). Instead of designating us, Resident Magistrates (old jurisdiction) and Magistrates Gr I (New jurisdiction) we were

gazetted as either the former or the latter. Fact remains that on a point taken by the Judge himself, arising from this appeal, our other judgments in appeal were quashed as being null and void for want of jurisdiction. It took one year for Validating Act to be passed.

(2) A civil servant of certain rank was expected to occupy allocated quarter. An exception was made for one Chief Magistrate who lived in his beautiful home. One residence overlooking Lake Victoria is introduced (a) as the largest in Uganda and (b) as testimony to British Colonial style of living.

Area – huge lounge-cum-dining (one whole roll of curtain cloth could not furnish it), 1 study, 2 large bedrooms each with a separate toilet, 3rd bedroom (with its own separate bathroom, dressing room, lavatory), 1 visitor's room with a Visitor's book bequeathed by the Colonial Masters, all with parquet flooring save the toilet area, 1 kitchen ½ of the lounge with a big board on the wall fitted with bells, 1 large open verandah with concrete floor, 1 closed balcony with red tiled flooring, with expanded metal wire netting on walls to keep mosquitoes and flies out, 3 garages, 5 servants' quarters, 1 disused tennis court at the rear, 2 acres for 2 open air garden parties and 2 flag posts in front.

History – Provincial commissioner lived in it. On abolition of his post it was resident Judge's home. When that position was transferred to Kampala, Judiciary retained it for Chief Magistrate. Just before and after the coup it was Presidential Lodge. Imagine it was my abode and in it I was alone. One weekend my wife with our daughters who lived in Kampala joined me. Another weekend I joined her in Kampala. I was told that the Queen when she inaugurated Owen Falls Dam in Jinja in April 1954, spent one afternoon in this mini palace and walls in toilet area had been lined specially with glazed pink tiles.

Irony of it was, I was paid only as Magistrate Gr I. Though it was a matter of pride to lodge in such luxury, I could hardly afford the expenditure. The reason for non payment – my promotion was not sanctioned by Judicial Service Commission. Bureaucratic octopus would not relax its stranglehold. While discussing with the same State Prosecuting Attorney a solution emerged.

Powers of Magistrate Gr I – A sentence not exceeding 5 years. Certain offences like rape, defilement of girls under 14 years and manslaughter were excluded from his jurisdiction.

Powers of Chief Magistrate – Any sentence authorised by law and offences other than treason, murder and others entailing capital penalty. Any sentence over 5 years by Magistrate Gr I would be illegal.

I addressed a letter to the Registrar that if I was not a properly appointed Acting Chief Magistrate (a) all sentences exceeding 5 years and (b) all convictions in crimes beyond the jurisdiction of Magistrate Gr I should be set aside, and offenders acquitted. Without any further ado, I was told on phone the same day that I would be paid Chief Magistrate's salary.

Now for the moral

Gulu – Law took its course. Justice was seen to be done. The right to live one's own life must transcend all other rights. Politics has its expediency but it does not absolve floundering politicians from the wrath of the innocent victims. They learnt their lesson, even though they had a fair prospect of winning their appeal in High Court at the risk of a Retrial.

Kabale demonstrated that a victorious MP cannot be easily deprived of the fruits of his labour if he was properly elected. It was a nail in the coffin of dirty politics, a triumph for law, democracy and for every individual who voted for him of his free will.

Bureaucracy – For the powers that be who are unconscionable and who want to explore a technicality, the gun loaded with legal ammunition held at their heads put them on their election. In a face-saving manoeuvre I was paid. For once the red tape had lost.

Now come tragic events

Respondent No 1 in Kabala Petition was hacked to death, before the coup by his political foes. The Barrister for the Petitioner was the very first Indian victim of the present Military Rulers' crimes as reported in the Report of International Commission of Jurists. R Ssebuggwawo Amooti appointed with me as Chief Magistrate and one of the 4 Uganda Delegates at the Commonwealth Magistrates' Conference in London in July 1970 was in March 1978 cold-bloodedly shot dead. I recalled some of the piercing words in the speech by Lord Hailsham, Lord High Chancellor to 52 delegates from 25 countries (including NZ) "This Conference is what you will make it, no more. But no less. You may be sure the emblem you inscribe on your banners is worth holding aloft. To do right". What became of the emblem the late S Amooti inscribed on his banner as President of the Industrial Court (Uganda)? See his Judgment reported at p 38, Vol 1 No 5 May 1975 of Commonwealth Judicial Journal. Failing to keep a low profile (see [1978] NZLJ 277 – last para in subtitle "Uganda") is not a capital error to be so summarily dispatched in the presence of his children who were in his car at the time of his death.

We delegates were presented to the Queen Mother at Blenheim Palace, Oxford. As mark of respect we visited the grave of late Sir Winston Churchill; psychiatric prison and open prison. Aims and objects of the CMA were thrashed out at the Closing Session. Section 2(b) thereof read "To safeguard the independence of the magistracy as an essential requirement of the judicial function and *a guarantee of human rights and freedom*" (my italics). What became of the guarantee? The popular President of the CMA must have taken up investigation of his murder with Uganda. I hope the killer is brought to trial.

In the spirit of that memorable address by the Lord Chancellor, alongside my dedicated legal brethren in the law office, who are equally sworn to do "right", I, as a small cog in the Wheels of Government machinery will try to hold aloft the banner of NZ Railways by putting my shoulder to the wheel to help oil and lubricate their steel wheels to keep them rolling ceaselessly to turn the wheels of industry of this small but great country.

NEGLIGENCE

AUDITORS AND THIRD PARTIES

By AN KHAN, *MA (Pesh and Keele), LLB, FIL, AFAIN, Dip Ed, Lecturer in Commercial Law, Department of Management, The University of Western Australia; and* AG DAVISON, *BA, MBA, CA, AASA, Senior Lecturer, Department of Accounting and Finance, The University of Western Australia*

Auditors have not been liable to third parties (under the privity of contract concept) for many years in common law countries, except perhaps the United States of America (USA) where the privity barrier has been considerably eroded. This article endeavours to explain the law and determine whether changes are possible.

Ultramares v Touche

The starting point is Cardozo CJ's judgment in *Ultramares Corp v Touche*, Niven (1931) NY 174 NE 441, where the foundation for auditors' tortious liability for negligence to third parties was laid down. In this judgment it was determined that an auditor owned a duty of care to persons whom he actually knew would rely on his statement in the specific class of transaction for which it was prepared. Therefore, although the liability was extended, Cardozo CJ did not, on policy considerations, wish to extend the liability with too wide limits, otherwise:

> ". . . a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."

US Security exchange Commission

To the Common law liability, the US SEC rule 10(b) 5 was added in 1934; thus giving added protection to the public. However, before the liberalisation of class-action the rule was seldom used. After 1966 the proverbial floodgates were opened; and the Courts started pushing the boundaries of liability further and further, until *Ernst & Ernst v Hochfelder* (1976) 425 US 185, in which the US Supreme Court decided that a private action cannot lie in the absence of scienter (defined as "the intent to deceive, manipulate, or defraud"). This trend has continued, whereby the USA Courts are now putting restrictions and fetters on the unruly horse of professional negligence, so much so that the Court of Appeal for the Tenth Circuit has said in *Koch Industries Inc v Vosko* [1972] CCH Fed Sec LR 93, 705, that *Ultramares* and *Hedley Byrne Inc v Heller* [1963] 2 All ER 575 were basically the same. In some other recent cases, the American Courts have continued "contracting" the liability eg *Sunderstand Corporation v Sun Chemical Corporation* (1977) 535 F 2d 1033, *Sanders v John Nuveen and Co* (1977) F 2d 790 (see Snow (1978) 53 Notre Dame Lawyer 636, Branson (1977) 52 Tulane Law Rev 50.).

Hedley Byrne v Heller & Partners

Denning LJ's dissenting judgment in *Candler v Crane, Christmas and Co* [1951] 2 KB 164 has become a classic in its own right and was accepted in *Hedley Byrne & Co v Heller & Partners*, supra. Denning LJ (as he then was) has said that accountants are

> "under a duty to use reasonable care in the preparation of their accounts and the making of their reports . . . . They owe a duty . . . to any third person to whom they themselves

show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them."

However, Denning LJ aware of Cardozo CJ's caution and warning against opening a Pandora's box, qualified the new extension of liability:

"I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts . . . . Accountants owe a duty of care . . . to all those whom they know will rely on their accounts in the transactions for which those accounts are prepared."

The House of Lords in *Hedley Byrne* accepted, and Lord Devlin paid respect to, this statement as showing the circumstances in which a duty to use care in making a statement exists. As regards the relationship of an auditor and an investor, the House preferred not to lay any rules because the categories of negligence are never closed. Lord Devlin continued:

"Cases may arise in the future in which a new and wider proposition . . . will be needed. Then speeches of . . . today as well as the judgment of Denning LJ . . . and the cases which exemplify it, will afford good guidance as to what ought to be said . . . ."

Lord Morris was more explicit in his judgment when he said:

". . . if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise . . . if, in a sphere in which person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, *or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise*" (emphasis added).

Post Hedley Byne Developments

Some writers have maintained that an auditor knows, or ought to know, that his audited report would be filed with the Registrar of Companies and would therefore be avaliable to the general public, investors and creditors. Moreover, these people are likely to look at and rely upon it. Obviously, if one were to take the argument a step further, the next question is – does not a relationship of proximity and reliance, as propounded in *Hedley Byne*, arise to make the auditor liable if his audit was conducted negligently? One writer has gone so far as to make the following statement:

"What purpose could be usefully served if the public are told: you may inspect the accounts, and other public documents, of X Company Ltd, but don't expect these documents to have been prepared with any degree of skill or care. If persons dealing with the company are deemed to have knowledge of the company's public documents then, surely, they are entitled (if not obliged) to rely on this knowlege in dealing with the company" (Baxt, 36 MLR 42).

The answer to the question posed in that statement is quite obviously – no purpose. However, just because a third party cannot sue an auditor for negligence one cannot then take the quantum step to state that third parties cannot expect these documents to have been prepared with any degree of skill or care.

Auditors are professionals, and as professionals they have a duty of skill and care. But so far, in law, that duty is only to their client and any third party who can prove scienter. If one is worried about the degree of skill and care put into the conduct of an audit, is it reasonable to suggest that the ability of the client and third parties with privity to sue the auditor for negligence is enough of a safeguard? It could be suggested that if these people did not sue, where they had reason to believe there was negligence on the part of the auditor, they were either derelicit in their duty or incompetent.

All the recent judicial and statutory developments have, if not endorsed the above viewpoint, at least coincided with it. That is, the Courts have decided that an auditor is not liable to the investing or lending public who deal with an audited company.

To do otherwise, it has been argued, would, if nothing else, make the law inoperative. For example, how would it be possible for the Courts to determine that a third party had relied on financial statements lodged in the companies office or sighted in a company's annual report. It would seem likely that the auditors would be exposed to claims, once negligence had been proven, from every third party involved with the company, regardless of whether or not they had relied on the audited financial statements before investing or lending. Surely, if liability is to be extended to the investing public, safeguards would have to be introduced so that the liability does not extend to an indeterminate class for an indeterminate time.

The recent British, Australian, New Zealand and Canadian judicial developments, outlined below, all restrict auditor liability to clients and

those third parties who can prove scienter. However, the Court of Appeal of New Zealand in *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 has tentatively broken new ground.

The Privy Council in *MLC v Evatt* [1971] 1 All ER 150, narrowed the principle of special relationship. The New Zealand Supreme Court in *Dimond Manufacturing Co Ltd v Hamilton* [1968] NZLR 705 said that when an accountant compiles the balance sheet and hands it to the company, he makes a representation to his *clients* of the reasonable correctness. Turner J added:

> "It was argued before us that an accountant who prepares a balance sheet of a company ought to contemplate the possibility that it will be acted upon by possible purchasers of shares, to whom he must therefore owe a direct duty of care . . . . I reject [this] proposition as a matter of law, and am prepared to hold that in the absence of circumstances bringing possible purchasers of shares into his reasonable contemplation, as persons who will read and rely upon the balance sheet, a public accountant preparing a balance sheet of a company is under no duty of care as to its correctness to such persons".

In a more recent case in New Zealand, Quilliam J went even further and said that it is extremely doubtful whether the requirement of the Companies Act that audited accounts have to be filed and made available to the public was intended or designed to enable the public to deal confidently in reliance on the accuracy of those accounts. He explained:

> "The legislation is . . . designed . . . to contain the activities of companies within some kind of defined boundaries [rather than] to provide a source of certified information for the information for those who, unknown to the particular company or its auditors, wish to embark on some business venture of their own . . . the requirements of [the Companies Act] would seem to be more appropriate for the detection and prevention of breaches of the law than to provide a vehicle for dealings by persons who could not be in contemplation when those requirements were fulfilled. If the [auditors] in the present case are to be held liable, that could only be upon an extension of the *Hedley Byrne* principle of a kind which seems to me to go do very much further than was ever considered likely when the principle was enunciated . . . ." *Scott v McFarlane* [1975] 1 NZLR 582.

New Zealand Court of Appeal

The majority of the Court of Appeal dismissed the appeal. But the dissenting judgment of Woodhouse J is worth looking at. His Honour was sceptical of the phrase of Cardozo CJ so often used ("accountants could be exposed to a liability in an indeterminate account for an indeterminate time to an indeterminate class") and said that it had been repeated in various judicial pronouncements as though it revealed a self-evident truth. He added that such language should not lead to uncritical acceptance of that sort of argument (see *Bowen v Paramount Builders* [1977] 1 NZLR 394). In his opinion the argument was one-sided, and in favour of those who are in business to give advice. The losses can be spread out by the insurance industry. He followed the *Mutual Life Insurance* case to come to the conclusion that *Hedley Byrne* did not lay down hard and fast rules, but developed principles. He relied on two recent cases: *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 and *Anns v Merton London Borought Council* [1977] 2 WLR 1024: to clarify that the existence of a duty of care does not depend upon precedent or upon finding some comparable factual situation where the Court has been prepared to recognise a responsibility owed by one person to another (see *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741).

Woodhouse J's dissenting judgment might become a milestone in the English-speaking countries in extending the auditor's liability for the investing public. Prior to this, no precedent exists whereby a Court found that the necessary "relationship" exists between a negligent accountant and the investing public. However, Woodhouse J decided, unlike two of his brethen, that the relationship is sufficient to give rise to a prima facie duty of care. He gave four reasons for his decision. Firstly, auditors are professional people who are in business of providing expert advice for reward:

> "Their work was undertaken voluntarily and their advice was then given in a considered and deliberate way by certifiying in effect that the accounts could safely be relied on. *It would be a fruitless exercise if they did not intend that the audited accounts could and would be relied upon*" (emphasis added).

Secondly, it must be within the reasonable contemplation of an auditor that reliance would be placed on his audit report.

> ". . . when auditors deliberately undertake to provide their formal report upon the accounts of a public company they must be taken to have accepted not merely a direct responsibility to the shareholders but a further duty to those persons whom they can reasonably foresee will need to use and rely upon them when dealing with the Company or its members in significant matters affecting the

Company assets and business."

Thirdly, an auditor accepts that there would be no opportunity

> "for any intermediate examination of the underlying authenticity of a company's accounts. Nor would it be practicable for numbers of persons to make independent examinations on an individual basis."

Finally, auditors undertake their duties knowing that their report would become a matter of public record eg because of s 133 of the Companies Act 1955.

Nevertheless, his Honour did not wish to open floodgates. He added:

> "In the present context of careless advice I think that some of the criteria that would seem to require evaluation are the significance of the information, the means by which it was formulated, the degree of deliberation with which it was released, its likely circulation and uses, and the extent to which it might be necessary for third persons to rely or depend on it."

Conclusions

The attest function has to be performed with a high degree of skill and care. This requirement is not only set out in case law (eg see the recent USA case: *Herzfeld v Laventhol, Krekstain, Howarth* (1976) 540 F 2d 27) but also in the postulates and standards which govern professional practice. A basic postulate of auditing is that – Professional status imposes commensurate obligations. (see RK Mautz and HA Sharaf, *The Philosophy of Auditing*, American Accounting Association, Monograph No 6 (1961) p 50). This postulate provides the auditing profession with a foundation on which to determine their responsibility to society and their client. Auditors are required to perform their audit efficiently and with due care. The American Institute of Certified Public Accountants has developed a set of standards which has influenced the development of auditing at least within the English-speaking world. (See *Statements on Auditing Standards* Nos 1-21, Auditing Standards Executive Committee of the American Institute of Certified Public Accountants, (New York 1978). One of these standards deals directly with the concept of due care. General standard number three states:

> "Due professional care is to be exercised in the performance of the examination and the preparation of the report. Similar types of standards have also been issued by the Accounting bodies in the UK, Canada and Australia. As a professional, an auditor would regard legal responsibility for due care as a minimum standard. Professional codes of conduct are attempts to raise these standards above the requirements of the law based on the principle that anyone who holds himself out to the public as someone who possesses certain skills has a duty to perform his tasks with a reasonable level of skill, care and independence. To claim otherwise would surely mean that the auditing profession would lose its utility to the business world. The profession's independence has to be above suspicion and beyond reproach. 'The auditor cannot afford to identify with management aspirations and goals either overtly or covertly' " (Davison and Khan, 'The Role and Legal Liability of an Auditor', *The Chartered Accountant in Australia,* February 1978 p 10).

Accountants are looked upon as playing a great role in providing extremely useful information to the public and acting as watchdogs on the affairs of companies. They are expected, and are proud, to have very specialised skill, knowledge and expertise. Therefore, when they audit accounts using their skills and knowing full well that their reports would be available for inspection and likely to be relied upon, should they be responsible for their frauds (which they are under the present law) *and* negligence to whosoever suffers economic loss as a result of acting upon their reports?

> "If courts do extend their sphere of liability, it should be regarded as a tribute to the important part they are playing in corporate affairs and as a burden they must accept as a part of the widespread reliance that is placed on them" (Carroll [1966] Ins CJ at 255).

However, the Courts in the UK, Australia, Canada and New Zealand (except the dissenting judgment of Woodhouse J), so far have not extended auditors' liability, and for the present

> "there is no decided case law indicating that accountants owe a duty of care to intending shareholders or trade creditors as third parties. But the law is disturbingly unsettled on this issue" (Khan and Lourens, "Accountants' Liability for Professional Negligence: some Recent Development", 43 (1) *Accountants' Digest* New York, pp 18–22).

The recently released Metcalf Report in the USA did advocate auditor liability to third parties for negligence. (Improving the Accountability of Publicly Owned Corporations and their Auditors – Report of the Sub-Committee on Reports, Accounting and Management of the Committee on Government Affairs United States Senate – as reported in *The Journal of Accountancy*, January 1978 pp 88-96). The report stated that "testimony before the sub-committee clearly demonstrated

that potential legal liability for negligence is the most effective mechanism for assuming that independent auditors perform their public responsibilities competently and diligently" (at p 95). Based on this evidence, the sub-committee believed the independent auditors of publicly owned companies should be liable for their negligence to private parties.

The professional bodies, on the other hand, although determined to maintain high standards of skill and care in performing their attest function, are equally adamant about any increase in liability to third parties. Although not specifically mentioned in the Cohen Report (A Commission was appointed by the American Institute of Certified Public Accountants to develop conclusions and recommendations regarding the appropriate responsibilities of independent auditors. A Summary of the Conclusions and Recommendations of the Commission was reported in *The Journal of Accountancy*, April 1978, pp 92-102), liability to third parties was likely on the commission's mind when their report states that among the effects of the present litigious environment is a reluctance by auditors to accept expanded responsibilities. The report recommends some form of statutory limitation of monetary damage. This is considered essential to the continued healthy existence of the public accounting profession in the private sector (at p 102).

Similarly, the Adams Report (the Report of the Special Committee to Examine the Role of the Auditor, CICA, as reported in CA magazine April 1978 pp 35-69) recently released in Canada, likely had liability for negligence on its mind when it recommended that it be mandatory for auditors to carry a certain minimum amount of professional indemnity insurance and where this became impossible at a reasonable cost the profession should seek either a statutory limit for damages in an action against an auditor for negligence or statutory provision to allow auditors to practise as a limited liability company (at p 40). Safe harbour rules were also advocated, as they were by the Cohen Commission, where corporations or their auditors are required to assume new or significantly extended responsibilities. Under this concept, the plaintiff in an action against auditors would have to prove that the auditor had not conducted his audit in accordance with the accepted standards and procedures as laid down by the auditing professison.

Therefore, although auditors implicity recognise that third parties might be relying on their opinion as to the truth and fairness of managment's representation, as set out in the company's annual financial statements, they are not willing to concede increased liability to third parties for negligence. Two major objections seem to be the opening of Pandora's box for huge damages, and the difficulty of proving that an investor did not rely on the audited accounts.

It is submitted that, if an auditor's liability to third parties is to be extended, it would appear *that before this is done* safeguards would have to be introduced to prevent the situation of liability arising whereby every investor who lost money is not able to blame the auditor. As Woodhouse J pointed out the relationship would have to be "special" and not general, and it is essential that "the maker of the statement was or should have been aware that his advice was required for use in a specific type of contemplated transaction".

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CORRESPONDENCE

Dear Sir,

Punishing the words of section 5 (i)

Since my letter under the above caption appeared at [1979] NZLJ 104 there has been a new decision on this topic which may be of interest.

The case is *Stowers v Auckland City Council* and the judgment of McMullin J was delivered on 2 May 1979 in the Auckland Supreme Court.

This action arose out of an alleged assault by a traffic officer on the plaintiff who had been taken to the defendant council's premises for the purpose of being tested for excess blood alcohol. In his statement of claim the plaintiff alleged that as a result of the assault he suffered various physical injuries together with emotional shock, anguish and humiliation as a result of being battered kicked and punched and threatened by the traffic officer concerned. The plaintiff claimed $15000 for punitive damages and $325 for special damages; there was no claim for general damages.

The defendant moved to strike out the statement of claim on the grounds that the assault which gave rise to the claim was a "personal injury by accident" within the meaning of the Accident Compensation Act 1972 and that section 5 of that Act operates as a bar to such a claim.

In the course of his decision McMullin J discussed the previous conflicting decisions in *Donselaar v Donselaar* (Wellington A 454/76: 28 July 1977) *Koolman v Attorney-General* (Wellington A 519/76: 3 October 1977) *Howse v Attorney-General* (Wellington A 132/75): 22 December 1977) and *Betteridge v McKenzie and Others* (Wellington A 103/77: 7 December 1978) His Honour also referred to a number of articles in the topic including those by Mr Collins at [1978] NZLJ 158 and Mr McInnes at [1979] NZLJ 8.

His Honour treated the matter as being primarily of statutory interpretation, the question being whether s 5 Accident Compensation Act 1972, properly construed, abolishes the right to claim exemplary damages which owe their genesis to some tortious act resulting in personal injury by accident. He began by considering the nature of compensatory and exemplary damages and the purpose underlying the award of each. Having explored that distinction he concluded.

"I am of the opinion that there is much to be said for the retention in our legal system of the power to make awards for 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 affective bar against the exercise if powers in a high handed way".

Despite this view, the learned Judge was faced with the difficulty that the words of s 5 (i) go much further than barring compensatory damages only. Considering those plain words, especially in the light of the amendments made in 1973, he held that "damages arising directly or indirectly out of the injury" are directed to the cause from which any right to claim them flows. He said:

"The point at issue is whether the action now sought to be brought by the plaintiff is to be classed as a proceeding for damages arising directly or indirectly out of the injury. In my view, it cannot be argued that it is other than a proceeding for damages. All that can be argued is that it does not arise directly or indirectly out of the injury. The words 'arising out of' are words of common legal use. They mean no more than that damages should originate from the persons injury by accident as that term is defined by s 2 (i) of the Act. . . . The actions of the defendant sought to be made the subject of proceedings by plaintiff have resulted in personal injury to him and, while the exemplary damages are sought to punish defendant rather than to compensate plaintiff, they cannot be awarded in vacuo. They must have a victim. If therefore a plaintiff's claim for exemplary damages arises because he has suffered personal injury by accident at the hands of defendant then the proceedings for exemplary damages must arise directly or indirectly from the injury."

With the greatest of respect to the learned Judge, in the passage just cited, which is central to his decision to strike out the statement of claim, he fell into the very error attention to which I was endeavouring to draw in my previous letter. The exemplary damages which Mr Stowers sought became claimable because he had been assaulted, not because he had been injured.

To some measure McMullin J appears to have been aware of this perhaps subtle but important distinction because he later comments:

"Whether an assault results in a personal injury is a question of fact and it is difficult to conceive of a battery or assault in respect of which it would be worthwhile to issue proceedings which is not accompanied by a personal injury be it physical or mental. But, in my view, if there is no personal injury within the definition of s 2 (i) pro-

ceedings for damages will still lie. It seems somewhat illogical that the Accident Compensation Act will permit of proceedings for damages where there has been no physical injury done in the case of an assault or battery but not where the assault or battery results in physical injury. If an act with lesser consequences gives rise to damages it seems odd that an act with greater consequences should not do so".

His Honour concludes:

"In the present case, it is clear that what plaintiff alleges in the statement of claim is that he suffered a personal injury by accident. Indeed he alleges that as a result of the assault he suffered "physical injuries" including physical injuries of five specified kinds. He also alleges that as a result of the assault he suffered emotional shock, anguish, humiliation, pain and suffering as a result of being battered, kicked, punched and generally abused and threatened. What plaintiff alleges is clearly a personal injury by accident and his claim clearly arises directly or indirectly out of the injury. The claim for exemplary damages is therefore in my view barred by s 5 (i) of the Act".

The writer is aware of at least two other cases in which prospective plaintiffs are contemplating actions for exemplary damages as a result of alleged batteries by persons in authority. So long as there continues to be confusion between the legal consequences of battery itself and of the injuries it caused such prospective plaintiffs are likely to hold their hand. In the light of McMullin J's comments that the action for exemplary damages is the best protection against official high handedness such reluctance must be unfortunate. Perhaps the matter will only become clear when some plaintiff carefully pleads an action making reference only to the battery and not to the injuries which followed it.

Yours faithfully,

K I Bullock
Auckland

Sir,

Preparing for Law

There is much in your editorial of 6 March "Preparing for Law" ([1979] NZLJ 65) with which I disagree. proper presentation of that disagreement would take many pages. It would also require from you a more precisely stated and factually founded presentation of your own case.

So, what are you really saying in your final paragraph about the teaching of law to those who do not intend to practise law in private law firms? What does this sentence mean – "At a time when there is some emphasis on moving law into the community it could be suggested that academically it should also promote other disciplines"? What are we to make of the law taught at University to commerce and administration students, to social workers, and to graduates in public policy courses, or in the polytechnics or, in some degree, in schools?

So, too, what do you mean when you say that "while topics have come and gone, the structure of the law degree has remained without change for as long as most of us can remember"? How can you make such a clear distinction between the topics and the structure? And, anyway, what of the very substantial changes in 1967, of the Auckland changes in 1973, and of the smaller changes in honours and masters programmes?

My main purpose is, however, not to pursue those or several other issues which your editorial raises, but to take up, first, your assumptions about the employment market for law graduates and, secondly, your comments about the appropriateness of the present degree course for employment outside private practice.

You say that "so many are interested in studying law and of those so few compared with yesteryear will finally practise law on their own account". What are your facts? I am not aware of comprehensive figures. But there are some suggestive pieces of material. They flatly deny your statement. Until recently the Annual Reports of the New Zealand Law Society provided a most interesting graph. The graph measured the number of admissions against the increase in practising certificates. In the 12 year period 1967 to 1978, about 3,100 have been admitted. (My figures are not precise since I have for the most part taken them from the graph in the 1976 report.) That figure includes many who before 1971 were admitted twice – ie as a solicitor and then as a barrister. When that factor is taken into account the number is still at least 2,600, ie rather more than 200 per year. The numbers of practising certificates have increased in the same period by only about 1,150, ie about 100 per year. Not the whole of that gap of 1,450-1,950 (of 100 or more each year) is made up of newly admitted people not taking out practising certificates. Some of the gap is to be accounted for by those leaving the profession. We can, however, assume for the present that that element is reasonably small and proportionately constant over the period, probably growing at much the same rate as the admissions and increases in practising certificates. The first conclusion is therefore that a very large number of law graduates (for almost all graduates get admitted to the profession) are not going directly into private practice. The figure might be as high as 50 percent. The next question is, of course, whether this is a recent trend. Is it only recently that the newly admitted have not been taking out practising certificates? The answer to that question is no. About 1,020 were admitted in the five year period 1967 to 1971. Practising certificates increased by only about 280. About 2,080 were admitted in the seven year period 1972 to 1978. Practising certificates increased by about 870. That is, *the annual increase in practising certificates in the recent period (140) is about twice that in the earlier period (60).* I must add that the figure for 1978-91 is a long way down on the recent average. But it is dangerous to project any trend from one year and it is still higher than the average for the earlier years.

Because we do not know how many cases of double admission there are in the earlier period, the above figures do not allow an accurate comparison of the *proportion* of the newly admitted taking out practising certificates. The recent rate may be higher; if lower the difference is small.

To repeat:

(1) the absolute numbers of practising certificates have increased markedly over the past 12 years; and

(2) the proportion of law graduates taking out

practising certificates appears to have remained about the same in that period.

I would not, however, want to leave the impression that I think that the employment situation is buoyant. It is not. Some law graduates are finding it difficult to get employment. But so are other graduates. The figures in Wellington show that the difficulties, statistically, are about the same for law graduates as for others. Nationwide, however, the position is not as favourable for law graduates.

I now turn to consider employment other than in private practice. Many potential employers other than private law firms have long been interested in our graduates. Probably a higher percentage of Victoria graduates go into government positions. This interest appears to be growing. The range of occupation classifications showing up in the figures is increasing.

This faculty has long recognised the diversity of employment possibilities. So the handbook prepared by this faculty for those thinking of entering it included the following passage as long ago as 1951:

> "There are several careers open to law graduates. The graduate can go into law practice; he can enter the Public Service and take up either legal, diplomatic or administrative work there; he may go into business. And, of course, many of our politicians are law graduates."

Our graduates too recognise this diversity. For many it is *not*, contrary to what you say, a question of "*second* choice" employment. It is not, moreover, a choice made only by those at the weaker end of the class. So of those in the top ten of the 1978 graduating class, six took employment outside private law firms, in all cases a matter of first choice. Among the law graduates who in the 1940s, 1950s and 1960s made your alleged "second choice" are the Chief Ombudsman, three Ambassadors and the Deputy Secretary for Justice.

In the light of the foregoing you make a serious allegation when you say that "much of [their legal education], probably as much as two years of it, dealing as it does with detailed topics of particular relevance to private practice, will be singularly useless" to graduates going into business or government or some other field. Within your "two years", you may be including the post-degree professional year. (Literally, you are not saying that, but your use of "singularly" makes me generally wary of your syntax.) I challenge the propriety of that. That is a *post* degree course designed for those who want to be admitted to practice. Many going into business and government take that course either because it *is* required for their employment and *is* relevant or because they wish to keep their options open. Within the four years of the degree, one is an "intermediate" year consisting of introductory law and non-law subjects *(a)*. Which two of the following three years are "useless"? The second in which the basic common law and public law subjects are introduced? The third in which the property courses are taught and the student chooses among a number of broader courses which are designed to move him or her *away* from narrow professional concerns? Or the fourth in which again the student takes two optional courses and takes two courses required for professional admission? It is possible to argue that the compulsory professional core is too large and that there should be a wider area of choice, especially for those not going into private practice. But a graduate intending to emphasise business will have taken Contract in the second year and Commercial Law, Company Law, and two of Administrative Law, Industrial Law and Planning Law in the third and fourth years. The potential government lawyer will have taken Constitutional in the second year, optional subjects such as Criminal Justice System and International Law in the third year and two of the public law subjects mentioned at the end of the preceding sentence in the fourth year. If the graduate had been in the honours group, the course may have included, for the business lawyer, corporate finance, maritime law, consumer protection, and environmental law and, for the government lawyer, constitutional problems, legislative drafting, access to official information and the legal position of the Crown. Special interests can also be pursued, within limits, in the masters programme.

As I say, the compulsory core may be too large; perhaps the choice should be wider. It is at Auckland for example. But there is already some choice and some room for specialisation. More positively we see the degree course as a whole as one which develops qualities and skills which are valuable far beyond the world of private practice. The handbook for intending law students in a passage which draws heavily on material published by the Osgoode Hall Law School and the College of Law of Iowa University lists eight qualities which a law course should develop:

Understanding the role of law in society
Knowledge of institutional environment
Analytical skills
Research skills
Communicative skills
Knowledge of the law and its practical implications
Professional knowledge and skills
Public responsibility

We attempt to engender those qualities in our graduates.

A final point concerns your suggestion that demand be matched to supply at an earlier time than at graduation. One anwer is that we cannot predict the demand four or five years hence, especially given the very wide range of employment possibilities. Another is to doubt whether we even have a clear idea of the *present* demand.

As I indicate at the outset, the matters you raise cannot be adequately dealt with in short compass. But facts are available. It is important that the public debate and individual choices of career take account of them.

Yours sincerely,

K J Keith
Dean of the Faculty of Law
Victoria University of Wellington

(a) The remainder of this paragraph relates to the Victoria degree. The others are different, but not significantly.

Three cheers for the Lord Chancellor for reminding us that there are three "Hips" to each "Hurrah" – *The Times.*