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INTER ALIA

National development and the constitution

"Constitutional rights is a hackneyed, pompous and fatuous catch-cry of those who wish to portray the Government as repressive and totalitarian" so the Minister of Tourism and Regional Development (Mr Cooper) is reported as saying.

He was, of course, speaking of those opposing the National Development Bill. It is disquieting that a Minister of the Crown should so lightly brush aside the rules and conventions that lie at the heart of our state.

Whether he likes it or not the National Development Bill does raise constitutional issues. It affects the power of the Courts to review planning decisions. It gives Cabinet power to override Acts of Parliament. It transfers powers to the Executive that many feel should remain with Parliament. It proposes that the checks and balances between legislature, Judiciary and Executive be swept aside and unchallengeable power to make and implement land use and development decisions that will fundamentally and permanently affect New Zealand's future be vested in the Government — or more particularly, in the ministerial trinity that may make an Order-in-Council.

The careful balancing of conflicting interests provided for in 28 Acts of Parliament, many of which are the product of years of thought and experience will stand for nought. The protection contained in them will no longer be able to be relied on.

Have we really reached a pass where centuries of constitutional tradition are to be lightly set aside as "a hackneyed pompous and fatuous catch-cry" that New Zealand may become a building site for select industrialists? If that is to be the cost of development then it is too much. And if the Government's true aim is but to streamline planning procedures then it is unnecessary.

Mr Cooper also made reference to those opposed to the Bill. He listed the Labour Party, some sections of the press, town planning lawyers and consultants, the Friends of the Earth, the Values Party and the Federation of Labour. He could have listed local authorities, water boards, the New Zealand Law Society and a number of distinguished and respected citizens among those who, while sympathetic to streamlining proposals, oppose this Bill as going too far. However, for some reason opposing establishment organisations were omitted. Another example of the myopic side effects of this miracle Bill? All in all, it would have been easier to have listed the support for the Bill — by all accounts it would have taken but one line.

This Bill is notable as attracting the least support and the most substantial criticism (in terms of content and source) of any legislation passed in recent years. If, despite that, it passes into law in anything like its present form then what chance have those making submissions in respect of national development projects?

Tony Black

FAMILY LAW

MATRIMONIAL PROPERTY — WHEN IS IT "ACQUIRED"?

In an earlier issue ([1979] NZLJ 410) it was suggested that the Court of Appeal decision in Reid v Reid *[1979] 1 NZLR 572 invited a reappraisal of the Matrimonial Property Act 1979. In this letter one of the parties to the litigation Mr A F Reid sets out his suggestions. They are thoughtful, balanced and justify close and careful study.*

Dear Sir,

I ask if you would permit me space in your Journal to express a layman's view of the Matrimonial Property Act 1976.

I am first to admit that I have no qualifications whatsoever — unless you count some 22 Court fixtures as a party to the recent Court of Appeal case *Reid v Reid* [1979] 1 NZLR 572.

I know there have been published several write-ups on the case facts. On those matters I wish to make no comment except to say that there is much of real interest in the case that has not come to light simply because all has been overshadowed by the major issue and the major decision — the decision that "all property acquired after the marriage is matrimonial property". I would like to present, as a basis for discussion, my interpretation of the Act.

I start with the *Oxford English Dictionary* (1961 Edition) Vol 1 Page 85:

> "'Acquire'
> From Latin and Old French
> — to get in addition —"

There are three basic meanings given but all centre on the above.

(1) To gain, obtain, or get as one's own, to gain the ownership of (by one's own exertions or qualities).
(2) To receive, or get as one's own (without reference to manner,) to come into possession of.
(3) To come to attain.

Number (1) is quite clear.

Number (2) is the interesting one and the dictionary gives an example of the use of the word in this sense:

> "1862 Ruskin —
> If in the exchange, one man is able to give what cost him little labour for what has cost the other much, he acquires a certain quantity of the produce of the other's labour. And precisely what he acquires the other loses."

If I had to put this in modern language I would simply say that in an exchange of goods the only thing that is acquired is the profit *or loss.*

Having gained an understanding of "acquired" I would then try to understand what "property" means.

The Act itself interprets this in s 2. It includes "real and personal property . . . and any debt; and asset has a like meaning". This is strange for a debt is usually looked on as a liability.

Is the Act silly? I think not.

If I buy a car and incur a debt of equal value the Act tells me I have acquired two assets. I must surely have the car as a positive asset and the debt is a negative asset. If I add them together I get the obvious (but interesting) answer — zero asset. The Act also tells me that property and asset have a like meaning so if I have zero asset I also must have zero property.

Now we must surely ask what property has been acquired in terms of the Act? The Act describes itself as "to provide for a just division of matrimonial property". This does not mean every thing should be cut down the middle with the best chain saw, and quite clearly the Act recognises this by giving the Court power to vest property in either husband or wife (s 33) or to sell it and divide the proceeds. (It is interesting that the value of the property is at the time of the Court hearing but it does not state at which Court hearing; the Magistrate's Court, the Supreme Court or the Court of Appeal. This is a slip in the Act and should certainly be corrected. Who wants to value property twice (as the Reids do!) — let alone three times).

However, the point I want to make is that it is not the property that is really being divided under the Act but rather the value of the property. The "property" is the all embracing term which covers everything and while, in the example I have given, it is true to say that a car has been acquired and a debt has also been acquired *no property has been acquired.*

The argument can now go to the next vital stage. If a man owns $10,000 as his separate

property and he buys a car with it he disposes of property equal to that which he acquires. While he acquires a car he acquires no property in the terms of the Act.

Is there not more wisdom in the English dictionary than at first there may appear? Mr Ruskin (God bless him) may have us all learn yet that in an exchange of goods the only value that is acquired is either the gain or loss on the deal.

Does the Act recognise that in an exchange of property it is only the gain that is the acquired property? I think it does. Section 9 (2) is a good example. Separate property includes "all property acquired out of separate property and any proceeds from the disposition of separate property". Why otherwise state the same thing twice? What the Act is saying here is simply this: "All property gained in addition out of separate property is separate property and any proceeds from the disposition of separate property is separate property". Surely by this example we must accept that when the law was drafted there was recognition of the difference between acquiring property and receiving the proceeds of the disposition of property.

Is "proceeds of any disposition" used elsewhere? Yes it is — in s 10 (1). If it is correct to conclude from the Court of Appeal judgment that property acquired by gift remains separate property only so long as it does not change its form then the words "or the proceeds of any disposition of it" are at best superfluous and at worst, misleading.

Section 9 (6) also uses the words "any proceeds of any disposition of" and here again if obtaining the proceeds of the disposition of property is "acquiring" property then this subsection is also unnecessary. The same could be said of ss 8 (f), 9 (2), (3), (4) and (5)!

And if you really want an absurdity consider the case of a husband who has been given a car by a grateful friend. It is his separate property (s 10). He is thrilled (who woundn't be) but he finds the paint work badly scratched. He quietly returns it to the agents and has it changed for one without a scratch. Has he really, as would seem to follow from the Court of Appeal judgment converted separate property to matrimonial property?

May I suggest we go back to the *Oxford Dictionary* and put reason into the Act. Wherever we find the word "acquired" let us change it for "gained", "gained in addition" or "got in addition" — as is the definition in the dictionary.

Let us start with s 8. Matrimonial Property is defined as:

(a) The matrimonial home whenever gained — seems OK (but I comment on this later).

(b) The family chattels whenever gained — seems Ok

(c) All property owned jointly or in common in equal shares by the husband and wife.

We must stop here for a moment. "Expressio unius est exclusio alterius". All property owned in common in unequal shares is not matrimonial property. Let us look at s 9 (1). It must be separate property.

(d) Property acquired in contemplation of marriage;

does not seem any problem here if "gained" is swapped for "acquired". But the subsection itself is interesting. Could it not be simply to stop a fight over wedding presents? If father wanted to give his about-to-be wed daughter a sports car for her own use why not? He could well deliver it the day before the wedding! Why should it not be her separate property? — it was not intended for husband's use as well. But mother gave the bridegroom a set of dining room chairs. Fair enough, matrimonial property "for the common use and benefit of husband and wife" and if mother gave a beach holiday home — same thing; matrimonial property.

However consider the case where the bridegroom is, this time, a widower of some means — it is his second marriage. He buys a beach holiday home before his marriage day using his separate property. It is for the common use and benefit of both husband and wife and is in addition to the matrimonial home. The value of the beach house and the money paid are of equal value so no "property" has been acquired by the deal — *it surely remains his separate property.*

Now are we seeing some common sense? Let's rewrite s 8 (e) by replacing "acquired" with the dictionary meaning and re-punctuating it:

> "Subject to subsections (3) to (6) of section 9 and to section 10 of this Act, all property *gained* by either the husband or the wife after the marriage, including property *gained in addition* (for the common use and benefit of both the husband and wife) out of property owned by either the husband or the wife or both of them before the marriage, or (*gained in addition*) out of the proceeds of any disposition of any property so owned".

First and foremost this subsection covers wages, salaries, bonuses etc ie everything that is

gained by either the husband or wife's own exertions. I do not think this subsection is meant to cover the winning of the "Double Banger" lottery but I must concede that it does if there is to be no differentiation between the two meanings of "acquired"; (in which case s 8 (f) is quite unnecessary). There must be a reason for s 8 (f) so let's go back to the dictionary. The first definition says this. "To gain, obtain, or get as one's own, to gain the ownership of. (*By one's own exertions* or *qualities*)". Let us assume that it is this definition that is intended for s 8 (e) and the gaining of property is here intended to be that which is gained by the exertions of the spouses.

This covers the case of a farm owner who marries a land-girl who works the land with him. The tractor they buy for their common use and benefit with money gained from the use of the land becomes matrimonial property but the farm remains separate property. Even if they sell the farm and buy a dairy instead, the gains from the joint running of the dairy are matrimonial property — but there is nothing to say the dairy itself is matrimonial property — that remains separate property.

Now let us suppose the farmer works his own farm himself. The tractor he buys is not for their "common use" so it remains part of the separate property of the farm, for a capital expense is not derived from income. But of course all that which is gained as the farmer's income is matrimonial property. Income must be taken in its normal everyday sense.

Have we now still a conflict if we turn to s 9 (2)? This now makes perfect sense for it is a very clear statement of the fact that separate property remains separate property and even the property gained out of separate property is separate property (unless it is gained by the exertions of the spouses as in s 8 (e).) Next we must look at s 8 (f). It does two things. Firstly it refers to the gains that are made from all property described in s 8 (a) to (e) (to simplify thinking I am classing "increase in value" and "income" as gains). Then it is saying that subss (a), (b), (c) and (d) property, (which is matrimonial property) will stay as matrimonial property even if sold. It does this by stating that the proceeds of any disposition of it will be matrimonial property. So far it makes good sense. There is only subs (c) left — but now that we know that "acquired" means "to gain" and that the whole of subs (e) is already referring to gains only, isn't it clear that the reference to "gains" used in subs (f) refers to the proceeds of any disposition of *the gains* in subs (e). What must be kept clearly in mind is that the last statement in subs (e) "or out of the proceeds of any disposition of any property so owned" is only to ensure that the gains from such proceeds are also matrimonial property, *it does not say the proceeds of any disposition etc are matrimonial property.* Does subs (f) of s 8 not now become a very sensible subsection?

Need I go on much further? What a just and fair act it is becoming. Everything is starting to fall neatly into place and all the subsections of ss 8, 9 and 10 have their place. There is no conflict between any. Subsections (g), (h), (i) and (j) of s 8 all seem to fit without conflict and to me make good sense. I cannot speak for subs (k) for I have had no experience whatsoever with other Acts.

Sections 9 and 10 are clear with only minor grey areas. Section 9 (3) is a grey area where it refers to gains "attributable wholly or in part to actions of the other spouse". The "in part" is, of course, the problem but surely the Courts would use the intent of the overall result of ss 8 and 9 to bring an effect that would not be out of place with the results that should come from a little common sense. If not there should be an amendment to describe the "in part". Perhaps "substantial" would be appropriate.

If one looks deeper into the Act there is now much which supports this overall view. For example: s 2 (c) "Family chattels". Note that it does not include chattels used for business. One has to agree that this could be in order to allow this sort of property to be divided in other than equal shares — but I think not. I think it is there to simply stop an argument that could otherwise be made in support of a claim to a share in business property which would, in so many cases, now be separate property.

At this stage I think it is worth looking at s 21. There are nearly two and a half pages of ways in which a couple can settle their own affairs. Clearly it is an Act for the future and a wonderful thing for all would-be married couples. (Quite frankly an agreement should be a necessity along with a marriage licence). There is however something strange namely, subsection 13. Why husband *or* wife and not husband *and* wife. Could I with my son have a joint bank account? I believe I could, as I could with my wife. *We* could also have a joint account with "any other person". To me this is a most important part of the Act for as I see it, even though husband and wife make an agreement in terms of s 21 my capacity is not in any way affected to make other agreements with other people; (and correct me if I am wrong) in property held jointly each party has an equal right

of ownership of the total. How then could the Court divide property which a husband held jointly with a son — or for that matter anyone else? Now this subsection is also recognising property held in common and does not stop the parties from doing that even if there is no agreement under s 21. Surely there is a connection between this and s 8 (c) where property held in common in unequal shares is not matrimonial property. If the parties have entered into an arrangement to hold property in unequal shares in common they have already made an agreement between themselves as to the division of that property and the Act is telling me that neither the Courts nor the Act will alter that agreement.

Now let us look at s 55 — the "Transitional provision". The Court is to have regard to *any* agreement entered into before the commencement of the Act by the parties to the marriage and s 57 (5) clearly says that *any* agreements entered into before the commencement of the Act shall stand as if the Act had not been passed. The Act is recognising such agreements as the Memorandum of Association of a Company where husband and wife have agreed to their shareholding.

The Act will recognise *all* and *any* agreements and s 57 (5) is not referring only to maintenance agreements as so many seem to think. In effect the Act is recognising all those agreements of the older generation of married couples who made their own agreements; in their time, in their way, and in accordance with the laws of their generation.

Where now is this Act unjust? I cannot find it so. What the Act is really saying is simply this:

> A woman who makes a warm and welcoming home for her husband and children to come home to, puts as much into a marriage as he who works all day for the monetary reward that makes that home a viable proposition.
>
> Share those things you've always used and shared as a family. Share those extra goods you've both worked at obtaining together and keep separately those extra goods that were either your own in the first place or that you have gained by your own exertions with your own separate property.

Could anyone show me a fairer Act?

There remain a few grey areas and one I have already pointed out. There are two others which concern me. Section 14 deals with Extraordinary circumstances. In the decisions the Courts have made where this question has been raised, there seems to be a reluctance to accept anything at all as being extraordinary. One has to admit that this has been viewed in the belief that the Act reflects a completely new social attitude to the division of property and as the results to date are extraordinary in themselves it has to be something most extraordinary before any real use of this section is made. With an interpretation of the Act such as I have suggested this section could have much more use. I still, however, think that it should read "abnormal circumstances" as this would give it the flexibility that I am sure was intended. The principle of the Act seems to me to be so fair when applied to the normal situations that exist in marriages (with regard to the build up of assets) that the Courts should have more jurisdiction where the position is otherwise.

My other concern is s 16 where one spouse only provides the home. There has already been one case where a man married a second time. He struggled to try and keep this marriage going and it lasted for a period over that necessary to qualify for the marriage of short duration provision (s 13). He had his home divided for a second time! I wonder if he should have. Could there not have been a very good case for "abnormal circumstances". There is, I think, a very searching question revolving around s 8 (a). Was a matrimonial home ever "acquired"? First of all the matrimonial home was that of his first marriage. Upon the breakup of that the home became the sole property of the husband. No longer could it be called the matrimonial home. Now he later married again but in this case he did not "acquire" a matrimonial home for to do that he had to "get in addition" a home — which, of course, he did not do. I would want to ask: just when was the matrimonial home acquired? I believe there would be great difficulty in setting a date and the not so obvious answer may just be the correct one — it was never acquired! I am not pretending that this is the intent of the Act but I foresee some injustices if the man happened to marry a widow who had a home of her own but sold it just before the date of marriage. It seems to me that the Court loses its jurisdiction (s 16) to make any adjustments to compensate him and the widow keeps her separate property and also collects half his home if the second marriage fails! I call that a very grey area. Should s 16 not recognise that either spouse may hold separate property at the time of marriage and not utilise it for the marriage partnership while the other commits all?

I have given my understanding of the Act. The Act, as I understand it is fair and just. But that does not seem to be the way it is working out. So where do we go from here?

ENVIRONMENT

ENVIRONMENTAL IMPACT REPORTING IN NEW ZEALAND — PART II

By Stephen J Mills. *This is the second of three articles. Part I appeared at p472.*

(7) The Environmental Impact Report:
Subject to the gloss placed on the 1973 Procedures by the May 1978 Cabinet directive *(cb)*, if an assessment reveals the likelihood of a significant impact on the environment an impact report will follow *(cc)*. The impact report is a written statement describing the ways of meeting a certain objective or objectives and the environmental consequences of so doing *(cd)*. In general the report is prepared by the proponent of the project. Similar comments apply here to those which were made previously regarding the definition of "the decision-maker" *(ce)*. The scope of the report clearly depends on the definition of the objective *(cf)*. In the Commission's audit on the Wellington Airport Runway Extension *(eg)* the Commission criticised the report's treatment of the best way to extend the airport runway. The Commission saw this as an aspect of a broader question — how to move people from Wellington to Australia with greatest efficiency *(ch)*. Whether the Commission will take such a broad view in a given case seems entirely unpredictable. In its audit on the Featherston County Council Solid Waste Disposal Site *(ci)*, for instance, the Commission accepted that the objective was simply to find a suitable land fill site *(cj)*. How the question of objectives is defined essentially determines whether the impact reporting process is a planning system or merely a design technique.

An exploration of alternatives is central to the impact report *(ck)*. A multi-disciplinary approach is required. The statement is not to be a justification for the proposal *(cl)*.

Paragraph 15 of the Procedures states that when a decision is made to prepare an impact report, the department or board concerned is "required to give notice of this to the Commission" and the body concerned is "required to send the Commission a short written description of the proposal, the initial assessment of the environmental impact and a likely due date of completion for the impact report". When the Commission receives this a public notification may be issued *(cm)*. Generally this is done through the public notices columns of major newspapers *(cn)*. As previously explained, where there is a disagreement between the promoter and the Commission on whether an impact report should be prepared, the Minister for the Environment may "direct the preparation" *(co)*.

Again it must be borne in mind that the Procedures have no legally enforceable status. The use of terms such as "required" and "direct" must be understood in the context of the Procedures themselves rather than in the sense in which a lawyer would generally understand such terms — as mandatory provisions backed up by legally enforceable sanctions. While there are sanctions inducing compliance with the Procedures they are not sanctions flowing from the application of the legal system. The ultimate sanction is the power of the body charged with responsibility for determining project approval to withhold consent where there has been inadequate compliance

(cb) Discussed supra at pp 9-12.
(cc) Procedures, para 12.
(cd) Id, para 7.
(ce) Supra, para 5.
(cf) See, "Alternatives under NEPA: the function of objectives in an environmental impact statement", 11 Harv J of Legisl 595, 1974.
(cg) 21 May 1976.
(ch) Id, 2.
(ci) 24 May 1976.
(cj) Id, 1-2.
(ck) Procedures, para 7.
(cl) Id.
(cm) Procedures, para 16.
(cn) Id.
(co) Procedures, para 13. This is reaffirmed in the May 1978 Cabinet Directive, para (d), discussed supra 9-12.
(cp) Particularly when the power of decision making is vested in a statutory board, however, the weight that can be given to environmental considerations may be proscribed by statutory criteria.

In New Zealand no particular pattern has been discerned, although reports have certainly been required for a number of projects with an essentially local impact. This is a matter which seems to be of some concern to the Commission for the Environment. See the Report of the Commission for the Environment for the Year Ended 31 March 1976 at p 3.

with the Procedures *(cp)*. In practice, however, this step will be seldom resorted to and many deviations from the details of the Procedures have been ignored, provided some kind of report is prepared. It should be noted, however, that failure to comply fully with the Procedures may also lead to public criticism and this may seriously jeopardise project approval. Now, of course, many of these "deviations" will be specifically authorised under the May 1978 directive *(cq)*.

(8) What is a significant impact:

The Government body responsible for the proposed action has the ultimate responsibility for determining whether an activity is likely to have a significant impact *(cr)*. Criteria are set out in para 12 of the Procedures for guiding the decision on this issue. The criteria are:

(a) Does the proposal transform a significant physical area.

(b) Does the proposal affect existing communities or involve the establishment of new communities of significant size.

(c) In respect of those living in the neighbourhood, is the proposal likely to have a long term effect on their living conditions or quality of life or their use and enjoyment of the environment.

(d) Is the proposal likely to have a significant impact on ecosystems in the area.

(e) Are any especially significant plant or animal species likely to be affected or are scenic, recreational, scientific or conservation values likely to be affected.

(f) Is the proposal, although not significant environmentally on its own, likely to stimulate further developments which would have a significant environmental impact.

(g) Does the proposal affect any areas or structures of historical or archeological importance.

(h) Is the proposal likely to be one of substantial public interest.

(i) Does the proposal create a significant demand on a resource which is, or is likely to become, in short supply.

(j) Does the proposal create significant pollution problems.

(k) Has the proposal already been fully considered under the procedures of the Town & Country Planning Act 1953 or the Water & Soil Conservation Act 1967 and has this consideration involved a comprehensive examination of the impact of the proposal on the environment and provided an opportunity for public objection and appeal.

Subject to the right of the Minister to intervene *(cs)*, the decision on whether an impact report should be prepared lies with the Government body responsible.

(9) Responsibility for preparing assessments and reports:

The responsibility for preparing assessments and reports is placed on the promoter of the project or proposal *(ct)*. Where this is a Government body it is the body responsible for "promoting a proposal or exercising a discretion with environmental consequences" in terms of para 2 of the Procedures *(cu)*. Where the proposal has come from a non-government body para 10 of the Procedures states that:

> "Any impact report : . . should normally be prepared by the promoting organisation but with the agreement of the latter the relevant Government department may, if it so wishes, prepare the report."

As a minor point it should be noted that while para 10 refers specifically to "reports" it seems clear that this would include "assessments". Where the promoting organisation is unable to carry out the impact reporting function "the Ministry of Works or such other department or organisation as the Commission for the Environment may suggest, may provide the necessary service, including, if necessary, the preparation of the final report" *(cv)*.

Promotional bias, innocent or otherwise, is a basic problem in a system of this kind. To expect the proponent of a project to evaluate it objectively where a result of this is to provide cogent grounds for its rejection, is unrealistic. The same approach is employed in the National Environmental Policy Act, although at the state level in the United States impact reporting legislation has experimented with different approaches. Literature on their effectiveness is scarce, but reference should be made to

(cq) See the discussion of this, supra at pp 10-11.

(cr) In the United States this threshold question of whether an impact report is required has generated more litigation than any other single aspect of the National Environmental Policy Act, Anderson, supra fn (r) at p 57. It is also an area where the Courts have found it singularly difficult to define suitable criteria. The position that has in fact developed seems closer to a test of whether an impact is likely to be "insignificant". If it is not, an impact report is required; Anderson, Id. See also, Baum, "Negative NEPA — the Decision not to File", 6 Ecology LQ 309.

(cs) Procedures, para 12.

(ct) Supra fn (y).

(cu) Procedures, para 8.

(cv) Procedures, para 9.

The Environmental Impact Handbook, Burchell and Listokin, Centre for Urban Policy Research, Rutgers, New Jersey, (1975) and to "The Writing and Review of Reports of California's Environment: Developer Prepared EIR'S", 10 U of San F L Rev 272. The alternative approaches to the preparation of impact reports also have problems. But the promotional tone of the majority of New Zealand impact reports is a matter of serious concern. On occasion reports have been prepared by private consultants, but the ambit of the consultant's inquiry has frequently been circumscribed by the employer. For example, the report on the Maui development contains the statement by Jasmad — the consultants retained to prepare certain parts of the report — that they had not considered means of handling the problems which they had identified, as this had been excluded from their terms of reference *(cw)*.

(10) The content of the impact report:

An impact report must be a clear, precise, written statement objectively analysing the environmental consequences of a proposal and its alternatives *(cx)*.

Appropriate documentation is required *(cy)*. Paragraph 7 of the Procedures states:

> "An environmental impact report is a written statement describing the ways of meeting a certain objective or objectives and the environmental consequences of so doing. The statement is not to be a justification for a proposed action, but is to be an objective evaluation setting out clearly and precisely, with appropriate documentation, the environmental consequences of a proposed action and of the alternatives to that action, and ways of avoiding or ameliorating any harmful environmental consequences."

The Procedures do not establish a rigid format for reports, but a suggested form is set out in Appendix A of the Procedures. The suggested outline for a report is as follows:

(1) Name of the proposal and the stage of commitment.
(2) Objective and options.
(3) Description of proposals.
(4) Description of existing environment.
(5) Impact on the environment.
(6) Safeguards.
(7) Conclusion.
(8) Consultation.
(9) References.
(10) Responsibility for the report.

In determining the impact on the environment a consideration of six criteria is suggested:

(I) Adverse and/or beneficial effects.
(II) Primary and secondary effects.
(III) Unavoidable effects.
(IV) Immediate short term effects.
(V) Long term effects.
(VI) The probability of an effect occurring whether or not any changes are irreversible, or consume an irreplaceable resource.

It is basic to an understanding of impact reporting to recognise that the production of a perfect impact report is impossible. There will always be limitations on knowledge; practical limitations of time and money will also intrude. The whole process is subject to a rule of reasons — the greater the potential impact the greater the detail, the wider the analysis and the more penetrating the search for alternatives. "The scope of an impact report will reflect the scale and scope of the environmental significance of the proposal *(cz)*".

The approach required by the Procedures is a multi-disciplinary one *(da)*; those consulted to give specific technical or scientific advice must be qualified to give this and in general the best available advice should be sought. Where particular advice is critical in assessing environmental impact the Procedures state that consideration should be given to consulting more than one expert in this field *(db)*.

(cw) Maui Gas Project-Environmental Impact Report, at p 3, Gazetted 13 June 1974. In his paper to the New Zealand Institute of Chemistry (referred to supra, fn (bn)) the Assistant Commissioner for the Environment also expressed concern about this problem (at p 9). He acknowledged that not only is the proposer usually personally or organisationally sympathetic and committed to the kind of development envisaged, but in many cases the brief given to the consultant may not have been written with an understanding of or a sympathy with the intentions of the Procedures. Id.

Diener, "Defining and Implementing Local Plan-Land Use Consistency Requirements in California", 7 Ecology LQ 753, 772, n 111 states that in Sausalito a list of consultants judged qualified by the city is given to the project sponsor, who can choose three from the list of 10. Then these three bid on the EIR and the city chooses from among the bids.

The Commission endeavours to reduce these problems of bias by early consultation where advice is proferred on contacts, various possible courses of action that might be followed, background material, and the description of the proposal, the identification of environmental values and the discussion of environmental impacts. Id.

(cx) Procedures, para 7.

(cy) Id.

(cz) Procedures, Appendix A, para B.

(da) Id, para C.

(db) Id.

All impact reports which are published must bear the notation that the action which is subject to the report has not yet been decided on by Government and that a final decision on the proposal will take into account the data in the impact report, the public comments, the audit and all relevant factors *(dc)*.

(11) Institute of Engineers view:
In understanding the way in which guidelines are interpreted and applied it may be useful to consider the views of major professional bodies which are involved with their operation. The New Zealand Institute of Engineers is a particularly pertinent body. Its *Handbook on Environmental Impact Reporting (dd)* states that the following standards should be observed in preparing or commenting on an impact report:

3.1 Objectivity
Accuracy
Relevance
Balance
Completeness

3.1.1 That all environmental implications have been identifid and evaluated.
That all alternatives have received adequate attention.
That the requirements of the Procedures are met.
Consider the validity of the contributions made.
Does the scope and scale of the study reflect the scale of the project.
Is the format and presentation suitable.

3.1.2 . . . The report is to inform the public and should be comprehensible to lay persons. It is essential that the conclusions be clear and comprehensible . . . . The prime duty in reporting . . . is to the public and they are entitled to factual unbiased information even if it is distasteful.

(12) Commission's conclusions on content:
From the Commission's audits over a period of years it is possible to draw a number of conclusions on what should be contained in an impact report. While there are areas of uncertainty and inconsistency the following principles are suggested:

(a) *Important secondary impacts which result from a proposal must be considered*: when the impact report on the Wellington Airport Runway Extension *(de)* was prepared it merely noted that a study of the effects of taking fill should be made before construction commenced. In its audit the Commission noted that "from the point of view of the environmental impact reporting procedures [this] is unsatisfactory. The potential source of fill, the amount required and the impact on the environment of removing, transporting and placing it, should be clearly identified" *(df)*.

(b) *Where basic questions of resource utilisation are involved it is not clear whether these need to be considered*: in its submissions on the Mt Davy proposal the Australasian Institute of Mining and Metallurgy was highly critical of any attempt to turn the impact report on the scheme into a consideration of resource conservation. In the Institute's view any consideration of such magnitude should be subject to separate procedures; all that should be considered under the present system was the impact of the proposal *(dg)*.

While the Commission has not entirely excluded the need for such issues to be explored in reports, in general this has not been required. The emphasis in the May 1978 directive on limiting impact reports to a few major matters, particularly those of long term significance, may herald some changes in this position *(dh)*.

(c) *The treatment of alternatives*: a consideration of alternatives is generally considered to be central to an impact reporting process. In general New Zealand reports have failed to address this issue adequately, but the Commission has not rejected any reports as a result of failings in this area. Where there appear to be alternatives, however, it is clear that if they are being rejected for some reason the explanation for this must be clearly stated *(di)*.

(d) *The treatment of uncertainties*: the Commission's attitude toward this issue appears to differ according to the nature of the project. Where the proposal is a flexible one, or there is a long development period during which impacts can be evaluated, lack of initial data has been seen as less significant. In auditing the Maui Impact Report *(dj)*, for instance, the

(dc) Procedures, para 27.
(dd) Auckland Branch, July 1976.
(de) Supra fn (cg).
(df) Audit, 4.
(dg) Mt Davy Colliery Project, Environmental Impact Report, referred to in the Audit at pp 15-16, 6 October 1975.
(dh) See the text of the Cabinet Directive, supra, 10.
(di) Mt Davy Audit, Supra, fn (dg) at p 2.
(dj) 13 December 1974.

Commission noted the lack of data on the impact on the natural environment, but saw this as an inadequacy in the available data base rather than in the impact report itself *(dk)*. In the circumstances the Commission recommended monitoring *(dl)*. Again, in its audit on the Wilberforce River Diversion Scheme *(dm)*, the Commission expressed concern at the lack of available data, but acknowledged that good efforts had been made to determine the impacts on the basis of available information and noted that the inherent flexibility of the proposal should be balanced against the lack of data *(dn)*. The commission stated:

> "There remains a great deal of uncertainty as to the effect the scheme will have on these issues. A mitigating feature . . . is the flexibility with which the scheme can be constructed and operated. Without this flexibility it could be strongly argued that the scheme could be deferred until better account can be taken of some environmental values that are at present exposed to an uncertain degree of risk." (p 8)

In general this approach seems a sensible one. Uncertainty is inherent in much decision making affecting the environment. In principle, however, one would expect the criteria which the Commission has postulated to be weighed against the likely severity of any risk in the event that it should materialise, and the availability of less risky alternatives *(do)*.

(e) *The content of reports prepared at an early stage in the planning process*: Closely related to the previous point is the question of the detail that is required in reports which are making an early evaluation of a proposal. While it is difficult to define precisely the detail the Commission will demand, it is clear that the Commission is prepared to sacrifice some measure of detail in favour of the advantages of early preparation of the impact report. Apparently it is acceptable, for instance, for the promoter to see the auditing process as a means of identifying those environmental issues that warrant further investigation, although a genuine effort to examine the impacts that are apparent still appears to be required. In the Remarkables Ski Field Audit *(dp), the Commission noted in para 2.1 that:*

> "In preparing the report at an early stage of planning the company clearly expected the audit process to identify those environmental issues which warranted further investigation. In general the Commission considers this to be a reasonable approach, but it should not lead, as would this report, to the preparation of a document which does little more than describe the proposed course of action and list a number of general safeguards."

The Commission went on to note that the report was clearly inadequate, providing little detailed information or evaluation of the existing environment, or the potential impacts of the proposed access road and ski field. Neither did it explore any alternatives or safeguards *(dq)*. This audit is usefully contrasted with the audit on the Pacific Cement Ltd-Portland Cement Works Proposals *(dr)* where the report was prepared while the scheme was still at the concept stage. The Commission commented that it generally supports the idea of reports being prepared early in the planning process, prior to the preparation of detailed plans, and that in this situation a lack of detail in the report is not a matter of concern. In the present case, however, the Commission expressed concern that the lack of detail also seemed to have resulted in a lack of consistency *(ds)*.

In the audit on the New Zealand Forest Products-Reforestation Proposals in the King Country *(dt)*, where a broad statement of reforestation proposals was produced, lacking detail on impact in specific areas and again seeking to use the submission and audit process to identify environmental impacts which would require further evaluation, the Commission accepted the report as adequately complying with the Procedures.

It is important in this context to note that the Procedures specifically provide for the preparation of more than one impact report where this is necessary to adequately evaluate a proposal. Paragraph 22 states that:

> "For certain major projects with substantial environmental impact more than one environmental report might be appropriate. The initial report could deal with various alternative solutions to the prob-

(dk) Id, 2.

(dl) Id.

(dm) Lake Coleridge-Wilberforce River Diversion Audit, 18 February 1976.

(dn) Id, 11.

(do) For valuable consideration of decision-making in situations of uncertainty see: Page, "A Generic View of Toxic Chemicals and Other Similar Risks", 7 Ecology LQ 207, 1978 and Gelpe and Tarlock, "The Uses of Scientific Information in Environmental Decision Making", 48 So Cal L Rev 371.

(dp) 7 April 1976.

(dq) Id, para 2.1.

(dr) 31 March 1976.

(ds) Id, 8.

(dt) 27 June 1975.

lem of meeting the objectives intended of the proposed development. A second report could deal with the environmental impacts of a specific proposal, when its form, location, scope and operation have been clarified as a consequence of consideration of the first report. In some cases a third report could be justified which would identify further environmental impacts, arising from detailed design work, additional specific information on the nature of the development [eg, selection of operating equipment]."

Applying such an approach the Commission has, on occasion, called for further reports on matters of detail while approving the basic concept. For example, in its audit of the Kirkpatrick Reclamation-Napier Breakwater Harbour *(du)*, the Commission advised the Harbour Board that an impact assessment would be required on the effect of taking fill from the Ahurui Estuary prior to approval being given for this *(dv)*. Again, in its audit on the Marsden Point Power Station *(dw)* the Commission requested a further report on the impact of the railway spur required for bringing the coal *(dx)*. On the other hand, when the Environmental Defence Society requested that this sequential approach to impact reporting be applied to proposals for nuclear power in New Zealand, with the first report to be on the nuclear power programme, the then Minister of Electricity, the Honourable T McGuigan, said no. The Minister for the Environment, the Honourable J A Walding, refused to reverse this decision *(dy)*.

(f) *Reports where projects may form part of a larger proposal*: While in theory it is clearly desirable that proposals should not be defined and reported on in such a way that they ignore other planned schemes with interconnected environmental impacts, this is not an entirely easy principle to apply in practice. Obviously where another scheme is at a firm planning stage the total impact of the scheme being subjected to impact reporting and the other planned scheme ought to be considered as a totality in terms of their environmental impact. Where other proposals are more speculative, however, it might be thought that the task of considering total impacts should be left until the later proposals actually materialise. In principle, however, the need to consider the potential impact of more remote proposals in combination with present ones should be affected by the likely severity of impacts, the degree of flexibility that will be lost by the initial proposal proceeding in isolation and the likelihood that the later project will proceed regardless of any increased or unavoidable environmental impacts, because of competing national policy considerations.

The potential problems are well illustrated by the audit of the Fergusson Wharf Reclamation *(dz)* where during the process of preparing the report and audit it became public knowledge that the Defence Department was also considering extensions to its Calliope Dock facilities, almost directly across the harbour from the proposed Fergusson Wharf complex. Despite the combined significance of the two proposals the Commission declined to consider them together.

It is difficult to identify any pattern in the Commission's audits on this issue although on occasion this point has arisen quite specifically. The impact report on the Lake Wakatipu, Kinloch Elfin Bay Road *(ea)*, for instance, was strongly criticised by the National Parks Authority for examining only part of what the proponents of the scheme had ultimately in mind — a through road to Milford Sound; to permit the construction of a through road on a step-by-step basis would obviously have avoided (or evaded) proper investigation of the desirability of such a road *(eb)*. In the audit, however, the Commission rejected this and similar criticisms of the Report. The Commission stated at page 2 of the audit:

"The Commission does not agree entirely with [the argument that to permit a report on this section of road without regard to its wider implications would lead to step-by-step approval of the larger scheme] as the extension of any road beyond Elfin Bay to link with the Milford Road would require an environmental impact report which would examine the need for a road and the consequences of using alternative routes. Although a Kinloch-Elfin Bay road would form part of any through road it is not the Kinloch-Elfin Bay section that is in debate. Rather it is the need for or choice of any road beyond Greenstone River. The arguments for or against an alternative or more direct link to Milford, whether up the Greenstone Valley or via any other route would remain equally valid should the road

(du) 16 July 1975.
(dv) Id. 11.
(dw) 13 August 1974.
(dx) Audit at p 17.
(dy) Correspondence on file with the author.
(dz) 12 May 1976.
(ea) 11 November 1975.
(eb) Audit at p 1.

from Kinloch to Elfin Bay be built although the cost of any through road from Kinloch would be reduced by the amount spent on the Kinloch-Elfin Bay section. In this audit the Commission has treated the Kinloch-Elfin Bay road as an issue separate from that of a through road."

It is tentatively suggested that at least one principle can be derived from the material on this issue. Where a scheme potentially forms part of a larger proposal, but the scheme has value in its own right even if the larger scheme never proceeds, then it is legitimate for an impact report to be prepared on the smaller scheme alone. The wider implications of this approach, which have been mentioned above, do not appear to have particularly troubled the Commission.

(13) Consultation with other bodies in the preparation of impact reports:

This topic is dealt with by para 23 of the Procedures which states:

> "Particular environmental aspects of a proposal may by law or by Government decision be subject to approval or consideration by another Government agency, statutory or local authorities. In general formal approval of such agencies should be obtained following the preparation of the environmental impact report. Where timing is critical this may not be possible and in such cases the procedures seeking such approval may be invoked before completion of the report. Informal consultation with interested authorities and organisations should be commenced as soon as possible and the results of such consultation referred to in the impact report."

Paragraph 8 of Appendix A to the Procedures states that individuals and agencies who are consulted for their expert view and advice or opinion should be listed and wherever possible their written views and/or recommendations should be attached to the report.

(14) Timing of impact reports:

The impact report is to be prepared as early as possible in the decision making process *(ec)*. Paragraph 3 of the Procedures states that the *environmental assessment* is to begin "at the inception of a proposal where there is a real choice between various courses of action including the alternative of doing nothing". If the *assessment* shows that there is likely to be a significant impact on the environment, an environmental *impact report* must be prepared *(ed)*. Clearly a report also ought to be prepared before any project commitment, while there is real flexibility in the scheme.

The entire impact reporting process ought to be completed before any Government body is required to make a decision committing resources to a proposal or before the introduction of any legislation *(ee)*. Where other statutory and planning approvals are involved the impact report should precede them. One assumes that the audit should also precede any statutory or planning approvals but on this point para 18 of the Procedures is imprecise. Paragraph 18 actually states that:

> "[T]he *environmental impact report* should . . . be prepared as early as possible to provide basic information for the local planning authority and other statutory authorities which may be involved in the consideration of the proposals. The impact report *and the audit* thereon will also be an important source of information for any persons who may have rights of objection and appeal under the provisions of the legislation. In the case of a ministerial requirement . . . the *impact report* should, wherever possible, be prepared before that requirement is made."

While the publication of the audit has not always preceded the relevant statutory procedures [for example the objections to the mining right application preceded by a month the audit on the Kanieri Gold Dredge-Grey River proposals] *(ef)* it seems clear that the scheme set out in the Procedures necessitates that the audit no less than the report should be completed prior to the determination of any statutory or planning procedures. The inconsistent wording in para 18 appears to be simply another example of the careless drafting with which the Procedures are replete. Where, for

(ec) Procedures, para 18. The inherent difficulties involved in determining this question of *when* an environmental impact statement must be prepared are often particularly acute in relation to policies and programmes. Useful considerations of this issue as it has arisen under NEPA are to be found in *Scientists Institute for Public Information v Atomic Energy Comm* 481 F 2d 1079 (1973 DC Cir), *Aberdeen and Rockfish R R v Students Challenging Regulatory Agency Procedures (SCRAP II)* 422 US 289 (1975) and *Sierra Club v Kleppe* 427 US 390 (1976), where the Supreme Court specifically repudiated the tests laid down in *SIPI*, at pp 404-05. See the discussion in *Rodgers* supra fn (r) at pp 767-774. And see also the new CEQ regulations, discussed supra, fn (x).

(ed) Procedures, para 12. See the discussion of this supra, 15-17.

(ee) Procedures, para 27.

(ef) 11 October 1974.

some reason, statutory or planning Procedures *must* precede the impact report the position taken by the Commission in relation to the Huntly Power Station impact report *(eg)* is worth noting. The Commission stated that where water rights [which of course entail a statutory procedure] are obtained prior to the completion of the impact report, all the water right material should be included in the impact report *(eh)*.

Where a project is a major one there may be a need to scrutinise both, for example, a programme and individual components of the programme. Provision is made in the Procedures for the preparation of more than one report in such cases, a point that was made previously *(ei)*.

Despite the clear aim of the Procedures to have the impact report prepared at a state of maximum project flexibility, in many cases this has not occurred. In the case of the Waiau River irrigation scheme, for instance, application had been made by local farmers in January 1974 for the area to be declared an irrigation district under the Public Works Act, water rights had been applied for in February 1974, Cabinet approval in principle was given in February 1975, but the impact report did not appear until October 1975 *(ej)*. Other examples can be given. The Report on the Baigent's Refiner Groundwood Pulp Mill was prepared nearly 12 months after the completion of an economic feasibility study and concurrently with detailed planning and design *(ek)*. The Report on the Mount Davy Colliery Project came after Cabinet approval in principle had been given for the export of the coal and the Minister of Mines had already conveyed to the Company the Government's terms and conditions for negotiating for the granting of a coal mining agreement and an export licence *(el)*.

Although on occasion the Commission has been highly critical of failures to comply with the Procedures, this has never resulted in the rejection of an impact report.

(eg) Gazetted 22 July 1976.

(eh) Huntly Thermal Power Station Environmental Impact Appraisal, at p 9.

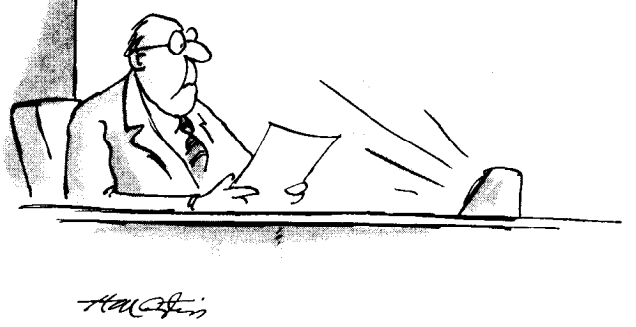
(ei) Procedures, para 22.

(ej) Waiau Plains Irrigation Scheme Audit. 14 April 1976.

(ek) Audit. 23 January 1975.

(el) Mt Davy Audit. Supra, at p 104.

"Mr Pointman, while you were out, a Miss or a Ms or a Mrs Valdy or Volney or Balmey left a garbled message for you."



EVIDENCE

BALANCING THE PROBABILTIES

By FRANK BATES.

* There are some evidential concepts which, over the years, have not received an especially good press. Of particular note has been the presumption — in the words of McCormick (*Handbook of the Law of Evidence*, 2nd ed 1971, at p 802) the presumption is the, ". . . slipperiest member of the family of legal terms except its first cousin, 'burden of proof'. [1] "Within the expression *burden of proof*, McCormick has subsumed the term better known to Anglo-Australian legal eyes as the *standard of proof*, [2] a concept which, itself, has not been unproductive of difficulty. In particular, the recurrent ideas of a third, intermediate standard of proof lying somewhere between the orthodox criminal and civil standards [3] and the notion that the civil standard of *balance* or *preponderance of probabilities* varies with the gravity or importance of the issue concerned are two notable problems. [4]

In Australia, however, the High Court has presented observers with an interesting new phenomenon in two recent cases; a real attempt to balance accurately the probabilities in civil cases. In the United States, such attempts have been by no means unusual; thus, in *Norton v Futrell* 308 P 2d 887 (1957) at p 891 Shottky J commented that, "The term 'probability' denotes an element of doubt or uncertainty and recognises that where there are two choices, it is not necessary that the jury be absolutely certain or doubtless, but that it is sufficient if the choice selected is more probable than the choice rejected", and there are other cases in which a similar view has been expressed. [5] On the other hand, a rather higher standard has been described elsewhere: hence, in *Sargent v Massachusetts Accident Co* 29 NE 2d 825 (1940) at p 827, Lummus J stated that, "After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there", and this view has also found support in other cases [6].

In Australia, the publication *Evidence, Proof and Probability* (1978) by Sir Richard Eggleston, a former Judge of the Supreme Court of Victoria, has stimulated interest in the problems which the matter presents. In that book, Eggleston (at p 106) writes that neither "balance" nor "preponderance" of probability is an entirely satisfactory term. "The former", he remarks, "suggests that a decision can be made in favour of the plaintiff where the evidence is exactly balanced. The latter suggests that something more than 'more probable than not' is needed. In fact it has taken sometime to get clear recognition that 'more probable than not' is sufficient". The learned author goes on to suggest that the difficulty has been caused by the various expressions which have been used in describing the process of deciding what are the facts on which the decision is to be based.

The first of the two decisions of the High Court of Australia was *Livingstone v Halvorsen* (1978) 22 ALR 213. There, the respondent had sued the appellant in the Supreme Court of New South Wales, claiming that the appellant's negligence had caused him to be injured when he had been thrown from his motorcycle. The parties had been travelling together on motorcycles along a country road; there was not acceptable evidence of the accident either from the parties themselves or from witnesses, but,

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[1] For other comments see, for example, *Mackowik v Kansas City, St J and CBR Co* 94 SW 256 (1906) at p 263 per Lamm J; WL Prosser, *Handbook of the Law of Torts* (4th ed 1971) para 38; *McCormick's Handbook of the Law of Evidence* (2nd ed 1972, by EW Cleary) at p 802.

[2] See, for example, *Cross on Evidence* (4th ed 1974) at p 93 ff; F Bates, *Principles of Evidence* (1976) at p 21 ff.

[3] See the discussion in *Cross*, supra n 2 at p 104 ff.

[4] A view now entrenched in Australia, see *Murray v Murray* (1960) 33 ALJR 521 at p 525 per Dixon CJ; *Andrijich v D'Ascanio* [1971] WAR 140.

[5] See, for example, *Beckwith v Town of Stratford* 29 A 2d 775 (1942); *Livenovitch v Livenovitch* 131 A 779 (1926); *Moffie v Slawsby* 94 A 193 (1915); *Murphy v Waterhouse* 45 Pac 866 (1896).

[6] See, for example, *Lampe v Franklin American* 96 SW 2d 710 (1936); *Anderson v Chicago Brass Co* 106 NW 1077 (1906).

after the accident, the respondent had been found lying on the outside edge of a corner. Lying further round the corner were the respondent's motorcycle partly damaged, the appellant's motorcyle severely damaged and, then, the appellant himself. It appeared that the appellant had entered the corner at a dangerous speed and had lost control of his motorcycle which had skidded across the road in front of the respondent, who had also entered the corner at a dangerous speed, though less so than the appellant. The Judge at first instance concluded that, on the evidence, the appellant's negligent driving was not a cause of the respondent losing control of his own cycle and that the respondent had crashed because of his own excessive speed and, thus found for the respondent. On appeal to the New South Wales Court of Appeal, the Court accepted the trial Judge's findings of primary fact, but held that he was in error by not drawing an inference that the respondent sustained his injuries in the course of a response to a situation of danger created by the appellant's negligence. Accordingly, the Court of Appeal substituted a judgment for the respondent and ordered a new trial to assess his damages, which were to be reduced by 25 percent for contributory negligence. The High Court of Australia, on further appeal, upheld the New South Wales Court of Appeal's decision, and the remarks which were made in the course of that decision by the High Court are worthy of note.

First, Barwick CJ commented (at p 217) that the question of whether, in a particular case, causal negligence existed was very much a matter of individual judgment and that a particular Judge was not necessarily wrong because his view was not that of others and, especially, of an appellate Court. [7] However, the Chief Justice came, albeit with some reluctance, to the conclusion that the trial Judge's, ". . . reasons are capable of the view that he did not think an inference that the negligence of the appellant caused the injury to the respondent was open. If I thought that he realised that the inference was open to him and that, fully conscious of that fact, he declined to draw that inference, I would have little difficulty in this case of saying that the Court of Appeal ought not to have interfered with his verdict. Having regard to the paucity of the evidence, I cannot think that one view of causation or its absence predominates over another." Nonetheless, the Chief Justice noted (at p 217) that the Court of Appeal had realised that it ought not to so interfere unless the trial Judge was in error and, in turn, Barwick CJ said (at p 218) that he thought, *on balance* [8] that the Court of Appeal could conclude that the trial Judge was in error, he could not say that the Court of Appeal was wrong to conclude that there was a causal connection between the fall of the appellant's cycle and the injury to the respondent. Of essential importance in Barwick CJ's judgment was his doubt (at p 218) that the conclusion drawn by the Court of Appeal was, in fact, the correct one, but he was of the view that the "judicial restraint" expected of the Court of Appeal extended to the still higher Court and, thus, the Court of Appeal's decision ought not to be overturned.

Jacobs J, with whom Stephen and Murphy JJ concurred, made a detailed analysis of the evidence (at pp 218-224). "The question to be decided," he said (at p 244), "turned only on causation. Was it equally probable that the respondent on his motorcycle, travelling at a significantly lower speed than the appellant, would have wholly failed to negotiate the corner and would have suffered his injury even if the appellant's motorcycle had not been on its side rotating on its own axis and sliding across the road a few yards ahead of him? I think that the answer must inevitably be in the negative." Jacobs J went on to say (at p 226) that, "When it is realised that the appellant's motorcycle was at the critical time in this physical relationship to the respondent on his motorcycle the inference that the respondent was affected in the course that he took by the presence of the appellant's cycle becomes much more probable than the inference that the respondent elected to ride across the road without at any stage attempting to negotiate the corner but unaffected by the appellant and his cycle". Accordingly, the Judge was of the opinion that the respondent's excessive speed was not the sole cause of his injuries and, thus, he was entitled to succeed, but with his damages reduced for contributory negligence. Aickin J was of the view (at p 231) that it was ". . . more probable than not" (the phrase used by Eggleston, supra that there was a causal connection between the appellant's negligence and the respondent's injuries, particularly in view of the finding that, at the critical time, the respondent was travelling at a very much lower speed than the appellant. *Livingstone v Halvorsen* raises two especially interesting issues: first, the situation of motor accidents where there are not witnesses and sometimes no survivors is by no means uncom-

[7] See, *Hicks v Roberts* (1977) 16 ALR 466, *Edwards v Noble* (1971) 125 CLR 296.

[8] Author's italics.

mon and, hence, Courts are often forced to make inferences from little direct evidence. This is not an easy task, and it is complicated by the well-established principle that the civil standard of proof is, although lower than the standard in criminal cases, not merely notional. As Dixon CJ of the High Court of Australia had said in the earlier case of *Holloway v McFeeters* (1956) 94 CLR 470 at p 477 the inferences which could be drawn from the general circumstances of the case must be such as to lead to a, ". . . reasonable conclusion that the accident . . . occurred through the lack of due care on the part of the driver and not otherwise". [9] Thus, when taken together with the normal incidence of the burden of proof, the attractions of finding in favour of the defendant on the basis that the standard of proof has not be fulfilled are only too apparent. *Livingstone v Halvorsen* illustrates that the High Court of Australia, at any rate, is not going to take that easy way out. Second, it will be remembered that, in *Livingstone v Halvorsen*, it was the two appellate Courts which found in the original plaintiff's favour, a fact which tells us something of the appellate process. A graphic statement of policy was enunciated by Murphy J, (1978) 22 ALR 213 at p 227: "The appeal to the Court of Appeal", he stated, "was a true appeal. Such an appeal is not a mere exercise of supervisory jurisdiction. The parties have a statutory right to the appellate Court's decision on the merits of the case. If the appellate Court is of the view that the appellant is entitled to succeed on the merits, it must not defer to the view of the primary Judge. On an appeal to this Court, the parties have a constitutional right to the decision of the Court on the merits". [10]

The second case of *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345 takes the issue a stage further. In that case, there had been a collision between an unladened pantechnicon travelling south and a loaded semi-trailer travelling north which had resulted in the deaths of both drivers. There was no witnesses of the accident, but afterwards the cabins of both vehicles were found torn from their bodies and forced together on the western side of the road, the semi-trailer was to the south on the western side of the road pointing north, and the pantechnicon body was further north on the eastern side and pointing east. Other debris was scattered about, and there was a gouge mark on the road. The wife of the driver of the semi-trailer then sued the employer of the driver of the pantechnicon and was awarded damages by the New South Wales Supreme Court under that State's Compensation to Relatives Act 1897. An appeal to the Court of Appeal was dismissed and the employer further appealed to the High Court of Australia. It was claimed on behalf of the respondent that it was not impossible to infer, from the evidence, that the driver of the pantechnicon had caused or contributed to the accident by negligent driving. [11] The High Court unanimously dismissed the employer's appeal.

Gibbs J, with whom Stephen, Mason and Aickin JJ agreed, was of the opinion that, (at p 350), ". . . the position and state of the vehicles after the collision do provide a basis from which a reasonable inference may be drawn as to the position of the vehicles before the collision. In my opinion it is reasonable to find on the balance of probabilities that the pantechnicon was, to some extent at least, on its incorrect side of the roadway at the time when the collision occurred. If that was so it should further be concluded that its driver was guilty of negligence." The prior authority on which Gibbs J relied was the previous unreported decision of the High Court in *Bradshaw v McEwans Pty Ltd* (1951), [12] where it was said, "Of course, as far as logical consistency goes, many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities . . . . In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is more matter of conjective . . . . But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjective or surmise".

Murphy J, however, although arriving at the same ultimate conclusion, adopted a rather different approach. At the outset, Murphy J

[9] This view was reinforced by the High Court in the subsequent case of *Nesterczuk v Mortimore* (1965) 39 ALJR 288.

[10] Murphy J referred to s 73 of the Australian Constitution and also to the earlier High Court decision of *Kouris v Prospector's Motel Pty Ltd* (1977) 19 ALR 343.

[11] In s 10(4) of the Law Reform (Miscellaneous Provisions) Act 1965 (NSW), it was provided that a claim under the Compensation to Relatives Act would not be defeated or damages reduced by reason of the fault or breach of statutory duty of the deceased person.

[12] Quoted in *Luxton v Vines* (1952) 85 CLR 352 at p 358.

made the following, ((1979) 23 ALR 345 at p 351) comment regarding the standard of proof in civil cases: "The civil standard of proof (the balance of probabilities) requires that the existence of the circumstances entitling the plaintiff to succeed is more likely than not. Satisfaction beyond that is not required. Dealing with the probabilities is not restricted to simple facts or events, but is applicable to complex events and relationships which involve mixed fact and law, such as negligence causing the damage for which recovery is sought." The method of resolving the problem which Murphy J elected to pursue was that assuming that the accident was caused by the trailer driver or the pantechnicon driver or both and that the chances of either driver having caused it were equal, then it followed that the one circumstance in which the defendant was not liable was if the semi-trailer driver were wholly to blame. However, the probability of that occuring was less than the probability that the pantechnicon driver was solely to blame or that both were to blame. Therefore, the probability that the pantechnicon driver was to blame (either solely or together with the trailer driver) was higher than the probability that he was not, which satisfied the requirements of the civil standard of proof.

A particularly important part of Murphy J's judgment was his rejection of the view which had been expressed by Dixon CJ in the well-known case of *Briginshaw v Briginshaw* (1938) 60 CLR 336 at p 361 to the effect that belief in the occurrence of events was necessary if the civil standard of proof were to be satisfied. In Dixon CJ's own words, "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality". [13] The former Chief Justice's approach had earlier been questioned by two commentators: Eggleston (*Evidence, Proof and Probability*, 1978 at pp 109-111) has criticised the idea of requiring belief on the basis that belief is something independent of probability — thus, Eggleston notes (at p 110) that a person may have a belief in an afterlife with no evidence to support it and, conversely, one may think that the existence of something is more probable than not without believing that it exists. In a rather different vein, ALC Ligertwood ("The Uncertainties of Proof" (1976) 10 Melb ULR 367 at p 389) had commented that, "We cannot escape the concept of probability by talking in terms of belief" Ligertwood had noted (ibid) that, although it was impossible to quantify the probability required, appellate would overrule verdicts based upon belief which were not supported by a sufficient degree of probability: "The point is that at all stages beliefs are being closely watched for they must be *rational* beliefs. A belief is only rational if the degree of probability is sufficient."

It is suggested that *Livingstone v Halvorsen* and *TNT v Brooks* are important cases and deserve to be noted in other common law jurisdictions than Australia. First, despite the rather imprecise terminology employed by Barwick CJ in the former case, it seems now safe to say that the Australian High Court has now formally adopted the "more probable than not test" in common with English Courts. As Lord Simon referred to the matter in *Davies v Taylor* [1974] AC 207 at p 219," . . . the concept of proof on a balance of probabilities, which can be restated as the burden of showing odds of at least 51 to 49 that such-and-such has taken place or will do so." Second, the cases demonstrate that a more precise approach to the issue of standard of proof in civil cases is being adopted by at least one leading common law appellate Court. Third, it is likewise clear from *Livingstone* and *TNT* that Australian appellate Courts are more likely positively to intervene in matters involving the standard of proof. The practical consequence, judging from the ultimate results in the two cases, of such intervention seems to be that the chances of negative findings in cases where there is an absence of first-hand evidence will be reduced as Courts begin to scrutinise the probabilities. This development ought to please Professor Hamson, at any rate, who wrote in 1974 ("A Valedictory Allocution" [1974] CLJ 2 at p 4) that, "It is a serious error to pamper defendants . . ."

[13] See also *Holloway v McFeeters* (1956) 94 CLR 470; *Rejfek v McElroy* (1965) 112 CLR 517; *Maher-Smith v Gaw* [1969] VR 371 and *Andrijich v D'Ascanio* [1971] WAR 140.

Lawyers in practice are essentially executants and not composers. The nature of the law, in its detailed description of rules, does not lend itself to invention or composition by its practitioners. On rare occasions however a lawyer may uncover an old and disused rule and put it to fresh use; he may actually adapt and fashion an existing rule to meet a new and unprecedented situation – *Justinian in The Financial Times.*

CRIMINAL LAW

RECEIVING GOODS STOLEN BY CHILDREN OR THE INSANE

By STEPHEN BROWN, *Senior Sergeant of Police at Police National Headquarters.*

The crime of receiving property dishonestly obtained is defined in s 258 of the Crimes Act 1961. For present purposes the important words of that provision are the opening words of subs (1): "Every one who receives anything obtained by any crime, or by any act wherever committed which, if committed in New Zealand would constitute a crime, knowing that thing to have been dishonestly obtained, (commits a crime)". In this article I will focus on the words "obtained by any crime" and attempt to discover the true meaning of them as they apply to a certain context. That context is when the property has been obtained contrary to the rights of the owner by a person who is insane or under 10 years of age, or in some circumstances under 14 years of age.

The learned author of *Adams on Criminal Law (a)* says:

> "Criminal responsibility for the 'crime'. There can be no offence of receiving if the person who did the act by which the thing was obtained was not criminally responsible for the act: eg where the thing is received from a child under ten years of age. So also, it is submitted, in cases of insanity under s 23 . . . ."

This approach was followed by Wild C J in an unreported decision, *R v Farrell (b)*. Farrell had "received" a cheque from a woman who, on being charged with the theft of the cheque was acquitted on account of her insanity.

In the course of his short oral judgment on a motion for an order directing that no indictment be presented, Wild C J granted the order, and referred to the case of *Walters v Lunt (c)*. The learned Judge said:

> "[defence counsel] relies primarily on *Walters v Lunt*, supra where, on a case stated, it was held the Justices were right in refusing to convict a person of receiving an article knowing it to have been stolen when it had been stolen by a child aged seven years."

That decision was held correct in that the child, being under eight years of age, could not have been found guilty of larceny.

If anything, the case is stronger in that the depositions contained evidence that X (the woman who stole the cheque) was acquitted on account of her insanity. Therefore they show positively that the cheque was not "before then obtained by a crime".

It will be appreciated that in New Zealand the relevant age limit is not eight years of age, but 10 years; s 22 of the Crimes Act 1961, and in some cases 14 years, s 23 of the Crimes Act 1961. The age in the UK has now been raised to 10 and 14; s 16 of the Children and Young Persons Act 1963 (UK).

The short oral judgment of the Kings Bench Divisional Court in *Walters v Lunt*, supra was delivered by Lord Goddard C J. It consists of five paragraphs, which comment should certainly not be taken to infer that the writer believes prolix judgments are good judgments. Far from it, but there does come a time when otherwise commendable brevity is self defeating. The reason why the number of paragraphs in the judgment is relevant is to assist in its analysis.

The first two paragraphs set out details of two charges that concern the "receiving" by parents of a tricycle and a child's bicycle alleged to have been stolen by their seven year old son. Then the Judge says:

> "The Justices refused to convict on the ground that, as the child was under eight years of age, under the Children and Young Persons Act 1933, s 50, he was incapable of stealing and could not be convicted of the felonious act of larceny, and, therefore, the respondents could not be convicted, under s 33 (1) of the Act of 1916 (the Larceny Act), of receiving stolen property because the property taken by the child was not 'stolen or obtained . . . under circumstances which amount to felony or misdemeanour'."

(a) 2nd ed, para 2098.

(b) Unreported, Supreme Court, Whangarei. 13 August 1975 (T 10/75).

(c)[1951] 2 All ER 645.

In his third paragraph Lord Goddard deals with the case of *R v Creamer (d)* which holds that a man cannot be guilty of "receiving" property taken from a husband by his wife when the wife commits no crime by reason of such taking. It was said that that case made it clear that the Justices were correct in their decision in *Walters v Lunt* and the Judge concluded:

> "In the case now before us the child could not have been found guilty of larceny because he was under eight years of age, and, unless he is eight years old, he is not considered in law capable of forming the intention necessary to support a charge of larceny. Therefore the Justices came to a perfectly proper decision in point of law on the charge of receiving."

The remainder of the judgment points out that the parents may nevertheless be guilty of larceny, just as in *R v Farrell*, supra where a theft charge was preferred against Farrell.

The terms of the Imperial Statute on which *Walters v Lunt* was decided are:

> "Every person who receives any property knowing the same to have been stolen or obtained in any way whatever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence . . ."

Consequently we must consider what, if any, difference in legal result is caused by the different statutes under which the cases were decided. The crucial parts of the statutes are set out in tabular form, for ease of comparison:

> *Section 33 (1) of the Larceny Act 1916 (UK)*
> "Stolen or obtained . . . under circumstances which amount to felony or misdemeanour"
>
> *Section 258 of the Crimes Act 1961 (NZ)*
> ". . . obtained by any crime, or by any act wherever committed which, if committed in New Zealand would constitute a crime. . ."

The element of extraterritoriality contained in the last part of the quote from the New Zealand statute is a very much more pithy rendering of the sense of s 33 (4) of the Larceny Act. This aside, it is possible to argue that the juxtaposition of the concepts in the New Zealand statute, of having been obtained by a crime on the one hand, and on the other hand of the element of extraterritoriality, indicate that the word "crime" has a special meaning in that provision. The meaning involves the idea that a "crime" need not be dependent on assignment of criminal responsibility. In other words, when it uses the term "crime" it means the actus reus of a crime.

This is supportable from the idea implicit in the words of the New Zealand Act quoted that, for its purposes, "an act" could constitute "a crime". Such a view is easily attackable on the grounds that the section contemplates an act carried out by an actor capable of fulfilling the mens rea concepts attached to the imposition of criminal liability. But the answer to that argument is provided by reflection on the necessity for my use of the phrase "criminal liability" in the last sentence. It is submitted that the view of the Hon F B Adams and that of Wild C J require the substitution of the phrase "an act imposing criminal liability on the actor" for the word "crime" where it appears in s 258 of the Crimes Act 1961. But that is not what the statute says, it uses crime in a way capable of being interpreted as referring to the actus reus alone. In *Hinde's New Zealand Law Dictionary*, 2nd ed, crime "in its widest sensue, . . . as opposed to a civil injury, is an act which is forbidden. . . by statute or regulations made by a subordinate authority". Only after describing a crime as a forbidden act does the definition go on to mention the remedy for crime; "which is the punishment of the offender at the instance of the state." Yet the two learned Judges, the one undoubtedly strongly influenced by the other in the context of an oral judgment, mix the concepts of the act and the criminal responsibility attaching to that act as being inseparable constituent parts of the term "crime" as used in this context.

No support for this mixing of concepts is found in the technical definition of "crime" in s 2 of the Crimes Act. There crime is defined as "an offence for which the offender may be proceeded against on indictment", in contrast to an "offence" for which any one can be punished under the Crimes Act or any other enactment, whether on conviction, on indictment or on summary conviction. The definitions plainly intend to distinguish the indictable "crime" from the "offence" which may be indictable or triable summarily.

It is, I submit, plain from these definitions that the Crimes Act contemplates the existence of a crime separate from the liability of the actor, and on that view property could indeed be, in terms of s 258 of the Crimes Act 1961, obtained by a crime when the actor is protected from criminal liability.

Section 33 (1) of the Larceny Act 1916

(d) [1919] 1 KB 564.

(UK) contains no such juxtaposition of ideas, and it is on that section that *Walters v Lunt*, supra was decided.

A possibly more cogent argument and *Walters v Lunt* is not law in New Zealand and that the Hon F B Adams and Wild C J were wrong, is found in the supposedly differing philosophical bases in the United Kingdom and New Zealand as to the status of the young thief. In England it is said: "Even though there may be the clearest evidence that the child caused an actus reus with mens rea, he cannot be convicted once it appears that he had not, at the time he did the act, attained the age of ten. Nor is this a mere procedural bar; no crime at all is committed by the infant with the result that one who instigated him to do the act is a principal and not a secondary party"; *Smith and Hogan on Criminal Law (e)*. The basis for this statement of the law, in the context of our problem, is s 50 of the Children and Young Persons Act 1933 (UK). That provision reads: "It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence." This provision, with an increase in the age limit by one year, states the common law: *Russell on Crime (f)*. In New Zealand the the law relating to the criminal responsibility of children is set out in ss 21 and 22 of the Crimes Act 1961. Section 21 (1) says: "No person shall be convicted of an offence by reason of any act done or omitted by him when under the age of ten years" and s 22 (1) relating to 10 to 14 year olds, proceeds in similar terms. Despite the obvious difference in terminology between the English and New Zealand provisions, Myers C J said, obiter, in *Brooks (g)* that ss 41 and 42 of the Crimes Act 1908, the predecessors of the present ss 21 and 22, were declaratory of the common law. Adams however is by no means so dogmatic in paras 388 to 392 of his second edition. He leaves the question open, notwithstanding his comments in para 2098, supra. In para 391 he says that s 21 is capable of being construed, not as rendering the child incapable of crime (as at common law), but as merely protecting a guilty child from being convicted —a view which would permit the conviction of another person as receiver, provided, of course, that the child were proved to have acted with the mens rea required for stealing.

With the passage of the new Crimes Act in 1961, a subs (2) was added to ss 21 and 22 and subs (4) to s 23. All the new subsections are identical and state:

> "The fact that by virtue of this section any person has not been or is not liable to be convicted of an offence shall not affect the question of whether any other person who is alleged to be a party to that offence is guilty of that offence."

As *Adams* points out, if ss 21 and 22 allowed a child to commit the offence but protected it from conviction only, subs (2) would be unnecessary. However the enactment could equally be seen as an overruling of the dictum of Myers C J in *Brooks*, supra. So whatever the true meaning of ss 21 (1) and 22 (1) is, the legislature has made the intended result so far as parties to those offences are concerned, clear. The parties are not to shelter behind the lack of criminal responsibility attaching to the young or insane actor.

However, it is with the greatest respect, totally obvious from the terms of the subs (2) that the legislature saw ss 21 and 22 as merely protecting from conviction. These in fact are the words they use. There can, I submit, be no question that New Zealand law differs from United Kingdom law in this respect, if United Kingdom law is as stated by the text writers (see below).

Receivers are not parties to the theft as the term "party" is defined in s 66 of the Crimes Act 1961. Therefore subss 21 (2) and 22 (2) do not affect their legal position. This omission seems to be a curious anomaly. Why would the legislature ensure that parties to crimes by juveniles are at risk of conviction, but not receivers of the ill-gotten gains of the same juveniles? Is it an intentional but inexplicable lacuna or have the text writers missed something? It is my respectful submission that s 344 (1) of the Crimes Act 1961 has been totally overlooked. It reads:

> "Every one charged with being an accessory after the fact to any crime or with receiving property knowing it to have been dishonestly obtained, may be indicted whether the principal offender or other party to the crime or the person by whom the property was so obtained has or has not been indicted or convicted, or is or is not amenable to justice; and the accessory may be indicted either alone, as for a substantive crime, or jointly with the principal or other offender or person by whom the property was dishonestly obtained."

Subsection (2) refers to the charging of a chain of receivers. This provision can be traced in identical terms through the Crimes Act of 1908, s 401, and the Criminal Code Act of 1893; s 377. It is taken almost word for word from cl

(e) 3rd ed p 127/128.
(f) 12th ed, p 99/100.
(g) [1945] NZLR 584, 595-6.

497 of the draft Criminal Code Bill appended to the Report of the English Law Reform Commission of 1879. Sir James Fitzjames Stephen's codification "celebrates" its centenary of neglect in its home country this year, a chastening thought for those who look to the United Kingdom for their lead in social innovation, although it is to be noted that the New Zealand of the 1890's was considerably more innovative, accident compensation and periodic detention aside, and more liberal than is the New Zealand of today.

In discussing s 344, *Adams* says *(h)*:

> "An accessory after the fact is not a 'party' to the crime and a receiver is not such a party to the theft or other offence by which the property was obtained. Hence the provisions for joint indictment and trial contained in this section . . . ."

In his first edition *(i)* Adams also treats the section as purely dealing with the joint indictment of thieves, accessories and receivers. He does point out that such a course would not be practically useful, serving only to confuse a jury.

Likewise Garrow in the first edition *(j)* of his work on the Crimes Act 1908 treats s 401 as dealing only with joint indictments. This treatment was continued through successive editions, accompanied by an increasingly lengthy essay of a footnote on joint indictments culminating in five pages in the fifth edition *(k)*, by the time of *Garrow and Willis on Criminal Law.* In that edition *(l)* the learned author says:

> "This section and s 343 refer to joinder of parties of crimes. Section 343 relates to parties to a crime within s 66; s 344 relates to accessories after the fact, within s 71, and receivers. All such parties may be joined in the one count. In practice, however, accessories after the fact and receivers are charged in separate counts, though frequently in the same indictment."

Only Adams in his second edition take cognisance of the fact that s 344 (1) comprises two sentences, which in my submission is a crucial factor in its interpretation. *Adams* says *(m)* "The first sentence renders inapplicable to accessories after the fact and receivers the old common law rule *(n)* which prevented trial unless the principal offenders were previously or simultaneously dealt with." He refers to our law previous to the Code as contained in s 90 of the Larceny Act 1867 (receivers) and s 3 of the Accessories Act 1867.

Section 90 of the Larceny Act 1867 reads, omitting unnecessary verbiage:

> "Whosoever shall receive any . . . property . . . the stealing or taking extorting obtaining embezzling or otherwise disposing whereof shall amount to a felony . . . knowing the same to have been feloniously stolen . . . shall be guilty of felony and may be indicted and convicted either as an accessory after the fact or for a substantive felony and in the latter case whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice (the section then sets out the penalty)."

It will be noted that the section speaks of the property as having been "feloniously stolen" and the receiver as being liable to conviction whether "the principal felon" has been convicted or is amenable to justice or not. Arguably *this section envisages that the thief* must be "convictable" before the receiver can be criminally liable. It is my submission that such an interpretation is not quite clearly correct, due to the use of the term "amenable to justice". When is an offender amenable to justice and when is he not? In the context of our criminal code, with no time limits for the preferring of charges, how does a person make himself not amenable to justice? To my mind to say that he does so by evading arrest, or by concealing his identity as the offender, or by removing himself from the jurisdiction, is facile. The fugitive can be captured. The unknown offender can be named or detected. The offender beyond the jurisdiction can be extradited or voluntarily or inadvertently return. He is then, surely, amenable to justice. Does the meaning of this term in the statute depend on the vicissitudes of the chase, amenable when the constable's hand is on his collar, not amenable when he breaks away?. I think not. I submit that a person is not amenable to justice in only two situations. When he is dead or when he is protected by some rule of law. Therefore it is quite logical to say that the section envisages a principal felon who is protected from conviction by some rule of law. The same phraseology appears in a United Kingdom statute *(o)*.

(h) At para 2744, 2nd ed.
(i) At p 555.
(j) Published in 1914.
(k) Published in 1968.
(l) At p 299.
(m) 2nd ed, para 2745.
(n) Referred to by *Adams*, 2nd ed, paras 642 and 687.
(o) 24 and 25 Vict cap 94, s 3 (The Accessories and Abettors Act 1861) which is one of the so-called Greaves Criminal Consolidation Acts, chapters 94 to 100 of that regnal year. These Acts were the only tangible result in England at that time of the move to codification.

It is therefore arguable that the law of England is not that a person under the age of criminal responsibility does not commit any crime, but only that he is protected from conviction, as in New Zealand. The terms of the irrebuttable statutory presumption mentioned earlier are equally amenable to this construction as they are to the opposite construction that has usually been put upon them. The 1933 UK Children and Young Persons Act says that the child cannot be *guilty* of an offence, not that he cannot *commit* an offence, but *Smith and Hogan*, supra make the transition from "not guilty of" to "cannot commit". Following on from the passage from *Smith and Hogan* quoted above *(p)* these learned authors say: "And where a husband and wife were charged with receiving from their son (aged seven years) a child's tricycle, knowing it to have been stolen, it was held that they must be acquitted on the ground that, since the child could not steal, the tricycle was not stolen; *Walters v Lunt.*" But in fact Lord Goddard in *Walters v Lunt* said no such thing, he said *(q)*, that the child *could not have been found guilty*, because he was considered in law incapable of forming the intention necessary *to support a charge*. Plainly the Judge is here talking about criminal responsibility, not the objective existence of a proscribed act, commonly called a crime *(r)*.

To return now to the treatment accorded s 344 (1) of the Crimes Act 1961 by New Zealand text writers, it can be seen that the first sentence of that provision is an amalgam of s 90 of the Larceny Act 1867 and s 3 of the Accessories Act 1867. These sections quite plainly abrogate the common law rule mentioned by *Adams (s)*. But the words of s 344 (1) go beyond a mere amalgam of the words of two existing provisions. Both of the 1867 sections refer the triability of the accessory or receiver to "the principal felon", but s 344 (1) goes far beyond that and speaks of three categories of people:

(i) the principal offender ("the principal felon"); or
(ii) another party to the crime; or
(iii) the person by whom the property was so (dishonestly) obtained.

If the law of New Zealand envisages that a thief must be criminally responsible before a receiver can be criminally responsible, then category (iii) is superfluous and the words comprising it have no meaning. The legislature could have achieved *that* result with use of the term "the principal offender". The addition of the formula "the person by whom the property was so obtained" can only be to distinguish this category of people from those who fit the other two categories, in this context particularly "the principal offender."

The section does use the word "dishonestly", and it has been said by Denniston J *(t)* considering a receiving charge under s 284 of the 1908 Act; "In an Act dealing entirely with crimes 'dishonestly obtained' must refer to criminal and not merely immorally dishonest acts by which the thing received was obtained." In that case the "dishonestly obtained" under consideration appeared in the indictment, and the Judge was considering whether or not the count was sufficient (presumably to fairly and fully inform the defendant and be usable in the future for *autrefois* purposes). He decided, as did the rest of the Court of Appeal, that the indictment *was* sufficient, and the decision does not go at all toward the proposition that "a crime" infers criminal responsibility in some person and not an objective proscribed act.

It is my submission that the words comprising category (iii) do not refer to receivers of the property, in a "chain of receivers" situation, since s 344 (2) specifically deals with the chain of receivers, and allows them to be jointly charged. It is this second subsection to s 344, and the second sentence of the first subsection, that speak of joint indictments. It is with these parts of s 344 that the texts deal, and I submit that the first sentence of s 344 (1) does something entirely different. That "something" is firstly to change the common law rule previously referred to, and secondly to change the law or make clear the true position, in relation to receivers of stolen property to exclude the possibility that their criminal liability depends in any way on the criminal liability of the original obtainer of the property.

Two further arguments support my thesis. The first one involves the words of s 344 (2), which it is now convenient to set out:

> "Where any property has been dishonestly obtained, any number of receivers at different times of that property . . . may be charged with substantive crimes, and may be tried together, whether the person by whom the property was so obtained is or is not indicted with them, or is or is not in custody or amenable to justice."

The argument contrary to mine is that the inclusion of the new category (iii) in the first sen-

(p) 3rd ed, pp 127/128.
(q) [1951] 2 All ER 645, 646 G-H.
(r) A somewhat similar view is expressed by Roger Leng in his casenote on *Whitehouse* in 41 MLR 725.
(s) 2nd ed, para 2745.
(t) *R v Creamer* [1912] 32 NZLR 449, 454 (CA).

tence of s 344 (1) is only intended to catch receivers of the stolen property subsequent to the first receiver. My reply to that is to point out that s 344 (2) distinguishes between "any number of receivers at different times" on the one hand, and on the other hand, "the person by whom the property was so obtained". There is no warrant to say that this latter expression when it appears in s 344 (1) means "receivers between the thief and the ultimate receiver" when the same words in s 344 (2) plainly distinguish between receivers and the original obtainer. As I have already pointed out, if that original obtainer must be criminally responsible for the act of obtaining, then "principal offender" would have served admirably to describe him.

Secondly, an interpretation indicating that the inclusion of the category (iii) words in the first part of s 344 (1) serves only to make the whole chain of receivers criminally responsible would make of those words mere surplusage. Subsequent receivers are liable to conviction by the plain words of s 258, because one who knowingly receives "stolen" property obtains that property by a crime just as much as does the original thief. Therefore a subsequent receiver obtains property before then obtained by a crime (receiving).

A final contrary argument to mine is that the legislature cannot have intended to make a change of substance in the law relating to receiving, and hidden it away in Part XII of the Act, under the subheading "Indictments". The first answer to that is that the cardinal rule of statutory interpretation is that the plain words of the statute are to be put into effect. If authority is needed for that proposition, then the decision of the House of Lords in *Stock v Frank Jones (Tipton) Ltd (u)* will suffice. That case was followed, so far as its rule that a Court is only justified in departing from the plain words of a statute when it can be demonstrated that anomalies exist to such an extent as to produce an absurdity or destroy the remedy established by Parliament to deal with the mischief which the Act is designed to combat, by Chilwell J in *McClenaghan v Bank of New Zealand (v)*.

Even if it can be said that the rule of statutory interpretation contained in s 5 (j) of the Acts Interpretation Act 1927 should prevail over the plain meaning of the words of the statute, then no different result is reached. Where in the Crimes Act 1961 is there any support at all for the proposition that Parliament could have intended to protect the receivers of goods stolen by children or the insane? These classes of people are protected from conviction, in a paternalistic but thoroughly understandable way, by ss 21—23 of the Crimes Act, but the matter does not end there. The thieving child is open to "care" proceedings under the provisions of the Children and young Persons Act 1974. The insane thief is open to compulsory mental health treatment under the provisions of the Mental Health Act 1969. Both methods of "treatment" can involve impositions on the personal liberty of the subject not discernably different from those imposed during imprisonment. Where then is the logical rationale for suggesting that the sane, adult, morally culpable receiver of goods stolen by the "protected" people should go scot-free? There is obviously none.

It may be permissible in New Zealand to look at *Hansard* to ascertain "the object of the Act" so as to be able to comply with s 5 (j). This particular chestnut was revived very forcibly by Lord Denning in *Davis v Johnson (w)*, only to be promptly squashed by the House of Lords *(x)*. But in the interim Judge Horn had not dismissed similar statements by Lord Denning from *Wachtel v Wachtel (y)*, although in *Re Application by Winton Holdings Ltd (z)*, he did not feel the need to consult the Parliamentary papers to ascertain the mischief aimed at since he said that he was already familiar with the Commission's Report. Whatever limitations are imposed on Courts, none are imposed on me, so I avidly sought out the comment made by our Parliamentarians in debate on the Criminal Code Bill. Alas, what there is of it is only on the question of whether or not we should wait for the Imperial Parliament to adopt a criminal code before we dared to. Thankfully we didn't. In any event *Hansard* is no help, nor is the Report of the New Zeasland Commissioners appointed to report on codification *(aa)*. Paragraph 11 (g) of the Report deals with the Part of the Act containing s 377, and is of no assistance whatever in the interpretation of the section; likewise the Report of the English Commissioners of 1879 *(ab)*.

(u) [1978] 1 All ER 948.
(v) Unreported, Supreme Court, Auckland. 11 July 1978 (A 2025/75 and 95 to 99/76).
(w) [1978] 1 All ER 811.
(x) [1978] 1 All ER 1132.
(y) [1973] 2 WLR 366, 375.
(z) [1978] NZAR 363, 366.

(aa) Their Report is published in vol 2 of the 1908 Reprint of Statutes at p 180.
(ab) Pages 35 and 36 of the Report. Report of the Law Reform Commission into Codification of the Criminal Law. Great Britain Parliamentary Papers, House of Com-

Clause 497 of the draft Bill is the predecessor of s 377 of the 1893 New Zealand Act. It appears in Title VII, Part XLI. In discussing this Part *(ac)*, the Commissioners mention cl 481, which deals with the heading of an indictment, and cl 482, which deals with the form and contents of an indictment. They then say: "We make in other sections a variety of provisions which we hope will render all future indictments perfectly simple." The Commissioners then make comments about the Bill wanting to abolish indictments in all but name. That is all they say about Part XLI. The "other sections comprising a variety of provisions to render future indictments perfectly simple" number eighteen. They deal with multifarious subjects, ranging from a code of autrefois acquit and convict to specifics concerning indictments for libel, perjury and high treason. They comprise in fact a ragbag of miscellaneous provisions that will not fit comfortably into any specific large part of the codification scheme.

It is also of relevance, when considering the context of the section, that it has moved its neighbours at every time of rewriting. It started off as cl 497 in 1879, then s 377 in 1893, then s 401 in 1908, now, from 1961, s 344. Adams, in his first edition, further moves the location of the section. All this goes to show that not much can be gathered from the context in which the section appears, and we are left with its plain words, whose meaning, I submit, cannot be altered by any known legal method.

All this should cause no consternation at all. To allow the receiver of property stolen by a child or insane person to go scot-free is not sensible. The state of the law that I advance is eminently sensible and is in plain accord with the legislative intent, ad evidenced by the 1961 additions to ss 21 to 23 of the Crimes Act.

The formulation of this opinion which is contrary to the views of all the New Zealand criminal law text writers has causd me much anxious reflection. I am forced to conclude that law is inherently structured to perpetuate an error, and the initial 1879 change, if it was that, to the common law was not publicised at all. In fact the nature of the ragbag collection of sections in Part XLI of the 1879 Bill is misrepresented, albeit unintentionally, by the Commissioners' laconic way of dealing with that part of the draft.

However, my waning confidence is bolstered by a decision of Mr Jaine S M in *Police v Rarere (ad)*. There the Magistrate was faced with a proposition that an adult who purchases a watch known to be stolen but which may have been stolen by burglars under the age of fourteen, could not be convicted under s 258 of the Crimes Act 1961. The Magistrate says at p 3 of the typescript:

> "This evidence does no more than raise a suspicion that *some* of those involved in the burglary were under the age of 14. The evidence clearly establishes that a burglary was committed. It does not establish the age of the offenders and therefore there is no basis in the evidence for this submission.
>
> Nevertheless I should give consideration to this submission assuming that there had been an evidential basis for it."

The learned Magistrate then went on to find that s 344 of the Crimes Act 1961 would have provided a complete answer to the defence if the defence had had a basis on the evidence. Before coming to this conclusion he had the benefit of oral argument from defence counsel which traversed *Walters v Lunt*, supra and the terms and history of ss 21 and 22 of the Crimes Act 1961, but not s 344. The Magistrate then called for written submissions from the prosecutor, which advanced the argument based on s 344.

In my respectful submission the learned Magistrate's obiter dicta is plainly correct and should be taken as finally laying this particular spectre of lack of rationality in the law to rest.

mons, Session 1878-79, Vol XX p 169.
(ac) At pp 35 and 36 of their Report.

(ad) Unreported, Magistrate's Court, Wellington. 30 March 1979.