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DEATH OF A PRINCESS — OR A PRINCIPLE?

After reading reports on whether the film "The Death of a Princess" should be televised one could be excused for thinking freedom of speech was a negotiable commodity.

We have a film that offends Saudi sensibilities — a threat of trade sanctions or some such should it be televised — a Government caucus that has unanimously opposed the showing of the film — and a Minister of Broadcasting who has been at pains to point out the political and economic consequences of screening it. However that parcel is packaged, whatever is said about the importance of freedom of speech and the independence of the Broadcasting Corporation in making its decision the impression remains of a Government, perhaps of a country, that will yield to censorship to protect its trade.

Few would deny the importance of our trading relationships. Yet trade is not an end in itself. It is but a means of procuring a way of life — a way of life that in our case is based on the traditional freedoms of a democratic society one of which is freedom of speech. If these values are to be negotiable what does that leave? Are we to work to live, or to live to work?

For us to retain our national identity and integrity the non-negotiability of our fundamental values must be beyond question. Instead however we are witnessing an insidious erosion of these values through pressure politics. Once the National Government stood firm in the face of the threat of cultural and sporting boycotts for the freedom of New Zealand sportsmen to make up their own minds concerning international competition. It is hard to reconcile statements supporting that view with the financial consequences certain clubs and competitors fear may follow attendance at the Moscow Olympic Games. By the same token how can the expression of a belief in freedom of speech be reconciled with pressure applied to the Broadcasting Corporation in response to a threat.

Either we have principles or we do not. And if we do they should come first. If we have any they are at the moment being hopelessly fudged. Surely some small attempt could have been made to give the lie to the observation that throughout history big nations have acted like bullies and small ones like prostitutes?

TONY BLACK

LANDLORD AND TENANT

TENANTS NEGLECT AND COMMERCIAL LEASES

By J H MARSHALL. *Solicitor, Auckland.*

> "That he or they will, at all times during the continuance of the said lease, keep, and at the termination thereof yield up, the demised premises in good and tenantable repair, having regard to their condition at the commencement of the said lease, accidents and damage from fire, flood, lightening, storm, tempest, earthquake and fair wear and tear (all without neglect or default of the lessee) excepted."

The above wording is that contained in s 106 (b) of the Property Law Act 1952. Does your office's standard form of commercial lease contain similar wording, or when you are undertaking the perusal of a commercial lease do you object where the tenants exemptions from repair obligations are qualified by the words "all without neglect or default of the lessee"?

I question whether the customary exceptions to a tenants repair obligation should be qualified by the damage not having resulted from tenants neglect. The tenants neglect qualification has been criticised at District Law Society seminars and many law firms in their commercial leases have modified the qualification by providing that the damage exemptions apply"save where insurance moneys are rendered irrecoverable in consequence of the act or default of the lessee". It has been the writer's experience that when criticising such wording a landlord's solicitor's response can be as follows:

(a) The clause follows the wording of s 106 (b) of the Property Law Act and we see no reason to alter the wording.
(b) Removal of the tenants neglect qualification would still leave the tenant liable for the damage under the law of torts.
(c) Removal of the tenants neglect qualification would jeopardise the landlord's insurance cover.
(d) There is no reason why a tenant should be liable to make good damage resulting from his negligent acts.

Superficially any one of these responses may appear reasonable, but it is suggested that none will stand closer examination. To facilitate consideration of this problem let us assume we are dealing with the question of fire damage to premises caused by tenants neglect.

The modern tendancy in commercial leases is to require a tenant to pay in addition to the rental, the insurance premium payable for keeping the premises insured against damage by fire and extraneous risks under a replacement cover. Where the lease does not so provide then it is suggested that payment by the landlord of the insurance premiums in respect of his building is a relevant factor to be taken into account by him when assessing the rental and is without doubt a factor taken into account by valuers for the purpose of rent reviews. It can accordingly be stated that tenants are either directly or indirectly paying the landlord's insurance premium. That being the case, should not the tenant get the benefit of the insurance cover which the premiums are purchasing? Regrettably this is not necessarily the case where there is a tenants neglect qualification.

Where the tenant's interest in the demised premises is noted against the landlord's insurance policy, no problems will arise. It is not however common practice for tenants' interests to be so noted, particularly where the tenancy is of a comparatively short duration or where the lease is of part only of a building. It should be noted in passing that a tenant has an insurable interest under insurance law and accordingly there is no legal obstacle to his interest as tenant being noted against the landlord's insurance policy. Where the tenant's interest is not so noted, the presence of a tenants neglect qualification in a lease can result in the tenant being liable to make good fire damage to the landlord's building resulting from tenants neglect notwithstanding that the landlord is fully indemnified by his insurance company. This situation is brought about by reason of the landlord's insurer exercising its right of subrogation, whereby the insurer may step into the shoes of the landlord and exercise all of the latter's legal remedies against third parties for making good the damage to the building. I am of the opinion that where the damage to the building has been caused by a risk against

which the landlord is insured, then in no circumstances should a tenant be liable to make good the damage. The justification for this view is that a prudent landlord should keep his building fully insured, and furthermore, modern marketing conditions are such that as landlords expect to recover the cost of insurance premiums from the tenants either directly or indirectly then the benefit of the cover so purchased should properly be extended to the tenant.

The criticism can of course be made that it is all very well for a tenant to be exempt from making good fire damage resulting from his neglect, but that there are other causes of damage which can be occasioned by neglect, which a prudent landlord would not necessarily have covered by his insurance arrangements — for example, impact damage. My answer to such criticism is that a commercial landlord should arrange his insurance cover with regard to the particular nature of the occupancy of the building by his tenant and the associated insurable risks. It has on one occasion been suggested to the writer that certain types of business operation are uninsurable, at least upon the New Zealand market; but if this is the case then the whole question of the landlord and tenant relationship in that circumstance must be the subject of special arrangements. The circumstances in which tenants neglect may cause damage to a building are not infinite and it is suggested that most insurance companies can arrange appropriate covers that are sufficiently extensive so that any damage resulting from tenants neglect will be covered by the insurance policy.

It is submitted that it would not be unreasonable to eliminate the tenants neglect qualifications from all leases, leaving the landlord to be indemnified by his insurance company. Many practitioners may regard this proposal as unduly radical. However at the very least it is submitted that in so far as the customary exemptions of damage by fire, flood, etc as set forth in s 106 (b) are concerned, the elimination of the tenants neglect qualification is not radical and should be reasonably acceptable. If regard is had to the specific damage factors specified in s 106 (b) then it is only damage from fire where tenants neglect is likely to be relevant. In so far as damage from flood, lightening, storm, tempest, or earthquake is concerned, damage from tenants neglect is either impossible, or is merely consequential i.e, failure to properly secure premises which are then damaged by a storm. In any event a prudent landlord should reasonably be expected to maintain an insurance cover against damage from such causes.

Earlier in this article, I listed various responses landlord's solicitors have given as to why they are not prepared to delete a tenants neglect qualification from a repair clause and have suggested that these responses do not stand closer examination.

The first example given was that as s 106 (b) contains a tenants neglect qualification then this is sufficient justification for the insertion of an identical qualification in the repair clause. This response tends to be linked with the second one whereby the landlord's solicitor considers that the deletion of the qualification is meaningless as the tenant would be liable under the law of torts in any event. The viewpoint has been lent credence by text book authorities, for example, the article on "The Tenants Covenant to Repair" in the *Adams Memorial Essays* published under the title "Studies on the Law of Landlord and Tenant" at pp 167 and 168. It must be acknowledged that the English and Canadian authorities have both taken the line that there can be concurrent liabilities in contract and in tort with the result that a contractual exclusion will not necessarily remove a tortious liability. In New Zealand however recent judgments have clearly enunciated a contrary principle that where there is a contractual relationship between parties there may not also be a cause of action in tort between them and this is not confined to any particular class of persons (Refer *Young v Tomlinson* unreported, noted [1980] *Butterworths Current Law* 45. This case follows the Court of Appeal judgment in *McLaren Maycroft & Co v Fletcher Development Co Limited* [1973] 2 NZLR 100, which together with other subsequent cases has produced a strong line of authority within New Zealand supporting the above principle).

Accordingly in New Zealand the contractual terms of a lease will automatically exclude any tortious liability on the part of any parties to the lease where the basis of the tortious liability is the subject of contractual provisions. It is submitted that there is no good reason for blind reliance upon the wording of s 106 (b) which ignores commercial realities and the line of New Zealand authorities mentioned.

The third response from the landlord's solicitors was that to eliminate the tenants neglect qualification would somehow place in jeopardy the landlord's insurance cover. This is a somewhat naive response, as carried to a logical conclusion it would have the effect that no landlord could contract with a tenant without first obtaining his insurance company's ap-

proval of the express terms of the leasing arrangement. I seriously doubt any practitioner would agree with that being the the legal situation. The terms of a tenancy may well result in an increase in the landlord's insurance premium but whether or not the tenant should be liable to make good damage caused by his negligent act should in no way invalidate the landlord's fire insurance cover.

I conclude that in no circumstance should any exemptions to a tenants repair obligation be qualified by tenants neglect. The question as to how extensive should be the tenants exemptions is of course a related but seperate matter. At the very least the tenants neglect qualification should be avoided and the following words used instead — "Save where insurance moneys are rendered irrecoverable in consequence of the act or default of the lessee".

CASE AND COMMENT

Real estate agency — Effective cause of sale

Hansen Real Estate v Jones & Jones (Supreme Court, Wellington; 16 April 1980 (No M389/78); White J) was an appeal from a decision of the Magistrate's Court at Upper Hutt refusing the appellants' claim for commission allegedly due following the sale of the respondent's property in Upper Hutt. The respondents had given the appellants an authority early in April 1977 to sell this property and it read ". . . if the property is sold by you or through your instrumentality . . . at a price acceptable to us we agree to pay commission . . ." In July, a Mrs Gabites approached the appellants to inquire about buying a house and she was shown through the Jones's house and, as a result, signed an offer to buy. The respondents accepted, but, as the conditions as to finance were not met, no sale ensued. Negotiations continued, unavailingly, until September 1977. At the material time, Mrs Gabites was — and this is important to note — negotiating a matrimonial property settlement with her husband and, as part of the settlement, she was to be provided with a house. She told her husband she wanted the Jones's property. He then took steps to buy the house and, in October 1977, an offer *signed by other real estate agents*, Mark & Wood Ltd, as agent for an undisclosed purchaser, was submitted to the respondents and accepted. It then appeared that Mr Gabites was the buyer. The contract was unconditional, and unusual in that it provided for the commission on sale to be paid by the purchaser. The Court below found that the property had not been sold through the appellants' instrumentality and that, without the intervention of Mark & Wood Ltd, the property would not have been sold. It was also found — and this, too, is noteworthy — that Mr Gabites was not acting as his wife's agent, but was acting independently and with no obligation to deal with the appellants. Thus, the appellants' case failed.

The question for his Honour was thus whether the appellants' introduction was a causa causans of the sale. *Symons v Callil* [1923] VLR 49, a decision of the Full Court of Victoria, was relied on for the appellants. In that case, a real estate agent was instructed to let a block of flats and he found a prospective tenant. He let her have a key to enable her to make an inspection. She returned the key, saying the premises were unsuitable. She had, however, noted the name of the owner on the label which was attached to the key. She found his address and approached him through another agent. She made an offer — lower than the original rental that had been proposed — and it was accepted by the owner in ignorance of the fact that she had already seen the premises. It was argued in the case under review that the act of the appellants' employee in showing Mrs Gabites the house was the impelling cause in the chain of events leading up to the sale of the property and was thus the effective cause of that sale. Accordingly, it was submitted, the property was sold through the appellants' instrumentality. For the respondents, on the other hand, it was said that the facts in each case must be considered and that "the effectiveness of the agent's work is a matter of inference from the evidence" as McGregor J had said in *Sushames v Cumming* [1962] NZLR 920, at p 925. It was also said that the *Symons* case was distinguishable in that there the chain of events had been simple and clear, but that in the present case the property would not have been sold but for the intervention of Mark & Wood Ltd. The appellants' activities had not, it was argued, resulted in a sale and could not be regarded as the impelling cause. It was pointed out that it was Mr Gabites who was the

purchaser, that the terms of the ultimate contract were different from those in the original contract in that the first was conditional, and that the purchaser's identity was unknown to the respondents. Counsel for the respondents accepted that, if an agency relationship had been established between Mr & Mrs Gabites, then there would be no answer to the appellants' claim, but he suggested that, in the absence of such relationship "the Court could not properly find a chain of causation," and that "in the absence of evidence from Mr Gabites as to why he purchased there was no evidence or no sufficient evidence of the impelling cause."

His Honour accepted the time-honoured rule that there must be evidence to show that the introduction by the agent was the effective cause of the sale and that simply to show the agent to have introduced a purchaser was not enough. He referred to *Millar v Radford* (1903) 19 TLR 575 and *In re Wadsworth* 29 Ch D 517. The question in each case, it was held, was one of fact and degree. Returning to the *Symons* case, White J noted that it had been said by Mann J in delivering the judgment of the Court that the whole tenor of the lady's conduct led to the conclusion that her first inspection of the premises and what she saw was the impelling cause of her later conduct. It had there been pointed out that the introduction "is an act of the plaintiff by which the customer and the owner have been brought into such business relations as resulted in the sale or lease as the case may be." In other words "some act of the agent must," as Mann J, had said, "have brought about the lease." Having noted that the Australian Court had held that the introduction had induced the lady to go to the owner and contract with him, White J quoted Mann J upon what seemed to him to have an important bearing on the present case:

> "In the present case we are of opinion that the act of the agent in bringing the premises under the notice of the proposed tenant and affording the latter an opportunity of inspection, undoubtedly brought about the lease in that it induced the tenant to go to the owner and contract with him. That the owner, in order to secure the tenant, greatly lowered his terms, is obviously immaterial. We think it is also immaterial that the tenant in the present case was helped in seeking out the owner by seeing his name on a label attached to the key handed to the tenant by the plaintiff. In our view of the other facts of this case, the plaintiff would have been equally entitled to recover if the tenant had as a result of the inspection sought out the owner by other means."

White J then turned to a comparison of the facts of the case before him. The inspection of the house, he said, had induced Mrs Gabites to tell her husband she wanted the particular house. The appellants had not called Mr Gabites as a witness and the respondents had called no evidence at all. White J thought the Magistrate had correctly found that the reasonable inference was that Mr Gabites had become aware of his wife's interest in the property directly from her and following on her inspection of it with an employee of Hansen Real Estate. He agreed with the Magistrate that the interest of Mrs Gabites in the property had been relatively continuous until the second contract had been signed, as could be seen from the continued negotiations between her and Hansen Real Estate. His Honour further noted the evidence given by their employee that, despite the fact that the deposit had been returned, the appellants hoped eventually to get the house for Mrs Gabites when her marital problems were solved. In his Honour's view there was ample evidence of the continuance of the appellants' exertions. His Honour further agreed with the Magistrate's finding that, although Mr & Mrs Gabites were living apart, they were at the time husband and wife and that it was not unreasonable to infer that they had a common interest in buying a property suitable for Mrs Gabites.

White J then noted the point at which he felt the Magistrate had not been correct. The Magistrate had found that Mr Gabites's actions were "independent". "In my view," said his Honour, "what Mr Gabites did was essentially on his wife's behalf in their joint interests, so that on the evidence the actions of Mr Gabites cannot be regarded as distinct from hers. It is in this respect that I have come to the conclusion that the Magistrate did not give sufficient weight to the fact that the actions of Mr & Mrs Gabites were part and parcel of their matrimonial property settlement. In my view the onus at that point was on the respondents to displace the reasonable inference on the balance of probabilities that Mr Gabites's actions were the direct result and therefore effectively caused by the appellants' actions in introducing Mrs Gabites to the property."

Evidently Mrs Gabites had testified that her husband bought the house with his money and that he did so as part of the matrimonial property settlement. Evidently also, the ultimate

purchase by Mr Gabites had been effected not only (as has already been mentioned above) through the other agent, but also through a firm of accountants. Having regard to the evidence before the Court, and applying *Symons's* case, "the act of the appellants in giving Mrs Gabites the opportunity of inspection brought her into business relations with the respondents and later induced her to require her husband to purchase the house for her as a term of her matrimonial settlement." White J considered that, proceeding as he had to instruct his accountants, Mr Gabites had indeed put in motion a way of making what amounted to direct contact with the respondents and that his wife's opportunity of inspection brought about the sale just as in *Symon's* case the "opportunity of inspection undoubtedly brought about [the] lease in that it induced the tenant to go to the owner and contract with him." White J reiterated that it must not be overlooked that the evidence showed that the real object and result of Mr Gabites's instructions to his accountants was to make his wife the owner of the property as she had demanded. He also reiterated that the Australian Court had made it clear that the result in the case before it would have been the same had the tenant, as a result of the inspection, sought out the owner by other means. His Honour concluded that Mr Gabites's action in obtaining the property for his wife had the same effect as a direct approach by Mrs Gabites to the respondents would have had. He allowed the appeal and remitted the proceedings to the District Court for judgment to be entered for the appellants.

Comment:

As is clear from what was decided by White J, and by Luxford's *Real Estate Agency* (5th ed, 1979), para [108], the truth about the cases on this topic is that the question is always one of fact and degree. The truth also is that, as may be seen from that work, the number of cases is legion. The present case is one more *divertimento* upon a familiar theme and as such commends itself to both lawyer and real estate agent.

P R H Webb

GROUND RENTS

By SIR DAVID SMITH.

Through the courtesy of the Editor, I am enabled to add the following comments based on dictionary meanings, to assist in clarifying my article on Ground Rents: [1980] NZLJ 223.

In the view which I now take of the *DIC* case, there are two elements of importance in the meaning of the term "prudent lessee": the first, that he is not required to limit his consideration to matters solely or mainly affecting himself and the second, that he will exercise foresight or forethought. In the context, these words are, I think, reasonably interchangeable.

With regard to the first element, I have perused the meaning of "prudent" in *Murray's* great *English Dictionary* in the volume published in 1909, in the impressions of *Webster* of 1961 the *Shorter Oxford* of 1956, *Chambers* of 1913 and 1964 and *Collins* of 1979. Not one of them gives a definition of "prudent" which would require a prudent person to confine his consideration to matters that affected only or mainly himself.

For example, *Murray's* primary definition of "prudent" in relation to persons, is — "sagacious in adapting means to ends; careful to follow the most politic and profitable course; having or exercising sound judgment in practical affairs; circumspect; discreet, worldly-wise." The subsidiary meanings are "wise, discerning, sapient", and in relation to conduct "characterised by, exhibiting, or proceeding from prudence; politic, judicious".

Omitting literary interpolations, *Webster's* definition is — "characterised by, arising from or showing prudence as (a) marked by wisdom or judiciousness (b) shrewd in the management of practical affairs (c) circumspect (as in conduct) (d) provident; frugal."

The definition in the *Shorter Oxford*, relating to persons, is — "sagacious in adapting means to ends; having sound judgment in practical affairs; circumspect, discreet, worldly-wise."

The definition in *Chambers* is — "cautious and wise in conduct; discreet; characterised by, behaving with, showing, having or dictated by forethought."

The definition in *Collins*, is — "1. discreet or cautious in managing one's activities; cir-

cumspect. 2. practical and careful in providing for the future. 3. exercising sound judgment or commonsense."

Not one of these definitions requires a prudent person to limit his consideration to matters affecting himself alone or for the most part. He is clearly entitled to consider how matters affecting other persons affect him.

With regard to the element of foresight or forethought, a difficulty arises because the meaning of "prudent" as including that idea is regarded by *Murray* as obsolete and by the *Shorter Oxford* as becoming obsolete.

To determine whether these views apply in New Zealand we need to look at the principles which govern the understanding of the meaning of words, first by an individual and then by an individual in relation to other individuals in his community.

In the 1979 edition of *Collins* to which I have referred, there are two learned introductory articles. The first, entitled "The Development of English as a World Language" by a number of learned authors, shows how not only the pronunciation but also the meaning of a word can change in different regions and in different countries. There is a special section on "The English of Australia and New Zealand".

The second article entitled "Meaning and Grammar", by Patrick Hanks who read English at University College, Oxford, shows how the meaning of words depends (a) for an individual on his experiences of the world from childhood onwards and on his memory, mostly unconscious, of those experiences and (b) for the individual in relation to other individuals in his community (because the experiences of individuals do differ greatly) upon a core of experiences which can reasonably be assumed to be common to most of the members of that community, thereby enabling the communication of ideas to take place in that community. This core meaning may be found in linguistic contexts, in the language used by good writers but it is not limited to linguistic contexts.

In the light of these principles, if one asks whether the word "prudent" implied "foresight" for Stout C J when, apparently, he coined the term "prudent lessee" in 1912, one needs to know what his experience of life had been. As a young man of 20 years of age, he had come, in 1864, from the Shetland Islands to Otago, seeking a better future. It is reasonable to think that for him the word "prudent" did imply "foresight". Most of his fellow colonists, in 1864, had come not only to Otago but also to the other provinces of New Zealand seeking a better future and for them too, "prudent" would have had the same implication of meaning, as including "foresight", as it had for the young Stout. Since 1864, many immigrants intending to better their lot in life have kept coming to New Zealand until after World War II. Allowing for the influence of parent on child in implanting, during several generations, the meaning of words in the mind, supported by, in relation to New Zealand, much large scale immigration, the conclusion I would draw is that the core meaning of "prudent" for the New Zealand community of today includes the idea of "foresight" or "forethought". Accordingly, the definition of "prudent" as including "forethought", given in *Chambers*, a dictionary published in Edinburgh, as quoted above, is applicable in New Zealand.

The colleagues of Stout C J in the *DIC* case of 1912 would, I think, have well understood this core meaning of "prudent" in New Zealand. Whatever their backgrounds, each of them had, by that year, lived for many years in New Zealand.

When the word "prudent" is thus interpreted as including a consideration of matters affecting not only the lessee but also the lessor and as involving foresight, the result should assist the arbitrators or umpire, representing the prudent lessee, in their difficult task under a *DIC* lease or its equivalent, of fixing a fair uniform annual ground rent payable throughout a renewed term of 14 or 21 years. They must look ahead cautiously and wisely so that the rent so fixed may be fair to both lessor and lessee. The word "prudent" thus includes the meaning that the ground rent has been fixed "fairly" and the word "fair" includes the meaning that the ground rent has been fixed "prudently". Perhaps, the words "fair", "fairness" and "fairly" could be used to define the whole concept.

Corrections to Sir David Smith's article on Ground Rents

We regret that in our issue No 10 of 3 June 1980, owing to a mishap the printer's proof corrections were not made in Sir David Smith's article on Ground Rents.

To enable readers to make their own corrections to his article we take this opportunity of indicating those corrections.

Where the name of a Chief Justice is followed by "J C" alter to "C J".

P 224 Column 2 line 21 delete "s" from "buildings"

P 225 Column 2 2nd and 3rd lines from foot of page, alter "ground annual rent" to "annual ground rent"
P 227 Column 1 alter "Wairapapa" to "Wairarapa"
Column 2 alter "authorisd" to "authorised"
P 228 Column 2 line 7 alter "apparantly" to "apparently"
Column 2 line 12 from foot of page, delete "the" in front of "law"
Column 2 line 2 from foot of page, alter "judgement" to "judgment"
P 229 Column 1 line 5 from foot of page, alter "formulae" to "formula"
P 230 Column 2 line 19 alter "determine" to "define"
Column 2 line 3 from foot of page, alter "provisions" to "provision".

EVIDENCE

PSYCHIATRIC TESTIMONY: THE ULTIMATE ISSUE RULE AND THE RULE IN ROWTON'S CASE

By C B CATO, *Lecturer in Law, University of Auckland.*

In this paper, it is intended to discuss the admissibility of the expert opinion of psychiatrists or psychologists in criminal trials. The admissibility of such testimony which will be referred to as "psychiatric" testimony is commonly regarded by criminal lawyers as admissible ex dedito iustitiae on behalf of the defence. However, this is a fallacy and the failure to appreciate that it is, may place the defence at a serious disadvantage if the possible rejection of the testimony is not at least anticipated prior to trial. The purpose of this paper is to consider the principles limiting the admissibility of psychiatric testimony, to appraise some recent cases where the Courts have had to wrestle with pleas for admission and finally to attempt to stimulate some discussion on whether the limits of admissibility appear rather too conservatively charted.

There are two basic principles limiting admissibility. One is the rule that expert testimony should be denied admissibility where an opinion is advanced on an issue which ulimately the trier of fact will have to determine.[1] This may be called the "ultimate issue" rule. The second, commonly known as the rule in *Rowton's* Case[2] may be invoked in conjuntion with the "ultimate issue" rule or independently of it to exclude psychiatric testimony. This rule precludes evidence which relates to an accused's disposition rather than his general character or reputation.

The Courts have been responsive to psychiatric testimony where the defence is based clearly on mental disorder. Accordingly, where the defence is based on the McNaghten[3] rules or where available, as in England and Scotland, a defence of diminished responsibility, expert testimony may be lead on questions relating to disease of the mind or defective reason notwithstanding an opinion may technically offend the "ultimate issue" rule or the rule in *Rowton.* Further, it would appear that such testimony would be admissible in cases involving pleas of insane automatism[4] and, it is submitted provocation where the characteristics of

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[1] Cross, *Evidence* 3rd ed NZ 1979 at 423; Phipson, *Evidence* 12th ed 1976 at para 1208.

[2] (1865) Le & Ca 520. And see Cross; ibid at 382.

NB The rule in *Rowton's* case has received some scathing criticism. "A witness may with perfect truth swear that a man who, to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty if he has the good luck to conceal his crimes from his neighbours". Stephen, *Digest of the Law of Evidence* 12 ed, at 201. Wigmore asserts that the rule has seldom been asked on in practice *Evidence* 3rd ed para 1982, p 150. Yet Goddard C J in *R v Butterwasser* [1948] 1 KB 4 stressed the need for better observance of the principle.

See discussion *R v McKay* [1967] NZLR 139, 143 per North J.

[3] See *Director of Public Prosecutions v A & B Chewing Gum Ltd* [1968] 1 QB 159, 164 per Lord Parker C J:

"Those who practise in the criminal courts see everyday cases of experts being called on the question of diminished responsibility, and although technically the final question "Do you think he was suffering from 'diminished responsibility'?" is strictly inadmissible it is allowed time and time again without objection."

See also *R v Bailey* [1961] Crim LR 828; *R v Matheson* [1958] 2 All ER 87 and cf *Walton v R* [1978] All ER 542.

[4] For example, it was admissible in *R v Cottle* [1958] NZLR 999.

the accused demonstrated a particular "phobia"[5].

However, in cases where the defence does not assert that an accused is suffering from any mental disorder sufficient to absolve him from responsibility, it is more difficult to predict with certainty when the Courts will admit psychiatric testimony. One case where psychiatric testimony was admitted is *Lowery v R* [1974] AC 85 a decision of the Judicial Committee of the Privy Counil on appeal from the Court of Criminal Appeal of Victoria.

Lowery and his co-accused King had been convicted of the brutal and sadistic murder of a young woman, who had been strangled to death in a bizarre manner. Both accused had been examined by a psychologist, who formed the opinion that King possessed a passive and Lowery an aggressive personality. Lowery attempted to incriminate King in his testimony and exonerate himself. King's counsel was permitted to call the psychologist to testify that it was Lowery who possessed the aggressive personality and was, therefore, more likely to be the perpetrator of the crime. Lord Morris in giving the judgment of the Judicial Committee, upholding admissibility said:

> "It would be unjust to prevent either of them from calling any evidence of the probative value which could point to the probability that the perpetrator was the one rather than the other." (p 101)

It is submitted that the testimony at least incidentally, offended the rule in *Rowton's* case in that it suggested that King's denial was more likely to be true:[6] but equally clearly justice dictated its admission, because it was so relevant to the issue of identity. Further it is submitted that King should have been able to adduce such testimony even if Lowery had not expressly attacked him.[7] Authority for this proposition is *R v McMillen* 29 CRNS Ont 191 a decision of the Court of Criminal Appeal of Ontario, where the Court upheld the admissibility of psychiatric testimoney tendered for the purpose of establishing that it was more probable that his wife, who possessed psychopathic tendencies and not the accused, was responsible for the murder of their two and a half week old baby. The Court, for Martin J A observed:

> "One of the purposes for which psychiatric testimony may be admitted is to prove identity when that is in issue in the case, since psychical as well as physical characteristics may be relevant to identify the perpetrator of the crime." (p 205)

Exceptionally, psychiatric testimony may be admissible on an issue of intent where it is not contended that the accused is suffering from a mental abnormality such as to fall within any of the recognised defences discussed earlier. Such a case was *R v Lupien* [1970] 9 DLR 3d 1 a decision of the Supreme Court of Canada. The appellant had been convicted of attempted gross indecency with a male. The defence contended that the accused believed that the victim was a female and sought to adduce testimony that he possessed a certain kind of defence machanism which made him react strongly against homosexual behaviour. This was relevant to intent but incidentally it also suggested that he was more likely to be telling the truth when he denied intent. The Supreme Court of Canada by a majority, upheld the admissibility of the testimony.

Although not prepared to assert that psychiatric evidence of an accused's disinclination to commit the crime with which he is charged, should generally be admitted, (p 12) Ritchie J A was extremely critical of the contention that the rule in *Rowton's* Case precluded admission.

> "This was not a question of adducing character evidence in the sense of reputation and I think that the rule laid down in 1865 by Cockburn, C J, in *R v Rowton* . . . to the effect that evidence of character can only be introduced by seeking evidence of the accused's general reputation in the neighbourhood to which he belongs, is singularly inappropriate to the introduction of evidence from psychiatrists as to the accused's disposition." (p 10)

Hall J in giving the second opinion for the majority was equally critical of a suggestion that

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[5] See *R v McGregor* [1962] NZLR 1069 at 1082, per North J. An approach now likely to be followed in England. *R v Camplin* [1978] AC 705, 727, per Lord Simon.

[6] But it is submitted its prime importance was that it was relevant to issue. As Lord Morris said:

"The evidence of Professor Cox as will have been seen, was not as such evidence in respect of the character of Lowery and King but rather was evidence as to their respective intelligences and personalities", ibid 102.

[7] As the case has been explained in *R v Turner* [1975] 1 QB 834 at 842. And see further the discussion in *R v Robertson* 29 CRNS (Ont) 141, 187-189; Martin J A expressly denies a wide application of *R v Lowery* supra, to justify the admission of psychiatric evidence indicating a psychological makeup which does not include a disposition for violence "in any case involving violence, even extreme violence", ibid, 189. And see discussion, infra, note 28.

the "ultimate issue" rule should preclude admission (p 14).

These cases illustrate how the Courts are prepared to entertain psychiatric testimony in situations where the issue is one of identity, or exceptionally one of intent. However, a pre-requisite for admissibility would appear to be some demonstrable mental disorder, indications of which can be perceived from the circumstances surrounding the offence,[8] or from the personality of the accused[9], or other party[10] whom the accused alleges expressly[11] or suggests by implication[12] is responsible for the crime. Where the testimony however, is adduced on an issue of intent, where there is no suggestion of mental abnormality, then it is extremely unlikely that the Courts will admit it.The testimony is likely to fall foul of both the "ulimate issue" rule and the rule in *Rowton's* case.

The leading case which exemplifies this approach is *R v Turner* [1975] 1 QB 834 where the defence sought to admit "psychiatric" testimony on an issue of provocation. The testimony was offered for the purpose of establishing that the accused although not suffering from a mental illness, nor violent by nature, possessed a personality structure such that he could have been provoked. Although the Court of Criminal Appeal admitted that the evidence was relevant, the testimony was ruled inadmissible. It offended both the "ultimate issue" rule, and although not expressly mentioned, the rule in *Rowton*; Lawton L J on the "ulimate issue" question, said:

> "Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any illness are likely to react to the stresses and strains of life. It follows that the proposed evidence was not admissible to establish that the defendant was likely to have been provoked." (p 842)

Of the *Rowton* ground, Lawton L J observed:

> "We do not consider . . . that in all cases psychologists and psychiatrists can be called to prove the probability of the accused's veracity. If any such rule was applied in Courts, trial by psychiatrists would be likely to take the place of trial by jury and magistrates. We do not find that prospect attractive and the law does not at present provide for it." (p 842)[13]

Similarly, in New Zealand in *R v Maisuria*[14] Vautier J dismissed an application by the defence for the admission of a "psychiatric" testimony to the effect that the accused was suffering from "mental disassociation", and did not therefore have the capacity to form an intent to murder. There was no suggestion that the accused suffered from a mental illness. The "ultimate issue" rule was the principal reason for denying admissibility.

Yet, it must be asked whether the limits of admissibility have been sufficiently well charted. It is submitted where the issue is one relating to identity or intent, the Courts should admit psychiatric testimony so long as it is sufficiently relevant to issue even though incidentally it may offend the rule in *Rowton*. If the pre-requisite for admissibility is a demonstrable mental disorder[15] then problems of admissibility will arise because of the difficulties inherent in satisfactorily defining abnormality. After all what is a sufficient indicia of abnormality? In many instances, it will be difficult to determine whether a crime of violence is "normal" as opposed to one for example which bears the hallmark of a sexual deviate or psychopath. For example, it cannot seriously be contended that the murder of a two and half year old baby was the work of a "normal" mind; yet in *R McMillen* the Crown asserted (at p 205) that it was. Surprisingly, the same Court in *R v Robertson* [16] ruled that the kicking to death of a young girl, did not sufficiently exhibit the product of an abnormal mind so as to justify admission of psychiatric testimony suggesting that the accused did not possess an ag-

[8] As in *Lowery v R* supra, sadistic homicide; or *R v Lupien* supra, a homosexual offence.

[9] As in *R v Lupien* supra, peculiar defence mechanism causing the accused to reject homosexual advances. And see further *R v McMillan* supra, at 207 per Martin J A where it is suggested that evidence that an accused was a homosexual with an aversion to heterosexual relations could be admissible to establish that he was unlikely to commit rape.

[10] As in *R v Lowery* supra, and *R v McMillan* supra.

[11] *R v Lowery* supra.

[12] *R v McMillan* supra.

[13] It is submitted that this dictum grossly exaggerates the role of the expert witness. It is always free for the jury to reject the opinion. Wigmore would describe such dictum as empty rhetoric. *Evidence* 3rd ed, para 120.

[14] Auckland T 187/189. And see *R v Chard* [1972] Cr A R 268.

[15] As was suggested, in *R v McMillan* supra, at 206-207.

[16] 29 CRNS (Ont) 141, at 190 per Martin J A. "In this case the evidence shows no more than that the young deceased was killed by an act of great brutality. It cannot be said that such an act would only be committed by a person with recognisable personality characteristics or traits."

gressive personality. Yet if the contention is correct that King should have been permitted to adduce evidence of his passive personality even in the absence of an attack by Lowery[17] does not fairness also dictate that Robertson should have been permitted to adduce similar evidence relevant to identity even though it incidentally assisted his credit. And similarly, on issues of intent, it is submitted that assuming the testimony is sufficiently relevant to issue, as it was held to be in *Turner's* Case, psychiatric testimony should be admissible even though it also tends incidentally to support the accused's credit. There must be some very good policy reason to deny the admissibility of testimony relevant to issue[18], and it is submitted that the rule in *Rowton's* Case which in any event has been strongly criticised, is not a sufficiently good reason.[19]

A further reason for advocating a more liberal approach to the admission of "psychiatric" testimony is that far from confusing the jury, an educated opinion on the issue of responsibility may better assist the jury to arrive at its ultimate "collective" verdict. One rationale for the exclusion of expert opinion testimony where the issues are "on matters of human nature and experience"[20] is that the jury may be misled by an expert's qualifications and place unjustifiable weight on them. But, it is submitted that this rationale is illusory. It is the responsibility of the prosecutor to test the basis for the opinion[21] and to expose any fallacies therein calling rebuttal evidence if it is suspected that the opinion is specious. There are, of course, those in any profession, who are overly anxious to please. It must be accepted that on occasions psychiatric testimony may be nothing more than an effort to bolster a weak case. However, given that the Crown has the right to test the evidence, and the Judge the responsibility to direct the jury that "the ultimate decision is theirs and theirs alone",[22] it is unlikely that the jury will be "hoodwinked". Even in *Lowery's*[23] Case for example, the evidence of a very eminent Victorian psychologist was insufficient to acquit King. But, and this is the third major reason advanced for adopting a more liberal approach, at least if convicted, the accused knows that everything relevant and favourable to his defence has been placed before the jury. This, it is contended, is a far more important reason for admitting "psychiatric testimony" on questions of identity or intent even where the testimony does not necessarily suggest a demonstrable mental abnormality on the accused's part, than the "ultimate issue" rule or the rule in *Rowton's* Case.

Addendum

Subsequent to the completion of this article, the decision of the English Court of Criminal Appeal in *R v Smith* [1979] 1 WLR 1445 was reported. This case is important because the testimony of psychiatrists was held to be properly admitted on behalf of the Crown where the defence relied on automatism on a charge of murder. The basis for this defence was that the accused had committed the crime whilst sleepwalking. The medical evidence to the contrary was admitted by the trial Judge. Counsel for the applicant sought to challenge the admissibility of the medical testimony on the basis that it did not relate to a defence or issue of insanity or diminished responsibility. The Court held, however, having referred to *R v Chard* [1971] 56 Cr App R 268 and *R v Turner* [1975] 1 QB 834 that the evidence was admissible.

In the opinion of Geoffrey Lane L J:

". . . the question seems to be whether or not the applicant exhibited the type of abnormality in relation to automatism that would render it proper and indeed, desirable for the jury to

[17] See discussion, ante, n 1.

[18] As for example the policy of ensuring a fair trial limits admission of previous convictions of an accused though these convictions may be relevant. See, Hoffman, [1975] LQR 193, 204-206.

[19] Ante, n 2. It is different where the evidence is relevant simply to credit, for example where the defence seeks to adduce testimony that the accused gave a version consistent with his testimony when under the influence of truth drugs. *R v McKay* [1967] NZLR 139.

[20] *R v Turner* supra, at 841. Also Hoffman, *Laws of Evidence* 2nd ed at 73.

[21] In so far as he is not able to so because the opinion is based on hearsay *R v Turner* supra, would justify the exclusion of that part of the testimony. See Roskill L J at 840. "It is not for this Court to instruct psychiatrists how to draft their reports, but those who call psychiatrists as witnesses should remember that the facts upon which they base their evidence must be proved by "admissible evidence". See, further *R v Lupien* [1970] 9 DLR 3d 1, 13, Hall J. "Psychiatrists are permitted to testify that from their examination and study, sometimes long after the event, of an accused, including conversations with him and from facts proven in evidence, that the accused was incapable of forming the intent necessary to constitute the crime with which he is charged."

[22] Per Hall J in *R v Lupien* ibid, at 14.

[23] [1974] AC 80. And for a decision where the jury failed to accept psychiatric testimony on an issue of diminished responsibility, see *Walton v R* [1978] All ER 542 and the dictum of Lord Keith at 546 f - h.

have expert help in reaching their conclusion. It seems to us without the benefit authority that that is clearly the case. This type of automatism — sleepwalking — call it what you like, is not something, we think, which is within the realm of the ordinary juryman's experience. It is something on which, speaking for ourselves as Judges we should like help were we to have to decide it and we see not why a jury should, be deprived of that type of help."

It is respectfully submitted that this decision marks, perhaps the beginning of a possibly more liberal approach to the admission of psychiatric testimony. Given that the evidence is relevant to issue, and within the province of a psychiatrist, then it should be admissible on a issue of intent even though it is not suggested by the defence that the accused is mentally abnormal, so as to come within one of the recognised medical defences. If the testimony is admissible on behalf of the Crown in a case of sleepwalking, then it should also be available for the defence, in similar circumstances.

INDUSTRIAL LAW

PERSONAL GRIEVANCE: DISMISSAL FOR THEFT

By JOHN HUGHES, *Lecturer in Law, University of Canterbury.*

Reports had been made of petty theft from an office rest room, leading the management to hold discussions with a crime prevention officer. Late one afternoon the office junior, a Ms Holley, went to the rest room to check that it was secure for the night and to retrieve her comb. Whilst she was in the room a worker entered and later alleged to the management that she had seen Ms Holley with her hand in another worker's purse. The police were notified and on the following morning Ms Holley was interviewed by a police officer at her place of work, when she denied the allegation of attempted theft. The police officer involved informed the employer that he considered himself to have enough evidence to charge Ms Holley with attempted theft. Thereupon she was taken to the company office and summarily dismissed without any request from the company management for an explanation; having placed the matter in the hands of the police, the company apparently did not feel that it ought to make inquiries on its own behalf. Three months later a Magistrate's Court dismissed a charge of attempted theft brought against Ms Holley. On application by Ms Holley's union for reimbursement and compensation under the grievance procedure contained in s 117 of the Industrial Relations Act 1973, the employers were held by the Arbitration Court (Mr J B Walton dissenting) to have unjustifiably dismissed Ms Holley (*Holley (Wellington, Taranaki and Marlborough Clerical, Administrative and Related Workers IUW) v JN Anderson and Son Limited*, unreported, Arbitration Court, Napier. 28 November 1979 AC 115/79). At the hearing before the Court, the company called no evidence on the events in the rest room. In arriving at their decision, the majority of the Court nevertheless emphasised two other aspects of the case which must now be considered as laying down guidelines for future cases of this nature. First, in asking whether the company gave the worker any opportunity for explanation and denial and coming to the conclusion that it did not, Judge Horn stated that the company acted unjustifiably in substituting the opinion of a police officer for its own inquiries. Secondly, in asking whether the company was justified in dismissing Ms Holley on the police officer's statement that in his view there was sufficient evidence to bring a charge, the Court stated that it was not so justified; in doing so, Judge Horn emphasised that "the opinion of that police officer has been shown subsequently, by the Magistrate's Court hearing, to have been insufficient". In the course of his judgment, Judge Horn drew attention to the earlier decision of the Industrial Court in *Wellington Amalgamated Shop Assistants Union v Wardell Bros and Co Ltd* [1977] Ind Ct 13, where Judge Jamieson suggested that suspension on full pay was "the proper course" in a case of suspected theft by employees, although stressing that the present case had been decided on its own facts.

In one sense *Holley* may be welcomed as providing a clear indication of the Arbitration Court's emphasis on procedural as well as subs-

tantive fairness in unjustifiable dismissal cases of this type[1]; nevertheless it is respectfully submitted that, in terms of industrial relations practice, the case raises more questions than it answers. In the following examination of the case, some reference will be made to the recent developments in this area in the United Kingdom under the statutory concept of "unfair dismissal"[2]. It must be noted however that, whilst the Arbitration Court and its predecessors have acknowledged certain aspects of the law of "unfair" dismissal as being relevant to New Zealand's law of "unjustifiable" dismissal[3], the Court has shown little tendency to resort to existing authority (whether in New Zealand or elsewhere) in dealing with applications under s 117.

In *Holley* the Arbitration Court drew a distinction between the process of investigating and ascertaining the facts, which in this case was conducted largely by the police, and the process of deciding whether dismissal was the appropriate penalty[4]. No problem arises when, as will usually be the case in other areas of dismissal for misconduct, these separate functions are undertaken by the same person or body. But the decision in *Holley* means that where the investigation of what has happened is undertaken as a separate exercise (perhaps by a security officer or, as in the instant case, the police) it will usually be necessary, when a decision is being taken whether dismissal is to follow, for the employee to have an opportunity to make representations to the person who will take the decision to dismiss. It remains to be seen how far the Arbitration Court will insist on an inquiry in different circumstances (eg what if the employer is told by the police that the worker has confessed?) The operative test in the United Kingdom where it is alleged that the dismissal is procedurally unfair is to ask:

> (1) Have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry, and had they received the information which that inquiry would have produced?
> (2) Have the employers shown that in the light of the information which they would have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss?[5]

Applying this test to the facts in *Holley*, it is submitted that the same result would have been achieved. It is noteworthy though that the second limb of the test does not require that guilt of the offence alleged be established conclusively[6]. Whether the Arbitration Court would take the same view is open to doubt in the light of *Holley*. Mr J B Walton remarked in his dissent that:

> "There were undoubtedly suspicous circumstances surrounding the discovery of Ms Holley alone in the rest room and she admitted in evidence that this would give reasonable ground for suspicion.
>
> The employer faced with such allegations quite rightly . . . decided to call in the police to handle the matter independently. The matter eventually proceeded to trial in the Magistrate's Court with the result recorded herein.
>
> The majority of this Court now decides that . . . the employer before dismissing Ms Holley should have conducted deeper inquiries or in the vernacular held a 'kangaroo court' of its own."

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[1] For other instances of procedural defects leading to a decision that dismissal was unjustifiable *Boswell v Wellington Regional Hydatids Control Authority* [1977] Ind Ct 141 (no opportunity given to summarily dismissed worker to explain himself or to answer allegations made against him at the time the decision to dismiss him was made) and *Otago Road Transport etc Union of Workers v St John Ambulance Association* [1977] Ind Ct 217 (breach of agreed complaints procedure — no opportunity to give an explanation); see also on the question of complaints procedures *Northern Industrial District United Storemen etc IUW v Rex Consolidated Limited*, (unreported, Arbitration Court, Auckland, 21 December 1979 AC 126/79).

[2] See now Part V of the Employment Protection (Consolidation) Act 1978.

[3] See, eg, the treatment of UK authority in the first two cases cited in note [1], supra. "Unfair" and "unjustifiable" are often used synonymously in the UK cases: see, eg Lord Denning in *Alidair Ltd v Taylor* [1978] ICR 445 at p 451. Whilst the detailed structure of the UK legislation makes comparison difficult, the underlying principles which have developed are arguably capable of general application.

[4] Compare the judgment of the Employment Appeal Tribunal (UK) in *Budgen v Thomas* [1976] ICR 344.

[5] *British Labour Pump Co Ltd v Byrne* [1979] ICR 347 at pp 353-4. It should be noted that this area of UK employment law is subject to a uniform procedural Code of Practice which may be taken into account in determining whether a dismissal is unfair. The relevant provisions of that Code are echoed in some New Zealand collective agreements: see "Personal Grievance Procedures: A collection of some Facts and Opinions", Industrial Relations Division, Department of Labour, November 1978, at pp 34-35.

[6] See *Parker v Clifford Dunn Ltd* [1979] ICR 463, applying *Carr v Alexander Russell Ltd* [1979] ICR 469 (Note).

An employer's reluctance to conduct his own inquiries in the face of a police investigation is perhaps understandable, and in most cases these inquiries would presumably not amount to the "kangaroo court" so vividly envisaged by Mr Walton, but is such reluctance justified in law? The question has not been considered in New Zealand (save by implication in *Holley*) but in a leading United Kingdom authority[7] it was suggested that it would be improper (whilst a criminal prosecution was pending against an employee for theft of the firm's goods) for the employer to carry out any form of internal inquiry into the circumstances of the theft, due to possible prejudice to the subsequent trial. However it is suggested that, so long as care is taken to do nothing to prejudice the subsequent trial, there is nothing in the law of New Zealand to stop an employer from discussing such a question with the worker concerned so far as it bears on the action which the employer is going to take[8]. However in *Holley*, having established that the employer has a duty to inquire, the Arbitration Court left open the question of what conclusion the inquiry must come to in order to justify a dismissal to the grievance committee or the Court[9]. Judge Horn, in stating that Ms Holley's dismissal was unjustified, gave three reasons as the basis for the Court's decision:

> "In the first place she was subsequently acquitted of a charge of attempted theft in the Magistrates's Court. Secondly, the company itself substituted the opinion of a police officer for its own inquiries and the opinion of that police officer has been shown subsequently, by the Magistrates's Court hearing, to have been insufficient. Thirdly, the one person who could have given evidence of any alleged overt act of dishonesty on the part of Ms Holley was *not* called before this Court."

Regrettably, the Court did not elaborate on the approach which it would have adopted had the worker who made the allegation been called as a witness. The decision is therefore open to two interpretations. The first interpretation is simply that the Court had insufficient evidence before it to establish that the dismissal was justified, in view of the admitted failure of the employers to make inquiries of Ms Holley and their subsequent failure to call as a witness the worker who had made the original report; against this, of course, the Court had evidence from Ms Holley and the acquittal by the Magistrate's Court which helped to support Ms Holley's version of the facts. On this view had the witness been called her evidence might have been relevant not as to whether the alleged offence was proved but as to whether the employers, after a careful and fair investigation, had come to a justifiable decision that dismissal must follow — these two issues not being synonymous. This interpretation is supported first by the Court's emphasis on the need for an inquiry by the employer regardless of police action and secondly by the Court's reference to the *Wardell* case, where Judge Jamieson emphasised that whether or not a dismissal is justified falls to be determined in the light of circumstances known to the employer at the time of dismissal (at this time the employer cannot possibly be certain as to whether or not the alleged criminal offence has been committed).

Another interpretation (and that which the Court's dissenting member seemingly adopted[10]) is that, in these cases, the employer is apparently required to go beyond justifying his action in the light of circumstances known to him at the time of dismissal and to prove actual commission of the offence[11]. This second interpretation is supported by Judge Horn's reference to the "insufficiency" of the police officer's belief in the light of the subsequent acquittal even though, presumably, the officer had a reasonable belief after the initial interview that Ms Holley had committed the offence alleged[12]; under the first interpretation

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[7] *Carr v Alexander Russell Ltd* ibid, per Lord McDonald in the Court of Session.

[8] Compare the approach of the Employment Appeal Tribunal in *Harris (Ipswich) Ltd v Harrison* [1978] ICR 1256 at p 1259.

[9] In some cases the provision for recourse to the Court is removed. See the discussion in GJ Anderson, "An Examination of Section 117 of the Industrial Relations Act, 1973", Wellington 1978, at pp 16-21.

[10] Mr Walton stated his belief that "The employer by recalling the original witnesses in the original criminal proceedings again at a hearing before this Court would without any shadow of doubt have placed Ms Holley on trial again . . ."

[11] The writer recently attended a seminar where an industrial mediator stated that, in grievance cases where alleged misconduct amounted to allegation of potentially criminal conduct, he required employers to prove the commission of the offence beyond a reasonable doubt.

[12] Although the Arbitration Court conceded that allegations by the union of undue harassment at the interviews were possibly justified.

this belief, if held by management, would probably serve to justify dismissal if reached after a fair inquiry. To an extent, the second interpretation may also be supported by Judge Horn's reference to Wardell since in that case, which involved suspected theft from the employer, Judge Jamieson suggested that the proper course would have been suspension on full pay until criminal trial[13]. In the absence of a "right to work"[14] such a course would not involve any breach of contract at common law on the employer's part and, according to Wardell, would not be unjustifiable. Nevertheless obvious problems arise under such a course of action. First, there is the difficulty with the differing burden and standard of proof in each proceeding. In the Arbitration Court the employer has to show that, on the balance of probabilities, he had adequate grounds for terminating the employment[15]; in the criminal Court the prosecution has to prove all the elements of the offence beyond a reasonable doubt, as well as disproving to the same degree any defence for which there is some evidence. It remains to be seen what evidential value will attach in the Arbitration Court to an acquittal in the Magistrate's Court, when the employer subsequently brings evidence to show that he had reasonable grounds for believing at the relevant time that the offence had been committed. Secondly, there is the waiting period. In commenting on defended hearings before the Magistrate's Court, the Royal Commission on the Courts remarked that "it is not unusual for nine months or more to elapse from the time of the alleged offence to disposal of the case"[16]; if the defendant elects trial by jury, total waiting time for Supreme Court trials from the first Magistrate's Court appearance to final disposition may be in excess of 17 weeks[17]. Whilst the normal "waiting time" for grievance committee hearings is considerably shorter[18] presumably such a hearing will be adjourned until after the criminal trial in most cases, particularly where reinstatement is sought as a remedy[19]. On failure to reach settlement at the committee stage the case will normally be referred to the Arbitration Court, with further delay in disposing of the case. At present there is no indication of the length of time for which the Arbitration Court would expect a worker to be suspended on full pay whilst awaiting trial although in *Wardell* a period of six weeks was endorsed by Judge Jamieson and in *Holley* it appears, by implication, that a period of three months paid suspension would have been appropriate (this being the interval between the alleged incident in the rest room and the date of acquittal). There is, in addition, little prospect that in cases of this nature the worker will be able to find alternative employment and thus mitigate his or her loss.

One may conclude that in cases of suspected dishonesty suspension on full pay is the safest course for the employer to follow, in the absence of a contractual right to suspend without pay, though how many employers will follow that course remains to be seen. Suspected involvement in a criminal offence at work will usually also involve a separate and serious breach of the individual worker's contract of employment by virtue of express, implied or incorporated terms; the most common examples — unauthorised removal of goods from the workplace, "clocking" irregularities and "tilling" offences — will almost certainly be in breach of company rules and as such may render the worker liable to dismissal regardless of any intention to steal or defraud. Nor need the rule have been one of which the worker had been specifically informed; in *Wellington Road Transport etc IUW v Fletcher Construction Ltd* (unreported, Arbitration Court, Wellington 6 August 1979 AC 71/79) evidence of "a common rule on all construction sites" that permission was to be asked before removing waste materials led to the upholding of the dismissal of a worker who had removed, without permission, a short off-cut roll of wire mesh from the job site even though the Arbitration Court was not satisfied that the worker concerned had been specifically told of a rule to this effect and was satisfied that no criminal intent was involved. Nevertheless, particular circumstances may well render such dismissal unjustifiable. For example, many cases involving breach of

[13] It is unclear whether Judge Jamieson was expressing the view as being of general application: in that case, where theft charges arose from irregularities in staff purchases, the Industrial Court found that both parties were at fault and it may be that this finding affected the Court's attitude towards the proper course to adopt.

[14] As to which see the authorities discussed in "The Obligation to Work and to Pay for Work" M R Freedland (1977) Current Legal Problems, 175.

[15] *Scholes v AA Mutual Insurance Co* (1975) 75 Bk of Awards 5515.

[16] Report of the Royal Commission on the Courts, Government Printer, Wellington, 1978, para 192.

[17] Ibid, para 209.

[18] See the Labour Department survey, note [5] supra, at page 45. The great majority of grievance committees meet within 30 days of the alleged grievance.

[19] Though delay, even if inevitable, will prejudice the granting of reinstatement. See *Otago Road Transport etc Union of Workers v St John Ambulance Association*, note [1] supra.

security rules arise from lax observation of those rules on the part of both workers and management. In *Wardell* two workers disregarded an established system whereby staff members were allowed to remove goods from the premises for later purchase by them, on the understanding that the goods would be listed by a checkout operator before removal. When the manager discovered this, and considered the workers' explanation to be unsatisfactory, he dismissed them: they were later acquitted of a charge of theft. In holding that, over a period of time, a general slackness had developed in regard to the rule in question Judge Jamieson went on to say:

> "We do not think that the management of the shop had been as vigilant as it should have been and consequently both parties must accept some share of responsibility for the situation which arose. *We point out however that the dismissal took place at that point, and consequently could not then be justisfied upon the ground of theft. If it was to be justified at all it had to be by the fact that the workers had broken the rules.* Dismissal on that ground alone would, in all other circumstances, have been excessive and unjustified. The employer would have been quite justified in issuing a stern warning, not limited to those particular workers, but we do not think dismissal can be justified."[20]

Obviously the result in *Wardell* may well have been different if the management had not been guilty of a generally slack attitude towards the rule, since the acquittal would not have altered the fact that company rules on the removal of property had not been followed. Nevertheless it seems clear that if management intend to dismiss as soon as alleged theft comes to light, in most cases the breach of company rules will need to be sufficient in itself to justify dismissal. Presumably if a later conviction for theft results this might be relevant to the award of reimbursement, compensation or reinstatement but not, on present authority, to a decision as to whether the dismissal was unjustifiable[21] where the employer has taken no steps to inquire into the allegations before dismissing the worker.

[20] [1977] Ind Ct 13 at p 15. Emphasis added.

[21] Contrast the position at common law in *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 and *Cyril Leonard & Co v Simo Securities Trust Ltd* [1972] 1 WLR 80 and see *W Devis and Sons Ltd v Atkins* [1976] ICR 196. Section 117 does not oblige the Court to provide any remedy on deciding that a dismissal was unjustifiable.

CORRESPONDENCE

Dear Sir,

"Subject to Solicitors' Approval"

I feel I must make some comments on Professor Brian Coote's article "Subject to Solicitor's Approval — Another Development" [1980] NZLJ 78. The comments come, as it were, from the streets of practice to the seats of learning.

Professor Coote evidently feels there is something wrong with a solicitor being able to act on a client's instructions for whatever reason in disapproving or withholding his approval of a contract entered into by that client subject to his solicitor's approval, his feeling being that to hold in favour of this construction of the plain meaning of the words would mean that one party is apparently bound whilst the other is not. I do not criticise Professor Coote's analysis of the cases, but I cannot agree with his sympathies, nor do I think the law need necessarily be the way the cases to date have pointed.

If a party, whether he be vendor or purchaser, signs a form "subject to solicitor's approval", why should he have any reason to doubt that the words mean what ey say. The condition is usually inserted because the party is inexperienced in business matters, unsure of himself, has been told by his solicitor never to sign anything without his approval, doesn't trust the land agent, or just wants to have the benefit of having some more time to think about it, and/or his solicitor's advice. These are the common sorts of reasons why the clause is inserted. That is certainly my experience of the way the man in the street understands it, and he is often induced to sign by the land agent inserting such a provision and telling him that it will then be alright. I have also seen the clause used where the purchaser actually needs finance and the solicitor's approval has been given conditionally upon a finance clause being substituted. I am certain that all lay-people understand the clause to mean exactly what the term implies. Simply. And most land agents believe it to mean the same thing except for a few who have an idea that it is not quite that simple but don't know what the difficulty is. Certainly lay-people and land agents have no understanding of the difficulties with which lawyers have embellished the terms.

If a contract is formed with the signing by vendor and purchaser, then there must be some obligation on the party signing subject to his solicitor's approval. In this respect, the condition of a solicitor's approval would be no different from any other condition. But I suggest that is no contract

at all unless and until the solicitor's approval is given. If there is no contract then there is no obligation and the approval can be given or withheld at the mere option of the party in whose favour the approval clause is written.

There are three possible situations and it will be useful to examine each in term.

First, the purchaser makes an offer which the vendor signs subject to his solicitor's approval. Already I have to avoid using the word "accepts" as describing what the vendor has done and the word "contract" in describing what the vendor and purchaser have signed. I assume no one will quibble with my use of the words "vendor" and "purchaser". Is there a contract? I think not. Suppose a vendor signed subject to his solicitor's approval by 31st March in the year 2000. Who would think the purchaser bound in such a situation. Of course he isn't, and for the reason that the vendor has not accepted his offer simply but has modified the apparent contract with a further term which the purchaser has now the option of accepting or rejecting. In practice, of course, he usually accepts this variation passively by doing nothing because the approval is only a few days away. But the fact that the approval is usually only a matter of some days away makes no difference to the principle that the offer has not been accepted in its terms. In my view where a purchaser's offer is "accepted" by a vendor subject to his solicitor's approval, the purchaser is then free to withdraw his offer at any time before the solicitor's approval is given because in truth until that time, there is no contract. And all worries about one party being apparently bound whilst the other party is not disappear.

Nor does a vendor's signing subject to his solicitor's approval amount to a counteroffer. It is not an offer at all, I suggest, since it is the very signing which is qualified.

Secondly, a purchaser signs an "offer" subject to his solicitor's approval. When the vendor sees this qualified offer, he has the option of accepting it or rejecting it. If he does not want to wait for a few days before finding out whether the purchaser will be bound by a contract, he can say to the purchaser, "no, if you want any other advice or some more time to think about it, go see your solicitor first and then come back to me with an offer without that condition". But if he signs accepting the condition of the purchaser's solicitor's approval, knowing that the purchaser's "offer" is not binding on him until it is perfected by his solicitor, why should he be allowed to complain. He went into it with his eyes wide open. He read the words and he understood what they meant. Or, more likely, the land agent told him the purchaser had signed subject to his solicitor's approval and pointed to the clause.

On a true construction of the situation, is not the purchaser saying to the vendor "these are the terms on which I am prepared to consider your offer to sell to me. If you are prepared to sign an offer to sell on these terms, I may accept it and will notify you through my solicitor." In this situation, the condition of the solicitor's approval is vastly different from the condition of, say, the purchaser's arranging finance. In the case of the finance it is to be arranged as a condition of the completion of the contract, whereas in the case of signature subject to a solicitor's approval, I suggest it is the signing which is the subject of the approval and not the completion of the terms of the contract. Although, having said that, one must distinguish, at least in so far as they affect the purchaser's solicitor's approval cases, situations where the relevant provision regarding approval is annexed to the signature, and those in which it is inserted in what is commonly clause 19 of the Auckland District Law Society agreement form. In the latter case, the clause commonly commences: "(completion of) this agreement is subject to the purchaser's solicitors' approval . . .". Some go on to limit the approval "as to form" whilst others look for approval "in all respects" and there are many other variations. There appears to be no uniformity of the clause used between land agencies. Different branches of the same land agency will use different forms. Even different land agents in the same office will use different forms, many times depending on what their last form said or the nearest one at hand or even what they can think of off the top of their head. And is there any difference between the "passive" and "active" approval clause? That is, on the one hand the clause which states that if approval is not given by a certain time the "contract" will automatically be void, and, on the other, the clause that requires actual disapproval by a certain time before it is to be considered at an end. When the rest of the agreement is in standard form which has evolved and been compiled with qualified assistance in the light of experience and with a view to balancing or protecting the rights of the parties, so that vendor and purchaser can sign in reliance, surely one is compelled to the conclusion that the status of the contract should not then rest on the random choice of a clause by a person who isn't even a party to it. They have signed "subject to my solicitor's approval" simply and do not consider the written words to say any more.

Having said earlier that the plain meaning of the words is what is understood by the parties, I must now backtrack and say that a technical element has been introduced into the simple concept of solicitors' approval which makes the clause read in a way different from what is intended and understood by lay-people and land agents in the way that I have mentioned earlier. Certainly the written words express far more than the spoken words convey. I do not think that lay-people or land agents understand that by commencing the paragraph "completion of this agreement . . ." they are labelling what they have signed as a contract at that time. As far as they are concerned, it is still a tentative agreement signed subject to solicitor's approval and the differences between the various sorts of clauses available is the domain into which lawyers have entered to create nice distinctions as if the contract had been prepared by qualified people.

In the case where it is the vendor who has inserted this type of solicitor's approval clause, the purchaser's offer has not been accepted in its terms, and for that reason there is no contract. And who would think that the solicitor's approval clause is any different for vendor or purchaser. I have never known of any such distinction. If it works for the vendor it should work for the purchaser too and I suggest the foregoing argument enables it to do this without breaching any of the principles of contract law.

Thirdly, there is the situation of both vendor and purchaser signing subject to their respective solicitors' approval. A fortiori in this case, the two previous arguments apply and there is no contract until the solicitors' approvals are given.

If any further argument is needed to show that the clause is intended to relate to the signing and not be a con-

dition of completion of the contract, perhaps this can be found in looking at the differences between the finance condition and the solicitors' approval. With respect to finance, the vendor is told what the purchaser is looking for as to amount, by when it is to be arranged, the interest rates acceptable, the term of the loan, and more than likely its source also. This is relevant for at least three reasons. First, so that the vendor can see what it is that the purchaser wants and judge for himself whether it is a realistic offer. Secondly, so that he can check up on the purchaser if necessary to see that he has applied in terms of his stated intention in the contract. Thirdly, it enables the vendor, in appropriate circumstances, to supply the finance himself should the purchaser's efforts not be successful. In contrast, what does the solicitor's approval clause tell the other party which enables him to make any assessments. How does a Judge divine the reasons a purchaser had in having the clause inserted. In what sculduggery do counsel involve themselves in order to advise the vendor that the approval has been withheld reasonably. What is reasonable when the conditions upon which approval will be given are not specified. The very fact that the approval clause is without parameters mitigates against its imposing an enforceable obligation.

Vendors and purchasers signing subject to their solicitors' approval do so in the belief that they are not bound unless and until they have had the opportunity to discuss the proposed agreement with their solicitor and then instructed him to approve. That being the case, there is no harm done in allowing this belief to be manifest and the law of contract will survive notwithstanding.

Alan Jenkinson
Panmure

FAMILY LAW

THE EFFECT OF SOCIAL SECURITY ON THE PAYMENT OF MAINTENANCE — SOME ENGLISH COMPARISONS

By W R ATKIN *Senior Lecturer, Faculty of Law, Victoria University of Wellington.*

The Finer Report *(Report of the Committee on One-Parent Families* HMSO July 1974 Cmnd 5629) ranks as one of the most important social documents published last decade. No other such comprehensive study of the needs of solo parents, especially those who are party to a marriage breakdown, exists.

The report recognised very clearly the significance of the role of public law in income maintenance and the inadequacies of private family law to deal with the problem. At para 4.90 the report says that "the real problem of maintenance is not the unwillingness but the inability of men to pay. There is not enough money to go round." For this reason, the leeway is made up by the State through the payment of social security benefits. What normally happens is that the beneficiary is paid a full benefit, thus gaining security of income, and then permits any payments made pursuant to a maintenance obligation to be diverted to the State (known in England as "the diversion procedure".)

The situation described by the Finer Report is essentially no different from that in New Zealand. A comparison of statistics bears this out. In New Zealand to the year ending 31 March 1979 $143,533,000 was paid out in domestic purposes and related benefits. Most of those receiving these benefits were divorced or separated women or unmarried mothers, for whom someone could be pursued for maintenance. Yet the amount recouped from such sources was only $11,563,008, a figure which is not set off against administrative and legal aid costs.

In England, as at November 1978, the Department of Health and Social Security was paying out L486,000,000 annually by way of supplementary benefit to persons such as divorced, separated and single women with a "liable relative" who could in part support them or their children. The amount collected from liable relatives was L67,000,000, a rate of recovery slightly better than but overall not very different from that in New Zealand. When taking the figures for separated spouses only, of whom there were 140,000, the picture is similar — L182,000,000 paid out and an estimated L33,000,000 recovered. The figures for divorced spouses (119,000) were L181,000,000 and L25,000,000 respectively.

It is tempting to suggest that there is a point beyond which the State cannot expect its welfare payments to be balanced by the enforcement of private law obligations. That point is somewhere near 15 percent. What is quite clear is that welfare state carries a far greater burden than husbands in enabling people to adjust financially to marriage breakdown.

Given the similar results revealed by an analysis of the statistics, one might expect a close correlation in the systems operating in New Zealand and England. Some interesting

points of divergence arise however, and it is proposed to examine some of these.

The obligation to bring proceedings

In New Zealand, one of the criteria to be met before a solo parent can become entitled to a domestic purposes benefit is to have obtained maintenance, either by way of a registered maintenance agreement which the Social Security Commission considers reasonable, or by way of Court order. The Commission has a residual discretion to waive compliance with this requirement if it considers that all reasonable steps to obtain maintenance have been taken. The law is spelt out expressly in s 27B(2)(c) of the Social Security Act 1964, as added by the Social Security Amendment Act 1977. Section 74(e) of the Act also gives wide powers to the Commission to terminate, refuse to grant a benefit if there has been a failure to take reasonable steps to obtain maintenance. On the other hand persons in need may still be granted an emergency benefit under s 61 of the Act, which is completely at the discretion of the Commission.

At the time of the Finer Report, the position in England was very similar to that currently prevailing in New Zealand. The stated policy of the Supplementary Benefits Commission was to "encourage" women to bring proceedings against their husbands or the fathers of their children, as the case may be. The Finer Report was critical of this policy: "On balance, we consider that this policy causes pain and anxiety, for no tangible advantage, to far more claiments than those upon whom it may confer some advantage." (para 4.202). The reason for this is that only rarely will a Court grant a sum which will be larger than the supplementary benefit. Thus, said Finer, "it is not surprising that . . . much of the encouragement to take proceedings is addressed to women who have little heart for doing so." (para 4.192)

A consequent recommendation to alter the encouragement policy was one of the few immediately implemented after the publication of the Finer Report. Today, beneficiaries receive an explanatory note about their right to proceed for maintenance. They are told that they can seek advice from a solicitor under the Legal Aid and Advice Scheme, but they are not pressured. The final sentence of the explanatory note emphasises this: "But the decision whether or not to take your own proceedings is entirely for you."

The advantages of bringing proceedings are not great. Few husbands would have sufficient income to pay more than the level of supplementary benefit. Anything less would normally be diverted to the Supplementary Benefits Commission, or the level of benefit would be reduced. It should be pointed out, though, that a respondent cannot escape his maintenance obligations by arguing that the receipt of a benefit constitutes income which satisfies the applicant's needs. *(Williams (LA) v Williams (EM)* [1974] Fam 55. For the corresponding New Zealand law, see *U v W* [1978] 1 NZLR 90 and *Ropiha v Ropiha* [1979] *Butterworths Current Law* 728. Note also clause 63 of the Family Proceedings Bill (No 2) 1979). Thus a maintenance order may be for a substantial sum and to have such an order in force, especially for the support of children, may be of assistance when the beneficiary decides she is in a position to obtain employment and come off the benefit. Her new source of income could be immediately supplemented by maintenance payments. Some proceedings for maintenance are therefore still taken by recipients of the supplementary benefit.

The English practice raises the question why the very approach abandoned after the Finer Report should have prevailed in New Zealand. If the Social Security Amendment (No 2) Bill 1979 (before the Statutes Revision Committee, at the time of writing) is passed in its present form then the obligation to proceed for maintenance will go. That must surely be a good thing, whatever the merits and demerits of the rest of the scheme encompassed within that Bill.

Agreements

The maintenance obligation may be satisfied by means of a maintenance agreement but by far the most common procedure in New Zealand is to seek a Court order. The reason for this is that the Social Security Commission does not take an especially generous attitude to agreements. The respondent knows that he is more likely to get a better deal from the Courts than from the Commission.

The only lessening in the Commission's policy came with the so-called pilot schemes operating in certain parts of the country. Under these schemes, beneficiaries have been referred immediately to marriage counselling without being required to first file maintenance proceedings. Out of such a counselling session, conducted in the knowledge of the Commission's guidelines, a maintenance agreement acceptable to the Commission is more likely.

The contrast with the English situation is sharp. The Courts there are much tougher on respondents than is the Supplementary

Benefits Commission. As in New Zealand (see for instance *Letica v Letica* [1976] 1 NZLR 667, 671), the English Courts recognise the principle that respondents must not be ordered to pay an amount of maintenance which would reduce them below subsistence level. Subsistence level is worked out by treating it the same as the amount of supplementary benefit the respondent would notionally be entitled to. The Courts are not however prepared to equate subsistence with the Supplementary Benefits Commission's "liable relative formula". This formula is used by the Commission in settling amounts to be paid by the liable relative towards the support of his dependants and leaves the liable relative with a margin over supplementary benefit scales of L5 or one quarter of his net earnings, whichever is higher (see Finer, para 4.188). An allowance is also made for actual housing costs. According to the Court of Appeal in *Shallow v Shallow* [1978] 2 WLR 583 (cf *Fitzpatrick v Fitzpatrick* (1978) 9 Family Law 16), the formula has nothing to do with subsistence levels. "It produces, in fact, nothing more than a negotiating figure for the use of the commission's officers when seeking contributions from 'liable relatives' " (at p 586). In that case, the husband paying L30.50 per week maintenance was left with L31.94 to live on, whereas he would have been left with L37.50 had the liable relative formula been used.

A discrepancy between private law and public law rules, such as the outlined, is surely unsatisfactory.[1] Such a danger is already inherent in the Social Security Amendment (No 2) Bill 1979 unless substantial amendments are made during the passage of the Bill. But the other lesson to be learnt from the English experience is that a liberal policy by the social security authorities will not necessarily jeopardise the exchequer. Indeed it would seem that the Supplementary Benefits Commission gets more co-operation from liable relatives and an earlier settlement of the question of liabilities because of the policies they have adopted.

Proceedings by the State

Under s 27F(3) of the Social Security Act 1964 (as added by the 1973 Amendment), the Social Security Commission is given power to bring proceedings for maintenance itself against a beneficiary's spouse. The recent invocation of these powers created a storm of criticism from the legal profession and saw statements being made in Parliament. The central feature of the criticism was the improper interruption of existing solicitor/client relationships, its effect on proceedings and possible conciliation.

The 1979 Social Security Amendment (No 2) Bill will give even more power to the Commission, for they will effectively be judge in their own cause under the proposed scheme. The decision on what amount a "liable parent" has to pay will be an administrative one for the Commission, subject only to an ex post facto procedure for objection through the Courts. No longer will the question of separation, occupation of the matrimonial home, child custody, matrimonial property and maintenance be seen as part of an interrelated package.

If an alternative to the 1979 Bill is thought desirable, the English system is worth examination. It is the writer's view that a better balance between judicial and administrative action is thereby achieved.

In England, after receipt of the benefit, the beneficiary's liable relative (usually the husband) is approached by the Supplementary Benefits Commission to see if the liable relative's contribution can be settled by negotiation. Because of the formula already discussed above, many such settlements are made. In the absence of a settlement, the Commission will approach the beneficiary to see if she wishes to proceed herself. The "explanatory note" about this has also been discussed above.

Under s 18 of the Supplementary Benefits Act 1976, the Commission may itself apply to the Magistrate's Court for an order for maintenance. The Commission has only recently begun using this power to any great extent and the latest figures show an increasing trend: 440 orders in 1979, compared with 285 in 1978 and 120 in 1973. The crucial points in the operation of this provision are however twofold. (i) The power will only be used where there is controversy, ie, where the liable relative and the Commission have failed to reach agreement on the amount to be paid. Given the fact of controversy, the forum for resolution is judicial. (ii) The power is used only after consultation with the beneficiary and only if the beneficiary decides not to proceed. The possibility of conflict between the action of the Commission and the beneficiary's own legal advisers does not therefore arise.

The Effect of Inflation

One of the probable contributing factors to the wide gap between social security payments

[1] Cf Cretney *Principles of Family Law* (3 ed, London, 1979), 384.

and the recovery from liable parents is the loss in value of maintenance orders due to inflation. While inflation is a ground for variation of a maintenance order, variation proceedings take time and money. Under the new system contained in the Social Security Amendment (No 2) Bill 1979, the Social Security Commission will be duty-bound to review assessments of amounts to be paid by liable parents at least every two years (see new section 27U(1)). One suspects that this provision is designed principally for the up-rating of assessments in the light of inflation.

In England a new approach is being adopted in the Child Maintenance (Annual Uprating) Bill which seeks to automatically index child maintenance payments to inflation. The proposal has not been greeted with great enthusiasm in England and it is suggested that New Zealand should be cautious in adopting a similar scheme, for two reasons. First, not all payments are to be indexed, only those which fall below the level of the supplementary benefit. The measure will therefore help few one-parent families but may assist the exchequer. Secondly, and more importantly, there is no guarantee that while the benefit will have risen with inflation, the income of the liable relative will have done likewise. Maintenance orders usually require much more individual treatment than this.

In appropriate cases, there is no reason why the Court order itself could not include an indexation provision, eg, where the respondent has a secure salary which is increased regularly with the cost of living. This may be a preferable approach to that being considered in England.

Conclusion

New Zealand's social policy on marriage breakdown is at present in a state of transition. How the financial needs of the parties to such a breakdown are met is an ever-increasingly important part of that policy. This article has touched on several aspects of the problem by drawing comparisons with the position in England, and it is the writer's view that considerable advantage could be gained by a study of the English system.

OFFICE MANAGEMENT

WORD PROCESSING: THE SAVIOUR OF THE NEW ZEALAND LEGAL PRACTICE

By D B THOMAS *

During the late 19th century the newly invented typewriter and telephone began to appear in legal offices, and in 1897, were introduced to H M Land Registry in England. Needless to say such radical technology was not easily accepted by the legal profession of the day, many solicitors being unwilling to accept the typed opinion of any member of the Bar in case the new-fangled invention failed to reproduce the exact meaning of the counsel of their choice. A similar ground swell of feeling presently exists against the introduction of word processing in law offices in New Zealand so that the greatest office aid since the typewriter is ignored. I hope that the following articles will go some way to dissipating that opposition. It is my firm belief that in word processing lies the answer to the production bottleneck that is presently occurring in most legal firms to the detriment of the profession's income and its public image.

While a lot has been spoken and written over the past 12 months on the subject of word processing, many practitioners still appear confused and uncertain as to what word processing is. I believe they are thereby prevented from realising the full potential of word processing and are dissuaded from considering its possible application in their own offices. Like most other manufacturing or service industries the practice of the law today has moved away from a cottage industry handcrafting in solid gold the solutions to clients' problems and instead is forced by the exigencies of the modern financial world to mass produce those same articles in tin plate. In word processing lies the poten-

*The author is a partner in the firm of Fournier Thomas & Co, Solicitors, New Lynn, Auckland who adopted Wang, VDU based, word processing equipment in February 1979 after studying firms in Auckland, Sydney and Melbourne. This system was the sixth such system (all makes) introduced in Auckland and the first in a small legal firm. Originally a two partner, two solicitor, five secretary and receptionist-typist, and about to hire a sixth secretary, firm, Fournier Thomas & Co have now three partners, one solicitor, two legal executives, four secretaries and one receptionist typist. A second article will explain the equipment and its capabilities.

tial to return to handcrafted work at a comparative cost to us of less than even our grandfathers were capable of achieving. It is only by the adoption of modern technology and systems such as word processing that the profession can return to the profitable practice of law and be able to look back in horror on the present non-profitable paper war being waged by today's law practitioners.

"Word processing" in its current day sense comprises two completely separate and distinct parts and it is essential that the two parts of the distinction be fully understood before studying, discussing or implementing word processing in an office. The two parts are not interdependant and are capable of being implemented by themselves if that is suited to the individual practitioner's requirements. The two parts comprise:

(i) the word processing "system", involving the processing of an author's (originator's) thoughts through to the written end product as it is received by the intended recipient; and
(ii) the word processing "equipment" used to place characters on paper.

The word processing system

The advent of modern computer-based word processing equipment and increased concern at and interest in the possibility of management of legal practices has revived interest in the centralised "typing pool" as an efficient work system for the production of the paper product of the legal office. As increasing overheads, comprising in the main salaries to support staff and floor space, continue their never-ending upward spiral and public pressure holds or reduces fees, then that interest must develop into an appreciation and usage of the real alternative to reduced standards or services.

In the present day legal office the greatest restriction to the production of work lies at the point of the physical creation of the written word on paper, by the same manual-error prone system used since the last century. That area is at the same time the major contributor to the overhead level of a firm. If we are to break that bottleneck without imposing further overheads then the expensive luxury of having our own personal secretary will have to be foregone in the interest of increased efficiency, production and profitability.

As any trainee IBM salesman can point out, University efficiency studies clearly demonstrate that the modern girl Friday secretary transcribing her employer's spoken word using shorthand would on weekly average produce approximately five words per minute of typed final quality documentation. As has been amply demonstrated by the present practice of a majority of practitioners, the use of a dictaphone can increase that output by at least 100 percent thereby making more efficient use of the secretary's typing capabilities in allowing more time for typing rather than wasting that time awaiting the author's pleasure. Management studies have re-emphasised that taking that same experience to its logical conclusion then involves allowing a secretary to utilise her full typing capability by taking away all the remaining non-typing tasks or interruptions. Allowing the typist full uninterrupted time enables her to utilise her training and ability to produce a minimum of 60 words per minute, that is five times more than is presently being produced using dictaphone dictation methods.

The solicitor in the present day legal office might be supported by his or her own secretary with perhaps also arrangements for overflow or permanent use of at least part of the time of a second secretary/typist. As that secretary must be able to deal with clients, type, prepare legal documents, make tea and numerous other jobs — usually all at one time — a high degree of experience and ability is required and must be paid for, in an employee's market. In that situation the solicitor's work can be between one to two days and one week in arrears while productive work not governed by time limits or similar and the costing of completed matters can remain undone for anything up to six months or more. The time limited work is done at the expense of the disruption of other work, the relegation in priority of the matters mentioned previously and by the solicitors spending more time at work.

An alternative is available to any practitioner concerned at the effect of such pressures on his professional and personal life. University studies and practical applications in both Australia and New Zealand have proven that a full time typist is able to deal readily with all the typewritten production requirements of three to four authors and that the remaining non-typing tasks of the secretary require only one secretary for every two or three authors. Translation of those capabilities to the legal offices of the present day have proven a substantial overhead saving and/or production increase.

A rearrangement of job functions within a small office, or within work groups in the larger office, so a typist is able to concentrate on the typing function and another secretary on the non-typing will allow two support staff to complete all current work for three authors at nothing worse than a 24 hour turnaround in

work. A firm is then placed in a position where it can decide whether to dispense with, or not replace, now surplus support staff members or retain and transfer them to productive work in a legal executive capacity. Most offices would be able to employ such a new author on productive work delegated by the existing authors with the end result that the overall production of costed work for the firm is increased while at the same time the individual solicitors' work loads are reduced. In a case study mentioned to participants at recent management seminars, a firm of two partners and one qualified clerk, employed three secretarys and two typists to achieve at best a seven day turnaround in work. A reallocation of job functions enabled that firm, without any change in equipment, to achieve a 24 hours turnaround using one administration secretary and two typists.

As a model word processing system, then, the reallocation of job function and work procedures would involve the allocation of appropriate numbers of suitably qualified staff to the word processing centre while others are assigned to the support role in the ratios mentioned before. The emphasis in the word processing centre must be on uninterrupted time for the typist. This involves the transmission to her of all the information necessary to complete the task on hand without the need for her to spend any time on research. Authors must dictate all the information needed so the typist can complete the task without a break. That dictated word can be conveyed to the typist by physical transference of tapes or other recording media or via a centralised dictation system. Document work should follow standard precedents or formats, copies of which are readily at hand for both the author and the typist, again with a view to causing as little disruption as possible to both the author's and the typist's work flow.

The non-typing secretarial functions are directed through an administrative assistant, either by dictation via a separate recording system or by use of written work sheets, or printed check sheets. Those instructions can then be collected by the assistant at a time convenient to her and actioned without need for time-consuming consultation between author and assistant. Control or co-ordination of the typing and non-typing functions so the necessary information is available to the author and the enclosures go out with the letter are then the responsibility of a single supervisor or of the administrative assistant.

With this reorganisation should also come a reorganisation of the firm or author's precedents. Further productivity increases can be achieved by avoiding repetitious work. Photocopied or printed forms, documents and letters can mean completion of routine or standard work in less than half the time taken, for both author and typist, if the same task has to be typed in its entirety each time.

As in all things in life nothing is obtained for nothing and the above outlined benefits and improved profitability do not come easily or without heartburn or effort on the part of all involved. The major hurdle is the personality problem arising from the redefinition of job functions and the supposed loss of the personal one-one relationship between a secretary and her superior. That fear is groundless as the secretary will in time develop the same relationship with her group of authors and their work with the advantage of not being tied to the typewriter for most of the day.

Additional problems supposedly arise from the apparent loss of personal contact between the secretary and solicitor, the loss of personal control of the solicitor's own work, the boredom of the narrowed-down job specification and similar. These and others are communication problems and a planning meeting where the proposals and reasons for their introduction can be fully explained and discussed will get over the initial adverse reaction. Initial emphasis should be on trying different systems to achieve the desired end and real staff involvement in the planning and implementation will help attain that end while maintaining morale. For the about-to-become typist the apparent boredom of a wholly typing job is demoralising. However, given time and experience the people involved will adapt because they find they like typing and/or because the job "environment" is changed. By ensuring authors restrict their work to short periods at a time (no more than a maximum of 8-10 minutes continuous recorded dictation from a single author) the typist will receive a variety of authors voices and a variety of work. At the same time, the typist's hours can be altered to allow glide time, rostered free time within a normal day or shifts thus giving the staff more personal time. The new tasks within the office could also be rostered and rotated to allow change. For the author the change is not so easy, as he or she loses their personal slave who must come at their call. No longer can the author control his own work priority to the same degree as previously as it must now be controlled to a large extent by the system. The increased profitability of the office and being able to sleep at night because work is up to date would, in most cases, be sufficient compensation for that. Likewise the need to spend more

time in dictating work, spelling names, dictating addresses initially appears to be a drawback in the "perfect system". When it is considered the information is usually in front of the author or in their minds anyway then the extra time (therefore cost) is obviously less than for a secretary to later relocate that same information, even taking into account the respective value of their time.

Most importantly of all, for the newly reorganised firm, some of the previous secretarial staff will become "redundant". If the change and reallocation of functions has been handled right, then those redundant staff members will be the best of the secretaries of the "I can throw the file at her and she will complete the Transfer, divorce paper, etc, by herself" type. Without the need to type that transfer, divorce or whatever, that same person will be able to complete two or three of these tasks in the time previously taken to do one. That new capacity can then be developed further with appropriate training, precedents and manuals, and delegation. This new legal executive capacity in the firm and its fee earning capacity will be pure profit for the firm because the previously non-fee producing unit is now an extra productive unit within the same overhead structure and will also, at the same time, reduce the solicitor's workload.That must mean less pressure, more sleep, more family time and a better life style altogether. Practical experience from firms of three authors that are able to maintain up-to-date work using two support staff only through to firms of 150 authors serviced by nine typists must surely be proof enough for even the most sceptical reactionary.

With the increased production and profitability outlined in the preceding paragraphs, also comes an additional benefit in the form of an increased flexibility in staffing arising from the compatability or ability to effect an interchange of staff so that even lengthy absences of one individual, whether author or support staff, is not as disruptive as in the present times. No longer is client work or system knowledge locked in the head of a single author or secretary. Now it is spread over a number of people and a system so that any vacancy can be covered without disruption to production. In the words of a doyen of the legal management movement in Australia: "When I die my office must be able to kick my body to one side and continue to function without interruption". Further, all authors throughout a firm now rank equally for typing and secretarial time, so overall firm production and morale is maintained ensuring that output at all levels meets deadlines, resulting in further increased goodwill and income. At the same time as the professional or office benefits are being reaped, the individual author is reaping benefits in shortened working hours and reduced emotional stress.

The above problems and others have been solved in legal offices in all jurisdictions. The answers given are only a few possibilities and there are others as many and as varied as there are individual practitioners and secretaries. No one solution to the problem can be said to be correct and only trying alternative solutions will show which is best suited to a particular individual or firm. As with any improvement or development in the knowledge of man, word processing centres can be made to work with the co-operation of the users of the system, the tailoring of it to suit the individuals involved and the application of a little discipline by all involved. While maintaining discipline allowance must be made for some flexibility so that departure from the system is possible in certain predefined or emergency situations. The system is simply another employee not the employer. Make it work for you and you can then reap benefits which far outweight all problems and more than compensate for any residual disadvantages.

Conclusion

In the present climate of public opinion the legal profession as a body must curb increases in legal fees while at the same time ensuring the service given to individual clients improves. If these results are not achieved and the present trend continues there will be increasing pressure for the surrender of our monopoly in legal matters. Management of the legal practice in general can and must be improved if we as a profession are to avoid such a fate and if we are to increase our market for our product. In the adoption of word processing systems in individual legal offices lies a large part of the answer to that problem. The reorganisation of this one facet of office procedure will have a more major effect on the firm's production and its overhead structure than any other one change or new system within the office. Therefore if the profession as a whole, and if practitioners as individuals, are to survive, the adoption of centralised word processing systems is essential.

I have no doubt that any firm, or workgroup within a larger firm, that properly plans and implements a trial period of such a system would within three months begin to appreciate that the benefits referred to above are real.