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PRIVACY — WHY?

Public and private intrusions [into privacy] and surveillance are increasing. The assumption that surreptitious surveillance is not especially undesirable is not accepted. There are many dangers inherent in an expansion of surreptitious invasions of privacy, even for law enforcement purposes. Our society has developed a special relationship between its citizens and its law enforcement officers. It normally requires a judicial warrant for major invasions of the integrity of the person or property of the individual. Any significant change from this special balance between freedom and law enforcement requires the most persuasive justification. The danger to freedom lies in its piecemeal erosion, not in its sudden disappearance.

Privacy and Intrusion.
Australian Law Reform Commission.

English law does not explicitly recognise a right to privacy — nor should it! That, in a nutshell, is the thesis propounded by Raymond Wacks in "The Poverty of Privacy" [1980] LQR 73. As a concept, privacy has become "entangled with confidentially, secrecy, defamation, property, and the storage of information. In this attentuated, confused and overworked condition, 'privacy' seems beyond redemption."

Privacy, in Wacks view, has become such a nebulous concept that it should not be used as a means to describe a legal right. However it does serve to describe a value or interest deserving of protection.

From the point of view of protecting an interest he advocates separately approaching:

- Intrusion — physically or electronically
- Personal information — and the use to which it is put.

The Australian Law Reform Commission has adopted this approach in two discussion papers published recently and entitled "Privacy and Intrusions", and "Privacy and Personal Information". In the opening sections to the papers is a valuable discussion backgrounding the concept of privacy, its definition, justification and purpose.

The interest in privacy

The concept of privacy is defined, or described might be a better word, as "the interest, which every individual asserts, in controlling the nature, extent, circumstances and content of his relationships with others. It involves recognition that as a general rule it is for each individual to decide:

- "when physical contact is permissible, in what circumstances and by whom;
- "when his living space may be physically entered or otherwise intruded upon by another, in what circumstances and by whom;
- "when he may be observed in his private behaviour, in what circumstances and by whom;
- "whether to confide to another personal details about his life, his conduct, his experiences, his background, his attitudes, his conversations, his correspondence or whatever, and in what circumstances;

- "in relation to those details of his private life which he has freely made known to another, whether they may be made known to third parties, in what circumstances and to whom.

"Putting the matter very broadly, the interest in privacy is that in maintaining one's person, personality or individuality inviolate."

To define privacy in terms of control is to invite controversy for if an individual is entitled to control the dissemination of information about himself where does this leave other traditional freedoms, such as freedom of speech and the freedom of the press. However it does draw attention to the need to balance competing interests and is therefore valuable (because controversial) in the context of the report.

As a succinct description of the interest to be protected reference may be had to A F Weston (*Privacy and Freedom* (1970)) who described "the four basic states of individual privacy" as solitude, small group intimacy, anonymity and reserve.

Justifying privacy protection

The justification for protecting the interest in privacy is summed up in one word — individualism. Two emminent writers, quoted in the Report, put it this way:

> "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity as such. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones, his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual."
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> Bloustein. "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser". (1964) 39 NYULR 962, 1003.

> "Democracy assumes that the individual citizen will actively and independently participate in making decisions and in operating the institutions of the society. An individual is capable of such a role only if he can at some points separate himself from the pressures and conformities of collective life."
>
> Emerson *The System of Freedom of Expression* (1970). 546.

In a nutshell "pressure for recognition of the interest in privacy is 'based upon the premises of individualism, that the society exists to promote the work and the dignity of the individual. It is contrary to theories of total commitment to the state, to society or to any part thereof' " (Emerson).

Tentative proposals

The Reports go on to examine, particularly in light of what are seen as existing abuses, the areas in which there is seen to be a "piecemeal erosion" of privacy. The topics covered include entry; search and seizure; secret surveillance; surveillance of prisoners' conduct, mail and telephones; intrusions and harrassments by private concerns; and in the second Report, look to setting out the principles to be followed in information privacy with particular reference to the collection, access and challenge, disclosure and storage of information, and with black-lists, matching (ie, comparing computerised personal information records) and a number of other matters.

New Zealand and privacy

Over the last few years there has been a considerable measure of concern expressed in respect of surveillance and entry powers that have been assumed by the State. The Reports however point to overseas practices in the private sector from which we have, so far, been spared. There is a device known as "the automatic solicitor" — an instrument that dials and plays a tape recorded message over the telephone. If the party called hangs up before completion of the message the call is repeated — and repeated — and repeated — until the whole message has been imparted. There is an advertisement given for a system that enables an employer to monitor his employees. "It monitors and reports employee whereabouts and actions. And gives you an accurate, immediate record of who, what, where, and when." This is given as an example of the form of overt surveillance possible through use of increasingly sophisticated technical devices. Its danger is that it may be justified on the seemingly reasonable basis that an employer is entitled to keep tabs on those he is employing — but what sort of human relationships does that foster?

Future potential abuse, even more than present erosion, points to a need to protect what may be a nebulous concept but is nonetheless a very important one.

Legal protection

The Report acknowledges that the law can provide only a partial response to invasion of privacy.

> "A determined intruder, using modern technology of ever increasing sophistication, will frequently escape detection or be detected long after great damage to privacy has been done. However, it has not been the way of our legal system to surrender in despair to the difficulties of enforcing proper standards."

Instead it looks to a function of the law that is all too often overlooked.

> "The law has an educative function, to establish and clarify acceptable conduct in society and to denounce, prevent, redress and ultimately punish unacceptable conduct. The fact that every case of wrongful intrusion into privacy is not detected and redressed or is not punished is no reason for failing to provide remedies and sanctions for unacceptable invasions of privacy which do come to notice."

The greatest value in prescribing standards of conduct in this area of privacy lies in countering the assumption that surreptitious surveillance is not "especially undesirable". The longer the matter is allowed to drift the more entrenched will become the "not especially undesirable" attitude. Somehow there is something very dehumanising about a society that looks on surreptitious surveillance in this way.

The last word on this topic should remain with the Chairman of the Commission, Mr Justice Kirby:

> "In the dazzling advances of science, lie many advantages for mankind. . . . But there are also dangers. A world in which telephones are regularly tapped, individuals are the subject of electronic eavesdropping, optical surveillance at work and elsewhere, traced by their "credit trail" in a virtually cashless society and photographed, tracked and otherwise monitored when officialdom wants it, seems fantastic. So does the society in which information of such invasive scrutiny is constantly fed into computerised data bases accessible to a few, able to retrieve in a flash the most intimate details of the life of the individual. This seems in today's Australia to be a fantasy world of Orwellian imagination. But the point that has to be made is that, technologically, such a world is now (or shortly will be) perfectly possible. The technology is with us. In Australia, the defences against such developments need to be enhanced and supplemented. Present laws provide puny defences".

TONY BLACK

STATUTORY INTERPRETATION

FURTHER REFLECTIONS ON STATUTORY INTERPRETATION

By MARTYN FINLAY QC

The article by J G Fiocco and A N Khan on statutory interpretation ([1980] NZLJ 53), with its references to the permissibility of recourse to the debates of Parliament and to associated proceedings prompts further comment. Some of these have a parochial flavour, to be savoured fully, perhaps, only by those lawyers who have also been engaged in the art (craft? mythology?) of politics.

Parliament is, of course, literally a "talking shop", where in theory, firmly formulated proposals are debated by individual members representing the majority will of geographically defined constituencies. In Parliament assembled these good men and women, untrammelled by prior commitments to each other, will be guided by sober debate and conscientious appraisal of all material facts to a conclusion reached solely on its merits.

The reality is somewhat different: and the facts of party political life are that parliaments today, both here and abroad, devote their time and efforts, not to making decisions, but to registering decisions already made elsewhere, one side justifying and defending them, the other attacking and criticising them. Inevitably the majority have their way and all the minority can hope for is to postpone the implementation of the decision. Delay is the only weapon democracy allows a parliamentary minority; and it is exercised by talk. The stronger its opposition to any measure, the longer it talks, and, to minimise repetition, the more irrelevant the talking becomes, the more it elicits, in response, similar excursions into the inappropriate. This is encouraged and abetted by the press, which labels as "weak" any Opposition that does not "fight" hard enough to warrant the strictures it then proceeds to

make about wasted time. So, if Members' speeches are going to be analysed to ascertain exactly what Parliament meant by saying what it did, a great deal of dead wood must first be cut away — and to distinguish between the dead and live wood is not always easy.

However the problem is not as vexed as it might be because what is usually in issue in a question of statutory interpretation, namely, "the language of Parliament" does not usually come under scrutiny (if it does at all) until a Bill reaches the committee stage of its passage through the House, — which in New Zealand is not recorded in *Hansard*. The Introduction (or First Reading) can be disregarded entirely as an aid to textual understanding or interpretation. It consists of a brief summary (departmentally prepared) of a Bill's substance followed by a succession of gallery plays under the guise of information seeking.

The Second Reading is concerned with the broad principles of the Bill and may occupy days or seconds, usually depending on whether it occurs early or late in the Session. The circumstance that it is broadcast adds a peculiarly New Zealand factor to any consideration of Members' speeches. It means, of course, that M P's address their remarks (as they often say, perhaps hopefully) "to the nation", so giving up any pretence of attempting to convince or change minds in the Chamber in favour of campaigning for their party at the next election. There is also the mystique attaching to "prime time", with Members dragging their feet and manoeuvering for party advantage to ensure that best use is made of this (whenever, in fact, it may be). This leads to even more meandering than usual, and if it does not achieve the virtuoso filibustering known to the US Senate, where speakers take off on wild flights of oratorical imagery, it would be hard to derive inspiration as to legislative intent from the padding with which members (often dragooned by the whips) "play out time". If the Minister's introductory speech offers any clarity in applying the "mischief" rule, it is often muddied by letting in the subsequent seepage, including his reply.

Sometimes the text of a Bill does come under scrutiny in the committee — or "nuts and bolts" — stage, when it is examined clause by clause. If this was recorded verbatim some useful hints might be revealed as to each Member's views on what he thought was meant or intended by the words used. Alas, this, too, is submerged in party politics. The desire to make capital, to lampoon "the other side", to support a colleague, all lead to much casuistry, with propositions being advanced with more vehemence than conviction. Even at the best the party system necessarily produces assertion and counter-assertion which throws a fitful and uncertain light on an ambiguous phraseology.

But before we rush too headlong to condemn the party system consider the enigmatic obscurityof legislation that owes its passage through the House to the comedy of the "free" vote (eg, Sale of Liquor and its predecessor, Licensing). They incorporate amendments drafted on the backs of envelopes, and if they are presented with unaccustomed sincerity the language used is often clouded with passion and exaggeration.

So far what I have said endorses the stand taken, or rather affirmed, in *Davis v Johnson* ([1978] 2 WLR 533), and although Fiocco and Khan credit Lord Denning with a willingness to penetrate parliamentary incomprehensibility, it was not by seeking to inquire what *it* thought *it* had done (or said), but by substituting or supplementing what *Lord Denning* thought it *ought* to have done (or said). (*Nothman v Barnet London Borough Council* [1978] 1 All ER 1243, 1246).

They make the point that in particular circumstances consideration of para-parliamentary material is permissible, and cite authorities which demonstrate that the reports of commissions upon which legislation is based may be regarded as acceptable sources of reference. An invitation to go further, yet stop short of scrutinising *Hansard* was made to but declined by the Licensing Control Commission, in *Re Application by Winton Holdings Ltd* (1978) 1 NZAR 363, 366. That was to consider certain changes to a Bill during its passage through Parliament.

I have referred to the unsatisfactory nature of the Committee stage of the proceedings of our Parliament. This is to be distinguished from the work of select committees, which is, I believe, unique to New Zealand. It is entirely different from the practice of Westminster where separate ad hoc committees are set up to consider each Bill, and go out of existence when their work on that particular Bill is completed. Proceedings before them are a microcosm of those in the Chamber and are marked by the same party procedure and discipline. Here we set up at the beginning of each session, a number of standing committees to which Bills are frequently referred — the committees more and more often sitting in public.

Fortunately, perhaps, the news media take little account of this and seldom attend hearings so that there is little to encourage or

reward the "grandstanding" so common in Parliament itself. At all events, it has become something of a convention, especially in the Statutes Revision Committee, to which all law-reforming Bills are referred, to eschew partisanship in their proceedings and deliberations. Opposition members adopt a posture of saying, in effect, "We are against the principle of this Bill, and will continue to obstruct its passage through the House, but here we recognise that the Government's majority will ultimately prevail and a Bill will be enacted. Let's make the best of a bad job and in this Committee cooperate at making the legislation at least technically workable". While this may not effect a consensus, at least it brings about a constructive meeting of minds.

In the result many Bills are amended, and usually — by common consent — for the better. They are re-submitted to the House in a form that clearly shows the original wording as well as the new version, and these changes often give a clear clue to the intention and thinking of the members of the committee, comprising, as it does, a representative cross-section of Parliament as a whole. Little danger, I believe, would be involved in the Courts having access to Bills as so reported back and to the extent (as is usually the case) that the language remains unchanged in the final enactment they would provide a valuable interpretative tool, but not lead to the ambiguity Fiocco and Khan fear could arise from a consideration of the debates.

Such scrutiny would not transgress the rule that the *proceedings* of Parliament are inviolate and are as inscrutable as those of any secret society or brotherhood. As stated by Lord Scarman in *Davis v Johnson* [1978] 2 WLR 553, 583, it runs thus; "There are two good reasons why the Courts should refuse to have regard to what is said in Parliament — or by Ministers as aids to the interpretation of a statute. First such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. The cut and thrust of debate and the pressures of executive responsibility, essential features of open government, are not always conducive to a clear, unbiased explanation of the meaning of statutory language. And the value of Parliamentary and ministerial utterances can confuse by its very size. Secondly, counsel are not permitted to refer to *Hansard* in argument. So long as this rule is maintained (and it is not the action of the Judges) it must be wrong for the Judges to make any judicial use of the proceedings in Parliament for the purpose of interpreting statutes."

Earlier authorities carry this formulation even further and suggest that "anything arising concerning the House" should not even be discussed elsewhere; and in *Church of Scientology v Johnson-Smith* [1972] 1 QB 522 it seems to have been accepted that to do so without the leave of the House would involve a breach of parliamentary privilege by all concerned, though the actual decision went no further than to rule that the proceedings of the House could not be examined for the purpose of supporting a course of action arising aliunde.

Perhaps it is the difficulty of surmounting this barrier that prompts some to divine "the will of Parliament" regardless of what, in fact, it has said. On the other hand, "the best evidence" as to the intent of statutory words could well be that of the chaps who put them together. All Government Bills are drafted by Parliamentary Counsel, who now also tidy up all private members Bills that have a remote chance of success, and apart from "free" votes, they are also responsible for amendments, whether made in select committees or in the Committee of the Whole. Theirs is the hand of Esau, recording and uniting the voice of Jacob.

RECENT ADMISSIONS

Barristers and Solicitors

Addison, H	Wellington	8 February 1980
Allan, G J	Wellington	21 April 1980
Alston, A P	Christchurch	9 June 1980
Anderson, D J	Auckland	27 May 1980
Brewer, T C	Wellington	8 February 1980
Butt, P C	Wellington	8 February1980
Chellew, H B	Auckland	14 May 1980
Fine, M Q	Wellington	9 May 1980
Gilkison, P F	Wellington	9 May 1980
Gill, R B W	Wellington	21 April 1980
Gurgiel, E Z	Auckland	23 May 1980
Kingi, P	Auckland	23 April 1980
Kraayvanger, C H D	Christchurch	19 June 1980
Moon, S F	Wellington	23 May 1980
Munaam, D S	Auckland	16 May 1980
Patel, D D	Auckland	16 April 1980
Rosenberg, W	Wellington	28 March 1980
Stewart, G R	Wellington	14 March 1980
Tubb, G G	Wellington	21 April 1980
Young, A M	Wellington	23 May 1980

LEGAL PROFESSION

CONTINGENCY FEES

By ANTHONY GRANT, *an Auckland Practitioner.*

Introduction

"Lawyers spend a great deal of their time shovelling smoke" said Oliver Wendell Holmes Jnr, and anyone investigating the law on contingency fees will have his fill of that useless activity.

For a start, the position seems to be governed by a statutory provision which has been considered in this context on only one occasion in almost 100 years. If the section had been worded differently that might not be so bad, but as it is worded the section leads naturally to rampant speculation.

With American lawyers trying to entice local law firms to participate in claims arising from the Mt Erebus DC10 crash on the promise of lush contingency fees and with the general ignorance of the legal position concerning such fees, it is appropriate that the subject be scrutinised.

Because there is so little case law on the meaning of the section, it is first of all necessary to delve a little into history.

The History

The 1880s was a period of much law reform, rather like the 1970s. Two of the main complaints at that time were the level of lawyers' fees and the length of time it took to conclude cases. One MP is recorded as saying:

> "There could be no doubt that the law procedure of the colony was unsatisfactory; and certainly it was most expensive. The Supreme Court had been practically closed to all but the wealthy. The poor could certainly not go there now, and to the rich the procedure was not only costly, but very tedious. The first steps in an action were slow to a degree — the pleadings, demurrers, applications, the settling of the issues; at length the trial, then application for a new trial to reverse the decision of the jury, then the arguments in Banco; fourthly the arguments in the Court of Appeal, and if unsuccessful, the final application to the Privy Council in England. The result of all that, he need scarcely say, was that the rich man could completely snuff out not only the poor man but the person of ordinary means. In that way the objects of our Courts of law were frustrated, and law became in many instances a solemn farce."[1]

And another Member declared that:

> "After a verdict was given by a jury, if the case was of any importance, the long purse carried the day. The ingenuity of counsel was sure to discover some little flaw or something else that would bring about a new trial, and the whole battle had to be fought over again. The more conscientious a Judge might be the more he was likely, in the administration of his duties, to yield to the ingenuity of counsel or to the arguments adduced, and say, "Well, take your rule". He attached more weight, as a single Judge, to the arguments brought before him than he would have done if there had been two or three Judges. The result was that they occassionally had three different trials of one and the same issues, and then as a result, the loser went to the Court of Appeal, and there the whole battle was fought over again."[2]

After making every allowance for the extravagance of expression politicians sometimes display, and even the possibility of error, the criticisms were still substantial.

In 1880 the Government appointed a Commission consisting of all the Judges, the Law Officers of the Crown, several Magistrates, several Solicitors "and other persons of experience".[3] Five Bills resulted from the deliberations, one of which became the Supreme Court Act 1882.

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[1] Mr Weston, *Parliamentary Debates* Vol LXIII pp 29, 30.
[2] Mr Bathgate, ibid 33.
[3] Mr Connally, ibid 132.

Supreme Court Act 1882, s 33

> "*A solicitor may in writing agree with a client . . . respecting the amount and manner of payment of* the whole or any past or *future* services, *fees,* charges or disbursements in respect of business done or to be done by such solicitor either *by a* gross sum or by commission, *percentage,* or salary or otherwise: provided that if the argeement appears to a Judge to be unfair and unreasonable he may reduce the amount agreed to be payable under such agreement: provided further that no solicitor can make any further charges than those mentioned in the agreement."

This clumsily drafted section gives all the appearance of allowing contingency fees in that it allows a solicitor to agree to be paid by "percentage". At the time of the passing of the Act, however, a solicitor who agreed to work for a contingency fee committed a crime[4]; was in breach of several other statutes; and committed the tort of champerty.[5] The House had borrowed the wording from an English statute[6] but it had omitted the additional words from that Statute which declared that:

> "Nothing in this Act be shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest of his client in any suit . . . or to give validity to any agreement by which an attorney or solicitor . . . stipulates for payment only in the event of success in such suit."[7] (ie, an agreement tainted by maintenance or champerty).

Only one Member of Parliament mentioned s 33 when the Act was debated — Mr Connally. He had been a member of the Commission which had drafted the Bill and had also sat on the Committee to which the Bill had been submitted and he must have had a good idea of what the section was intended to mean. He told the House that:

> "The alterations of any importance (ie, to the law) were contained in the 33rd and 34th sections, which were clearly very much for the benefit of those who had occasion to employ solicitors. The 33rd section sanctioned agreements between solicitors and clients for doing the work for a gross sum. Honourable members would see that this was a very great advantage. At present a man entered on a case and did not know what it would cost him — whether it would cost him L50 or L500 or L1,000; but under this Bill it was competent for him, before commencing this action, to agree with a solicitor for a sum which he should receive over and above all fees, and the solicitor could not claim any more. Therefore it would not be for the interest of any solicitor to prolong litigation or to increase the cost and trouble, because he was tied down to a fixed sum, and the sooner the case was finally determined the better it would be for him as well as his client."[8]

Judicial Interpretation

Section 33 with some slight amendments subsequently became in succession s 26 of the Law Practitioners Act 1908, s 21 of the Law Practitioners Act 1931 and finally s 56 of the present Law Practitioners Act. In all that time it appears to have been considered on but six occasions by the Courts,[9] and on only one of

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[4] Champerty was a criminal offence and remained so until the enacting a year later of the Criminal Code Act. The effect of s 6 of that Act was to abolish all common law criminal offences. Such is the uncertainty in this field of law, however, that Mr F C Spratt in his New Zealand commentary on 9 *Halsbury's Laws of England* 2nd ed, paras 572, 573, when dealing with the crimes of maintenance and champerty said that as a result of s 6 "There *seems* to be no statute making maintenance and champerty eo nomine a criminal offence." (my italics).

[5] "In its origin champerty was a division of the proceeds (campi partitio). An agreement by which a lawyer, if he won, was to receive a share of the proceeds was pure champerty. Even if he was not to receive an actual share, but payment of a commission on a sum proportioned to the amount recovered — only if he won — it was also regarded as champerty: see *Re Attorneys and Solicitors Act 1870* (1875) 1 Ch D 573 at 575 by Jessel MR; *Re A Solicitor* [1912] 1 KB 302. Even if the sum was not a proportion of the amount recovered but a specific sum or advantage which was to be received if he won but not if he lost, that, too, was unlawful: see *Pitman v Prudential Deposit Bank Ltd* (1896) 13 TLR 110 by Lord Esher MR. It mattered not whether the sum to be received was to be his sole remuneration or to be an added remuneration (above his normal fee), in any case it was unlawful if it was to be paid only if he won, and not if he lost" — per Lord Denning MR in *Wallerstein v Moir (No 2)* [1975] 1 All ER at 860.

[6] 33 and 34 Vict, c 28.

[7] Ibid, the proviso to s 11.

[8] *Parliamentary Debates* Vol LXIII p 32. He then proceeded to say how s 34 was designed to rectify the grievance over the "enormous charges" made by solicitors of Maoris.

[9] *In re A Solicitor* (1900) 2 GLR 158 (where it was held that

those occasions was it considered in connection with the question of contingency fees. The section is referred to hereafter by its present name, s 56.

The case in which the question of contingency fees arose was *Mills v Rogers* (1899) 18 NZLR 291, a decision which is unusual in that one of the Judges had been a member of the Commission which actually drafted the section, and another, Mr Justice Denniston, not only sat as the trial Judge but was also able to consider whether to uphold his decision since he sat as one of the three Judges in the Court of Appeal!

The facts are no less interesting. Mr Mills was a Member of the House of Representatives who considered he had been libelled by both the *Otago Daily Times* and the *Christchurch Press*. A solicitor, Mr Rogers, agreed to act as the solicitor on the record (for one-third of the proceeds) and another solicitor, Mr Sinclair, agreed to back the proceedings for one-third of the proceeds. In the event of the action failing, it was agreed that each party would pay the resulting costs in equal proportions.

One of the libel actions succeeded and the other failed. The solicitors having taken two-thirds of the proceeds of the successful action refused to pay two-thirds of the losses of the other! When Mr Mills sued the solicitors for their breach of the agreement they ungallantly claimed that it was unenforceable on the grounds of maintenance and champerty.

It was held by the Court of Appeal that the agreement was champertous but that the plaintiff could in an action for moneys had and received, recover from the two solicitors all of the moneys recovered in the successful action less his taxed costs.

What the Judges said

Denniston J at first instance speculated as to the meaning of s 56 saying:

> ". . . I should be sorry to be compelled to draw the inference that it was intended to legalise the trafficking by solicitors in speculative actions, or stipulating for payment by results. The reasons which have led English courts to forbid such transactions as against public policy, because tending to encourage improper litigation, and in producing the temptation to obtain success by discreditable and unprofessional methods, remain unaltered. If it was intended to make that legal which had hitherto met the unqualified reprobation of our courts, it would, I think, have been done so directly, and not left to doubtful inference . . ."[10]

On appeal, Williams J (who had been a member of the Commission which drafted s 56, although he was absent from the country for the greater part of the period during which the Commission sat)[11] said of it:

> "That the agreement set out in the statement of claim . . . was illegal on the grounds of champerty and maintenance I think there can be no doubt . . . s 56 may possibly have had the effect of making legal some agreements that theretofore might have been held void as savouring of champerty, but it could never be held to justify an agreement for a partnership in litigation of the nature here entered into . . . An arrangement more calculated to foster and encourage improper litigation and unscrupulous professional conduct can hardly be conceived."[12]

On appeal, Denniston J stated:

> "I think the agreement clearly champertous at common law, as giving the solicitor a part of the proceeds of the suit. If an agreement was champertous it was not, I think, the less so even if such an agreement was legalised by s 56 when made in writing and subject to the safeguards provided by (that) Act."[13]

Mr Mills' agreement had been made orally. Section 56 refers only to written agreements. Denniston J appears to say in this passage that if Mr Mills' agreement had been recorded in writing it would have been "legalised" by s 56 — an opinion contrary to that which he expressed when he heard the case at first instance (in the passage which is referred to above).

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there was no s 56 agreement); *Lovegrove & George v McNaught* 29 MCR 16 (where it was held that there was no s 56 agreement); *In re Lundon* [1918] NZLR 193; *Official Assignee of Martini v Grey* [1929] GLR 218; *Re Young & Tripe* (1911) 13 GLR 378; and *Mills v Rogers* (1899) 18 NZLR 291. The facts of the last four cases are referred to in the text of this article.

[10] (1899) 18 NZLR 291, 297.

[11] He added a small memorandum to the Commission's report in which he referred to this matter. The memorandum is set out in *Parliamentary Debates* Vol LXIII p 30.

[12] *Mills v Rogers* (1899) 18 NZLR at 309.

[13] Ibid, 312.

The meaning of s 56

Williams J stated that s 56 "*may possibly have had the effect of making legal some agreements that therefore might have been held void as savouring of champerty*"; Denniston J appeared to say that if the agreement had been made in writing it would have been "legalised"; and Connally J said simply "I concur"!

It therefore seems as though some contingency fee agreements may now be legalised, although precisely what types of agreements are legalised is not clear. Mr Mills' agreement went further than a usual contingency agreement in two ways. Firstly because a third party (the second solicitor) joined the proceedings for no other reason than to participate in a speculative venture, and secondly because both of the solicitors agreed to participate in paying any costs awarded against the plaintiff if he should lose. Normally, a solicitor would simply participate in the profits and he would not participate in the losses. Both of these aspects were referred to by Williams J when he gave his reasons for saying that this agreement would not, if it had been made in writing, have been legalised by s 56.[14]

Other aspects of s 56

The section was considered in *In re Lundon* [1918] NZLR 193. Mr Lundon was an Auckland solicitor who grossly overcharged a "weak and intemperate" labourer client. The Auckland District Law Society was sufficiently incensed to strike Lundon off the rolls of practitioners and Lundon appealed to the Court of Appeal. The Full Court[15] rejected the appeal. Because Lundon received his scandalously excessive fee as a result of a written agreement s 56 was considered and Denniston J in giving the judgment of the Court stated:

> "It is permissible to a solicitor to bargain for his remuneration on a basis other than that of charging for the work actually done, and governing the amount by what would be allowed by the Registrar."

He then referred to s 56 and continued:

> "But this power, even with this protection, does not prevent or attenuate the obligation of the solicitor to *observe good faith and honesty in making the bargain with his client.* It does not permit him to forbear from informing him of the nature and character of the matter in respect of which he is bargaining, or to misstate or exaggerate its difficulties."

Official Assignee of Martini v Grey [1929] GLR 218 concerned some agreements which Mr Martini had entered into before his bankruptcy by which his solicitor was to be paid for various items of work which he had done. In setting aside the accounts Smith J held that an agreement "to satisfy the requirements of s 56 should show the nature of the arrangement between the parties sufficiently to enable the Court to consider whether the agreement is fair and reasonable, or otherwise."

The section was also considered in *Re Young & Tripe* (1911) 13 GLR 378 and in that case Cooper J approved a written agreement for a procuration fee as being fair and reasonable.

These cases[16] appear to be the only reported decisions in which s 56 has been considered. Together with the *Parliamentary Debates* they provide the only illumination which there is as to the meaning of the section. As sources of light they are most ineffective.

Sievwright v Ward [1935] NZLR 43

In 1934 Mr Justice Ostler considered the torts of maintenance and champerty, apparently in ignorance of s 56. There had been an arrangement of the most innocent kind whereby a solicitor had agreed to advance moneys for costs and disbursements and it was held that if a solicitor by prior agreement with his client takes on a case on condition that he will be repaid his costs and disbursements or that he would be paid only out of the proceeds of the suit and if there were no proceeds he would bear the loss, "the solicitor would be guilty of no wrong".[17] What the solicitor must avoid is the making of an agreement to take a percentage of the fruits of the judgment or more than his reasonable costs.[18] Further, it was said to be neither unlawful nor dishonourable for a solicitor before commencing an action on behalf of his client to take from his client a charge over the proceeds of the action for his reasonable costs and disbursements.[19]

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[14] Ibid, 309.

[15] Consisting of Stout CJ, and Denniston, Cooper, Chapman and Hosking JJ.

[16] Together with the other two cases referred to in footnote (9).

[17] [1935] NZLR at p 47.

[18] Ibid, at p 48.

[19] Ibid, at p 49.

[20] Proposals for Reform of the Law Relating to Maintenance and Champerty: Law Commission No 7.

Contingency Fees in England

The Law Commission in England reported on maintenance and champerty in 1966.[20] It decided in favour of abolishing the criminal offences of maintenance and champerty, and tortious liability in respect of them, but described the question of allowing contingency fees in litigation as a big question "upon which the professional bodies as well as the public must have further time for reflection before any solutions can or should be formulated".[21] Parliament subsequently passed legislation to give effect to the Law Commission's proposals[22] but was careful to preserve the existing law in so far as it declared contracts of maintenance or champerty to be illegal.

The Court of Appeal in *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 considered whether contracts for contingency fees were still unlawful and concluded, Lord Denning dissenting,[23] that such contracts were still unlawful.

It is however anomalous that with the integration of England into the EEC English barristers may now obtain contingency fees in respect of foreign instructions.[24]

Lack of Justification

There are many good reasons of policy which have caused the Courts and legislatures to outlaw contingency fees.[25] Two significant distinctions between our system of justice and the American system are firstly, that the English system of awarding costs to the successful party is largely unknown, and secondly, there is no comprehensive system of legal aid such as exists in England or here. As a consequence, a poor American litigant has little prospect of being able to pay for litigation except on the basis of a contingency fee.

Criminal Cases

Even the Americans recognise the grave problem associated with contingency fees in criminal cases and such fees are generally regarded as improper and prohibited in criminal cases, both for the prosecution and the defence.[26] The wording of s 56 is so wide that no differentiation is made between civil and criminal cases. In so far as the section allows contingency fees there is nothing to indicate that a solicitor should only make such an arrangement in a civil case and not in a criminal case.

The tenor of the *Parliamentary Debates* would indicate that it was never the intention of the Legislature to allow a contingency fee in a criminal case but there is nothing in the wording to indicate this.

Barristers

The books and cases all refer to solicitors in relation to contingency fees and mention is never made of counsel in this context. This is probably because barristers, being unable to sue for their fees[27] have no legal entitlement to any fee. Section 56 itself refers only to the rights of solicitors to be paid a "percentage" and barristers are not referred to.

The Anomalies

It is hard to conceive of a field of law so riddled with anomalies and uncertainties as is this question of remuneration for lawyers.

If it is correct that s 56 allows some contingency fee arrangements there are the following consequences:

- a solicitor may work for a European or a Polynesian for a contingency fee but not for a Maori: s 56(1);
- a barrister may not work for a contingency fee whereas a solicitor performing indentical work can: s 56(1);
- oral contingency fee agreements made by solicitors are unlawful while written ones are approved: s 56(1);
- solicitors may be able to enter into contingency fee agreements in criminal cases, a proposition which if correct has grave public policy implications.

The Safeguard

Section 56 provides that if a Court considers an agreement to be "unfair and unreasonable" it can reduce the amount payable. As a Court has never had to interpret this provision in the context of a contingency fee, the extent to which a Court would allow a solicitor to receive more than his usual fee is not known.

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[21] Ibid, para 19.

[22] Criminal Law Act 1967, s 14(2).

[23] Lord Denning would have allowed a plaintiff in a derivative action to conduct the proceedings on the basis of a contingency fee, subject to the permission of the Council of Law Society and also of the Courts — p 862.

[24] See Michael Zander (1979) 42 MLR 492.

[25] For some criticisms of the American System of contingency fees see G Palmer [1970] NZLJ 206.

[26] [1970] NZLJ 206.

[27] Except in the circumstances allowed by *Robinson & Morgan-Coakle v Behan* [1964] NZLR 650.

Conclusions

Contingency fee arrangements and arrangements of close similarity are made from time to time.[28] the writer has been quoted two fees by a barrister for a criminal case (more for an acquittal: less for a conviction); has been told by a QC that he could not say what his fee would be as "it all depended on the result";[29] and has heard University students taking their professional exams be exhorted to ensure that their contingency fee arrangements are documented and signed by their clients so that the clients cannot thereafter claim that the fee was unreasonable or had not been agreed.

The dicta from *Mills v Rogers* indicate that some contingency fee arrangements may have been approved by s 56 and if the intention of Parliament in enacting s 56 was as Mr Connally suggested at the time, to reduce the cost of litigation to the client, a contingency fee arrangement would be able to achieve that end. A lawyer instructed on that basis would not be so inclined to incur greater costs than was necessary in preparing for a case nor would he be so inclined to take cases on appeal.

If Parliament did intend to effect such a radical and profound change in the law, it could scarcely have done so in a less helpful manner. And a century of silence from the Courts has only compounded the uncertainties.

If "politics offers yesterday's answers to today's problems"[30] how much less satisfactory is it that in 1980 the legal profession should on this important question be offered the answer (whatever it was) that the politicians gave us in 1880.

[28] In *Duthie v Duthie* (1915) 34 NZLR 897 an agreement was set aside as being champertous. It is not clear from the report whether the agreement was made orally or in writing. In any event, s 56 was not considered by the Court.

[29] Which is not necessarily indicative of a champertous arrangement. It would not amount to such an arrangement if, in the event of success, he intended to charge only his usual fee and less, in the event of failure.

[30] Marshal McLuhan.

OFFICE MANAGEMENT

CREDITMEN-DUNS ON-LINE INFORMATION NETWORK

In April 1980 the Minister of Justice launched Creditmen-Duns Limited On-Line information network. In this article the General Manager, Mr Denis Orme has kindly responded to an invitation to outline who Creditmen-Duns Limited are, what information is being stored, to whom it is provided and, most importantly in this by no means uncontentious area of credit reporting, what steps are taken to ensure information is accurate.

By DENIS ORME.*

This foundation of Creditmen-Duns Ltd dates back to June 1928. Far sighted businessmen at that time were not content to accept economic depression as being responsible for the alarming increase in bankruptcies, but assessed that the fundamental cause was the lack of organised control on open credit in New Zealand.

This service motivation remains with the current shareholders, many of whom are large national public companies engaged in the retail, export, manufacturing/wholesale sectors of the business community. Their interest in maintaining a shareholding with Creditmen-Duns is that they can be provided with a range of business support services, and therefore the profit motivation is somewhat secondary.

During 1979 in a major internal review, objectives were established and these objectives provide the foundations for a medium-term company plan, both in relation to the range of business support services offered and the geographic locations supported by branches.

Creditmen-Duns objectives are:

- To develop and provide a range of business services to aid in the efficient operation of clients' commercial activities.
- To maintain the highest standard of integrity and independence within

* Mr Orme is the author of a series of articles on Law Firm management published in this journal in 1979.

the services provided, and to serve efficiently the needs of our clients.

- To promote the group as an entity and ensure its prominence and economic well-being.
- To provide all those associated with the group with job satisfaction, study opportunties and incomes consistent with individual responsibilities.

With these objectives in mind Creditmen-Duns opened its latest branch in Gisborne last year to bring its nationwide coverage to 16 branches and operating divisions, and nine agencies.

It also carried out an extensive video presentation on the principles of credit control and worked with the New Zealand Chambers of Commerce to produce a booklet on credit and budgeting, for use in secondary schools.

A leaflet "Credit & the Consumer" was made available free to the public and initially has been distributed to Citizens Advice Bureaux in the Auckland area.

As part of its objectives Creditmen-Duns extended the range of services with the installation of word processing equipment, and has become involved in word processing education, word processing bureaux services, word processing consultancy and management consultancy for law firms on a national basis.

The current range of business support services include:

- *Reporting division* — nationwide
  - Credit reports on individuals
  - Credit reports on companies
  - Wholesale suppliers credit information exchange groups
- *Collection division*
  - Debt collection and tracing nationwide
- *Commercial division*
  - Company liquidations/receiverships/supervisions. These are undertaken throughout the Auckland province at the present time from our offices in Auckland and Hamilton.
  - Auctioneering — specialist auctioneering in asset disposal throughout the Auckland province from the Ed Turner Auctioneering Division, Hamilton.
  - Word processing:
    Bureau facility — Auckland
    Consultancy service — available to clients nationally
    Education — seminars which include a video presentation are available nationally to the business community generally or as in-house training aids to partnerships or firms.
  - Management consultancy for law firms — The consultancy team is headed by Denis Orme (formerly involved with the New Zealand Law Society in presenting seminars and consulting to partnerships on time recording, word processing and management) and now includes Mr Kieran Corby Manager — Business Support Services together with his personnel.
- *Education division* — available nationally.
  - Business education
  - Video courses
  - In-house credit consultancy
  - Community education programmes

The installation of an on-line in-house computer for both credit reporting and debt collection in December last was to accomplish working level objects.

Each objective is of equal weight and has resulted in self-imposed controls within Creditmen-Duns, affording protection to both consumers and the business community alike. These objectives are:

- To provide all sectors of the business community including retailers, merchants and exporters with immediate access to credit history records of both individuals and businesses, and to provide nationally a range of services which are fast, accurate and relevant.
- To enable individuals and trading entities to obtain credit promptly.
- To facilitate the nationwide tracing of errant debtors through an *Address Wanted* facility.
- To provide a nationwide computerised debt collection service.

The system design itself is unique by world standards. Before deciding on the system design the research included a period of study overseas by myself, and study of the relevant legislation affecting the use of computers for similar services. The overseas legislation deals with fair debt collection practices, the Fair Credit Reporting Act and the Equal Credit Opportunity Act (or the equivalent Acts) in the United States, England and Australia (particularly the South Australia legislation).

The uniqueness of the system design is attributable to:

- *Name searching techniques* — The locally written computer programmes will retrieve a record only if there is an exact match on the inquiry details input into the system. Where any stored record does not match identically on the inquiry details, all similar sounding names will be returned to the inquiry screen. This means that the correct subject will be identified from the name and other personal descripters.
- *Links between businesses and individuals* — In New Zealand the majority of our businesses are in the small to medium-size range and even though there are only 110,000 companies registered throughout New Zealand we have records on some 180,000 trading entities. This means that on many occasions the trading entity record really relates to the credit history of the individuals involved. It is therefore important to establish links between individuals and the businesses they are or have been engaged in.
- *Terminals in client premises* — At the point of sale or credit application a terminal can be installed in client premises, and provided that a security clearance allows it, a credit inquiry can be lodged directly into the system without the necessity of the client phoning.
- *Nationwide address wanted service* — By flagging a file "Address Wanted" should a person incur a debt or liability and leave the country or otherwise be untraceable, the address wanted flag will remain on the credit history for a specified period. If that person or trading entity in the future seeks out further credit, the operator will be alerted to the fact that the current address of the subject is required.
- *Continuous service* — By placing a continuous service flag on a credit history record any changes to that record will be automatically notified to the client who requested the continuous service.
- *Access to a wide pool of information* — Nationwide collection activities will result in a wider pool of information being available on credit history cards.
- *Reciprocal information obtainable through computer trade tapes.* In offering a clearing house function in relation to the receiving and dissemination of information, a great deal of it at the present time is obtained by telephone inquiries. For the future and under adequate security controls, the credit history records of subjects existing on computer with any client, can be directly input onto our database via computer tapes, in compatable format and under strict audit control.

Creditmen-Duns self-imposed controls which will ensure protection to consumers and the business community alike include:

(a) The use of a signed contract for providing credit information services, and defining the legitimate business purposes under which reporting services will be provided to clients.
Those legitimate business purposes would include the granting of credit, a review of an account held with that firm, insurance transactions or other legitimate business need for the information in connection with a business transaction involving the consumer.

(b) Audit trails over information, so that unauthorised "sign-on" transactions, and changes to files are automatically logged onto computer tapes.

(c) Monthly purging of information. Information existing on a credit history file relates to both a good credit history and adverse factors. Categories of information are automatically removed each month as the time limit for that type of information expires.

(d) Security flagged information. Information supplied by clients will not disclose either their name or client code number on reports provided by us.

(e) Automatic system-produced management audit reports. Where breaches of our security controls are attempted, or where information is tampered with, the system will automatically generate a report to management showing the type of breach or attempt.
If the transaction was successful the report will show the record as it appeared before the transaction, and the record once the transaction is completed. This will enable a full restoration of the record and provide man-

agement with the identity of the terminal, date, time, and operator identification number in order for the breach to be fully investigated.

What is contained in a credit history record?

A credit record contains four sections.

Identity — Public information which will lead to a subject's proper identification and therefore the correct credit history file. This would include the correct name, (trading name or registered business name if applicable), current address, previous addresses and employment details. If available the subject's bank account number would provide a unique identifier.

Adverse information — Information on debt collections (not disputed accounts), and other matters of public record such as judgments, judgments summons orders, bankruptcies, convictions relating only to dishonesty and fraudulent offence. As can be seen these are only factors affecting the credit worthiness of the subject.

Trading history — Where other businesses have granted credit to the subject, information is recorded on the performance of those previous credit transactions.

Other inquiries — Where the subject has been previously granted credit following inquiries with us, the credit history record will detail current obligations.

No rating of credit worthiness or expression of opinions!!

Creditmen-Duns have no knowledge on many occasions of the credit applicant's current income or regular outgoings.

Additionally, Creditmen-Duns on many occasions do not have the credit application form which was filled out by the applicant, nor have they had the benefit of discussing the application with the applicant.

The only information Creditmen-Duns have is the credit history file, and therefore their function in providing credit reporting services is to act as a "clearing house" to receive and disseminate factual information.

The credit grantor is under no obligation to extend credit as it is a *privilege and not a right*, and if the applicant wishes to obtain goods or services on credit, it is only fair and reasonable that he provides the credit grantor with sufficient information to enable him to assess both the *ability* and *willingness* to pay for the goods or services requested.

Consumer rights

On request a credit applicant will be informed by the client that the source of a credit report was Creditmen-Duns Ltd. This is a contratual obligation on Creditmen-Duns clients.

Following proper identification, the subject of the credit report may review their credit history file with us. To ensure that no unauthorised access is obtained to the consumer's record, the consumer must be prepared to identify himself by the production of some means of identification eg, a drivers licence or bankbook etc.

If he/she wishes, the credit applicant may be accompanied by some other person when they review their credit history file.

If any information contained on the file is disputed a re-investigation will occur with the original source of the information.

If the information is not *re-confirmed* it will be removed from the file and a corrected report will be sent to whom the subject specifies, and a full written apology tendered to the subject.

If the information is re-confirmed, but the subject still disagrees with it, he or she may provide a written statement. The statement will be sent at the subject's request to anyone who has declined credit on the basis of information provided by Creditmen-Duns.

That statement, or a summary of it, will also be made available as part of any further report that contains the disputed information.

Equal opportunity to credit — where persons build a joint credit history and later sever their relationship, system design allows for the credit history to be separated. Each party has equal opportunity to any future credit. This equal opportunity to credit will be based on any joint credit history they have established.

Consumer complaints

Where members of the profession receive a complaint from a member of the public or a trading entity that they have been declined credit based on a credit report, or that unauthorised disclosure of information has occurred, the following procedure should be adopted.

The person making the complaint should go back to the credit grantor and establish that the credit report was obtained from Creditmen-Duns Ltd. If the information was provided from that source he should telephone his nearest Creditmen-Duns office and make a time to go into that branch, correctly indentify himself, and undertake the review procedure as previously outlined.

If the complaint relates to unauthorised disclosure of information and it appears that the source of the information is Creditmen-Duns Ltd, the possible breach will be treated very seriously. For the purpose it should be reported to the General Manager of Creditmen-Duns Ltd in Auckland. A management audit will be undertaken, following an interview with the subject and his or her representative.

At the conclusion of the investigation by Creditmen-Duns a full written report will be provided and if a breach was established, a statement made as to the action taken.

LEGAL LITERATURE

Tort Liability in a Collective Bargaining Regime, by Susan A Tacon, Butterworth, Toronto, 1980. $33.50, XVII and 155 pp, with index. Reviewed by Alexander Szakats.

The thesis of this book, based on the author's LLM research, is that Courts applying common law doctrines are the wrong forum to deal with industrial conflicts. The suitability of tort actions as a means of resolving employer-union confrontation has frequently been questioned, especially in Canada. McRuer CJ, of the High Court of Ontario, remarked in *Hallnor Mines v Behie* [1954] 1 DLR 135, that "these matters should be dealt with in another forum".

Strikes supported by picketing are viewed in Canada as prima facie lawful events in a collective bargaining relationship, but whether or not in the circumstances such actions will be within the law depends on the actual stage of bargaining and on the strict observance of pre-strike procedures. Statutes permit economic sanctions and criminal liability normally will not arise, but by invoking the civil sanctions of tort law the effect of any economic sanction can be successfully counteracted.

The author takes as the appropriate frame of reference the examination of picketing in tort cases, and deplores the quality of judicial analysis as it obscures a labour relations event by technical and legalistic jargon characterised by "fidelity to precedent and doctrine". Her fundamental criticism is aimed at the tort process itself which, instead of examining the event as a coherent whole, "must focus on certain aspects and exclude others which are integrally related from a common sense view". The Courts, she asserts, still apply the laissez faire philosophy of the nineteenth century based on the economics of Adam Smith at a time when the theories of Keynes and Galbraith are more appropriate. Judicial creativity, in the view of the author, shows "remarkable vigour and ingenuity in reshaping and extending tort doctrines in the direction of greater liability for the activities of organised labour". The Judiciary failed to notice statutes that constitute clear legislative statements on the undesirability of Courts as a forum in labour matters, but the unsatisfactory nature of "judicial workmanship, in itself would justify the removal of the courts' jurisdiction". She concludes that an administrative tribunal would be preferable for the adjudication of labour relations disputes, "perhaps modelled on the Labour Relations Board created by the current British Columbia Labour Code".

In the following chapters the author elaborates her views and analyses judicial decisions dealing with picketing in the context of the various phases of the collective bargaining relationship. Chapter 2 examines a problem peculiar to Canada and the United States, namely the struggle for recognition of a trade union as a collective bargaining unit. Chapter 3 discusses the negotiating period pointing out that statutes regulate recourse to strike at that stage. Parties are required to bargain in good faith and if neccessary to submit to conciliation or mediation. During these proceedings a strike will be an unfair labour practice. Chapter 4 focuses on the next phase, where negotiations have failed to produce a collective agreement. The Canadian collective bargaining system recognises the right of both parties to resort to economic sanctions in such cases. Picketing is acknowledged by legislation as essential to prevent the employer from continuing his operations, but the limits are not clearly outlined. Despite silence by statutes the Courts, notably in Ontario, have imposed liability on picketers according to tort principles. The problem of strikes for the purpose of enforcing collective

agreements, as discussed in Chapter 5, is a particularly complex one. Since 1940 collective agreements have become enforceable in the whole of Canada by statutory prescription, but not as contracts at common law. By virtue of legislation every collective agreement must include a "no-strike" provision. These may be enforced by arbitration, or by the Labour Relations Board, or even by criminal prosecution as a breach of the statute, though this last alternative is virtually ignored as being inappropriate.

Hundreds of judicial decisions are analysed in the examination of the issues in a penetrating and scholarly manner. The author, in her enthusiasm to hammer in the statements she makes, frequently falls into repetition, and her style changes at such points from the objective discourse of legal reasoning to the broad generalisation of emotional political pamphlets. (Eg ". . . economic and political power was firmly in the grasp of the bourgeoisie. For the workers . . . long hours in brutal workshops for a paltry wage".) The concluding chapter summarises the arguments, and repetition of statements here is even more noticeable.

After reading the book one would find difficulty, notwithstanding the occasional lapses from academic objectivity, in disagreeing with the logic of the author's conclusion that "the judge, the court and the common law are the wrong institutions to effectively resolve industrial disputes", and that special tribunals are better equipped to deal with such matters.

The relevance of labour relations law in Canada may be doubted in the New Zealand context as the statutory framework in the two countries is vastly different and further complicated by divergences among the Canadian provinces. The law of tort, however, especially the branch called economic torts, has retained its fundamental unity and the judicial approach also shows similar characteristics. In British Columbia the Labour Relations Boards have been granted special authority to adjudicate labour conflicts, but the Courts still claim to exercise their inherent jurisdiction and, disregarding industrial reality, they narrow down the underlying issue to a specific tort. In New Zealand, though the Industrial Relations Act 1973, ss 144 and 147 give exclusive jurisdiction to the Arbitration Court to deal with all offences and actions for recovery of penalties under the Act, which includes unjustified strikes, the ordinary Courts of law had no hesitation in invoking their inherent jurisdiction in actions brought before them, among others in the well known decisions of *Northern (except Gisborne) Road Transport Motor and Horse Drivers IUW v Kawau Island Ferries Ltd* [1974] 2 NZLR 617, CA, and *Harder v Tramways Union* [1977] 2 NZLR 162, SC. When these cases were in the public eye the appropriateness of Court proceedings was questioned also in New Zealand.

Despite the faults mentioned and disregarding lapses into emotionally charged declamatory style, the book still presents a scholary examination of the suitability of the tort law in labour disputes, and it can be regarded as a worthwhile contribution to the growing literature in this field.

Topical International Law, George M Barrie. Butterworth & Co (SA) (Pty) Ltd 1979. NZ$19.30. Reviewed by Jerome B Elkind.

Topical International Law by George M Barrie is a work of South African origin. The Author is a Senior Law Adviser of the Department of Foreign Affairs of the Republic of South Africa. The book very much takes the South African point of view and as such may be regarded as a useful though limited sourcebook for that point of view.

The book contains 11 short essays by the Author which appeared in South African law journals between 1973 and 1977. The essays are all on topical subjects. A number of them have barrows to push and these are usually unconvincing. The best ones are descriptive essays. The essays are enhanced by a brief and helpful synopsis at the beginning of each Chapter.

The first essay is a prime example of an essay with a barrow to push. Written in 1977, it deals with the non-designation of South Africa to the International Atomic Energy Agency (IAEA) Board of Governors. The Author objects to the refusal of the outgoing Board of Governors of the IAEA to designate South Africa to the new Board of Governors despite the language of Article VI A I of the Statute to the effect that the member chosen for each of the eight geographical areas must be "the member most advanced in the technology of atomic energy including the production of source materials". The Board chose Egypt instead of South Africa without denying South Africa's clear technological superiority.

Barrie is outraged because he views the reasoning behind the move to unseat South Africa as "blatantly motivated by extra-legal considerations". There were a variety of reasons advanced for the exclusion of South Africa. His reasoning is sound as far as it goes but the exclusion of South Africa could have been achieved in a strictly legal manner by treating the question as a credentials question.

If the IAEA had refused to accept the cre-

dentials of the Pretoria regime, the South African seat in the organisation would thereby have been vacant. Since the IAEA Statute directed the outgoing Board of Governors to select a Member from Africa, the Board would thereby have been required to select the next most technologically advanced Member. This is precisely what the IAEA Board of Governors has now done. On December 6, 1977, it voted to reject the South African Government's credentials thereby totally excluding it from the organisation.

The second essay considers international law and the civil use of nuclear energy. It is an excellent but brief summary of the Conventions relating to International civil liability for Nuclear damage.

The South African viewpoint comes across even in such matters as the International Control of Satellite Telecommunications. This essay begins with a short informative description. It lacks for failing to refer to one of the most authoritative articles on the subject, Gottlieb, Dalfen and Katz, "The Transborder Transfer of Information" by Communication and Computer Systems, 68 AJIL 227 (1974).

The Article then turns to the conflict between national sovereignty and the right enunciated in the Universal Declaration of Human Rights to transmit information regardless of frontiers. The Author doesn't think that it can ever be resolved. He feels that an international right to freedom of information and ideas has yet to be established. "How", he asked "does one differentiate between the free flow of 'information and ideas' and the dissemination of propaganda?" In his view "idealogies are too diverse ever to allow the 'right' to 'receive and impart information and ideas through any media regardless of frontiers' to become established in international law".
Thus, it is the sovereign prerogative of governments to have it their own ways idealogically.

Propaganda cannot really be distinguished from information and ideas. The free flow of information and ideas necessarily involves the free flow of propaganda. But everyone has a chance to make a point. Propaganda from one source can be counterbalanced by propaganda from another.

His plea for international control of the airwaves is odd, because international authority, if it were possible to establish such a thing, would inevitably be as hostile to South Africa as the IAEA Board of Governors. Article 3 of the International Convention on the Elimination of all forms of Racial Discrimination says "States Parties particularly condemn racial discrimination and *apartheid*". Furthermore Article 4 requires the condemnation of all progaganda based on ideas or theories of superiority of one race. Barrie might argue that this is not the South African viewpoint but that is not the view held by the international community in general. This reviewer prefers the notion that those rights advanced in the Universal Declaration including the right to the free flow of information and ideas, have become crystalized as norms of customary international law.

Another essay deals with the Transkei and the failure of other States to recognise it. Barrie feels that, from a strict and dispassionate legal analysis, the practice of States does not support the view that a State can have no legal existence before recognition. To so suggest would lead to some "startling" conclusions.

> "We would have to say for example that an intervention, otherwise illegal would not be illegal; or if the Transkei were to be involved in a war, it would be under no legal obligation to respect the rights of neutrals."

The essay reveals a totally inadequate understanding of the process of recognition in international law. It is in fact true that the Transkei, as such, is under no obligation to respect the rights of neutrals. As far as most States which have not recognised the Transkei are concerned, the duty rests with the recognised sovereign, the Republic of South Africa. I would commend, in this regard the case of *Carl Zeiss Stiftung* [1967], 1 AC 853.

A State is such only viz a viz those who recognise it. Recognition may be a political act. But it has legal consequences. The enactment of legislation is also a political act in that political choices are involved.

As far as citizenship is concerned, Barrie asserts that each State has discretion, subject to possible contrary treaty obligation to grant citizenship or to denationalise any of its nationals at will. He has apparently not heard of international minimum standards. Denationalisation on the basis of Race is contrary to such minimum standards as are currently accepted in international law.

The essay on International Monetary Law discusses causes of action upon which a legal attack on a State's monetary legislation might be launched. Also useful is the discussion on the legal structure of Air Transport. It *is* remarkably comprehensive for an essay of only 15 pages in length. I do not however recognise some of the limitation of liability figures perhaps because he states them in pre-1971 US

dollars. For instance, he states that the limitation under the Hague Protocol is $14,000, but the limitation is much higher in the Hague Convention. Actually it is more like NZ $42,000.

The Chapter on the Antarctic Treaty is of particular interest to New Zealand at this time. But unfortunately the essay continues to refer to the work by Francis Auburn, formerly of Auckland University.

The last four Chapters should be of interest to anyone interested in the Law of the Sea. The first of these four previews some of the issues discussed at the Third United Nations Conference on the Law of the Sea. It is followed by a Final Summation written in 1974. This has proved to be somewhat premature since the Conference has not yet achieved a final act.

Finally there are interesting discussions of the concept of Historic Bays and the International Enforcement of Conventions on Fisheries.

Some of the materials in this book may be seen as out of date. But, as the Author has explained in his Preface, he left the original essays untouched because "the process of rewriting, once started, would be endless". Having only recently withdrawn a manuscript from publication because of the Iranian crisis, I know how he feels. None the less it reduces the value of the work to leave it unchanged.

In sum, when the essays in this book are not pushing a barrow, they are useful as brief summaries. Those wanting to go into the topics in depth will have to go elsewhere.

CASE AND COMMENT

Companies — Liquidation — Is payment of a cheque a disposition?

Solicitors would be well advised to consider the implications raised by the recent judgment of Templeman J in *Re Gray's Inn Construction Company Limited* [1980] 1 All ER 814. This case turned on s 227 of the Companies Act 1948 which concerns companies in liquidation and is the same as our s 222, i.e, it voids all dispositions made after the commencement of the winding up unless validated by the Court. In this case the alleged dispositions were payments by way of cheque.

In the *Gray's Inn* case, the proceedings were brought by the Liquidator who claimed £13,259 being moneys paid in and out of the company's account with the Bank between the date of the presenting of the petition and the date of the order winding up the company. In turn, the Bank asked the Court to validate all payments through the account.

The petition was presented on 3 August 1972, advertised on 10 August 1972, and came to the attention of the local branch of the Bank used by the company on 17 August. The company was ordered to be wound up on 9 October 1972 and the Bank continued to accept payments into the account and to honour cheques drawn on the company's account until that date.

The point was earlier covered in the Australian case of *Re Mal Bower's Macquarie Electrical Centre Pty Ltd* [1974] 1 NSWLR 254. There an application was made to the Court for a declaration as to the validity of payments by cheque from a bank account after the presenting of a winding up petition. Street CJ held that the section did not apply as against the Bank as a disponor although it might apply for the recipient of the cheque as disponee.

In *Re J Leslie Engineers Co Limited (In liquidation)* [1976] 2 All ER 85, Oliver J held that a payment of a cheque was a disposition under s 227 but there he was considering the situation vis-a-vis the disponee.

In the *Gray's Inn* case Mr Justice Templeman decided:

1 The payments by the company into its Bank account were not dispositions.
2 The payments by the Bank to third parties were dispositions and that:
   (a) the Bank could not be held liable for the expenditure between 3 August and 10 August when the petition was advertised.
   (b) The Bank should not be held liable for any expenditure between 10 August and 17 August when the local

Branch Manager first heard of the petition.

(c) The Bank was not held liable for the payments from 17 August onwards as they were normal payments made in the ordinary course of business and the Court would have validated such payments.

Mal Bower's case was not referred by Templeman J but the two cases could possibly be distinguished on the grounds of notice. There is no mention in *Mal Bower's* case as to whether the Bank had any notice of the petition having been presented.

If *Re Gray's Inn* is to be followed in New Zealand, the reasoning there could as easily be applied to solicitor's trust accounts. Therefore, money paid into a solicitor's trust account would not be a disposition, but money paid out by that solicitor to a third party could well fall within the definition of a disposition. The solicitor could therefore have to account to the liquidator of a company for any moneys paid out by him from the trust account for the company after the solicitors had notice of a petition for winding up. It would be a defence if the payments were normal payments in the ordinary course of business or if they were payments that could otherwise be validated by the Courts.

In view of the above, petitioning creditors may consider it worthwhile in some cases to give notice of the petition to the company's bankers or solicitors. Similarly, solicitors should be cautious when paying moneys out on behalf of a company where they have knowledge that a winding up petition has been presented.

I A Ramsay

Unfairly obtained evidence and entrapment — A postscript

In concluding an earlier discussion the writer suggested as a possible future development that in some cases a prosecution for an offence procured by the police might be dismissed as an abuse of the process of the Court: [1980] NZLJ 203, 208. This overlooked a rather ambiguous remark in *Police v Lavalle* [1979] 1 NZLR 45, 48, where the Court of Appeal said that when a Judge acted to protect a defendant when there was evidence of improper entrapment of a person not otherwise ready to offend "it is the exercise of a discretion based upon the inherent jurisdiction of the Court to prevent an abuse of process by the avoidance of unfairness". The Court might have meant this merely as an explantion of basis upon which particular items of illegally obtained evidence may be excluded, or it may have meant that in the case of such entrapment the prosecution could be dismissed as an abuse regardless of whether all the evidence was tainted by the entrapment (although in *Lavalle* counsel had not pressed such an argument).

A recent oral but reserved judgment of Roper J suggests that the latter is the correct view: *R v Keenan* [1980] Butterworths Current Law 547. After some $44,000 worth of goods had been stolen in a burglary of a jewellery shop the accused told the police that he knew one of the burglars and could arrange for recovery of the goods in return for payment of $10,000. The police warned the accused that such an offer might well be criminal as a corrupt bargaining for a reward for the recovery of goods obtained by a crime (s 262 of the Crimes Act 1961) but they also told the manager of the jewellery shop of the accused's proposal, without suggesting that the shop should have nothing to do with it. A few days later the accused met with the shop manager and the upshot was an agreement that $10,000 would be paid for the return of the jewellery.

This was the basis of a count against the accused charging corrupt bargaining. Roper J held that this count did not contravene the principle approved in *Lavalle*: the police had warned the accused after he had shown a disposition to commit the offence, and the mere fact that the police had told the shop about the accused did not amount to wrongful "initiation" of the bargaining. This seems straightforward enough, but things had progressed beyond the bargain. The accused had later met with the shop manager and had actually been paid $10,000 and (it seems) had handed over the booty. The manager had told the police of this arrangement shortly before it was executed and, after warning of a possible "rip-off", the police had observed the exchange from nearby. The police allowed the transaction to go ahead because they intended to follow the accused in the hope that he would lead them to the burglars, although "unfortunately that plan went awry and the $10,000 was not recovered".

As a result of all this the accused faced a second count under s 262 which charged that he "did corruptly take a reward". Roper J expressed the opinion that a charge of "taking" a reward did not lie when the accused had previously bargained for that reward which had not been initially offered, but of more general importance is that, in exercise of the jurisdic-

tion under s 347, his Honour ordered that no indictment be presented for this count on the ground that the charge was an abuse of the process of the Court.

> "It is really no different from a police officer observing an attempted burglary but deliberately taking no action until the crime is complete, and indeed ensuring that it goes without a hitch, so that the offender can be charged with the full crime. The police had good reasons for acting as they did on the day but I regard it as an abuse of process that the Accused should then be charged with the commission of an offence which the police could have prevented, but did not prevent because they wanted it committed to further their own purposes."

The first thing that may be noticed about this decision is that it could be of little practical importance in the particular case in that proof of a corrupt taking would, on the facts, appear to make it inevitable that corrupt bargaining would be proved, which charge remained in the indictment. The bargaining and the taking would almost certainly be regarded as part of the one transaction and cumulative penalties would hardly be warranted. The inclusion in the indictment of two such counts arising from a unified course of conduct could arguably be itself regarded as in the nature of abuse of process, although the more orthodox (and convincing) approach would be to regard them as alternatives, so that in the event of conviction on one a verdict would not be taken in respect of the other.

Be that as it may, Roper J did not rely on the close relationship between the two counts, but rather on the theory that the charge was an abuse of process because the police had allowed the offence to be committed for their own ulterior but proper purposes. The view that improper entrapment justifies a Court rejecting a charge (not merely evidence) as an abuse is attractive but, with respect, the principle applied by Roper J is doubtful.

In *Keenan* the police had hoped that allowing the accused to offend would lead them to bigger fish, and in this respect the case is similar to *Pethig* [1977] 1 NZLR 448 where the accused was used as decoy in the police attempt to catch drug wholesalers. But in *Pethig* the police conduct was merely held to justify rejection of the undercover policeman's evidence, and the accused would not have committed an offence of the kind in question had it not been for positive assistance and encouragement from the policeman-procurer. In contrast, in *Keenan* (and in Roper J's hypothetical example) the offence was the accused's idea from the start, and the police merely allowed it to be committed after having warned the accused. Appellate Courts have not generally encouraged defence arguments from entrapment and one cannot anticipate must enthusiasm for a concept of entrapment by omission.

It is submitted that as a general rule there is nothing improper in the police omitting to prevent the commission of an offence which threatens no injury to the person or irrepairable damage to property or danger to the State, if their inaction is motivated by legitimate objects of law enforcement. This seems an inevitable conclusion in view of the Courts' acceptance of the propriety of positive police involvement in offences undertaken in the cause of crime detection. Moreover, the police may often have convincing evidence of some inchoate offence — for example, attempt, conspiracy or the possession of burglarious instruments — but may have sound reasons for allowing the accused to proceed to the commission of the substantive crime. For example, such inaction may be justified by a desire to avoid difficulties of proof of intention, agreement or proximity, or by the need to minimise the risk of the suspect's escape, or by a desire to acquire evidence against accomplices. In such cases it seems impossible to suppose that the indictment must be confined to the previously detected inchoate offence and that a count for the completed offence is an abuse of the process.

G F Orchard

"The Judge ruled that Rankin could not rape her, assault her, threaten her or contact her except through her lawyer". *Johannesburg Citizen.*

Excise — "A hateful tax levied upon commodities and adjudged not by the common Judges of property, but wretches hired by those to whom excise is paid." *A Dictionary of the English Language* by Samuel Johnson.

CRIMINAL LAW

WITHDRAWAL OF CRIMINAL CHARGES BY THE PROSECUTION

The recent withdrawal of murder charges against two 15 year old boys in respect of the death of a man in Gribblehirst Park, Mount Albert, Auckland raises a number of issues of concern for the administration of criminal justice. Principles to be observed when questioning youthful suspects were not complied with. Murder charges were withdrawn without explanation and in the absence of the accuseds' legal representative.

By The Public Issues Committee of the Auckland District Law Society.*

Following upon their initial appearance in the Children and Young Persons Court at Auckland on charges of murder, the two boys were remanded in custody to Mount Eden Prison, although the Judge dealing with them directed that they be kept apart from adult prisoners. At that hearing, legal counsel appeared on behalf of both boys, and at counsel's request they were remanded for a further Court appearance on 15 April 1980. On 9 April at approximately 5 30 pm the two boys were brought back before a special sitting of the Children and Young Persons Court. They were dealt with in the absence of their legal counsel, who was out of town and unable to be contacted, and in the absence of their parents, who had been given last minute notice of the hearing, but who did not arrive in time. With the boys unrepresented either by their parents or by legal counsel, counsel appearing on behalf of the police asked for the leave of the Court to withdraw the charges of murder pursuant to s 157 of the Summary Proceedings Act 1957 which permits the withdrawal of an information against the defendant prior to the charges against him being gone into, and which expressly provides that the withdrawal is no bar to the same charge being laid again. Counsel for the police addressed the presiding Judge as to the proper legal course to follow. His argument was accepted by the Judge, who granted leave to withdraw the informations. No submissions were addressed to the Court by or on behalf of the two boys.

The Judge was advised that the police had consulted the Crown Solicitor and as a result it was considered that "at this time it would be inappropriate to proceed with the charges". No further explanation was proffered the Court hearing, nor was one requested by the Judge, so that the actual reasons why it was "inappropriate" to proceed with the charges were never canvassed in open Court.

Subsequently, however, the episode as a whole, and in particular the methods employed by the police in questioning the two boys, were the subject of an internal police inquiry. It now appears, according to a recent press statement by the Commissioner of Police, that written statements confessing to their involvement in the murder were obtained from the two boys in the absence of their parents. These statements were later confirmed by the youths in the presence of their parents. The confessions, together with certain preliminary scientific evidence, formed the basis of the decision to charge the boys with the murder. Subsequently, it was found that the scientific evidence did not in fact support the murder charges, and, further, that the statements also contained factual inconsistencies which raised doubts as to the boys' involvement. The Commissioner commented that the inquiry had revealed that some members of the police involved "had in some respects not complied with the principles to be observed when questioning suspects". However, he denied allegations by the boys' counsel that they had been assaulted by the investigating officers.

It further appears that immediately it was realised that the charges of murder could not be sustained, the police arranged for the boys to be brought to Court for the purpose of having the charges withdrawn. This in fact involved having a District Judge return to the Court from his home for a special Court sitting.

In deciding to drop the charges and in seek-

*Members are: R B G Mahon, G B Chapman, M L S Cooper, J G Hannan, R H Hansen, R E Harrison, G J Judd, C M Nicholson QC, E W Thomas, M G Weir, P F A Woodhouse.

ing to have the boys brought before a Court and released from custody at the earliest possible moment, we have no doubt that the police acted in good faith and for understandable and commendable reasons. However, there are several aspects of the case which in our opinion give some considerable cause for concern. These are, first, the absence of any legal representation for the boys on the occasion when the murder charges were dropped despite counsel having already previously appeared on their behalf; secondly, the timing and manner of the withdrawal of what were very serious criminal charges; and, lastly, the question of just what are "the principles to be observed when questioning suspects," particularly suspects who are not adults.

Dealings with a legally represented person should be through his legal representative.

As to the question of representation by legal counsel, we consider it to be a generally accepted and important principle that, once a person is legally represented, dealings with that person by the police, opposing legal counsel or the Judiciary should not take place with him direct, but should only be through the medium of his legal representative. This applies to dealings as basic as telephone conversations and correspondence, but also to any appearance before a Court of law. There are compelling reasons why this should be so. In the first place, to view the matter from the point of view of the individual concerned, it can be seen that by retaining legal counsel, the individual has made a conscious decision that recognises his inability to cope with the legal and procedural complexities of the matter he is faced with. He has chosen instead to accept professional guidance. That is a choice which, once made, should be respected, even if it leads to inconvenience and delays. Secondly, dealing with the matter from the position of the police, solicitor or Judge, a prohibition on direct contact with a person who is legally represented performs a useful protective function in that it ensures that they are not placed in the position of even seeming to be obtaining an advantage from their greater familiarity with, or even direct control over, the legal process. We regret to say that in the case under discussion, this basic principle apears not to have been adhered to.

We stress that the issue of adherence to the principle to which we have referred is not simply a sterile academic one. Had counsel for the boys been present at the withdrawal of the charges, he could have insisted on a proper explanation being given for the withdrawal of the charges at that stage. Such an explanation might well have served to vindicate his clients. (As it was, a clear explanation was only forthcoming some seven weeks after the dropping of the charges, and only after complaints by the boys led to an internal police inquiry.) In addition, counsel could have sought on behalf of the boys an award of costs against the police. (It is an open question whether, under the relevant legislation, such an application could be made at some time subsequent to the charges having been withdrawn. Section 75 of the Summary Proceedings Act 1957, which gives a defendant who is convicted or who has "an order . . . made against him" the right to apply for a rehearing, would not appear to assist the defendants in this case.) Finally, defence counsel could have taken the opportunity to air in open Court, without fear of an action for defamation, any complaints his clients may have had in relation to the conduct of the police during this whole episode, including any complaints of assault by individual police officers.

The justification may be advanced for the withdrawal of the charges in the absence of defence counsel that those involved were acting in the best interests of the youths, and with a view to ensuring that they were set at liberty at the earliest possible moment. However, it seems to us inconceivable that, if proper efforts had been made, some form of legal representation could not have been arranged for the boys, even at such short notice. In any event, it should be pointed out that the youths could have been set free on bail without the charges being dropped, thereby affording defence counsel an opportunity to take whatever action he saw fit on the ultimate withdrawal of the murder charges. The youths were already facing quite unrelated charges in respect of the unlawful taking of a motor vehicle, and it would have been a simple matter to have adjourned all the charges to a set date, thereby allowing all matters to be dealt with at that time.

An explanation should be proffered when charges are withdrawn.

The second major matter of concern on which we wish to comment is the manner of the withdrawal of the charges of murder. In order for the charges to be withdrawn in the manner in which they were, the leave of the District Court Judge was required. We consider it a sound practice, and one which has been adhered to on many occasions in the past, that the reasons why withdrawal of the charge is

sought be outlined by the prosecutor when such an application is made. It is only when the presiding Judge is fully acquainted with the facts which have led to the decision to seek to withdraw the charge that he can properly and judicially exercise the discretion which he has as to the granting of leave to withdraw the information. Unfortunately, in our view, this again is an area in which the practice of the prosecution and the Courts, in Auckland at least, has been inconsistent of late. The principle that an explanation ought to be proffered is, however, an important one, for it ensures that any appearance of a "deal" having been concluded between the defence and the prosecution, with or without the knowledge of the Court, is avoided. In the present case the seriousness of the charges, coupled with the unusual hour at which the Court sitting was held, in our view required a full and careful explanation in open Court of the reasons which led to the charges of murder being withdrawn. The absence of any such explanation gave rise to a legitimate public concern as to the background to this affair, which later police press statements and the Commissioner's recent public statement have only partially dispelled.

Clear statutory guidelines for interviewing youthful offenders would protect both the youth and the police.

Finally, there is the question of "the principles to be observed" when questioning youthful suspects. It was not made clear in the newspaper reports of the Commissioner of Police's press statement what were the principles which had not been complied with in this case. It is however, implicit in the Commissioner's remarks that he regarded the situation as governed by principles of some sort. Certainly, there are the Judges' Rules, in force in this country, which lay down certain guidelines — which fall short of being binding rules of law — for the questioning of all suspects, adults and children alike. These guidelines include the giving of a formal caution once the police officer concerned has made up his mind to charge a suspect, and a prohibition against excessive cross-examination of suspects. But New Zealand law contains no specific procedural safeguards to protect children who are being interrogated on suspicion of an offence. In the absence of any specific provision, the police have laid down certain self-imposed standards, contained in General Instructions issued by the Commissioner of Police pursuant to the Police Act 1958. The relevant General Instruction provides:

"Interviewing Children and Young Persons

"**C42** (1) In an interview with anyone under 17 years of age, extreme care must be exercised so that an untrue admission of guilt or incorrect information is not obtained on account of youth or lack of maturity. Any admission must be carefully scrutinised before acceptance, and corroboration should be sought.

"(2) In an interview with a child under the age of 14 years, a parent, guardian, or teacher must be present, unless there is very good reason to the contrary. Only in unavoidable circumstances should such a child be taken to a police station.

"(3) An interview with anyone of or over the age of 14 years and under 17 is, where practicable and having regard to the particular circumstances, to be carried out in the presence of a parent, guardian, or teacher.

"(4) When it is necessary to interview pupils at a school the Police must be completely in plain clothes, unless in the particular circumstances this is impracticable. The headmaster should be asked to arrange the interview and be requested to be present throughout.

"(5) Where anyone under 17 years of age is interviewed without a parent or guardian being present, a parent or guardian is to be promptly informed. In doing so the feelings of the parent or guardian should be respected, and all information not contrary to the interests of justice or the person interviewed is to be given. The Police should offer any appropriate advice or assistance."

These directions are obviously a step in the right direction. They do at least provide some positive guidance to the individual police officer questioning a youthful suspect. But such guidelines are little known outside of the Police Force; and in a Court of law they lack even the exhortatory force of the Judges' Rules. They are, moreover, somewhat open-ended in their terms, and much will clearly depend on the individual police officer's assessment of the "particular circumstances" of the case. Nor is there any real protection for a child or young person if the guidelines *are* breached. The police officer involved could find himself the subject of disciplinary proceedings. But the confession thus obtained may well still be admissible in

evidence against the child or young person concerned.

For these reasons we consider that it is necessary to go further than the laying down of guidelines for the police. The chilling and intimidatory effect on a youthful suspect of an apprehension and subsequent questioning by a large policeman cannot be underestimated. This is clearly demonstrated by the present case in which, on the basis of the Commissioner's denial of threats and assaults, two 15 year old youths were induced to sign false confessions of murder simply under pressure of police questioning, and without the making of any threats or assaults against them. To avoid the possibility of a repetition of what occurred in this case, and by the same token to protect the police against allegations of use of threats or undue pressure when interviewing youthful suspects, we consider that clear statutory guidelines are necessary. It is beyond the scope of this paper to canvass such guidelines in detail, but we think that at the very least there should be an amendment to the relevant statute law to provide that admissions of criminal involvement made by a child or young person to a person in authority in the absence of his or her parent, guardian or solicitor and without the giving of a previously administered caution in the usual form, shall not be admissible in evidence against him or her, unless the Judge trying the case in his discretion orders to the contrary. In considering whether to order that the confession be admitted in cases of non-compliance with the foregoing requirements, the Judge would have to satisfy himself that the confession, despite non-compliance, was likely to be true, having regard to certain factors such as: (1) the urgency of the matter; (2) the seriousness of the offence concerned; (3) the age and personal circumstances of the child or young person concerned; and (4) the degree of non-compliance involved.

It may be said that such a standard would make the work of the police in apprehending youthful suspects more difficult. But the police have to a large extent recognised the need for such a requirement in their own General Instructions. The safeguard we propose may involve occasional delay and frustration for the police, but it will not prevent them attempting to obtain a confession of guilt, if the proper procedure is followed. It may be also said that such a standard would result in guilty persons avoiding conviction. But our law recognises as fundamental the right of a person suspected of crime to remain silent. Furthermore, if in a particular case the evidence of commission of a crime by the suspect is so thin that the police have to rely on a confession of guilt as the only means of securing a conviction, that is precisely the situation where there is the greatest risk of a child or young person being pressured or intimidated into a false or inaccurate admission of guilt.

We conclude, therefore, that the striking of a fair balance between the competing interests of law enforcement on the one hand, and the provision of adequate procedural safeguards for children and young persons suspected of crime on the other hand requires the enactment of certain minimum statutory standards. A provision along the lines we have advocated would, we believe, provide these.

CORRESPONDENCE

Dear Sir,

The Death of a Princess

If Tony Black's editorial on page 281 in your issue of 15 July is a point of view designed to provoke argument, as far as I am concerned he can have one. He stated "Either we have principles or we do not. And if we do they should come first." What he really seems to believe is that our principles should fill all the places in the race; should over-ride all other considerations.

The fallacy of this belief is exposed when one extends the principle into the areas of treason, subversion, crime. Freedom of speech has always been a conditional right, even in a free society; balanced by obligations, duties, responsibilities. It is possible to abuse the freedom of speech by trespassing into slander, treason, obscenity etc and this could not be true if it were a non-negotiable commodity.

It seems fashionable today to stand mute while all sorts of fringe people and organisations attack the principles on which society is based and yet scream blue murder whenever the government in mild tones and responsible manner behaves according to its mandate and points out where it believes our best national interests lie.

Mr Black's attitude in propounding our right to offend other nations on a basis of principle is exactly the type of arrogance that in a previous era despatched gunboats to teach wily oriental gentlemen their manners. Times have changed but even had they not, Mr Black's fallacy would still be called cutting off one's nose to spite one's face.

Yours truly,

J M Dobson

The impression I had was that it was the wily oriental gentlemen (or some such) who were threatening to send the gunboats (or not send the oilboats) here. Ed.