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HEARSAY: ROUND TWO

In September 1977 the Evidence Amendment Bill was introduced into Parliament. It proposes changes to the law bearing on hearsay, the admissibility of convictions in civil proceedings, and privilege, these changes being based on recommendations of the Torts and General Law Reform Committee made in 1967, 1972 and 1977.

Of these changes, those related to the hearsay rule are likely to prove most interesting, not only for what they propose, but also because of the debate engendered at the New Zealand Law Conference in 1969 (see [1969] NZLJ 211 et seq) — after which substantially the same proposals for reform as those in the Bill were mothballed — and also because of the more general debate on the laws of evidence that may follow. The hearsay rule prevents the use of evidence that would or might be relevant to establishing matters of fact or opinion. Its justification". . .lies primarily in the fact that the admission of hearsay evidence tendered by one side denies to the other side the opportunity of testing the value of the evidence by cross-examination; of demonstrating the unreliability, bias, incompetence, ignorance, or even perjury of him whose original testimony is tendered."(supra, p 215 per Sir Alexander Turner).

In the cases where an exception is made to the rule there is generally something about the circumstances that makes the statement likely to be reliable — as being, for example, against interest or on a deathbed. Principally though, and in accordance with our legal traditions, cross-examination is seen as the best test of reliability.

Those who favour a widening of the rules urge that relevant evidence should be admissible "unless there is a clear and strong reason for its rejection" (supra, p229 per R C Savage QC) — hearsay simpliciter being neither clear nor strong enough. Reliability, they would say, is a matter of degree, and with a very much higher standard of education prevailing throughout society than at the genesis of the hearsay rule, those charged with finding facts are better able to assess the weight to be given to the evidence coming before them. Unreliable evidence today is less likely to lead to error than would have been the case in the past.

The differing points of view were put by Sir Alexander Turner, Mr R C Savage QC (as he then was) and various commentators at the 1969 New Zealand Law Conference and it suffices to say that the present amendment continues to steer a middle course. The rules restricting admissibility of hearsay evidence are relaxed (documentary hearsay is admissible in criminal proceedings, oral hearsay in civil proceedings before a Judge alone, and the grounds on which a person will be unavailable to give evidence are widened), and the exceptions to the rule are codified while the element of reliability where juries are concerned is preserved through judicial supervision and guidance.

The law of evidence is being changed gradually, and it is this perseverance with gradual change, a perseverance, it may be added, that has since 1969 resulted in almost annual amendments to the Act, that is likely to stimulate again consideration of the wider question of whether the laws of evidence should be codified. In the past proposals for codification have not been well received. At the Law Conference Sir Alexander Turner mentioned the failure of attempts in 1872 to have Sir James Stevens' Code introduced in England. More re-

cently Mr McLay mentioned, when introducing the amending Bill, that when Dr A L Haslam (as he then was) put forward proposals for codification in 1959 they "ran into so much flack from so many different sources that they were very quietly and none too ceremoniously dropped."

Codification was opposed by Sir Alexander Turner at the Conference. He thought the law of evidence "inherently unsuitable for codification" for a number of reasons. The laws of evidence are "unsystematic to the point almost of inconsistency, and some are the subject of so many exceptions as to defy concise statements." Simplification, which is one object of codification, would involve not codification but the manufacture of a new law of evidence. He was reluctant to see the Courts imprisoned within the limits of a Code, doubted whether a code would render reference to existing common law principles unnecessary and questioned the success of the Indian Codification.

Now it is interesting that the only voice raised at the Conference in favour of codification was that of Mr D A R Williams — interesting because part of his legal education was gained in America; and in recent years an increasing number of New Zealand graduates have been looking to America rather than England as the country in which to further their studies — with a resultant increase in American influence on our laws. He was unhappy that

> ". . .in practice lawyers have to contend with two different interpretations of the subject. One interpretation consists of the black letter law of the textbooks and the considered opinions of Appellate Judges. The other is the law of evidence as practiced in Courts of first instance where decisions often have to be reached on the spur of the moment."

He would prefer " a set of rules dealing in general terms with the more important categories and subdivisions of the law of evidence." He pointed out that we have a partial code in the Evidence Act 1908 and can now point to further codification in the present Bill.

Mr Williams' view is supported by Geoffrey Palmer, MP, who also has extensive experience of American law. In the Introductory debate Mr Palmer asked why a complete codification of the law relating to hearsay evidence was not attempted.

> "The Bill, which is very lengthy, sets out in statutory form a good deal of the law of evidence, but we must have recourse to common law decisions for a good deal more of it. Evidence should be either a common law subject or a statutory subject, and it seems to me that it is not clear in the Bill which policy is adopted. I suggest that the Minister might want to consider Federal Rules of evidence in the United States, where a completed code of evidence has been adopted for use in the Federal Courts of that country — a code that does away completely with the rule against hearsay."

Given his interest we may well see a resurgence of the Codification Debate.

Space does not, at this juncture permit a detailed critique. However there are several general criticisms levelled by both Sir Alexander and Mr Williams that warrant revival.

Sir Alexander Turner was critical both of the complex interlocutory procedures contemplated (in which he saw potential for protracting proceedings) and of the dual standard applying to evidence depending on whether the trial was before a Judge alone or Judge and Jury.

He also resisted tinkering with the old wording, mentioning in particular documentary hearsay from persons not able to be found. The change is from "if all reasonable efforts to find him have been made without success" to "if. . . the maker of the statement. . .cannot with reasonable diligence be found." Does the change indicate a different meaning? "Fiddling with the text of an existing statute to meet the grammatical idiosyncrasies of a draftsman is a process which should not be encouraged." (supra, p221).

The Bill (clause 16) gives Judges a discretion to reject any statement if "it would be inexpedient in the interests of justice to admit the statement." — a vague and imprecise phrase to say the least and by no means the only one. Sir Alexander Turner, although not commenting on this provision specifically , opposed overreliance on discretionary powers. Nor was Mr Williams in favour of such a wide discretion as it "often makes it virtually impossible for a lawyer to predict what will happen in a particular case. If such discretions are absolutely unavoidable, and this is rarely the case, some effort should at least be made to indicate the sort of considerations which should govern their exercise." (supra, p247) — as is the case with the American Uniform Rules of Evidence. This criticism is particularly cogent and it is hard to understand why no attempt has been made to meet it.

There are other matters that could, and

perhaps should be commented on but these will suffice for now. It does need to be emphasised, however, that reform of the laws of evidence was very thoroughly discussed 10 years ago. Strong arguments were presented for relaxing the hearsay rule on the one hand and for leaving it alone on the other. There was, however, a high measure of unanimity when it came to specific criticisms of the manner in which the rule against hearsay was being relaxed. It is a matter of some suprise that little attempt seems to have been made to meet these substantial points of criticism. If the rules require modernising, so too does their expression and those who use them are hardly likely to regard the uncertainties of judicial discretion as much of an advance on the unsystematic and inconsistent rules that have prevailed in the past.

Tony Black

CRIMINAL LAW

INCITEMENT TO RACIAL DISHARMONY: KING-ANSELL v POLICE

By Wm C HODGE, *Senior Lecturer in Law, University of Auckland.*

The appellant had been convicted in the Magistrate's Court at Auckland on 20 October 1977, of an offence under s 25 (1) of the Race Relations Act 1971: *Brookes v King-Ansell* (1977) 14 MCD 212. Mr Mitchell S M sentenced the appellant to three months imprisonment. The conviction was upheld by Miller J in the Supreme Court at Auckland, on 27 June 1978, although a $400 fine was substituted for the gaol sentence, on the grounds that the publication contained no specific threats: *King-Ansell v Police* M 1577/77; see note [1978] Recent Law 353. A unanimous decision of the Court of Appeal has upheld that decision: CA176/78; Richmond P, Woodhouse and Richardson J J (14 December 1979).

The facts

The appellant, Durward Colin King-Ansell, was the leader of the barely perceptible New Zealand National Socialist Party*, the ambsace of New Zealand political parties, and was responsible for printing and publishing 9,000 copies of a pamphlet, many of which were distributed by party members to private letter boxes in east Auckland suburbs. (No charge was laid under s 46 of the Post Office Act 1959, which outlaws the placing of "filthy or noxious" material in letter boxes). A printing press and relevant plates were found in the appellant's home. He was also solely responsible for the post office box numbered in the pamphlet.

The appellant might have described the pamphlet as a proposed immigration-emigration policy. It was, in fact, odious anti-semitic propaganda. Complaints were made, by two persons of Jewish ethnic origin, to the Race Relations Conciliator, but the burden of collecting evidence and prosecuting was left to the police. Consent of the Attorney-General, necessary under s 26 of the Act, was sought and obtained, and a prosecution was brought in the name of a police constable.

The actus reus of the charge, parsed out of subs (1) and para (a) of s 25 of the Act, was that the appellant published insulting written matter which was likely to excite ill-will against Jewish persons in New Zealand on the ground of their ethnic origins. The mens rea of the charge was the intent to excite ill-will against the Jews in New Zealand on the ground of their ethnic origins. (Since the facts in this case arose, a new section has been inserted in the Race Relations Act 1971 which prescribes the incitement of racial disharmony in terms identical to those set out in s 25, but lacking any element of mens rea: s 9A, per s 86 of the Human Rights Commission Act 1977. Section 9A is presumably directed at careless or innocent incitements, since there is a conciliation function, in s 13, but no police power to prosecute).

For a discussion of the crime of incitement to racial hatred, see the articles at [1967] Crim LR 497, [1966] Crim LR 320, and (1966) 29 Modern LR 306, Lester and Bindman, *Race and Law* (Penguin, 1972), ch 10, and Bracegirdle, "Race Relations Legislation in New Zealand", ch 6 (an unpublished dissertation held by the Davis Law Library at the University of Auckland). The United Kingdom analog to s 25 was s 6 of the Race Relations Act 1965, now replaced by the Public Order Act 1936, s 5A, as substituted by the Race Relations Act 1976, s 70.

The decision

The only question of law considered by the Court of Appeal, and the defence most seriously pursued in the Court below, was the application of the phrase "colour, race, ethnic or national origins" to Jews in New Zealand. Were they a religious group, or did they have "ethnic origins", as the phrase was used in the Act?

Counsel for King-Ansell submitted that the police had not proven beyond a reasonable doubt that Jews in New Zealand constituted an ethnic group with ethnic origins. Counsel submitted, in fact, definitions from the most reputable dictionaries which demonstrated precisely the opposite. The following definition, taken from the edition of the Shorter Oxford English Dictionary current in 1971, was read to the Court and relied upon by King-Ansell:

> "ethnic: Pertaining to nations not Christian or Jewish; Gentile, heathen, pagan."

[Author's note: The only English dictionary available to the author in the staff library in the Law Faculty at the University of Auckland is the *Shorter Oxford English Dictionary* 3rd ed, with corrections and additions to 1959, with the above definition.]

The impact of this somewhat surprising definition is, however, diminished by its dated usage, which is cited as 1470 AD.

Mills J and the Court of Appeal heard extensive etymological argument from both counsel, based on dictionary definitions, old and new; in addition, both Courts carefully reviewed the expert testimony of Dr MacPherson of the Sociology Department of the University of Auckland.

Mills J concluded that dictionaries did not have binding force on law-givers; although they "may be of assistance to any tribunal", the proper approach is to construe words in their ordinary meaning, in the common or popular sense: *36 Halsbury's Laws of England*, 3rd ed, para 587. In any event the English language was not static, and had evolved considerably since 1470, and it was continuing to evolve. Mills J buttressed his rejection of counsel's submitted definition by reference to the testimony of Dr MacPherson, by considering the known intent of the New Zealand General Assembly (taking into account the 20th century mischief, which was the legislative target), by examining the International Convention on the Elimination of All Forms of Racial Discrimination, cited in the preamble to the Act, and by noting extracts from more recent dictionaries. Rather incredibly, counsel for King-Ansell suggested that these more recent extracts "may have been included at the behest of world Jewry to favour the position of Jews under this type of legislation." The response of Mills J to this unworthy submission was understated: "This criticism does not find favour with me."

The learned Judge also distinguished a reference from *14 Halsbury's Laws of England* 4th ed, para 1423, which referred to Jews as a religious group (and thus not covered by the Race Relations Act). Noting that Jews might well be a religious group for purposes of "Ecclesiastical Law", that did not mean that they could not also have "ethnic origins".

The Court of Appeal, with separate judgments, upheld the conclusion of Mills J that the term "ethnic origins" could apply to the Jews of New Zealand. Richmond P emphasised that such words should be applied in a "broad popular sense", citing the approach of the House of Lords in *Ealing LBC v Race Relations Board* [1972] AC 342. Woodhouse J emphasised the judgment of Lord Simon in the *Ealing* case, where similar language in s 6 of the British Act was labelled "rubbery and elusive", and "not terms of art, either legal or, I surmise, scientific." (p 362). Richardson J emphasised more recent dictionaries; such as the *Heinemann New Zealand Dictionary*, and the relevant international conventions. Offering his own definition —"ethnic origins" distinguish a segment of the population by "shared customs, beliefs, traditions, and characteristics derived from a common or presumed common point, even if not drawn from what in biological terms is a common racial stock" — Richardson J agreed with Richmond P and Woodhouse J that the appeal should be dismissed, but that no order of costs be assessed against the appellant, "as this is the first occasion on which this Court has been required to consider the rather difficult question of construction which arises from the language used in the Race Relations Act 1971."

Comment

The broad interpretation of the categories of prohibited discrimination is welcome, although the Courtroom exercise of categorising human groups is somewhat distasteful. Unfortunately, however, in directing their minds to the etymological confusion put forward by counsel, neither the Magistrate nor any of the Judges focused on whether the published matter was objectively "likely to excite ill-will against Jews in New Zealand". Unlike a civil action for libel, where printed material may be injurious per se, without reference to proven damage, it will be submitted here that in a crim-

inal action, the Crown should show some factual likelihood of the unlawful result.

In passing over that element of the offence, Mr Justice Mills only recorded his satisfaction that it was "likely to excite ill-will against Jews in New Zealand" because two Jewish witnesses found it "very offensive" and "derogatory to any Jewish person". Such evidence proves only that the pamphlet was likely to, and did in fact, excite ill-will against its publishers and disseminators. There was not the proverbial scintilla of evidence — or judicial notice based on fact — that the material had an illegal effect. As far as the Court was aware, the people who read the appellant's rubbish were insulted. It is not suggested that a breach-of-the-peace test be imported into s 25, or that the Crown should find a reasonable man on the Tamaki Drive omnibus who, having read the pamphlet, would confess to having become a raving anti-semite. It is submitted that, at least, some factual possibility of one recipient of the literature being moved in the political direction urged by the pamphlet should have been contemplated in the mind of the Judge. Perhaps, for example, the Crown could have discovered whether the post office box of the appellant's party, referred to in the pamphlet, had been swamped with contributions and party subscriptions after the distribution.

Authorities in the United Kingdom have suggested that such a factual showing is necessary under similar legislation there. Writing in the *Modern Law Review*, Vol 29, Professor Hepple described the elements of the offence of incitement as including the likelihood of stirring up hatred. "In this regard, presumably, the speaker or publisher must take his audience as he finds them." (p 314). (The latter phrase is a reference to a remark of Lord Parker CJ in *Jordan v Burgoyne* [1963] 2 QB 744, at 749). Mr M Partington asks, quite rhetorically, in the 1967 *Criminal Law Review* at p 502, "[I]s it necessary, for an offence to be committed, that in *fact* feelings of hatred be aroused in the recipient of the matter or words?" [emphasis in the original]. After reviewing the language of the section he concludes, (quite unhappily): "[D]oes this not give the Court power to view the matter or words used objectively, and not merely impose a subjective test in relation to the recipient of the words?" Finally, the authors of *Race and Law* conclude that the phraseology of s 6 ("likely to stir up hatred") requires that "the language used must . . . be likely *in fact* to do so." (p 362) (emphasis added).

It might also be suggested that prosecutions in cases where there is no demonstrable injury could do more harm than good. One New Zealand commentator has written that "those threatened with prosecution [under s 25] may be seen as martyrs . . . . Ultimately if one takes the reasoning far enough, there could be a hardening of racial attitudes with the cause of racial harmony accordingly put back, rather than advanced." (Bracegirdle, supra, p 117). Lester and Bindman also conclude that needless prosecutions (under s 6 of the 1965 UK Act) can lead to a climate where ". . . the demagogue's cowardly attack upon a defenceless minority can all-too-readily be interpreted as courageous conduct, carrying a real risk of prosecution and imprisonment, while members of the minority are regarded not as victims but as a privileged group, immune to criticism." (p 372). In other words, the Nazi post office box may have received greater patronage thanks to the trial, the conviction, the appeals, and subsequent publicity than as a result of the original distribution of the pamphlet.

Recent American experience, with fringe Nazi parties may also be instructive. In particular, the celebrated case of the National Socialist Party of America (a grandiloquent title for a few dozen Nazis living in Chicago) and their planned march in Skokie, Illinois, illustrates the tensions implicit but values upheld in refusing to suppress odious political postures. In April 1977, the NSPA announced its plans for marches and demonstrations in Skokie, a Chicago suburb especially chosen because of its relatively high percentage of Jewish immigrant residents. The town authorities sought to deny any such Nazi demonstration by requiring the NSPA to post a $350,000 bond and by obtaining an injunction from the State Court. The American Civil Liberties Union, led by its Illinois legal director, David Goldberger, eventually had the injunction overturned and the bond requirement struck down in Federal Court. See *Collin v Smith* (1978) 578 F 2d 1197; *National Socialist Party of America v Village of Skokie* (1977) 432 US 43. When the Skokie march was finally approved, in 1978, the Nazis substituted a demonstration in Chicago, on 24 June 1978, attended by several thousand counter-demonstrators and approximately 20 Nazis (who arrived an hour-and-a-half late for their own demonstration). The story of defending the rights of a detestable minority, who would give no similar defence in return should they take power, is told by Aryeh Neier, the Executive Director of the ACLU in 1977-78, in *Defending My Enemy: American Nazis, The Skokie Case and the Risks of Freedom* (Dutton 1979).

The lesson is perhaps best taught by Robert

Bolt's drama of Sir Thomas More and Henry VIII, *A Man for All Seasons*. Sir Thomas More asks the unprincipled Roper "What would you do? Cut a great road through law to get after the devil?" Roper answers, "I'd cut down every law in England to do that." "Oh?" says More. "And when the last law was down and the devil turned around on you — where would you hide, Roper, the laws all being flat? D'you really think you could stand upright in the wind that would blow then? Yes I'd give the devil benefit of law for my own safety's sake."

*Identified in some party literature as the "National Socialist White People's Party"

CASE AND COMMENT

Gift duty — Effect of covenant by donee to pay gift duty

An important point arising under the Estate and Gift Duties Act 1968 was decided in *Baigent v The Commissioner of Inland Revenue* (1979) 3 TRNZ 420 (CA). By a deed of trust the appellant constituted a trust to which he transferred by way of gift a parcel of land valued at $38,000. The deed contained a covenant by the trustees to pay out of the trust fund the gift duty payable in respect of the gift of the land.

The appeal concerned the value for gift duty purposes of the gift of the land. The Commissioner treated the full value of the land as being the value of the gift and assessed gift duty at $7,180. The appellant contended that, in determining the value of the gift for duty purposes, the Commissioner should have made an allowance in respect of the obligation of the trustees to pay the gift duty. On that basis the value of the gift was $32,378, and the gift duty $5,622 (the value of the gift and the gift duty together equalling the value of the land). In the Supreme Court judgment had been given in favour of the Commissioner of Inland Revenue ((1977) 2 TRNZ 270).

In s 2 (2) of the Estate and Gift Duties Act 1968 ("the Act"), the term "gift" is thus defined:

> " 'Gift' means any disposition of property, wherever and howsoever made, otherwise than by will, without fully adequate consideration in money or money's worth passing to the person making the disposition:
>
> Provided that where the consideration in money or money's worth is inadequate, the disposition shall be deemed to be a gift to the extent of that inadequacy only:"

The measure of the value of a gift for gift duty purposes is therefore the difference the value of the property comprised in the disposition and the value of any consideration in money or money's worth passing to the disponor. By s 86 (1) of the Act gift duty is declared to be a debt due and payable to the Crown by the donor. By virtue of s 86 (2) and (3), gift duty also constitutes a debt due and payable to the Crown by both the donee and, in the case of a gift in trust, by the trustee. It is, however, expressly recognised by s 86 (4) that the primary liability for gift duty may be shifted from the donor by the term of the gift. That subsection enacts that:

> "Unless it is otherwise provided by the terms of the gift, the donee and trustee shall each be entitled to be indemnified by the donor against all liability under this section."

The main question in *Baigent's* case was whether the obligation accepted by the trustees to pay the gift duty could be regarded as consideration passing to the appellant donor in respect of the disposition of the land so as to have the effect of diminishing the value of the gift by the amount of the gift duty. It was held that the shifting of the liability as between the parties for gift duty constituted consideration in money or money's worth passing to the appellant donor and that the disposition should be deemed to be a gift only to the extent of the inadequacy after taking that consideration into account. The appellant's contention that the amount of the gift duty was $5,622 only was therefore correct. It may be noted that the Court refused to allow any possible difficulty in calculating the amount of the gift duty to influence its construction of the Act. An algebraic formula had to be used in order to work back from the value of the land and calculate the figure upon which duty should be assessed. These difficulties in computation were "trivial and insufficient to override the

effect of the definition in s 2 (2)" (per Cooke J).

Counsel for the Commissioner also relied upon the notorious s 70 (no deduction or allowance to be made in respect of any benefit or advantage to the donor); but it was held that the express exclusions in subs (l) (g) and (h) (iv) applied. The payment covenanted to be made by the trustees was of an ascertainable amount in money payable at an ascertainable date, or on demand, and it was secured to the appellant donor by deed executed by the trustees, who might properly be said to have acquired the beneficial interest under the disposition from the donor, even though they were obliged to deal with the property thereafter in terms of the trust deed.

A final argument advanced on behalf of the Commissioner depended on the meaning and effect of s 69 which provides, in essence, that in valuing property for gift duty purposes no deduction shall be allowed in respect of (inter alia) any liability affecting or incident to the property if and so far as any person acquiring a beneficial interest is entitled as against any other person to any right of indemnity. It was held that s 69 could have no application, Cooke J commenting that "the argument has not satisfied me that any beneficiaries could be entitled in any circumstances to indemnity against gift duty from this settlor, having regard to the terms of the gift . . . ."

In the result, the Court unanimously allowed the appeal. The principle established in *Baigent's* case will, in appropriate cases, be useful to the estate planner. Richardson J remarked:

> "There were . . . very real benefits to the appellant donor from carrying out the transaction in this way. The gift duty on the transaction was less than what it would have been if the appellant had simply transferred the land by way of gift and met the liability for gift duty — $5,622 as against $7,180. If he had sold the land to the trustees for $5,622 and had then died within three years the amount brought within his dutiable estate would have been $38,000 as against $32,378 under the contractual arrangements actually entered into, that latter difference resulting from the scheme of s 42 of the Act."

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HUMAN RIGHTS

A CHILLING REPORT

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The International Covenant on Civil and Political Rights has been in force for New Zealand since 28 December 1978. Yet it does not appear to have entered into the thinking of those whose business it is to recommend legislative reform. Under Article 2, paragraph 2 of the Covenant, one of the chief duties of States who are parties to it is "to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the . . . Covenant".

So far the only law which has been passed in New Zealand to give effect to the rights guaranteed in the covenant has been the Human Rights Commission Act 1977. Section 67 of that Act deals with privacy and ss 68 — 70 relate to Trade Union activities. But for the most part, the Act is aimed at discrimination on the grounds of sex, marital status or religious or ethical belief. It also amends the Race Relations Act which prohibits discrimination on the grounds of race, colour or national or ethnic origin.[1]

As to other rights guaranteed in the Covenant, the Commission is given the general function of reporting to the Government on the desirability of legislating to implement the Covenant, on the human rights implication of any proposed law or Government policy and on the consistency of existing legislation and Government policy with standards laid down in international instruments on human rights such as the Covenant.

The Government, in ratifying the Covenant felt that, by and large, legislation was not necessary to protect the rights guaranteed by it, since most of those rights are already protected

[1] For a more thorough discussion of these provisions see previous writings by the present author in [1977] NZLJ 123 and [1978] NZLJ 189.

by English common law as indeed they are. In fact in many instances present common law safeguards are even more substantial than those offered in the Covenant and Article 5 of the Covenant cautions that the fact that the Covenant does not recognise certain rights or recognises them to a lesser extent is no reason for retreating from those rights already recognised so far.

Yet, since ratification, there has been a stream of proposals for legislative change which not only retreat from the common law but which would, if implemented, erode the standards set out in the Covenant. One of the most chilling examples is the Report of the Criminal Law Reform Committee entitled "Report on Bodily Examinations and Samples as a Means of Identification". The committee starts by admitting that "at common law . . . any forcible restraint in respect of a suspected offence may only be exercised by way of arrest, or in the course of arresting. Detention for the purpose of making inquiries is not permissible . . ." (p 3).

The recommendation of the committee may be summed up as follows (pp 2-3). If the police have reasonable grounds to believe that a suspect has committed an offence involving a prison term of more than 12 months, they should be permitted to apply to a Magistrate for an order allowing them to detain the suspect in order to examine him or her for identifying marks or to extract bodily samples as a means of identification. This procedure is to be available before, as well as after arrest. In other words, without making an arrest, the police would be empowered to request a suspect to accompany them to a place specified in the order for the purpose of examination. If the suspect consented then examination could be undertaken immediately (p 27).

If consent is not forthcoming, then the police would be able to make an ex parte application to a Magistrate for an order requiring the suspect to conform to the request (p 3). The application will have to specify that:

> "(a) there are reasonable grounds to believe an offence has been committed;
> "(b) there are reasonable grounds to suspect that a specified person has committed that offence; and
> "(c) there are reasonable grounds to believe that relevant material or evidence will result which will assist in determining the guilt or innocence of the person suspected of having committed the offence (p 13)."

The order will specify:

> "(a) the offence to which the order relates;
> "(b) the nature of the examination to be carried out, or the specific type of sample to be obtained;
> "(c) the identity of the person who is the subject of the order, ie the examinee;
> "(d) the names and ranks of the police officers, or the names, addresses, and occupations of other persons, who are authorised to carry out the examination or to obtain the sample;
> "(e) the time when and the place where the examination is to be carried out or the sample obtained;
> "(f) the maximum period (normally, not exceeding one hour) during which the examinee will be required to attend pursuant to the order;
> "(g) the duration (not exceeding one week) during which the order shall remain in force; and
> "(h) any other conditions which the Magistrate may impose to ensure that the order is carried out effectively and that the rights of the examinee are protected" (p 24).

Samples that might be taken would include blood samples, physical measurements and markings, saliva, hair, pubic hair, nail clippings and scrapings, fingerprints, palm prints, footprints and dental impressions (pp 8-9). If the suspect resists, then the committee recommends that the police be allowed to take him into custody and to use reasonable and necessary force to obtain the samples (p 3).

The only grounds for objection recognised by the committee are "genuine" religious or medical grounds (p 23). There is no provision for any other form of conscientious objection although the procedure might humiliate certain ethnic group members on cultural grounds (p 23).

If the police want nail clippings, they would be able to dispense with the order on the grounds that the suspect might clean his nails before the sample can be obtained (p 26).

The committee does not spell out what reasonable grounds are, but as a standard of suspicion, it is considerably less than the standard of suspicion currently required for an arrest.

Finally, the committee proposes that, where a crime has been committed in a confined situation and where the offender must obviously be one of the persons present, then

everyone present should be subject to examination.

The committee's examples of a confined situation are a military barracks or a ship. But a confined situation could just as easily be a hotel, a university dormitory, a pub, or a shop (pp 15-16).

In such a situation the Magistrate must have regard to:

"(a) the seriousness of the offence;
"(b) the number of persons involved;
"(c) the nature of the group;
"(d) the likely usefulness of the specimens sought;
"(e) any other consideration relevant in the circumstances (pp 15-16)"

Any other statements made during the examination will not automatically be excluded at a later trial (p 19) and the police will be protected from liability with regard to their conduct of the examination (p 21).

Certain palliatives are suggested such as the right to demand that the examiner be a person of the same sex if a state of undress is required and the right to have three persons of one's own choosing present. But, reduced to its essentials, if the proposals become law the police would be able to serve the suspect with a frightening order charging him with a crime he did not commit. He could only object on very limited grounds. If he refused to comply out of conscience or out of a sense of personal dignity, they could haul him to the police station and hold him down or strap him down while they removed samples of his blood or pubic hair or searched his body for identifying marks.

Article 7 of the Covenant prohibits torture or cruel, inhuman or degrading treatment or punishment. Of course, the committee does not recommend torture and the recommendations do not constitute punishment. People vary in the degree of self-respect and regard for personal integrity which they possess. But, on the whole, this can be viewed as degrading treatment. It also offends Article 10 of the Covenant which requires that persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 7 also provides that no one shall be subjected, without his consent, to medical experimentation.

Even consent does not necessarily legitimise the operation. Consent may be obtained from what the dissenting members of the committee call "vulnerables" (Minority Report, para 7 (iii),) persons who are innocent but unsophisticated or who are easily cowed by police authority, persons of youth who are uncertain about their rights, probationers and former inmates "nervously intent on avoiding further 'hassles' with the police", persons with a tendency to tell authority figures what they believe those figures wish to hear . . . and persons of sub-normal intelligence or brittle emotional stability." For such persons, consent does not necessarily render the treatment any the less degrading.

The procedure for ex parte application offends Article 9 of the covenant which says that anyone detained on a criminal charge shall be brought promptly before a Judge or other judicial officer. So the report of the committee offends at least three provisions of the Covenant.

The committee proposes to retreat from common-law rights because "we think that the rights of the individual are no more absolute than society's need for effective law enforcement" (p 10). New Zealand and 55 other parties to the Covenant disagree.

CRIMINAL LAW

TIME LIMITS FOR SUMMARY PROSECUTIONS UNDER THE CRIMES ACT

By C S WITHNALL, *Barrister, Dunedin.*

Section 14 of the Summary Proceedings Act 1957 provides that subject to statutory exceptions ". . . every information for an offence (other than an offence which may be dealt with summarily under Section six of this Act) shall be laid within six months from the time when the matter of the information arose."

In *Brown (Police) v Urquhart* (Supreme Court, Dunedin 29 May 1978, M49/78) Jeffries J was faced with a submission that offences under s 246 (2) (c) of the Crimes Act 1961 (obtaining by false pretences where the value of the property obtained did not exceed $10) were not offences "which may be dealt with summarily under Section six of this Act" and were therefore subject to the time limitation contained in s 14, notwithstanding that s 246 of the

Crimes Act is included in the First Schedule to the Summary Proceedings Act.

The matter came before Jeffries J by way of appeal by case stated against the decision of the learned Magistrate dismissing the charges as being out of time. After setting out in full the provisions of ss 6 and 14 of the Summary Proceedings Act, his Honour observed:

> "Section 246 is included in the First Schedule which lists indictable offences triable summarily by Magistrates. However, it is s 66 (1) of the Summary Proceedings Act which makes the essential direction as to when an accused who has been proceeded against summarily may choose to elect to be tried by a jury. If the term of imprisonment exceeds three months he is then entitled to elect.
>
> Counsel argued that the maximum goal sentence provided by s 246 (2) (c) is three months, and therefore the charge can only be dealt with summarily. If it can only be dealt with summarily it is not within the category of those crimes provided for by s 6 (1) which are indictable offences which may be tried summarily, and for which the limitation of s 14 does not apply. Under s 2 of the Act "Indictable offence" means " . . . Any offence for which the defendant may be proceeded against by indictment:" Counsel argues that the defendant cannot be proceeded against by indictment. In summary, counsel submitted that all those offences which may be charged under the Crimes Act, but in relation to which no indictment may be presented are caught by the limitation of s 14 of the Act."

Other offences in this category included theft under s 227 (d) and receiving under s 258 (1) (c).

The learned Judge referred to *Adams on Criminal Law* (2nd ed) para 61, which states:

> "The only cases in which a summary offence can be charged in an indictment are, (a) where the accused has elected (under s 66SPA) to be tried by a jury, (b) under s 329 . . . . and (c) under s 345 (3)."

and then concluded:

> "Under s 66 of the Summary Proceedings Act 1957 the accused is unable to make such an election and therefore for the charges under consideration summary jurisdiction is the only way he can ask they be tried. Under ss 329 (1) and 339 (1) only charges which can proceed by indictment are embraced. In *R v Rowlands* [1974] 1 NZLR 759 it was held that a mere summary offence could proceed on indictment if the condition precedent to a prosecution is fulfilled (consent of a Judge or Attorney-General) but that is a special procedure, and no such question arises in this case. Therefore, in my opinion, mere summary offences are not included under s 6 of the Summary Proceedings Act, and the exception to s 14 does not apply. It follows that s 14 does limit the time in which an information may be laid and the four informations were not laid within the six months and therefore the Magistrate was right in dismissing them."

It is respectfully submitted that the argument of counsel, logical though it may appear, nevertheless overlooks a vital factor to which the learned Judge was not referred and which, with respect, undermines the validity of the argument and therefore the judgment based on it.

Put briefly, the argument is that the offence *cannot* be proceeded against by indictment, and is therefore not within the definition of "indictable offence" in s 2 of the Summary Proceedings Act, viz "any offence for which the defendant *may* be proceeded against by indictment" (emphasis supplied).

Section 2 (2) of the Crimes Act provides:

> "When it is provided in this Act that any one is liable to any punishment for doing or omitting any act, every person doing or omitting that act is, subject to the provisions of this Act, guilty of a crime."

Section 2 defines a "crime" as: "an offence for which the offender may be proceeded against by indictment."

An offence against s 246 (2) (c) is therefore a "crime" and may form a count in an indictment pursuant to s 329 (1) of the Crimes Act, viz,

> "Every count of an indictment shall contain and shall be sufficient if it contains in substance a statement that the accused has committed . . . some crime therein specified . . . ."

Section 6 of the Summary Proceedings Act in effect gives the prosecution a right of election in respect of offences specified in the First Schedule to either proceed summarily by laying an information in Form I pursuant to s 15, or to proceed indictably by laying an information in Form II pursuant to s 145. So long as the latter course is available to the prosecution then the

offence, regardless of the maximum penalty, is an "indictable offence" in terms of the definition in s 2 and is therefore within the exception to the time limit in s 14.

One may safely assume that in practice an information for this type of minor "crime" will always be laid summarily, and no doubt it was as a result of this practice that counsel in *Urquhart's* case failed to realise the significance of the procedural provisions of s 145 enabling an offence of this type to be proceeded for by way of indictment.

MATRIMONIAL PROPERTY

DEBTS AND THE MATRIMONIAL PROPERTY ACT 1976 — PART I

By A J B McLEOD. *Mr McLeod was formerly Judges' Clerk at Auckland but is now in private practice.*

Introduction

The Matrimonial Property Act 1976 ushered in a radical change in New Zealand's matrimonial property law. The Act contains many far reaching and detailed provisions, some of which have received the attention they deserve. Equally important provisions, however, have gone virtually unnoticed and it is the purpose of this article to draw attention to a hitherto neglected section, s 20.

Section 20 deals with the interrelationship of matrimonial property, creditors and debts. It is a reasonably long provision, running for eight subsections and occupying nearly two pages in the Statute Book. Unfortunately, it has been deplorably drafted and, once this fact is realised by practitioners, should provide a fertile source of litigation.

This article is a critical analysis of a portion only of s 20, namely subss (5) and (7). It is really quite difficult to find something positive to say about these two subsections. They are nearly incomprehensible on first reading. Once understood, they are amazingly complex in their operation. Ambiguities and anomalies abound. Drafting errors are obvious. To top it all off, they sometimes produce manifestly unjust results.

Little wonder then that most practitioners, and Judges, have chosen either to ignore these two subsections or pay them lip service only.[1] Yet these two subsections, with their novel concept of "personal debts", are an integral part of the Act. Almost every matrimonial property case must at some stage go through the arithmetical exercise outlined in s 20 (5). Therefore an understanding of these subsections and how they work is essential to any understanding of the Act.

At this stage it may be preferable to summarise the general effect of these two subsections and their particular niche in the overall framework of the Act. On an application under the Act, all property before the Court which is classified as "matrimonial property" is divided between the spouses. This is done, not by vesting each item of property in the spouses as tenants in common, but by awarding each spouse a share in the value of the matrimonial property. The Court then allocates the various items of property between the spouses so as to give effect to this award. The value of the matrimonial property to be divided between the spouses in this way is calculated by totalling up all the matrimonial property owned by each spouse and then deducting certain debts: s 20 (5). These deductible debts are, with two exceptions, those outlined in paragraphs (a), (b), (c) and (d) of s 20 (7).

This article is divided into three parts. Part I will examine s 20 (7), Part II will discuss the special case of mortgages over the matrimonial home; and Part III will examine s 20 (5).

I Section 20 (7): Personal debts and matrimonial debts

To understand which debts are deductible, and which are not, one must first understand the concept of a "personal debt". Unfortunately, the draftsman has chosen to define this novel concept by the technique of exclusion which only adds to the general confusion

[1] Thus out of the 300 odd cases reported in Volumes 1 and 2 of *Matrimonial Property Act Cases* published by the New Zealand Council of Law Reporting, only eight have discussed ss 20 (5) or (7) in any significant detail. And in the first 10 Court of Appeal decisions delivered on the Act there is only the single obiter paragraph of Richardson J's in *Meikle* [1979] 1 NZLR 137 at 157.

surrounding this part of the Act.

Section 20 (7) reads:

> "(7) For the purposes of this section, 'personal debt' means a debt incurred by the husband or the wife, other than a debt incurred —
>
> (a) By the husband and his wife jointly; or
>
> (b) In the course of a common enterprise carried on by the husband and the wife, whether or not together with any other person; or
>
> (c) For the purpose of improving the matrimonial home or acquiring or improving or repairing family chattels; or
>
> (d) For the benefit of both the husband and the wife or of any child of the marriage in the course of managing the affairs of the household or bringing up any child of the marriage."

It can be seen that paragraphs (a), (b), (c) and (d) in themselves provide a definition of what may be termed "matrimonial debts", ie those debts which are not personal debts of the spouses, and are therefore prima facie deductible from the value of matrimonial property that is to be divided between the spouses. The difficulties that result in interpreting these four individual paragraphs, which together provide an exhaustive definition of "matrimonial debts", will now be discussed.

II Section 20 (7) (a): Debt incurred by the husband and wife jointly

A debt incurred by the husband and wife jointly will be a matrimonial debt and prima facie deductible.

The only two cases to have discussed paragraph (a) in any degree of detail show a marked difference in approach. In *Frost*,[2] the original mortgage on a joint family home was increased to provide capital for the husband's business venture. Counsel for the wife argued that the increase should be treated as the husband's personal debt despite its joint nature. Such an argument did not find favour with Jeffries J who said:

> "For myself I do not accept that it is a personal debt of the respondent as envisaged by that subsection. Although the applicant gave evidence of reluctance on her part to refinance the property to provide this surplus there is no doubt that she voluntarily executed the documents and knew full well for what purpose the money was required and gave her consent. It is really an attempt on her part to go behind the mortgage which is at present on the property and to get at the purpose for which the mortgage was raised and describe that, at least partly, as a personal debt of her then husband."

The practical result of this decision was that the wife had to share the full burden of the mortgage.

The converse approach was taken by Vautier J in *Kelly*.[3] In that case, the matrimonial home bore a second mortgage which had been raised as security for the overdraft operated by the husband's company. Counsel for the husband argued that, as both spouses were liable on this mortgage, it fell squarely within s 20 (7) (a). But Vautier J preferred to look behind the two signatures. In an oral judgment he said:

> "In my view however, I must look more into the substance of the situation than is submitted by Mr Beattie in the argument he advanced in this regard. The situation clearly is that this is a liability of the company in question and a liability which was incurred for the benefit of that company even though the Bank has obtained some security against the matrimonial home with regard to that debt. In my judgment therefore, the only practical way of dealing with this debt and the only just way, is for the amount to be deducted from the husband's share of the net proceeds so that he then will become a creditor of his company for that amount."

It is submitted with respect that the approach of Jeffries J in *Frost* is the correct one, as it is in accordance with the Court of Appeal's guidelines in *Reid*[4] as to how the Act should be construed. Unambiguous words should be given their natural and ordinary meaning unless that meaning is clearly at variance with the purposes of the legislation or calculated to produce results that are absurd. The words of paragraph (a) are perfectly plain and unambiguous. The sole criterion is whether the debt was incurred by the husband and wife jointly. Other considerations, such as for whose benefit the debt ws incurred, whether the spouses' liability is primary or secondary, or whether the spouses remain jointly liable, are not men-

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[2] (1977) 1 MPC 84.
[3] (1978) 1 MPC 117.
[4] [1979] 1 NZLR 572.

tioned and should therefore be regarded as irrelevant. Nor would such a literal interpretation have produced a result in *Kelly* that was absurd or at variance with the purposes of the legislation. By classifying the mortgage as a matrimonial debt, the wife would have shared the burden of an encumbrance that had helped to sustain matrimonial property, property in which she would ultimately share.

As it turned out, however, by awarding the wife half the shares in the company, Vautier J effectively reached the same result as Jeffries J in *Frost*, since the value of those shares were of course diminished by the amount of the debt owed by the company to the husband. Thus under either approach the wife would share the burden of the second mortgage.

This is not to say that the approach of Jeffries J in *Frost* will always produce the just result. Consider the case where a joint debt is used to sustain the husband's separate property. In this situation, Vautier J's approach is preferable since the wife, who of course will not share in the husband's separate property, will not bear the burden of the debt. However if the Court felt constrained by the plain words of paragraph (a) to hold the wife jointly liable, s 17 (1) (a) could perhaps be used to make a suitable adjustment. The difficulty with this strategy of course is that it does rely on a somewhat forced use of the phrase "application of matrimonial property", though note that property as defined in s 2 (1) includes "any debt".

III Section 20 (7) (6): Debt incurred in the course of a common enterprise carried on by the husband and wife, whether or not together with any other person

It is difficult to establish with certainty the precise scope of paragraph (b); and in particular what is meant by the words "a common enterprise carried on by the husband and the wife". These words obviously cover business activities conducted by the husband and wife, for example, the corner dairy in which both spouses participate or the husband's company for which the wife performs the secretarial duties.

But "enterprise" does not necessarily carry a commercial connotation. It can have the wider meaning of an undertaking or project. Thus the joint sponsorship by the spouses of a Corso child would appear to fall within the words of the paragraph.

On this wider meaning of "enterprise", marriage itself is conceivably a common enterprise carried on by the husband and wife. Against such an interpretation however must be placed the following factors. First, the paragraph finishes with the phrase "whether or not together with any other person", which suggests that the draftsman in using the word "enterprise" was not referring to marriage; and second, the drastic result of the wider interpretation, which would mean that all debts incurred by either spouse in the course of the marriage would be matrimonial debts and therefore prima facie deductible. Not only would this create injustices, but such an interpretation would render paragraphs (a), (c) and (d) otiose except for the periods before and after the marriage, periods at which paragraphs (a), (c) and (d) do not appear to be directed. The better view then is that marriage per se is not to be regarded as "a common enterprise carried on by the husband and the wife."

Two other difficulties with paragraph (b) shall be mentioned. First, what degree of participation is required of each spouse before it can be said that the enterprise was a "common" one, "carried on" by both husband and wife? The case of the wife who works an 80 hour week alongside her husband in the corner dairy presents no problem. Equally clear cut is the situation where the wife merely balances the books of her husband's company once a year. The latter contribution falls far short of participation in a common enterprise. But the difficulty lies as usual in analysing the grey area between these two extremes.[5] At what point does a minor contribution by one spouse become participation in a common enterprise? Other problems suggest themselves. How, for example, is the infusion of capital to be measured against the infusion of labour?

The further difficulty with paragraph (b) is whether continued participation is required by the words "carried on". The situation contemplated here is of the wife who initially enters a business concern with the husband but later for some reason during the course of the marriage drops out or makes no further contribution. It may be argued that since the enterprise is no longer carried on by the husband *and the wife*, the criterion expressed in s 20 (7) (b) is no longer satisfied. However it is submitted that the moment the debt is incurred is the crucial one on which the Court should focus. Thus if there existed a common enterprise at the time the debt was incurred, the debt is a

[5] Farms will be a big headache. For an apparent example of a s 20 (7) (6) debt in a farming context, see *Dorreen* (unreported, Perry J, Whangarei, 16 May 1977 M59/77) where an overdraft incurred in the running of the farm was held to be deductible.

matrimonial one. For two judicial applications of s 20 (7) (b), see *Haddad*[6] and *Patterson*.[7]

IV Section 20 (7) (c): Debt incurred for the purpose of improving the matrimonial home or acquiring or improving or repairing family chattels

Paragraph (c) is directed at domestic property.[8] The most startling omission is the debt incurred for the purpose of *acquiring* the matrimonial home. Unless such a debt is caught by another paragraph, it will remain a personal debt and prima facie be non-deductible.[9]

The other curious omission is the debt incurred for the purpose of *repairing* (as distinct from improving) the matrimonial home. This seems a necessary conclusion to draw from the words of paragraph (c) because the draftsman has expressly referred to "improving or repairing" family chattels but has only referred to "improving" the matrimonial home. "Repair" and "improvement" are obviously distinct concepts. In the context of paragraph (c), "repair" suggests nothing more than maintenance, whereas it is submitted an "improvement" normally will have the effect of increasing the value of the asset.

The anomalous result produced is that while the mortgage raised to repair rotten floorboards is not within the paragraph the mortgage raised to add another bedroom is. Difficulties will arise in determining the precise moment at which repairs stop and improvements begin. Take for example the new Monier tiles to replace the rusted iron roof — a repair or an improvement? The Monier tiles can be happily described as either, but probably a Court will opt for "improvement" so that the debt will be classified as matrimonial and accordingly be borne by both spouses. As the spouses will in most cases share equally in the matrimonial home, this would seem the correct result.

V Section 20 (7) (d): Debt incurred for the benefit of both the husband and the wife or of any child of the marriage in the course of managing the affairs of the household or bringing up any child of the marriage

A prime example of the lamentable standard of drafting to be found in s 20 is para (d) of s 20 (7). There are at least three possible ways of reading this paragraph!

First it could mean:

(i) for the benefit of both the husband and the wife, or
(ii) for the benefit of any child of the marriage in the course of managing the affairs of the household or bringing up any child of the marriage.

Secondly, it could mean:

(i) for the benefit of both the husband and the wife in the course of managing the affairs of the household or bringing up any child of the marriage, or
(ii) for the benefit of any child of the marriage in the course of managing the affairs of the household or bringing up any child of the marriage.

Thirdly, it could mean:

(i) for the benefit of both the husband and the wife in the course of managing the affairs of the household, or
(ii) for the benefit of any child of the marriage in the course of bringing up any child of the marriage.

The cause of the confusion is not difficult to discern. The ambiguity arises from the juxtaposition of the two sets of alternatives (spouse or child/household or upbringing). Why did the draftsman not, at the cost of a few extra words, spell out his message a little more clearly?

The problem thus arises of selecting the correct interpretation. In the writer's opinion, the third interpretation set out above is the one which reads the most naturally. This is because "any child of the marriage" readily links up with "bringing up any child of the marriage" and similarly the phrase "both the husband and the wife" is contextually compatible with "managing the affairs of the household". Both the second and third interpretations suffer from the awkward association of "any child of the marriage" with "managing the affairs of the household". "Any child of the marriage" is more obviously connected with "bringing up any child of the marriage," than it is with "managing the affairs of the household". And if "any child of the marriage" is intended to be coupled to *both* these clauses, it will be difficult to imagine any exclusive situation covered by the latter clause that would save it from being labelled otiose. In other words — when is a debt incurred for the benefit of any child in the

[6] (1977) 1 MPC 97.
[7] (1979) 2 MPC 143.
[8] An expression used to describe the matrimonial home or equivalent plus the family chattels.
[9] This problem is explored further in the second part of this article.

course of managing the affairs of the household not also a debt incurred for the benefit of any child in the course of bringing up any child?

Nevertheless, when the results that flow from the three different interpretations are examined, the first construction is by far the most useful one. This is because it contains the all-encompassing "debt incurred for the benefit of both the husband and the wife". In normal circumstances, such a debt should be a matrimonial debt and thus be borne equally. It should not be necessary for a spouse to go further and prove that it was incurred in the course of managing the affairs of the household. It suffices that the debt benefits both parties.

It will be shown in the second part of this article that if the first interpretation is adopted then many of the difficulties resulting from the omission of the verb "acquiring" in the first limb of s 20 (7) (c) will be removed. For these reasons the merits lie with the first interpretation.[10] However if the decision is confined to the natural and ordinary wording of the paragraph itself, it is thought the third interpretation will probably prevail.

Two cases[11] have classified a husband's liability for income tax as a deductible debt. In doing so, they would appear to have relied upon paragraph (d)[12], either of the above interpretations of this paragraph being applicable to a liability for income tax.

A further source of difficulty with paragraph (d) is revealed by the words "for the benefit of". To begin with, is the draftsman referring only to the immediate recipient(s) of the benefit, or is he referring to the ultimate recipient(s) as well? For a "benefit" is very rarely felt only by the immediate recipient(s); its effect, especially in family situations, often filters down to other people. Secondly, does the benefit actually have to be received, or is it sufficient if it was intended that in incurring the debt, a benefit would pass?

In *Frost*,[13] Jefferies J appears to have given the words a wide meaning. In that case, as will be remembered, the wife had argued that the portion of the mortgage raised on the home to provide capital for the husband's business venture was a "personal debt" of the husband's. After rejecting this argument on the ground that the whole debt was clearly a joint debt, the learned Judge continued:

> "In any event, even if it were possible to describe part of it as a personal debt, it was to enter a business which if it had succeeded and the marriage had stayed together would have benefited the husband and wife, as envisaged by s 20 (7) (d). It was never suggested the business was separate property and property acquired during the subsistence of a marriage is prima facie matrimonial property".

Thus the fact that the company was the immediate recipient of the benefit of the debt did not deter Jeffries J. Rather he was concerned with the *ultimate* recipients of the *intended* benefit of the debt, the husband and the wife.[14]

A narrower view was taken by Quilliam J in *Castle*.[15] In that case the wife had borrowed money for her business. The learned Judge said of these advances:

> "It is necessary to decide first whether the advances were "personal debts" as defined in subs (7). I think it is clear that they do not fall into any of the categories set out in that subsection. It was argued for the wife that, once she and her husband had separated and she had custody of the children, her own business activities were the kind of thing she needed to do in order to assist in the upbringing of the children. There is no suggestion in the evidence, however, that either of these advances were debts incurred by the wife for the benefit of any child of the marriage. They were incurred by her for the carrying on of her business interests."[16]

It is respectfully submitted that the wider approach of Jeffries J is to be preferred to that of Quilliam J. It cannot be denied that in *Castle* the wife's immediate reason for incurring the debts was the carrying on of her business interests. However, although the immediate recipient of the benefit of the debt would have been the wife's business, the ultimate recipients of the benefit would have been the wife and her children. In the ordinary sequence of events they would have been fed, clothed and housed

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[10] The first interpretation appears to have been used by Jeffries J in *Frost* (1977) 1 MPC 84. In that case a debt incurred for the benefit of both spouses, but not incurred in the course of managing the affairs of the household, was held to fall within s 20 (7) (d).

[11] *Delbridge* (1978) 1 MPC 57; *Patterson* (1979) 2 MPC 143.

[12] Note, however, that in *Delbridge* the husband had no separate property. Thus his liability for income tax could have been classified as a personal debt, and yet still have been deductible by virtue of s 20 (5) (b).

[13] (1977) 1 MPC 84.

[14] See also *Allum* (1979) 2 MPC 2.

[15] [1977] 2 NZLR 97.

[16] Ibid, p 101.

out of the profits of the business. In this sense it could be said that the debts were incurred inter alia for the benefit of the children. And it is submitted that as long as the debts were incurred during the time when the children were being raised by the mother, they would be considered to have been incurred "in the course of bringing up" the children. The danger with this approach, however, is obvious. How far down the line can the Court go in tracing the benefit?

CORRESPONDENCE

Dear Sir,

I feel bound to reply to comments in your editorial concerning the Grey Lynn Neighbourhood Law Office (1 April 1980).

It is not entirely correct to say that inexpensive legal services other than those provided by the Grey Lynn Neighbourhood Law Office are unavailable to the people in Grey Lynn. The bulk of the office's work is in respect of domestic and criminal matters, for which legal aid is available. There is not, therefore, a financial barrier to the legal services in many cases.

From the information available to me, a claim of 6,000 clients last year is an extreme exaggeration. It seems that there might be some confusion between clients and "attendences". On figures given to me, the office opened approximately 500 files in 1979. It has been estimated by the Neighbourhood Law Office staff that files are opened for about half their clients. It would seem, therefore, that the office helped approximately 1,000 people in 1979. If we were in fact talking about 6,000 clients, then an average fee of, say, only $10 would provide an income of $60,000, a sum greater than the current total budget.

The statement that the Government does not want to know about the need for a neighbourhood law office is patently incorrect. We have, after all, funded the pilot scheme for two years without any real commitment to do so. The Department of Justice's evaluation of the office is further evidence of my concern.

From my point of view it would be very helpful to know from potential users themselves what form of service they most feel the need for. It may well be that these do not coincide with a legally-orientated view of "unmet need". In order to explore these needs and preferences, an examination of clients' cases and backgrounds is needed. As to breach of privilege, it has never been suggested that such enquiries be done without the client's consent. Rather than "ineptness", the department in its approach to the research has been concerned to ensure that the credibility of the Neighbourhood Law Office is not threatened and that the goodwill it has developed is not prejudiced.

A further aim of the evaluation is empirically to assess the previously unsubstantiated claims that a need exists and that a neighbourhood law office is the best remedy for this. Such claims abound in your editorial: "Ninety-five per cent of them could be described as poor"; "culturally disadvantaged people"; "6,000 people", "people with low incomes"; "criminal charges often arising out of their lack of understanding of New Zealand laws and customs".

The evaluation of the Grey Lynn Neighbourhood Law Office has always been considered a joint project by the Department of Justice, and one that requires genuine cooperation and acceptance by both parties. Unfortunately, apart from suggestions of taking superficial counts and the relating of experiences, the Law Society's input has been minimal. As we have seen, these two methods tend to be unreliable and misleading.

It is also appropriate to comment on the more fundamental issues of the structure and funding of the Grey Lynn Neighbourhood Office, thus putting my observation "that the Law Society had chosen initially to go it alone" in context.

In 1976 the Department of Justice and the Law Society held discussions on the development of a pilot neighbourhood law office. It was agreed then — and the Government still holds this view — that the local community should have a majority on the Supervisory Committee with three representatives, and that the Law Society and Government should have two representatives each. It was also agreed that this committee would establish, in the light of community interests and by its experience, the broad guidelines for the nature and scope of the office's work.

Although it initially indicated its acceptance of both propositions, the Law Society Council later advised that it could not accept this agreement. It insisted that the society should have a majority on the Supervisory Committee and that the society's representatives must have sole power to approve the nature of the work. Without further consultation, the Law Society later established a pilot office in Grey Lynn. It was therefore the profession itself that assumed financial responsibility for this service. Apart from shouldering miscellaneous administrative costs, it should be realised that the Law Society has not made a grant to the Neighbourhood Law Office since its initial $10,000 in 1977.

Yours sincerely,

J K McLay
Minister of Justice

Dear Sir,

Relevant earnings for Accident Compensation

While your comment ([1980] NZLJ 65), on the statutory basis for relating relevant earnings to assessable income for tax purposes, raises one important point in fixing earnings-related compensation for the self-employed it does not mention the most difficult and apparently insoluble problem.

Section 113 of the Accident Compensation Act 1972 provides a formula for the calculation of earnings-related compensation for both employees and self-employed persons. Earnings-related compensation is calculated at 80 percent of the loss of earning capacity. Loss of earning capacity is derived under subs (2) of s 113 by deducting from the relevant earnings for a like period the amount of the earnings during the period (of incapacity).

The real problem involved in fixing earnings-related compensation for the self-employed arises when one attempts to ascertain the earnings of a self-employed person during the period of incapacity. Some self-employed people eg, dairy farmers or sheepfarmers or orchardists would suffer no loss of "earnings" during the period of incapacity if the period coincided with the normally slack or inactive part of the farming season. Other self-employed people derive the major part of their annual income from activities which may be concentrated into only part of the year so that they also may suffer no loss of earnings if incapacitated by accidental injury during their non-productive period.

The fixing of relevant earnings as the starting point does not present great problems. Section 104 provides a variety of ways in which the Commission may fix the amount which in its opinion would, at the time of the accident, fairly and reasonably represent normal average weekly earnings. "Earnings as a self employed person" are defined in Section 103 as the assessable income for tax purposes which is beneficially derived from the carrying on of a business (with some exceptions).

The problems associated with fixing relevant earnings have been recognised by the Commission and have been met to some extent by the introduction of the "minimum relevant earnings scheme" and the application of the "fair and just rules". There may be arguments for suggesting that relevant earnings should be fixed in some other way, for example by allowing a self-employed person to nominate an amount, or by allowing him to write back allowable tax deductions such as export incentives or development expenses or farm-income equalisation deposits. However assuming that some other method was adopted for fixing an amount which would fairly represent normal average weekly earnings that would not solve the problem within the present provisions of s 113 (2).

One suggestion made is that compensation should be paid as a percentage of relevant earnings (or a nominated figure upon which levy is paid) without any regard being had to "earnings during the period of incapacity".

A change of this kind would mean that for employees, the compensation provisions of the Act would be based on the principle of income maintenance while for the self-employed straight insurance benefits would be available without any regard for actual loss. Not only would such a distinction be illogical and untenable in terms of the spirit and purposes of the Accident Compensation Scheme as a whole but it would lead to very substantial and costly administrative problems.

Providing for the cost of replacement labour during the period of incapacity is another suggestion which has been made to overcome the problem but this also has its shortcomings both practical and philosophical.

It is clear that while the formula provided in the Act for fixing earnings-related compensation for employees is simple to apply the problem of fairly compensating the self-employed on an income maintenance principle does not give rise to a simple solution.

Yours faithfully,

D A Rennie
Director of Research and Planning
Accident Compensation Commission

Dear Sir,

Some comments on Police v King-Ansell

My recent experience as a witness in the case of the *Police v King-Ansell* and the comments which the case has generated have prompted me to make the following comments:

I became involved when the police sought my opinion as to whether, in laying the charge under the "ethnic origins" provisions they had been "correct". There was some concern that a defence might consist of arguments that the charge was "incorrectly" laid and that there was in fact no case to answer. I stated at that time that in my opinion the choice of "ethnic origins" as the appropriate category was sensible and that available literature would confirm this view.

I was then asked to submit a written opinion in which the substance of my argument was to be summarised, for the Crown Solicitor. In view of statements made in the Appellate Court in connection with this evidence I should like to set down my approach to the problem as I saw it.

I first assumed that those who drafted the Race Relations Act 1971 had sought to outlaw all forms of racial discrimination and had sought to includeall categories necessary to this end, viz colour, race, ethnic or national origins.

I further assumed that each of these terms described a basis for categorising groups of people and that they were mutually exclusive. Had they not been mutually exclusive there would have seemed to be little point in their inclusion in the Act. Had one term, viz, race, been adequate as a description of bases of categorisation of people there would have been little point in including others which would have added little to the Act and would certainly not have furthered its intent.

I decided then that those who drafted the Act must have included all four possibilities for a purpose concerned with their understanding of the individual terms' meanings.

It seemed that argument would have to establish that in any given case the category chosen was the most appropriate or "correct" under which to lay a charge. It appeared to me that to demonstrate that the charge was correctly laid one would proceed by showing, (a) that a particular category was "appropriate" and (b) that others available were "inappropriate". This supposition seemed to be borne out by the police concern that a defence argument might seek to establish that the choice of category was inappropriate and that there was in fact no case to answer.

I proceeded by assuming that since an "expert" opinion was sought, the police sought an intelligible summary of

the current state of the "scientific" debate which surrounds the issue. If this were not so, why seek an "expert" opinion and not an opinion on common usage from an authority on semantics or indeed a representative selection of everyday usage of the various terms?

As an "expert" witness it seemed that my task was to summarise the arguments for considering Jewry to be a group of persons on the ground of their ethnic origins and to show that they could not be considered to be a group on grounds of colour, race or national origins. This I proceeded to do to the best of my ability.

In view of the poor quality of those sections of the Magistrate's Court transcripts which I have seen, my arguments are summarised here. Jewry cannot be accurately described as a race because they do not share in common a set of genes and/or associated physical characteristics which distinguish them from other species of human. If race is used accurately, that is, in a way agreed upon by the scientific community as a means of avoiding the very sorts of confusion evident in this case, the Jews cannot *correctly* be described as a race because dispersal and intermarriage have ensured that the conditions necessary for the "preservation" of a racial group have not been met. Since the biological basis for a claim that the Jewish people are a race no longer exists, and since the basis of any scientific definition of race must rest on a shared genetic heritage, there can be no grounds for a claim that the Jewish people are a race.

Nor can the Jews be said to be a group on grounds of their national origins. There are Jewish populations in virtually every nation known and even the Jewish community within New Zealand contains members of diverse national origins. The Jews then cannot be said to be a group on the grounds of their national origins and since this is not at issue no further comment is necessary.

Nor could the Jews be said to be a group on the grounds of their "colour". There are in the world Black Jews, Oriental Jews, and Caucasian Jews and even within New Zealand there are Jews who are of different "colours".

If these arguments are accepted we are left with the category of ethnic group and since this is the category which has resulted in most confusion it would seem useful to set out current usage of this term in social science.

In view of the fact that transcripts of my evidence in the Magistrate's Court contained words which I did not know (viz: "eationals" for "rationale") the opinion which I provided for the police is reproduced here.

> "The Jewish people are more correctly referred to as an ethnic group. An ethnic group is not defined by reference to biological similarities but rather by reference to a shared consciousness of kind which *may* transcend biological, national, and religious boundaries. An ethnic group's boundaries are not defined biologically but by a consciousness of the members of a group that they are in some way different from other people who are not members of the group. In other words, it is a socially defined entity. The simplest, and most concise statement on this subject is that of Professors Shibutani and Kwan who comment that, . . . 'an ethnic group consists of those who conceive of themselves as being alike . . . and who are so regarded by others.' (Shibutani T, and Kwan, K, *Ethnic Stratification: a Comparative Approach*. Macmillan Co, 1965)
>
> This definition of Jewry, ie, as an ethnic group, is correct and squares with the facts. As Berry notes, '. . . it is the consciousness of being a Jew that is crucial; and however unsatisfactory it may be as a definition, it approaches the reality of a situation to say that a Jew is a person who thinks of himself as a Jew and is treated by others as a Jew, regardless of the physical features which he bears, the language he speaks or the nation of which he is a citizen.' (ibid, 29).
>
> This definition fits the reality in that it explains why Jewry includes among its ranks people of diverse racial origins, and whose presence underlines the inadequacy of any claim that the Jewish people constitute a race."

The argument in the case has revolved around the meaning which is to be attached to the word ethnic. As Richmond P noted on p 3 of his judgment the matter focuses on the issue: "In what sense is the word 'ethnic' used in its context in s 25?"

While it is undoubtedly a question of law, some comments made in the context do interest me as a layman. To set aside a technically "correct" and accurate meaning of a term in favour of "common usage" would seem to be a risk and presupposes that those who drafted the law had no better understanding than the man in the street of the meaning of the words used. If one tried to draft the plumbing and drain laying Regulations without a clear and technically accurate description of the components the results would be, to say the least, messy. Of course this is not the case — those who drafted the regulations clearly equipped themselves with an armoury of technically correct and accurate descriptions of the components and of their relations with one another.

Why then should we assume that those who drafted the Race Relations Act 1971, and indeed the UK Act from which much of the NZ Act derives, paid less attention to detail in their preparation of the Act than those who drafted the plumbing and drainage Regulations? If in fact those responsible for the Race Relations Act did attach importance to its drafting, might they not have sought to establish what would be required to attain the intent of the Act? Might not the terms included in the Act have been included because they were found to have separate and mutually exclusive meanings and because no one term alone would have achieved the intent of the act. If race alone was adequate as a term describing collectivities of man, as Mr Justice Richmond seems to imply, why was it deemed necessary to include various other bases of categorisation of mankind.

Furthermore, if these terms do have, as their inclusion in the Act implies, separate meanings, does it not then defeat the intent of the Act to put them aside in favour of common usage. If this results in a precedent which establishes the adequacy of common usage of race as a "blanket" term, does it not open up the possibility of defences based on the fact that a charge is incorrectly laid and of dismissals based on technical deficiencies which will defeat the intent of the Act?

Yours sincerely,

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CRIMINAL LAW

UNFAIRLY OBTAINED EVIDENCE AND ENTRAPMENT

By Dr G F ORCHARD, *Senior Lecturer in Law, University of Canterbury.*

In *Sang* [1979] 2 All ER 1222 the House of Lords reviewed the extent to which a Judge in a criminal trial has a discretion to exclude evidence on the ground that it was illegally or unfairly obtained. The House accepted the existence of such a discretion, but gave it limited scope. In particular, it held that the fact that the accused was induced to commit the offence by the police or an agent provocateur is never a ground for excluding relevant and admissible evidence of the offence. Before considering this in more detail it is convenient to summarise the position in New Zealand at the time of the decision.

Summary of New Zealand Law [1]

It is well established that voluntary and admissible confessions and admissions may be excluded in the discretion of the Court if they are obtained unfairly. [2] The Judges' Rules provide guidelines for the police in questioning suspects and a substantial breach, or a breach of the spirit rather than the mere letter of the Rules, is likely to lead to the exclusion of a statement as being unfairly obtained. [3] This discretion has not been confined to statements and although evidence may be technically admissible notwithstanding that it was illegally obtained, the Court of Appeal has made it clear that the Courts of this country have an overriding discretion to exclude any kind of relevant, probative and admissible evidence on the ground that it was unfairly obtained. [4]It applied this broad principle in *Police v Hall* [5] in holding that the circumstances in which a doctor examined a drunken driving suspect were such that "fairness and justice" required exclusion of the evidence of the examination. Moreover, the Court of Appeal has accepted that, although there is no defence of entrapment, this discretion extends to authorise or require rejection of evidence in certain cases of entrapment, when inducements by the police have led to the commission of an offence by a person who was not otherwise ready or willing to commit an offence of the kind in question. [6]

The Decision in Sang

Sang pleaded guilty to conspiracy to utter counterfeit currency after the trial Judge ruled he had no discretion to exclude evidence on the ground that the accused would not have committed the offence had it not been for the persuasion by an informer acting onthe instructions of the police. In affirming the conviction the House of Lords dealt with three matters of principle: whether the common law allows any defence of entrapment, whether entrapment can justify the discretionary exclusion of admissible evidence, and the existence and scope of the discretion to exclude unfairly obtained evidence.

The possibility of a defence of entrapment had never been considered by the House of Lords but counsel for the appellant ignored the well-known American authorities and accepted that there is no such defence. The Lords unanimously held this to be clearly correct, approving earlier rulings to this effect in the Court of Appeal. [7] It was reasoned that when the prohibited act is committed with the requisite state of mind the accused's guilt cannot be affected by the fact that the procurer happened to be a policeman or police agent. Lord

[1] Doyle "The Discretion to Exclude Unfairly Obtained Evidence" [1978] NZLJ 25.

[2] Subject to the possibility that this discretion is excluded if the means used were not likely to cause an untrue admission and s 20 of the Evidence Act 1908 applies: *Cross on Evidence* (3rd NZ ed), 523-524.

[3] *Convery* [1968] NZLR 426 (CA); *Hartley* [1978] 2 NZLR 199 (CA), 217-219; *Rogers* [1979] 1 NZLR 307 (CA), 312-315; but it seems the guidance in the Rules is inapplicable to anyone other than the police, eg a doctor summoned by the police: *Police v Hall* [1976] 2 NZLR 678 (CA), or a customs officer: *Lee* [1978] 1 NZLR 481 (SC).

[4] *Capner* [1975] 1 NZLR 411 (CA), 414; cf *Lee* [1978] 1 NZLR 481, 488; contra *Wray* (1970) 11 DLR (3d) 673 SCC.

[5] [1976] 2 NZLR 678 (CA); and see [1976] NZLJ 434.

[6] *Capner* [1975] 1 NZLR 411 (CA); *Police v Lavalle* [1979] 1 NZLR 45 (CA), 48-49, approving *Climo* [1977] Recent Law 287 (Speight J), which explained the exclusion of evidence by Mahon J in *Pethig* [1977] 1 NZLR 448.

[7] *McEvilly* (1973) 60 Cr App R 150; *Mealey* (1974) 60 Cr App R 59.

Fraser asserted that "no finding other than guilty would logically be possible" [8] but this is unconvincing for there are defences, such as compulsion and self-defence, which are in the nature of confession and avoidance and which may succeed notwithstanding proof of all the elements required by the definition of the crime. There is no analytical difficulty in a defence of entrapment, the real question being whether considerations of public policy justify or require acquittal when a representative of the State is responsible for procuring the criminal conduct. [9] This was recognised by the New Zealand Court of Appeal in *Capner* [1975] 1 NZLR 411 when it also held that our law does not recognise the defence.

Their Lordships then departed from the New Zealand position in unanimously holding that in England there is no discretion to exclude evidence on the ground that the offence was procured by an agent provocateur. [10] On the assumption that the only discretion in question was one to exclude all evidence of the offence, not just the evidence of the procurer, it was emphasised that it went beyond a mere power to reject items of evidence that had been unfairly obtained and would effectively give Judges and Magistrates a discretion to allow a defence in particular cases. On this assumption, which may be disputable, the claimed "entrapment discretion" is certainly exceptional, but the approach of the Lords was also influenced by their attitude to other cases where it is claimed that evidence was unfairly obtained.

It was accepted as well-established that a Judge has a discretion to exclude evidence if he thinks its prejudicial effect outweighs its probative value, but it was held that "save with regard to admissions and confessions *and generally with regard to evidence obtained from the accused after commission of the offence*, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means". [11] Their Lordships unanimously accepted this statement of the law, although in one respect there is some doubt about its precise scope.

Generally, the House took a restrictive view of the role of a trial Judge in respect of technically admissible evidence. His function is to ensure a fair trial according to the law, and although this readily justifies the power to exclude evidence because its prejudicial effect outweighs its probative value it is no part of his trial duties to discipline the police or review their pre-trial conduct, or to prevent prosecutions based on evidence obtained by methods of which he (or the law) disapproves. The Judge is concerned with how evidence is used at the trial, not how it is obtained. [12] But in deference to the numerous modern judicial statements recognising a discretion to exclude unfairly obtained evidence [13] their Lordships accepted that such a discretion now exists. Of course this accords ill with their restrictive view of the role of the trial Judge and so they gave it minimum scope, confining its operation to statements by the accused (where the position was not in dispute) and other evidence "obtained from the accused after [the alleged] commission of the offence".

Lord Diplock was content to explain this rule on the basis that "for historical reasons" (perhaps originating with a concern that confessions be reliable) the Judges have a power to exclude evidence which the accused has been unfairly induced to provide against himself, in breach of the maxim nemo debet prodere seipsum (no one can be required to be his own betrayer). On this basis it seems Lord Diplock confines the discretion to evidence obtained from the accused *with his consent*: "there is no discretion to exclude evidence discovered as a result of an illegal search but there is a discretion to exclude evidence which the accused has been induced to provide voluntarily if the method of inducement was unfair". [14] On the other hand, Lords Salmon, Fraser and Scarman thought that the discretion to exclude unfairly obtained evidence arose from the Judge's duty to ensure a fair trial and was part of a broader discretion to exclude evidence "if justice so requires". [15] Nevertheless, they agreed that unfairness in the acquisition of reliable and admissible evidence could justify exclusion only when it was obtained from the accused after the offence. Moreover, Lord Scarman may have agreed with Lord Diplock's extremely

[8] [1979] 2 All ER at 1238; contrast *Majewski* [1977] AC 443 HL.

[9] See, eg, Barlow "Entrapment and the Common Law" (1978) 41 MLR 266.

[10] Overruling the first instance decisions in *Foulder* [1973] Crim LR 45; *Burnett* [1973] Crim LR 748; and *Ameer* [1977] Crim LR 104.

[11] This rule was formulated by Viscount Dilhorne and incorporated in Lord Diplock's speech at 1231; the emphasis is added.

[12] See especially [1979] 2 All ER at 1230 per Lord Diplock, and 1245-1246, per Lord Scarman.

[13] The source of these was identified as being the rather ambiguous judgment in *Kuruma* [1955] AC 197 PC.

[14] [1979] 2 All ER at 1230.

[15] A formula taken from Lord Reid's speech in *Myers v DPP* [1965] AC 1001, 1024.

limited conception of the discretion for he rationalised it on the basis that one of the essentials of a fair trial process is the principle that no one is to be compelled to incriminate himself, so that evidence (including "real" evidence) may be excluded if this principle is "endangered". [16] Lord Fraser, however, thought the discretion would authorise exclusion of "evidence and documents obtained from an accused or from premises occupied by him", [17] and does not appear to confine this to cases where the accused is induced to consent to the obtaining.

The Position in New Zealand After Sang

In New Zealand the discretion to exclude unfairly obtained evidence has been held to be capable of justifying exclusion on the ground of entrapment, and more generally the Court of Appeal has said that it is anxious not to restrict the discretion which our Courts "have not hesitated to develop". [18] *Sang* is inconsistent with these propositions and the question arises whether it ought to be followed here. As a general rule, decisions of the House of Lords on the common law will be followed in New Zealand, but they are not strictly binding. In particular, they need not be followed if the law in New Zealand has developed along different lines, especially in the area of adjectival law, [19] and it is noteworthy that not one New Zealand or Australian decision was considered in *Sang*. It is submitted that there are good reasons why the Judges here should not accept their Lordship's conclusions.

(a) Unfairly Obtained Evidence

The general restriction of the scope of the discretion is unsatisfactory in that it results in arbitrary distinctions and is based on an excessively narrow view of the functions of a trial Judge. A rule allowing rejection of unfairly obtained evidence only if it is obtained from the accused results in essentially arbitrary distinctions of a kind which the existence of a discretion should avoid. On Lord Diplock's theory evidence may be excluded if the accused is tricked into supplying it, but there is no discretion if it is forcibly seized from him in an illegal search. The slightly broader view apparently favoured by Lord Fraser is similarly difficult to justify: an illegal search of the accused or his premises may lead to discretionary exclusion, but not if the evidence is found in an illegal search of his wife, or his parent's home, whatever improprieties might have been involved. A discretion should not be so hobbled as to lead to such distinctions.

The restrictive rule in *Sang* resulted from the notion that the only relevant aspect of the function of a trial Judge was his duty to ensure fairness in the trial process. And on this approach even the narrow exclusionary discretion is justified only by the theory that the privilege against self-incrimination is infringed, for apart from this doctrinal objection the "unfairness" lies in the pre-trial obtaining of evidence. [20] Their Lordships ignored the very different approach which has been adopted by Courts in Scotland, Ireland, and more recently Australia. The question was reviewed in the High Court of Australia in *Bunning v Cross* (1978) 19 ALR 641 where the complaint was that the result of an illegally conducted breathalyser test had been admitted in evidence. Stephen and Aickin JJ (Barwick CJ concurring) held that for Australia the law relating to admissible but improperly obtained evidence was summarised by Barwick CJ in *Ireland* (1970) 126 CLR 321, 335:

> "Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion". [21]

This discretion does not arise from the Judge's duty to ensure a fair trial, which in this context usually finds its expression in the ex-

[16] [1979] 2 All ER at 1246-1247; contrast *Daily v Police* [1966] NZLR 1048 (SC), and the Criminal Law Reform Committee in its Report on Bodily Examination and Samples as a Means of Identification, paras 19-21.

[17] Ibid 1241; Lord Salmon agreed with Lord Diplock's rule, but also said that the category of evidence which may be rejected to ensure a fair trial cannot be closed: 1237.

[18] *Capner* [1975] 1 NZLR 411 (CA), 414.

[19] *Ross v McCarthy* [1970] NZLR 449 (CA) 453, 455-456; *Jorgensen v News Media Ltd* [1969] NZLR 961 (CA), 979.

[20] Cf J C Smith [1979] Crim LR 655; the House of Lords' theory justifies the exclusion of evidence in *Barker* [1941] 2 KB 381 CCA, and *Payne* [1963] 1 All ER 848 CCA; cf. *Smith (Stanley)* [1979] 1 WLR 1445, 1452.

[21] (1978) 19 ALR at 657; there is a very similar statement in Scotland in *Lawrie v Muir* 1950 JC 19, 26-27; cf *King* [1969] 1 AC 304, 315; and for Ireland, see *People v O'Brien* [1965] IR 142.

clusion of evidence because its prejudicial effect outweighs its probative value. That discretion may be relevant when evidence is improperly obtained, when the circumstances raise doubts about the reliability of the evidence (for example, when admissions are obtained by prolonged cross-examination, or when the circumstances of an illegal search suggest evidence may have been "planted" [22], but in the case of "real" evidence of undoubted reliability (such as fingerprints or a blood-alcohol analysis) "fairness" to the accused has little or nothing to do with the discretion. In such a case the object is to reconcile two competing requirements of public policy: that criminals be convicted and that those charged with enforcing the law should themselves obey it, and should not be encouraged by the Courts to act illegally. "Unfair" but lawful conduct in obtaining evidence is unlikely to bring the principle into play.[23]

As the two competing public interests must be weighed against each other, neither can be insisted upon "to the uttermost". [24] Thus, although the desirability of convicting the guilty will not excuse every transgression in the course of crime detection, a minor or "technical" illegality is unlikely to lead to exclusion. The Courts have also identified a number of more particular factors as being important to the decision, although they have not attempted an exhaustive list. In *Bunning v Cross* it was concluded that the evidence ought to be received, the most fundamental consideration being that there had been no deliberate or reckless disregard of the law, the officer having made an isolated and understandable mistake in believing he was entitled to require the test. This avoids the reproach that "the criminal is to go free because the constable has blundered". Another important factor was that the offence, while not one of the most heinous, was serious in that it endangered innocent people, and it was also held to be relevant that the evidence obtained was cogent (and, indeed, conclusive of guilt). It was said, however, that cogency would not be material in the case of intentional or reckless illegality unless there were special circumstances, such as a danger that the evidence would perish or be destroyed in the event of delay. A consideration favouring exclusion was the fact that there had been a breach of procedures carefully defined by Parliament to protect the individual, but this was outweighed by the other factors, and although ease of compliance with the law will sometimes favour exclusion it had little significance here for it was apparent that the proper procedures would have led to the accused's being detained and the conduct of a test with the same result as that illegally administered — this factor rather indicated the fairly technical nature of the illegality. In addition, it may sometimes be relevant to consider the importance of the means used in the detection of the type of crime in question, and illegality by private agencies may be viewed with rather more disfavour than equivalent abuses by the police, who are more likely to respond to public opinion and criticism, and who have a formal system of internal discipline. [25]

The approach in *Bunning v Cross* has yet to be adopted in New Zealand where the Courts have hitherto spoken generally of a need to avoid "unfairness" to the accused. Nevertheless it is consistent with the recognition of a discretion of broad application which has been favoured here, even though in practice the discretion is unlikely to lead to exclusion of significant evidence unless there has been serious impropriety. The principle applied by the High Court seems distinctly superior to that approved by the House of Lords. It provides a coherent basis for the discretion which enables technical infringements to be excused and arbitrary distinctions to be avoided. As actions speak louder than words the existence and use of a general power to exclude illegally obtained evidence is desirable in order to minimise the risk that the judicial process will be brought into disrepute by the Courts appearing to condone serious illegality in the collection of evidence. It probably provides a significant deterrent to improper practices, it being unrealistic to suppose that the police do not desire convictions, and the alternative remedies suggested in *Sang* are, with respect, quite inadequate: the imposition of internal police discipline depends on the police themselves regarding the conduct as deserving of censure, and the relief in practice available in a civil action is unlikely to be sufficient to encourage an individual to expend

[22] The decision in *Kuruma* [1955] AC 197 PC is somewhat disturbing in this respect: Heydon "Illegally Obtained Evidence" [1973] Crim LR 603, 606-607.

[23] "There is no initial presumption that the State, by its law enforcement agencies, will . . . observe some given code of good sportsmanship or chivalry. It is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it . . ." (1978) 19 ALR at 659, per Stephen and Aickin JJ.

[24] *Lawrie v Muir* 1950 JC 19, 27, cited by Stephen and Aickin JJ at 660.

[25] See, generally, Heydon, "Illegally Obtained Evidence" [1973] Crim LR 603, 607-610.

the time and resources involved in such a course. In the context of confessions and admissions the Court has regard to the need to discipline the police, for in considering the effect of a breach of the Judges' Rules it may consider not only the case in question "but also the necessity of maintaining effective control over police procedures in the generality of cases". [26] The rule against self-incrimination provides a rationalisation of the Court's role in these cases, but this does not justify effective condonation of all kinds of illegality whenever it is inapplicable. Moreover, the idea that it is sometimes proper to shut out reliable evidence in order that some other ideal may be preserved or furthered is not at all novel or outdated. In 1846 Knight Bruce V-C supported the solicitor/client privilege with rhetoric which many reasonable people accept today: "Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much". [27]

(b) Entrapment

One thing that is clear is that entrapment is a problem. On the one hand, it is not doubted that the use of informers and undercover agents is proper and necessary in the investigation of crime, especially those kinds of crime the very commission of which is otherwise difficult to detect. The process cannot be confined to passive observation and an effective undercover policeman will need to be an apparently enthusiastic party to offences, and will seek to gain the friendship and confidence of suspects or (some would say) "targets". On the other hand, it is generally accepted that there comes a point when trapping devices are improper and unacceptable, the emphasis being placed on the type of inducement offered and the presence or absence of any predisposition on the part of the accused to commit the kind of offence in question. There is, however, much dispute about what should be done about improper entrapment, although there is widespread agreement that whatever course is adopted the point of intervention is difficult to adequately define.

Outside the United States there is almost no judicial support for a defence of entrapment, and there is no real prospect of Parliament introducing such a general defence. This is probably justifiable in view of the difficulties in definition, the apparent need to exclude some offences (such as assaults), and the fact that the moral guilt of one who succumbs to temptation is not affected by the unknown identity of the procurer. [28] Nevertheless, the English Courts have held that when entrapment amounts to instigation of an offence which otherwise might not have been committed it may substantially reduce the appropriate penalty, and in the case of trivial offences it might justify an absolute discharge. [29] It is not obvious why the identity and motives of a procurer should be so very relevant to penalty when they are thought to be obviously incapable of supporting a defence and Heydon is probably right in suggesting that the main reason is to enable the Court to register its disapproval of the police methods. [30] The Law Commission concluded that mitigation of penalty is an inadequate response when serious abuse is discovered [31] and it is submitted that this is correct: where a trapping activity deserving of censure is allowed to lead to conviction and some penalty the judicial process is significantly tainted, and in assessing penalty the Court must also have regard to various factors unrelated to the entrapment, so that its significance is unlikely to be really clear. The possibility of a reduced penalty will probably have little deterrent effect on the police who might well assume that in the amorphous process of sentencing the Court will give at least as much weight to other factors (such as the seriousness and prevalence of the offence, and the prisoner's record) as to the entrapment.

In comparison, the discretionary exclusion of evidence has apparent advantages. It is likely to provide a significant deterrent to improper practices and it constitutes an unambiguous rejection of them by the Court. Uncertainty is no great problem for the Courts have achieved reasonable clarity in identifying the kind of case likely to involve exclusion — the mere provision of an opportunity to offend will not suffice and the accused must not have been

[26] *Convery* [1968] NZLR 426 (CA), 438, per Turner J, approved in *Hartley* [1978] 2 NZLR 199 (CA), 218.

[27] *Pearse v Pearse* (1846) 1 De G & Sm 12, 28-29, cited by Stephen and Aickin JJ, in *Bunning v Cross* at 657; compare *Police v Lavalle* [1978] 1 NZLR 56 (SC), 58-59; and see Ashworth "Excluding Evidence as Protecting Rights" [1977] Crim LR 723.

[28] Thus, the UK Law Commission did not recommend such a defence: Law Commission, Report No 83, Defences of General Application (1977), paras 5.37-5.40.

[29] *Browning v Watson* [1953] 2 All ER 775; *Birtles* (1969) 53 Cr App R 469; *McCann* (1972) 56 Cr App R 359; *Sang* [1979] 2 All ER 1222 HL.

[30] Heydon "The Problems of Entrapment" [1973] Camb LJ 268, 285.

[31] Law Commission, Report No 83, supra, para 5.33; but it also failed to make any positive recommendation for further judicial control.

already ready and willing to commit the offence — and precise definition of the scope of improper entrapment is unnecessary, particularly as a jury is never involved. As in other cases, a principle allowing discretionary exclusion enables all the factors to be weighed in each particular case and the Courts could have regard to other guidelines in addition to the ones already accepted in the context of entrapment (for example, it may be relevant to consider whether the inducements were of a kind that were obviously likely to tempt an innocent person, and whether the police knew the accused was unwilling).

It is doubtful, however, whether the discretion to exclude unfairly obtained evidence is really appropriate in this context. In *Pethig* [32] Mahon J rejected only the evidence of the undercover policeman, although the result was the discharge of the accused because there was no other evidence on the counts in question. The implication is that there could be a conviction if the prosecution had evidence from sources uninvolved with the entrapment, such as a confession or evidence of a stranger. This is explicable on the basis that a person, even a policeman, who participates in an offence in order to obtain evidence against others has no defence to a charge that he is an accomplice, [33] so that evidence obtained as a result of such conduct is illegally obtained and may be excluded under the general discretion if the conduct is found to be unjustifiable. This does not apply to other evidence which is not obtained by illegal conduct.

But the better view seems to be that any "entrapment discretion" should involve exclusion of all evidence of the offence. When the objection is that the offence itself has been improperly procured by agents of the State the basis for the exclusion of evidence is the belief that the Court should not encourage or condone the official manufacture of crime, but the force of this objection is the same whether it is sought to prove guilt by evidence from the agent provocateur, statements of the accused, or a stranger. [34] However, as was recognised in *Sang*, such a power to exclude all prosecution evidence is in substance a power to allow a defence and can hardly be subsumed within a mere discretion to exclude unfairly obtained evidence. [35]

Nevertheless, an "entrapment discretion" can be recognised pursuant to the discretion to discharge an accused (and thus acquit him) which is conferred in unqualified terms by s 347 (3) of the Crimes Act 1961. This discretion, which has no statutory equivalent in England, will be exercised with caution and is most commonly appropriate when at the end of the prosecution case there is no evidence on which a reasonable jury could safely convict. [36] However, the Courts have not sought to confine it by strict rules and it has been used when it was clear that only a nominal penalty would be appropriate [37] and in *Harrington* [1976] 2 NZLR 763 Casey J appears to have considered that a discharge was justified "in the interests of public confidence in the administration of justice" when, on the evidence, a conviction of the accused could not be regarded as consistent with the prior acquittal of a co-offender "on any basis of logic or common sense". More significantly, in *Hartley* [1978] 2 NZLR 199, 216 the Court of Appeal said that the power is available "to prevent anything which savours of abuse of process", including impropriety in bringing the accused into the jurisdiction after detection of the offence. It is probable that all criminal Courts have inherent jurisdiction to prevent an abuse of the process of the Court, including unfair "oppression" of an accused, [38] and there seems to be no reason why a prosecution for an offence procured by improper entrapment should not be capable of being regarded as such an abuse. [39] In any event, in New Zealand the statutory discretion in s 347 could readily justify a discharge in such a case, [40] as could the discretion in s 42 of the Criminal Justice Act 1954 in the case of proceedings in a District Court.

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[32] [1977] 1 NZLR 448; and see the statement in *O'Shannessy*, unreported (CA 78/73), quoted in *Capner*, supra 414.

[33] Cf *Phillips* [1963] NZLR 855 (CA); Heydon "The Problems of Entrapment" [1973] Camb LJ 268, 273-276.

[34] Barlow "Recent Developments in New Zealand in the Law Relating to Entrapment" [1976] NZLJ 304, 328, 331; cf Glanville Williams, Textbook of Criminal Law, 559-560.

[35] Law Commission, Report No 83, supra, para 5.29.

[36] See, eg *Rackham* [1975] 2 NZLR 714; *Jeffs* [1978] 1 NZLR 441.

[37] *Smith* [1923] GLR 148; *Hillhouse* [1965] NZLR 893, 895.

[38] Cf *Arnold* [1977] 1 NZLR 327; *Bosch v Ministry of Transport* [1979] 1 NZLR 502.

[39] Although in *Sang* [1979] 2 All ER 1222, 1245 Lord Scarman perhaps assumed the contrary, as did the Court of Appeal: [1979] 2 All ER 46, 63.

[40] The possibility was apparently left open in *Capner*: Barlow [1976] NZLJ at 331.